COMMENTARIES

ON

AMERICAN LAW.

By JAMES KENT.

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PART VI.

OF THE LAW CONCERNING REAL PROPERTY.

[CONTINUED FROM THE THIRD VOLUME.]

LECTURE LIV.

OF ESTATES IN FEE.

THE perusal of the former volumes of these Commentaries has prepared the student to enter upon the doctrine of real estates, which is by far the most artificial and complex branch of our municipal law. We commenced with a general view of the international law of modern civilized nations, and endeavored to ascertain and assert those great elementary maxims of universal justice, and those broad principles of national policy and conventional regulation, which constitute the code of public law. The government of the United States next engaged our attention; and we were led to examine and explain the nature and reason of its powers, as distributed in departments, and the constitutional limits of its sphere of action, as well as the restrictions imposed upon the original sovereignty of the several members of the Union. We then passed to the sources of the municipal law of the state governments, and treated of personal rights and the domestic relations, which *are naturally the objects of our earliest *2 sympathies and most permanent attachments. Our studies were next directed to the laws of personal property, and of commercial contracts, which fill a wide space in all civil institutions; for they are of constant application in the extended intercourse and complicated business of mankind. In all the topics of discussion, we have been, and must continue to be, confined to an elementary view and sweeping outline of the subject; for the plan of these essays will not permit me to descend to that variety

and minuteness of detail, which would be oppressive to the general reader, though very proper to guide the practical lawyer through the endless distinctions which accompany and qualify the general principles of law.

In treating of the doctrine of real estates, it will be most convenient, as well as most intelligible, to employ the established technical language, to which we are accustomed, and which appertains to the science. Though the law in some of the United States discriminates between an estate in free and pure *allodium*, and an estate in fee simple absolute, these estates mean essentially the same thing; and the terms may be used indiscriminately, to describe the most ample and perfect interest which can be owned in land. The words *seisin* and *fee* have always been so used in New York, whether the subject was lands granted before or since the Revolution; though, by the act of 1787, the former were declared to be held by the tenure of free and common socage, and the latter in free and pure allodium. (*a*) In Connecticut and Virginia, the terms *seisin* and *fee* are also applied to all estates of inheritance, though the lands in those states are declared to be allodial, and free from every vestige of feudal tenure. (*b*) The statute of New York, to which I have alluded, made an unnecessary distinction in legal phraseology as applied to estates; and the distinction *3 lay *dormant in the statute, and was utterly lost and confounded in practice. The technical language of the common law was too deeply rooted in our usages and institutions, to be materially affected by legislative enactments. The New York Revised Statutes have now abolished the distinction, by declaring, that all lands within the state are allodial, and the entire and absolute property vested in the owners, according to the nature of their respective estates. All feudal tenures, of every description, with their incidents, are abolished, subject, nevertheless, to the liability of escheat, and to any rents or services certain, which had been, or might be, created or reserved. (*a*) And to

(*a*) See the Reports *passim*, and particularly 18 Johns. 74, and 20 id. 548, 653.

(*b*) 6 Conn. 373, 386, 500; 4 Munf. 205; Notes to 2 Bl. Comm. 44, 47, 77, 104, by Dr. Tucker. In Michigan, by act of 1821, all persons seised in fee tail were declared to be seised of an allodial estate. So also in Pennsylvania. In Connecticut, by statute of 1793, every proprietor of land in fee simple was declared to have an absolute and direct dominion and property in the same.

(*a*) This is also the language of the Revised Constitution of New York, of 1846, art. 1, §§ 12, 13.

avoid the inconvenience and absurdity of attempting a change in the technical language of the law, it was further declared, that every estate of inheritance, notwithstanding the abolition of tenure, should continue to be termed a fee simple, or fee; and that every such estate, when not defeasible or conditional, should be termed a fee simple absolute, or an absolute fee. (*b*) It was undoubtedly proper that the tenure of lands should be uniform, and that estates should not in one part of the country be of the denomination of socage tenures, and in another part allodial; but it may be doubted whether there was any wisdom or expediency in the original statute provision, declaring the lands in New York to be allodial, and abolishing the tenure of free and common socage, since nothing is gained in effect, and nothing is gained even in legal language, by the alteration. The people of the state, in their right of sovereignty, are still declared to possess the original and ultimate property in and to all lands; and the right of escheat, and the rents and services already in use, though incident to the tenure of free and common socage, are reserved. (*c*)

A fee, in the sense now used in this country, is an estate of an inheritance in law, belonging to the owner, and * transmis- *4 sible to his heirs. (*a*) No estate is deemed a fee, unless it may continue forever. An estate, whose duration is circumscribed by the period of one or more lives in being, is merely a freehold, and not a fee. Though the limitation be to a man *and his heirs* during the life or widowhood of B., it is not an inheritance or fee, because the event must necessarily take place within the period of a life. It is merely a freehold, with a descendible or transmissible quality; and the heir takes the land as a descendible freehold. (*b*)

(*b*) N. Y. Revised Statutes, i. 718, sec. 3, 4; p. 722, sec. 2; N. Y. R. S. 3d ed. ii. 9.

(*c*) N. Y. Revised Statutes, i. 718, sec. 1, 3, 4. Why should we assume the allodial theory, if we must preserve the language of the socage tenure? With the *mutato nomine*, it is still *de te fabula narratur*.

(*a*) The word *feudum* imports not only *beneficium*, but *beneficium* and *hæreditatem*. It is an inheritable estate. Feodum idem est quod hæreditas. Litt. sec. 1; Wright on Tenures, 148. Spelman says, that *feodum* signifies *puram hæreditatem, maximum jus possidendi et perpetuum rei immobilis dominium*. Gloss. voce Feodum. Dr. Webster, the lexicographer, says that *fee*, when applied to land, was a contraction of the Latin word *fides*, and the name originated with the Lombards, and it was a grant or loan of land in trust for future services, and not a reward for past services. [See iii. 514, n. 1.]

(*b*) 1 Co. 140, b; 10 Co. 98, b; Vaughan, 201; 2 Bl. Comm. 259; Preston on

The most simple division of estates of inheritance is that mentioned by Sir William Blackstone, (*c*) into inheritances *absolute* or in fee simple, and inheritances limited; and these limited fees he subdivides into *qualified* and *conditional* fees. This was according to Lord Coke's division, and he deemed it to be the most genuine and apt division of a fee. (*d*) Mr. Preston, in his treatise on Estates, (*e*) has, however, gone into more complex divisions, and he classes fees into fees simple, fees determinable, fees qualified, fees conditional, and fees tail. The subject is full of perplexity, under the distinctions which he has attempted to preserve between fees determinable and fees qualified; for he admits that every qualified fee is also a determinable fee. I shall, for the sake of brevity and perspicuity, follow the more comprehen-
*5 sive division of Lord Coke, and divide the subject * into fees simple, fees qualified, fees conditional, and fees tail.

1. **Fee Simple** is a pure inheritance, clear of any qualification or condition, and it gives a right of succession to all the heirs generally, under the restriction that they must be of the blood of the first purchaser, and of the blood of the person last seised. (*a*) It is an estate of perpetuity, and confers an unlimited power of alienation, and no person is capable of having a greater estate or interest in land. Every restraint upon alienation is inconsistent with the nature of a fee simple; and if a partial restraint be annexed to a fee, as a condition not to alien for a limited time, or not to a particular person, it ceases to be a fee simple, and becomes a fee subject to a condition.

The word "heirs" is, at common law, necessary to be used, if the estate is to be created by deed. (*b*) The limitation to the heirs

Estates, i. 480. According to Lord Ch. J. Vaughan (though Sir William Blackstone and Mr. Preston do not follow his opinion), the heir takes in the character and title of heir, and not of special occupant.

(*c*) Comm. ii. 104, 109.

(*d*) Co. Litt. 1, b; 10 Co. 97, b; 2 Inst. 333. The judges, in Plowden, 241, b, 245, b, and Lord Ch. J. Lee, in Martin *v.* Strachan, 5 T. R. 107, *in notis*, are still more large in the division of inheritances at common law. They make but two kinds, fees simple absolute, and fees simple, conditional or qualified.

(*e*) Vol. i. 419.

(*a*) Litt. sec. 1, 11; Co. Litt. 1, b; Fleta, lib. 3, c. 8; Plowd. 557, a. But the above restriction has been essentially changed in this country, as we shall see hereafter, when we come to treat of the law of descent.

(*b*) A grant to a man and his *right heirs* is the same as a grant to a man and his heirs. Co. Litt. 22, b; but Lord Coke, in Co. Litt. 8, b, says, that a grant to a man and his *heir*, in the singular number, conveys only an estate for life, *because the heir is*

must be made in direct terms, or by immediate reference, and no substituted words of perpetuity, except in special cases, will be allowed to supply their place, or make an estate of inheritance of feoffments and grants. (*c*) *The location of the word in *6 any particular part of the grant is not essential; for a grant of a rent to A., and that he and his heirs should distrain for it, will pass a fee. (*a*) The general rule is applicable to all conveyances governed by the rules of the common law; for though prior to the statute of uses, the fee, in the view of a court of chancery, passed by reason of the consideration, in a bargain and sale, or covenant to stand seised to uses, without any express limitation to the heirs; yet, when uses were by statute transferred into possession, and became legal estates, they were subjected to the scrupulous and technical rules of the courts of law. The example at law was followed by the courts of equity, and the same legal construction applied by them to a conveyance to uses. (*b*) If a man purchases lands to himself forever, or to him and to his assigns forever, he takes but an estate for life. Though the intent of the parties be ever so clearly expressed in the deed, a fee cannot pass without the word "heirs." (*c*) The rule was founded originally on principles of feudal policy, which no longer exist, and it has now become entirely technical. A feudal grant was, *stricti juris*, made in consideration of the personal abilities of the

but one. This is a strange reason to be given, under a system of law which prefers males to females in the course of descent, and in which the right of primogeniture among the males is unrelentingly enforced. Mr. Hargrave, note [45] to Co. Litt. 8, b, questions the doctrine, and he says there are authorities to show that the word *heir*, in a deed, as well as in a will, may be taken for *nomen collectivum*, and stand for heirs in general. The doctrine of Coke was very vigorously attacked by Lord Ch. J. Eyre, near a century ago, in Dubber *v.* Trollope, Amb. 453; and Lord Coke himself showed, in Co. Litt. 22, a, that an estate tail, with the word *heir* in the singular number, was created and allowed in 39 Ass. pl. 20. See also Richards *v.* Lady Bergavenny, 2 Vern. 324; Pawsy *v.* Lowdall, Style, 249; Whiting *v.* Wilkins, 1 Bulst. 219; Blackburn *v.* Stables, 2 Ves. & B. 371. Notwithstanding all this authority in opposition to the rule as stated by Lord Coke, and the unintelligible reason assigned for it, Mr. Preston states the rule as still the existing law. Treatise on Estates, ii. 8. In the case of King's Heirs *v.* King's Adm., 12 Ohio, 390, [s. c. 15 id. 559,] a case distinguished for the most learned and elaborate discussion, the court held that the word *heir* in the singular number in a will was to be construed the same as the word *heirs*.

(*c*) Litt. sec. 1.

(*a*) Lord Coke, in 3 Bulst. 128.

(*b*) 1 Co. 87, b, 100, b; Gilbert on Uses and Trusts, by Sugden, 29, 143; Tapner *v.* Merlott, Willes, 177; Vanhorn *v.* Harrison, 1 Dallas, 137.

(*c*) Holt, Ch. J., 6 Mod. 109; [Batchelor *v.* Whitaker, 88 N. C. 350; Jordan *v.* McClure, 85 Penn. St. 495.]

feudatory, and his competency to render military service; and it was consequently confined to the life of the donee, unless there was an express provision that it should go to his heirs. (*d*)

But the rule has for a long time been controlled by a more liberal policy, and it is counteracted in practice by other rules, equally artificial in their nature, and technical in their application. It does not apply to conveyances by fine, when the fine is in the nature of an action, as the fine *sur conuzance de droit*, on ac-
*7 count of the efficacy and solemnity * of the conveyance, and because a prior feoffment in fee is implied. (*a*) Nor does the rule apply to a common recovery, which is in legal contemplation a real action; for the recoverer takes a fee by fiction of law, according to the extent of his former estate, of which he is supposed to be disseised. (*b*) It does not apply to a release by way of extinguishment, as of a common of pasture; (*c*) nor to a partition between joint tenants, coparceners, and tenants in common; nor to releases of right to land by way of discharge, or passing the right, by one joint tenant or coparcener, to another. In taking a distinct interest in his separate part of the land, the releasee takes the like estate in quantity which he had before in common. (*d*) Grants to corporations aggregate pass the fee without the words "heirs or successors," because in judgment of law a corporation never dies, and is immortal by means of perpetual succession. (*e*) In wills, a fee will also pass without the word "heirs," if the intention to pass a fee can be clearly ascertained from the will, or a fee be necessary to sustain the charge or trust created by the will. (*f*) It is likewise understood, that a court of equity will supply the omission of words of inheritance; and in contracts to convey, it will sustain the right of the party to call for a conveyance in fee, when it appears to have been the intention of the contract to convey a fee. (*g*)

Thus stands the law of the land, without the aid of legislative

(*d*) 2 Bl. Comm. 107, 108.

(*a*) Co. Litt. 9, b; Preston on Estates, ii. 51, 52.

(*b*) Preston on Estates, ii. 51, 52; 2 Bl. Comm. 357.

(*c*) Co. Litt. 280, a. (*d*) Co. Litt. 9, b, 273, b; Preston, *supra*, 5, 55–59.

(*e*) Co. Litt. 9, b.

(*f*) Ib.; Holdfast *v.* Marten, 1 T. R. 411; Fletcher *v.* Smiton, 2 id. 656; Newkerk *v.* Newkerk, 2 Caines, 345; Dane's Abr. iv. c. 128. [By statute the fee passes unless a contrary intent appears. 7 Wm. IV. and 1 Vict. c. 26, § 28.]

(*g*) Comyns's Dig. tit. Chancery, 2 T. 1; Defraunce *v.* Brooks, 8 Watts & S. 67.

provision. But in this country the statute law of some of the states has abolished the inflexible rule of the common law, which had long survived the reason of its introduction, and has rendered the insertion of the word *"heirs" no longer necessary. *8 In Virginia, Kentucky, Mississippi, Missouri, Alabama, and New York, (*a*) the word "heirs," or other words of inheritance, are no longer requisite, to create or convey an estate in fee; and every grant or devise of real estate made subsequent to the statute, passes all the interest of the grantor or testator, unless the intent to pass a less estate or interest appears in express terms or by necessary implication. (*b*) The statute of New York also adds, for greater caution, a declaratory provision, that in the construction of every instrument creating or conveying any estate or interest in land, it shall be the duty of the courts to carry into effect the intention of the parties, so far as such intention can be collected from the whole instrument, and is consistent with the rules of law. Some of the other States, as New Jersey, North Carolina, and Tennessee, have confined the provision to wills, and left deeds to stand upon the settled rules and construction of the common law. They have declared by statute, that a devise of lands shall be construed to convey a fee simple, unless it appears, by express words or manifest intent, that a lesser estate was intended. (*c*)

(*a*) Statute of Virginia, December 13, 1792; Statute of Kentucky, December 19, 1797; Statute of Alabama, 1812; New York Revised Statutes, i. 748, sec. 1, 2; Griffith's Law Register; R. C. of Mississippi, 1824; R. S. of Missouri, 1835.

(*b*) In Illinois, words of perpetuity or inheritance are still essential to create a fee, and the same general rule is implied to a devise. Jones *v.* Bramblet, 1 Scam. 276.

(*c*) R. S. N. J. 1847, p. 342. Mr. Humphreys, in his Essay on Real Property, and Outlines of a Code, 235, first edition, has proposed the same reform, of rendering the word "heirs" no longer necessary in conveyances in fee; and the American lawyer cannot but be forcibly struck, on the perusal of that work, equally remarkable for profound knowledge and condensed thought, with the analogy between his proposed improvements and the actual condition of the jurisprudence of this country. But I think it very probable that the abolition of the rule requiring the word "heirs" to pass by a free deed, will engender litigation. There was none under the operation of the rule. The intention of the grantor was never defeated by the application of it. He always used it when he intended a fee. Technical and artificial rules of long standing, and hoary with age, conduce exceedingly to certainty and fixedness in the law, and are infinitely preferable, on that account, to rules subject to be bent every way by loose latitudinary reasoning. A lawyer always speaks with confidence on questions of right under a deed, and generally circumspectly as to questions of right under a will.

*9 **2. A Qualified, Base, or Determinable Fee** (for I shall use the words promiscuously) is an interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event, circumscribing its continuance or extent. Though the object on which it rests for perpetuity may be transitory or perishable, yet such estates are deemed fees, because, it is said, they have a possibility of enduring forever. A limitation to a man and his heirs, so long as A. shall have heirs of his body; or to a man and his heirs, tenants of the manor of Dale; or till the marriage of B.; or so long as St. Paul's church shall stand, or a tree shall stand, are a few of the many instances given in the books, in which the estate will descend to the heirs, but continue no longer than the period mentioned in the respective limitations, or when the qualification annexed to it is at an end. (*a*) If the event marked out as the boundary to the time of the continuance of the estate, becomes impossible, as by the death of B. before his marriage, the estate then ceases to be determinable, and changes into a simple and absolute fee; but until that time, the estate is in the grantee, subject only to a possibility of reverter in the grantor. It is the uncertainty of the event, and the possibility that the fee may last forever, that renders the estate a fee, and not merely a freehold. All fees liable to be defeated by an executory devise are determinable fees, and continue descendible inheritances until they are discharged from the determinable quality annexed to them, either by the happening of the event or a release. (*b*) These qualified or determinable fees are likewise termed base fees, because their duration depends upon the occurrence of collateral circumstances, which qualify and debase the purity of the

*10 title. A tenant in tail may, by a bargain and sale, lease *and release, or covenant to stand seised, create a base fee, which will not determine until the issue in tail enters. (*a*)

(*a*) Plowd. 557, a; 10 Co. 97, b; 11 Co. 49, a; 1 Ld. Raym. 326; Powell, J., in Idle *v.* Cooke, 2 Ld. Raym. 1148; 2 Bl. Comm. 109; Preston on Estates, i. 431–433, 481–483; [Leonard *v.* Burr, 18 N. Y. 96.]

(*b*) Goodright *v.* Searle, 2 Wils. 29.

(*a*) Machell *v.* Clarke, 2 Ld. Raym. 778. The apprentice of the Middle Temple, in the course of his learned and successful argument in Walsingham's Case (Plowden, 547, 557), stated the distinction which has been followed by Mr. Preston, between a determinable and a base fee, and he gives the following obscure explanation of the latter: "A. has a good and absolute estate in fee simple, and B. has another estate of fee in the same land, which shall descend from heir to heir, but which is base in

If the owner of a determinable fee conveys in fee, the determinable quality of the estate follows the transfer; and this is founded upon the sound maxim of the common law, that *nemo potest plus juris in alium transferre quam ipse habet.* Within that rule, the proprietor of a qualified fee has the same rights and privileges over the estate as if he were a tenant in fee-simple; all the estate is in the feoffee, notwithstanding the qualification, and no remainder can be limited over, nor any reversion expectant thereon, other than the possibility of a reverter when the estate determines, or the qualification ceases. (*b*)

*3. **A Conditional Fee** is one which restrains the fee to *11 some particular heirs, exclusive of others, as to the heirs of a man's body, or to the heirs male of his body. (*a*) This was at the common law construed to be a fee simple on condition that the grantee had the heirs prescribed. If the grantee died without such issue, the lands reverted to the grantor. But if he had the specified issue, the condition was supposed to be performed, and the estate became absolute, so far as to enable the grantee to alien the land, and bar not only his own issue, but the possibility of a reverter. By having issue, the condition was performed for three purposes: to alien, to forfeit, and to charge. (*b*) Even

respect of the fee of A., and not of absolute perpetuity, as the fee of A. is." He then gives the following example, by way of illustration: "If a man makes a gift in tail, and the donee be attainted of treason, the king shall have the land as long as there are any heirs of the body of the donee; and in that case there are two fees, for the donor has his ancient fee simple, and the crown another fee in the same land, which is but a base fee, for it is younger in time than the fee of the donor, and if the heirs of the body of the donee fail, the fee is gone, whereas the fee of the donor never perishes; it is pure and perpetual, while the other is but base and transitory." Mr. Preston, in his Treatise on Estates, i. 460, 468, defines a qualified fee to be an interest given to a man and to certain of his heirs only, as to a man and his heirs on the part of his father; but this is termed in Plowden, 241, b, a fee simple conditional.

(*b*) 10 Co. 97, b; Preston on Estates, i. 484. According to Lord Ch. J. Vaughan, the reverter in this case is a *quasi* reversion, and he did not see why a remainder might not be granted out of such a qualified fee. Gardner *v.* Sheldon, Vaughan, 269. But the rule is probably otherwise, and on a fee simple conditional at common law, a remainder could not be created, for the fee was the whole estate. There was only a possibility, or right of reverter, left in the donor, and that was not an actual estate; Lee, Ch. J., in Martin *v.* Strachan, 5 T. R. 107, note; and yet Mr. Preston (on Estates, ii. 353) concludes, that limitations of remainders, after qualified or limited estates of inheritance, were in use at common law.

(*a*) Fleta, lib. 3, c. 3, sec. 5; 2 Bl. Comm. 110.

(*b*) In Izard *v.* Izard, Bailey, Eq. 228, the rule was recognized, that lands held in fee simple conditional were bound, after the birth of issue, by the lien of a judgment or decree, against the tenant, in bar of the right of the issue, to take *per forman*

before issue had, the tenant of the fee simple conditional might by feoffment have bound the issue of his body. But there still existed the possibility of a reverter in the donor. After issue born, the tenant could also bar the donor and his heirs of that possibility of a reversion, but the course of descent was not altered by having issue. (*c*) The common law provided the *formedon in reverter*, as the remedial writ for the grantor and his heirs, after the determination of the gift of the conditional fee, by the failure of heirs. (*d*) Before the statute *de donis*, a fee on condition that the donee had issue of his body, was in fact a fee tail, and the limitation was not effaced by the birth of issue. If the donee died without having aliened in fee, and without leaving issue, general or special, according to the extent of the gift, the land reverted again to the donor. But the tenant, after the birth of issue, could and did alien in fee; and this alleged breach of the condition of the grant was the occasion of the statute of West-
minster 2, 13 Edw. I. c. 1, commonly called the statute *de*
* 12 *donis*, which recited the evasion * of the condition of the
gift by this subtle construction, and consequent alienation, going to defeat the intention of the donor. The statute accordingly, under that pretence, preserved the estate for the benefit of the issue of the grantee, and the reversion for the benefit of the donor and his heirs, by declaring that the will of the donor, according to the form of the deed manifestly expressed, should be observed, and that the grantee should have no power to alien the land. It deprived the owner of the feud of his ancient power of alienation, upon his having issue, or performing the condition, and the donor's possibility or right of reverter was turned into a reversion. The feud was to remain unto the issue according to the form of the gift; and if such issue failed, then the land was to revert to the grantor or his heirs; and this is frequently considered to have been the origin of estates tail, though the statute rather gave perpetuity than originally created that ancient kind of feudal estate. (*a*)

doni. And in Pearse *v.* Killian, 1 McMullan, Eq. 231, it was held that the reversion or remainder expectant on the fee simple conditional, or the possibility of reverter, may be released, so as to make the estate of the tenant of the fee conditional an absolute fee. [See further, Groves *v.* Cox, 40 N. J. L. 40; Graham *v.* Moore, 13 S. C. 115.]

(*c*) Bracton, lib. 2, c. 6, 17, b; Co. Litt. 19, a; 2 Inst. 333. (*d*) F. N. B. 219.

(*a*) Sir Martin Wright (Int. to Tenures, 189), observes, that the statute *de donis*

4. Of Fees Tail. — The statute *de donis* took away the power of alienation on the birth of issue, and the courts of justice considered that the estate was divided into a particular estate in the donee, and a reversion in the donor. Where the donee had a fee simple before, he had by the statute what was denominated an estate tail; and where the donor had but a bare possibility before, he had, by construction of the statute, a reversion or fee simple expectant upon the estate tail. (*b*) Under this division of the estate, the donee could not bar or charge his issue, nor for default of issue, the donor or his heirs, and a perpetuity was created. The tenant in tail was not chargeable with waste, and the wife had her dower and the husband his curtesy in the estate tail. The inconvenience of these fettered inheritances is as strongly described, and * the policy of them as plainly condemned, in the writings of Lord Bacon and Lord Coke, as by subsequent authors, (*a*) and the true policy of the common law is deemed to have been overthrown by the statute *de donis* establishing those perpetuities. Attempts were frequently made in Parliament to get rid of them, but the bills introduced for that purpose (and which Lord Coke says he had seen) were uniformly rejected by the feudal aristocracy, because estates tail were not liable to forfeiture for treason or felony, nor chargeable with the debts of the ancestor, nor bound by alienation. They were very conducive to the security and power of the great landed proprietors and their families, but very injurious to the industry and commerce of the nation. It was not until *Taltarum's Case*, 12 Edw. IV., that relief was obtained against this great national grievance, and it was given by a bold and unexampled stretch of the power of judicial legislation. The judges, upon consultation, resolved, that an estate tail might be cut off and barred by a common recovery, and that, by reason of the intended recompense, * 13

did not create any new fee, *aut re aut nomine*. It only severed the limitation from the condition of the gift, according to the manifest intent of it, and restored the effect of the limitation to the issue and the reversion, as the proper effect of the condition to the donor. The fee simple conditional, at common law, was declared, in the case of Willion *v.* Berkley, Plowd. 239, to be the same as the estate tail under the statute *de donis*.

(*b*) Entails are generally supposed to have been introduced by the Normans, but they were frequent in the Saxon times, and they existed in the Roman law, — *volo meas ædes manere firmas meis filiis et nepotibus, in universum tempus*. Dig. 31. [88, § 15.]

(*a*) Lord Bacon on the Use of the Law; Co. Litt. 19, b; 6 Co. 40. Lord Coke's Dedication of his Reports to the Reader, 6.

the common recovery was not within the restraint of the statute *de donis*. (*b*) These recoveries were afterwards taken notice of, and indirectly sanctioned by several acts of Parliament, and have, ever since their application to estates tail, been held as one of the lawful and established assurances of the realm. They are now considered simply in the light of a conveyance on record, invented to give a tenant in tail an absolute power to dispose of his estate, as if he were a tenant in fee simple; and the estates tail in England, for a long time past, have been reduced to almost the same state, even before issue born, as conditional fees were at common law, after the condition was performed by the birth of issue. A common recovery removes all limitations upon an estate tail, * 14 and an absolute, unfettered * pure fee simple passes as the legal effect and operation of a common recovery. It is the only mode of conveyance in England, by which a tenant in tail can effectually dock the entail. If he conveys by deed, he conveys only a base or voidable fee, and he will not exclude his heirs *per formam doni*. Even by fine, he only bars his issue, and not subsequent remainders. He conveys only a base or qualified fee, though the remainderman will be barred by limitation of time, as a stranger would upon a fine levied with proclamations. It is the common recovery only that passes an absolute title. (*a*) In *Mary Portington's Case*, (*b*) Lord Coke says, that the judgment in 12 Edw. IV. was no new invention, but approved of by the resolutions of the sages of the law, who, "perceiving what contentions and mischiefs had crept in, to the disquiet of the law, by these fettered inheritances, upon consideration of the act, and of the former exposition of it by the sages of the law, always after the said act, gave judgment that in the case of a common recovery, where there was a judgment against the tenant in tail, and another judgment against the vouchee to have in value, the estate should be barred."

Estates tail were introduced into this country with the other

(*b*) Co. Litt. 19, b; Mildmay's Case, 6 Co. 40; Mary Portington's Case, 10 Co. 35.

(*a*) Martin *v.* Strachan, 5 T. R. 107, note. This case was affirmed in the House of Lords. Willes, 444. By the statute of 3 and 4 Wm. IV. c. 74, conveyances in England by fine and recovery are abolished, and all warranties of lands entered into by tenants in tail are declared void against the issue in tail, and estates tail can now only be barred by a deed enrolled under the statute.

(*b*) 10 Co. 38.

parts of the English jurisprudence, (*c*) and they subsisted in full force before our Revolution, subject equally to the power of being barred by a fine or common recovery. (*d*) But the doctrine of estates tail, and the complex and multifarious learning connected with it, have become quite obsolete in most parts of the United States. In Virginia, estates tail were abolished as early as 1776, in New Jersey, estates tail were not abolished until 1820; and in New York, as early as 1782, and all estates tail were turned into estates in *fee simple absolute. (*a*) So, in *15 North Carolina, Kentucky, Tennessee, and Georgia, estates tail have been abolished, by being converted by statute into estates in fee simple. (*b*) In the states of South Carolina and Louisiana, they do not appear to be known to their laws, or ever to have existed; but in several of the other states, they are partially tolerated, and exist in a qualified degree. (*c*)

(*c*) In the Pennsylvania charter of 1681, it was expressly declared, that estates of inheritance might be granted in fee simple, or in *fee tail*, the statute *de donis* notwithstanding.

(*d*) In Virginia, a law was passed in 1705, to take away from the courts the power of defeating entails. Tucker's Life of Jefferson, i. 21.

(*a*) Act of Virginia, of 7th October, 1776; Acts of Assembly of New Jersey, 1784, 1786, and 1820; R. S. N. J. 1847; Den *v.* Robinson, 2 South. 713; Den *v.* Spachius, 1 Harr. 172; Laws of New York, sess. 6, c. 2, sess. 9, c. 12; New York Revised Statutes, i. 722, sec. 3.

(*b*) Act of North Carolina, 1784; Act of Kentucky, 1796; Griffith's Reg. under the appropriate heads, No. 8; Prince's Dig. of the Laws of Georgia, 1837, pp. 231, 246.

(*c*) The Civil Code of Louisiana, art. 1507, prohibits substitutions and *fidei commissa*. It is more rigorous than the Code Napoleon, for it prohibits substitutions in favor of the grandchildren of the testator, or of the children of his brothers or sisters, and even when the provisions of the will do not tend to alter the course of descents, and whether the substitution be conditional or unconditional. The persons to take must be *in esse*, and designated by the will. The testator cannot control property beyond one life. He may name children living, and provide that, after the death of their mother, they shall take the property. Code, art. 1509, Rachal *v.* Rachal, 1 Rob. (La.) 115. In New Hampshire, estates tail are said to be retained; but I should have inferred from statutes passed in 1789, 1791, and 1792, respecting conveyances by deed and by will, and the course of descents, that estates tail were essentially abolished. But it was not so; for by statutes in 1837, any tenant in tail, in New Hampshire, may convey by deed his estate, and bar all remainders and reversions as effectually as by a fine or common recovery. So a tenant for life, with the person having a vested remainder in tail, may by deed convey the whole estate, as if the remainder was in fee simple. In Alabama and Mississippi, a man may convey or devise land to a succession of donees then living, and to the heirs of the remainderman. Statute of Alabama, 1812. In Connecticut (Kirby, 118, 176, 177; Hamilton *v.* Hempsted, 3 Day, 332; Swift's Dig. i. 79; Allyn *v.* Mather, 9 Conn. 114), and in

Conditional fees at common law, as known and defined prior to the statute *de donis*, have generally partaken of the fate of estates in fee tail, and have not been revived in this country. Executory limitations under the restrictions requisite to prevent perpetuities, and estates in fee upon condition, other than those technical conditional fees of which we are speaking, are familiar to our American jurisprudence, as will be more fully shown in a subsequent lecture. In Connecticut, the doctrine of conditional fees, so far as they are a species of entails, restraining the descent to some par-

Vermont, Ohio, Illinois, and Missouri, if an estate tail be created, the first donee takes a life estate, and a fee simple vests in the heirs, or person having the remainder after the life estate of the grantee, or first donee in tail. Revised Statutes of Vermont, 1839, p. 310; Statutes of Ohio, 1831; Statutes of Connecticut, 1784; ib. 1821; ib. 1838; Revised Laws of Illinois, 1833; Revised Statutes of Missouri, 1835. This is also the case in New Jersey, by the act of 1820. Elmer's Dig. 130. The estate on the death of the tenant for life vests in his children, though difficulty has been suggested to exist if the grantee has no children, or their issue. Griffith's Reg. The tenant in tail in those states is in reality but a tenant for life, without the power to do any act to defeat or encumber the estate in the hands of the heir or person in remainder. In Indiana a person may be seised of an estate tail, by devise or grant, but he shall be deemed seised in fee after the second generation. Revised Statutes of Indiana, 1838, p. 238. In Connecticut there may be a special tenancy in tail, as in the case of a devise to A. and to his issue by a particular wife. The estate tail, in the hands of the issue in tail, as well special as general issue, male or female, is enlarged into an estate in fee simple. In Rhode Island, estates tail may be created by deed, but not by will, longer than to the children of the devisee, and they may be barred by deed or will. Estates tail exist in Maine, Massachusetts, Delaware, and Pennsylvania, subject, nevertheless, to be barred by deed, and by common recovery, and in two of these states by will, and they are chargeable with the debts of the tenant. Dane's Abr. iv. 621; Lithgow *v.* Kavenagh, 9 Mass. 167, 170, 173; Nightingale *v.* Burrell, 15 Pick. 104; Corbin *v.* Healy, 20 Pick. 514; Statutes of Mass. 1791, c. 60; Mass. Revised Statutes, 1836, pt. 2, c. 50; Jackson on Real Actions, 299; American Jurist, No. 4, p. 392; Purdon's Dig. 353; Riggs *v.* Sally, 15 Me. 408. A fee simple passes on a judicial sale to satisfy a charge. This is so decided in one of those states, and the same consequence must follow in all of them, when the land is chargeable with debt. Gause *v.* Wiley, 4 Serg. & R. 509. In Maryland, estates tail *general*, created since the act of 1786, are now understood to be virtually abolished, since they descend, and can be conveyed, and are devisable, and chargeable with debts, in the same manner as estates in fee simple. Docking estates tail by common recovery had been previously abolished by statute in 1782, and they were to be conveyed as if they were in fee. It is equally understood that estates tail *special* are not affected by the act of 1786, and therefore the decisions prior to Newton *v.* Griffith (1 Harr. & G. 111) would seem to apply to that species of estates tail. Such estates may be barred by deed as well as by common recovery; and they are chargeable with debts by mortgage, and not otherwise; and they are not devisable; and if the tenant dies seised, they go to the issue, but not to collaterals. Statutes of 1782 and 1799; 3 Harr. & McH. 244; 1 Harr. & J. 465; 2 id. 69, 281, 314; 3 id. 302; Newton *v.* Griffith, Raymond's Digested Chancery Cases, 115.

ticular heirs in exclusion of others, have never been recognized or adopted. (*a*) These conditional fees are likewise understood to be abolished in Virginia, by a statute which took effect in 1787; and this I apprehend to be the better construction of the statute law of New York in respect to these common-law entailments; for the owner can alienate or devise them, as well as an absolute estate in fee. By the act of 1787, (*b*) every freeholder was authorized to give or sell at his pleasure any lands whereof he was seised in fee simple; and by the act of 1813, (*c*) every person having an estate of inheritance was enabled to give or devise the same; and by the new Revised Statutes, (*d*) every person capable of holding lands, and seised of or entitled to any estate or interest therein, may alien the same. These qualified fees are estates of inheritance *in fee simple, though not in fee simple abso- *17 lute; (*a*) and they would seem to come within the letter and spirit of the statute provisions in New York. In South Carolina, fees conditional at common law exist, and fees tail proper have never existed. The first donee takes an estate for life, if he has no issue; but if he has issue, the condition of the grant is performed, and he can alien the land in fee simple. (*b*)

The general policy of this country does not encourage restraints upon the power of alienation of land; and the New York Revised Statutes have considerably abridged the prevailing extent of executory limitation. The capacity of estates tail in admitting remainders over, and of limitations to that line of heirs which family interest or policy might dictate, renders them still beneficial in the settlement of English estates. But the tenant in tail can alien his lands, and the estate tail can only be rendered inalienable during the settlement on the tenant for life, and the infancy of the remainderman in tail. Executory limitations went further, and allowed the party to introduce at his pleasure any number of lives,

(*a*) Kirby, 118, 176; 3 Day, 339; Swift's Digest, i. 79.

(*b*) Laws of New York, sess. 10, c. 36.

(*c*) Laws of New York, sess. 36, c. 23.

(*d*) New York Revised Statutes, i. 719, sec. 10.

(*a*) Litt. sec. 13; Co. Litt. 19, a.

(*b*) 2 Bay, 397; 1 M'Cord, Ch. 91; 2 id. 324, 326, 328; 2 Bailey, 231. The creation of a fee simple conditional passes the whole estate to the tenant in fee. *The existing possibility of a reverter* is held not to be an estate, and neither the subject of inheritance nor devise. The fee conditional in the heir at law cannot merge in the possibility of reverter, if they should both meet in the same person. 1 Hill Ch. (S. C.) 276.

on which the contingency of the executory estate depended, provided they were lives in being at the creation of the estate; and to limit the remainder to them in succession, and for twenty-one years afterwards. (c) This was the rule settled by Lord Chancellor Nottingham, in the great case of the *Duke of Norfolk;* (d) and the decision in that case has been acquiesced in uniformly since that time, and every attempt to fetter estates by a more *18 indefinite extent of *limitation, or a more subtle aim at a perpetuity, has been defeated. (a) But the power of protracting the period of alienation has been restricted in New York, to two successive estates for life, limited to the lives of two persons in being at the creation of the estate. (b)

The English law of entail is so greatly mitigated as to remove the most serious inconveniences that attend that species of estates; and it is the opinion of the most experienced English property lawyers, that the law of entail is a happy medium between the want of any power, and an unlimited power, over the estate. It accommodates itself admirably to the wants and convenience of the father who is a tenant for life, and of the son who is tenant in tail, by the capacity which they have, by their joint act of opening the entail, and resettling the estate from time to time, as family exigencies may require. The privileges of a tenant in tail are very extensive. He not only can alienate the fee, but he may commit any kind of waste at his pleasure. (c) And yet, with a strange kind of inconsistency in the law, he is not any more than a tenant for life, bound to discharge incumbrances on the estate. He is not obliged even to keep down the interest on a mortgage, as a tenant for life is bound to do. If, however, he discharges incumbrances or the interest, he is presumed to do it in favor of the inheritance; for he might acquire the absolute ownership by a recovery, and it belongs to his representatives to disprove the presumption. (d) On the other hand, the tenant cannot affect

(c) Twisden, J., 1 Sid. 451. In Bengough v. Edridge, 1 Sim. 173, 267, a limitation was made to depend on an absolute term of twenty-one years after twenty-eight lives in being at the testator's death!

(d) 3 Cases in Chan. 1.

(a) Duke of Marlborough v. Earl Godolphin, 1 Eden, 404; Long v. Blackall, 7 T. R. 100.

(b) N. Y. Revised Statutes, i. 723, 724, sec. 17, 19.

(c) Mosely, 224; Cases temp. Talbot, 16.

(d) Lord Talbot, in Chaplin v. Chaplin, 3 P. Wms. 235; Amesbury v. Brown, 1 Ves. 477; Earl of Buckinghamshire v. Hobart, 3 Swanst. 186.

the issue in tail, or those in remainder or reversion, by his forfeitures or engagements. They are * not subject to any * 19 of the debts or incumbrances created by the tenant in tail, unless he comes within the operation of the bankrupt law, or creates the mortgage by fine. (*a*)

Entails, under certain modifications, have been retained in various parts of the United States, with increased power over the property, and greater facility of alienation. The desire to preserve and perpetuate family influence and property is very prevalent with mankind, and is deeply seated in the affections. (*b*)

This propensity is attended with many beneficial effects. But if the doctrine of entails be calculated to stimulate exertion and economy, by the hope of placing the fruits of talent and industry in the possession of a long line of lineal descendants, undisturbed by their folly or extravagance, it has a tendency, on the other hand, to destroy the excitement to action in the issue in tail, and to leave an accumulated mass of property in the hands of the idle and the vicious. Dr. Smith insisted, from actual observation, that entailments were unfavorable to agricultural improvement. The practice of perpetual entails is carried to a great extent in Scotland, and that eminent philosopher observed half a century ago, that one third of the whole land * of the country was loaded with * 20 the fetters of a strict entail; and it is understood that additions are every day making to the quantity of land in tail, and that they now extend over half, if not nearly two thirds, of the country. Some of the most distinguished of the Scotch statesmen and lawyers have united in condemning the policy of perpetual entails, as removing a very powerful incentive to persevering industry and honest ambition. They are condemned as equally

(*a*) Jenkins *v.* Keymes, 1 Lev. 237.

(*b*) Ch. J. Crew, of the K. B, in the great case concerning the earldom of Oxford, in which that house, under the name of De Vere, was traced up through a regular course of descent to the time of William the Conqueror, observed, that "there was no man that hath any apprehension of gentry or nobleness, but his affection stands to the continuance of so noble a name and house, and would take hold of a twig or twine-thread to uphold it." (Sir W. Jones, 101; 1 Charles I.) But the lustre of families and the entailments of property are like man himself, perishable and fleeting; and the Ch. Justice, in that very case, stays for a moment the course of his argument, and moralizes on such a theme with great energy and pathos. "There must be," he observes, "an end of names and dignities, and whatsoever is terrene. Where is Mowbray? Where is Mortimer? Nay, which is more and most of all, where is Plantagenet? They are entombed in the urns and sepulchres of mortality."

inexpedient and oppressive; and Mr. Bell sincerely hoped that some safe course might ere long be devised, for restraining the exorbitant effects of the entail law of Scotland, and for introducing some limitations, consistent with the rules of justice and public policy. (*a*) Entailments are recommended in monarchical governments as a protection to the power and influence of the landed aristocracy; but such a policy has no application to republican establishments, where wealth does not form a permanent distinction, and under which every individual of every family has his equal rights, and is equally invited, by the genius of the institutions, to depend upon his own merit and exertions. Every family, stripped of artificial supports, is obliged, in this country, to repose upon the virtue of its descendants for the perpetuity of its fame.

The simplicity of the civil law is said, by Mr. Gibbon, to have been a stranger to the long and intricate system of entails; and yet the Roman trust settlements, or *fidei commissa*, were analogous to estates tail. When an estate was left to an heir in trust, to leave it at his death to his eldest son, and so on by way of substitution, the person substituted corresponded in a degree to the English issue in tail. One of the novels of Justinian (*b*) seems to have assumed that these entailed settlements could not be carried
* 21 beyond the limit * of four generations. This is the construction given to that law by some of the modern civilians, (*a*) though Domat admits that the novel is expressed in a dark, ambiguous manner, and he intimates that it was introduced by

(*a*) Smith's Wealth of Nations, i. 383, 384; Edin. Review, xi. 359, lii. 360; Miller's Inquiry into the Present State of the Civil Law of England, 407; Bell's Comm. on the Laws of Scotland, i. 44. In Spain, private entails prevailed for ages, and one of the Spanish lawyers contends that they have been prejudicial to the agriculture and population of the nation. But since the Spanish revolution, the future creation of them has been prohibited. Institutes of the Civil Law of Spain, by Asso & Manuel, b. 2, tit. 5, c. 1, n. 6. And in the Austrian states north of the Danube, as Bohemia, Moravia, and Galicia, according to a late and very intelligent traveller, the feudal tenure of land prevails, with its rigorous feudal restrictions; and in Hungary it exists in the greatest severity; while, in the Austrian states south of that river, feudality has mainly abated, and equality of descent and freedom of alienation have succeeded. Turnbull's Austria, ii. c. 3.

(*b*) Novel, 159, c. 2.

(*a*) Browne's View of the Civil Law, i. 189; Wood's Inst. of the Civil Law, 189; Domat's Civil Law, [pt. 2,] b. 5, tit. 3; Proeme. But Pothier, very loosely, and without any reference to authority, says, that the Roman law allowed entails to an indefinite extent. Traité des Substitutions, sec. 7, art. 4.

Tribonian from corrupt views. It is also termed, by Mr. Gibbon, (*b*) a partial, perplexed, declamatory law, which, by an abuse of the novel, stretched the *fidei commissa* to the fourth degree. In France, entails were not permitted formerly to extend beyond the period of three lives; but in process of time they gained ground, and trust settlements, says the ordinance of 1747, were extended not only to many persons successively, but to a long series of generations. That new species of succession or entailment was founded on private will, which had usurped the place of law, and established a new kind of jurisprudence. It led to numerous and subtle questions, which perplexed the tribunals, and the circulation of property was embarrassed. Chancellor D'Aguesseau prepared the ordinance of 1747, which was drawn with great wisdom, after consultation with the principal magistrates of the provincial parliaments, and the superior councils of the realm, and receiving exact reports of the state of the local jurisprudence on the subject. It limited the entail to two degrees, counted *per capita*, between the maker of the entail and the heir; and, therefore, if the testator made A. his devisee for life, and after the death of A. to B., and after his death to C., and after his death to D., &c., and the estate should descend from A. to B., and from B. to C., he would hold it absolutely, and the remainder over to D. would be void. (*c*) But the Code Napoleon annihilated the * mitigated entailments allowed * 22 by the ordinance of 1747, and declared all substitutions or entails to be null and void, even in respect to the first donee. (*a*)

(*b*) Hist. viii. 80.

(*c*) Pothier, Traité des Substitutions, sec. 7, art. 4; Toullier, v. 27, 29; Répertoire de Jurisprudence, tit. Substitution Fidéi Commissaire, sec. 9, art. 2.

(*a*) Code Napoleon, art. 896; but see *infra*, 268. So by the Civil Code of Louisiana, art. 1507, substitutions and *fidei commissa* are prohibited, and consequently every disposition by which the donee, the heir, or legatee, is charged to preserve for, or to return a thing to a third buyer, is null; and by the Roman law a portion of the testator's property might be retained by the instituted heir, when he was charged with a *fidei commissa*, or fiduciary bequest, but this is no longer the law in countries where trusts are abolished. See the Code of Louisiana, art. *sup.* ed. New Orleans, 1838, with annotations by Upton & Jennings. In monarchical governments, which require the establishment and maintenance of hereditary orders in power and dignity, it may be very questionable whether the entire abolition of entails be wise or politic. As they are applied to family settlements in England, and modified according to circumstances, they are found, according to a very able and experienced lawyer, Mr. Park, to be extremely convenient, and to operate by way of mutual check. Thus, if the father, being tenant for life, wishes to charge the estate beyond his own life, to meet

the wants of the junior branches of the family, and provide for their education and marriage, and settlement in life, and his eldest son, being the tenant in tail, stands in need, on arriving to majority, of some independent income, they can do nothing without mutual consent. It is, therefore, a matter of daily occurrence, in respect to estates among the principal families belonging to the landed aristocracy, to open the entail, and resettle it, by the joint act of the father and son, to their mutual accommodation. New arrangements are repeated at intervals, as new exigencies arise, and all improvident charges and alienations are checked by these limitations of estates of inheritance, by way of particular estate in the father for life, with a vested remainder in the son in tail; for the father cannot charge beyond his life, nor the son convey the remainder during the father's life, without mutual consent. That consent is never obtained, but for useful or salutary family purposes; and by this contrivance estates are made to subserve such purposes; while their entirety is permanently preserved. The Massachusetts Revised Statutes of 1836, pt. 2, tit. 1, c. 59, sec. 4, follow this policy, for they declare, that where lands are held by one person for life, with a vested remainder in tail to another, they both may, by a joint deed, convey the same in fee simple.

[20]

LECTURE LV.

OF ESTATES FOR LIFE.

AN estate of freehold is a denomination which applies equally to an estate of inheritance and an estate for life. (*a*) *Liberum tenementum* denoted anciently an estate held by a freeman, independently of the mere will and caprice of the feudal lord; and it was used in contradistinction to the interests of terms for years, and lands in villenage or copyhold, which estates were originally liable to be determined at pleasure. This is the sense in which the terms *liberum tenementum*, frank tenement or freehold, are used by Bracton, Fleta, Littleton, and Coke; and, therefore, Littleton said that no estate below that for life was a freehold. (*b*) Sir William Blackstone (*c*) confines the description of a freehold estate simply to the incident of livery of seisin, which applies to estates of inheritance and estates for life; and as those estates were the only ones which could not be conveyed at common law without the solemnity of livery of seisin, no other estates were properly freehold estates. But *this criterion of a freehold *24 estate, as being one in fee, or for life, applies as well to the estates created by the operation of the statute of uses as to those which are conveyed by livery of seisin; for the statute which unites the possession to the use supplies the place of actual livery. Any estate of inheritance, or for life, in real property,

(*a*) This is even made a matter of legislative declaration, in the New York Revised Statutes, i. 772, sec. 6.

(*b*) Fuerunt in conquestu liberi homines, qui libere tenuerunt tenementa sua per libera servitia, vel per liberas consuetudines. Bracton, lib. 1, fol. 7. Liberum tenementum non habuit, qui non tenuit nisi ad terminum annorum. Fleta, lib. 5, c. 5, sec. 16; Litt. sec. 57; Co. Litt. 43, b. In the French law, the *liberi*, or freemen, were defined to be *celles qui ne recognoissent superieure en Feidalité*. So, in Doomsday, the *liberi* were expressed to be *qui ire poterant quo volebant*. Dalrymple on Feudal Property, 11.

(*c*) Comm. ii. 104.

whether it be a corporeal or an incorporeal hereditament, may justly be denominated a freehold.

By the ancient law, a freehold interest conferred upon the owner a variety of valuable rights and privileges. He became a suitor of the courts, and the judge in the capacity of a juror; he was entitled to vote for members of Parliament, and to defend his title to the land; as owner of the immediate freehold, he was a necessary tenant to the *præcipe* in a real action, and he had a right to call in the aid of the reversioner or remainderman, when the inheritance was demanded. These rights gave him importance and dignity as a freeholder and freeman. (*a*)

Estates for life are divided into conventional and legal estates. The first are created by the act of the parties, and the second by operation of law.

1. **Estates for Life by Agreement.** — Estates for life, by the agreement of the parties, were, at common law, freehold estates of a feudal nature, inasmuch as they were conferred by the same forms and solemnity as estates in fee, and were held by fealty, and the conventional services agreed on between the lord and tenant. (*b*) Sir Henry Spelman (*c*) endeavored to show that the English law took no notice of feuds until they became hereditary at the Norman Conquest; and that *fealty*, as well as the other feudal incidents, were consequences of the perpetuity of fiefs, and did not belong to estates for years, or for life. The question has now become wholly immaterial in this country, where every real vestige of tenure is annihilated, and the doubt, whether fealty was *25 not, in this * state, an obligation upon a tenant for life, has been completely removed, in New York, by the act declaring all estates to be allodial. (*a*) But, considering it as a point connected with the history of our law, it may be observed, that the better opinion would seem to be, that fealty was one of the original incidents of feuds when they were for life. It was as necessary in the life estate as in a fee, and it was in accordance with the spirit of the whole feudal association, that the vassal, on admission to the protection of his lord, and the honors of a feudal

(*a*) Sullivan's Lectures on Feudal Law, lect. 6; Preston on Estates, i. 206–210.

(*b*) Wright on Tenures, 190.

(*c*) Treatise of Feuds and Tenures, c. 3.

(*a*) New York Revised Statutes, i. 718, sec. 3.

investiture, should make an acknowledgment of his submission, with an assurance of service and fidelity. The rights of the feudal investiture were exceedingly solemn, and implied protection and reverence, beneficence and loyalty. (*b*)

Life estates may be created by express words, as if A. conveys lands to B. for the term of his natural life; or they may arise by construction of law, as if A. conveys land to B. without specifying the term of duration, and without words of limitation. In this last case, B. cannot have an estate in fee, according to the English law, and according to the law of those parts of the United States which have not altered the common law in this particular, but he will take the largest estate which can possibly arise from the grant, and that is an estate for life. (*c*) The life estate may be either for a man's own life, or for the life of another person, *and in this last case it is termed an estate *pur autre* *26 *vie*, which is the lowest species of freehold, and esteemed of less value than an estate for one's own life. The law in this respect has proceeded upon known principles of human nature; for, in the ordinary opinion of mankind, as well as in the language of Lord Coke, "an estate for a man's own life is higher than for another man's." A third branch of life estates may also be added, and that is, an estate for the term of the tenant's own life, and the life of one or more third persons. In this case, the tenant for life has but one freehold limited to his own life, and the life of the other party or parties. (*a*)

These estates may be made to depend upon a contingency, which can happen, and determine the estate before the death of

(*b*) See Lib. Feud. lib. 1, tit. 1, and lib. 2, tit. 5, 6, 7, where the vassal for life is termed *fidelis*, and every vassal was bound by oath to his lord, *quod sibi erit fidelis, ad ultimum diem vitæ, contra omnem hominem, excepto rege, et quod credentiam sibi commissam non manifestabit.* Doctor Gilbert Stuart, in his View of Society in Europe, 87, 88, was of the same opinion; and he explored feudal antiquities with a keen spirit of research, sharpened by controversy. His work is deserving of the study of the legal antiquarian, if for no other purpose, yet for the sagacity and elegance with which he comments upon the sketches of barbarian manners, as they remain embodied in the clear and unadorned pages of Cæsar, and the nervous and profound text of Tacitus.

(*c*) Co. Litt. 42, a.

(*a*) Co. Litt. 41, b. There are several subtle distinctions in the books, growing out of this topic, whereof students, according to Lord Coke, "may disport themselves for a time;" and Mr. Ram has endeavored to do so, in a puzzling note to his recent Outline of the Law of Tenure and Tenancy, 33. [As to estates *pur autre vie*, see *In re* Barber Settled Estates, 18 Ch. D. 624.]

the grantee. Thus, if an estate be given to a woman *dum sola*, or *durante viduitate*, or to a person so long as he shall dwell in a particular place, or for any other intermediate period, as a grant of an estate to a man until he shall have received a given sum out of the rents and profits; in all these cases, the grantee takes an estate for life, but one that is determinable upon the happening of the event on which the contingency depended. (*b*) If the tenant for the life of B. died in the lifetime of B., the estate was opened to any general occupant during the life of B.; but if the grant was to A. and his heirs during the life of B., the heir took it as a special occupant. The statute of 29 Charles II. c. 3, made such an interest devisable, and if not devised, the heir was made chargeable with the estate as assets by descent, and it speaks of him as a special occupant.

The statute of 14 Geo. II. c. 20, went further, and provided, that if there was no such special occupant named, *27 and *the land be not devised, it was to go in a course of administration as personal estate. This peculiar estate *pur autre vie* has been frequently termed a descendible freehold, but it is not an estate of inheritance, and perhaps, strictly speaking, it is not a descendible freehold, in England, for the heir does not take by descent. It is a freehold interest *sub modo*, or for certain purposes, though in other respects it partakes of the nature of personal estate. (*a*) In New York, an estate *pur autre vie*, whether limited to heirs or otherwise, is deemed a freehold only during the life of the grantee or devisee, and after his death it is deemed a chattel real. (*b*) The interest of every occupant, general or special, is, therefore, in New York, totally annihilated; but the statute provisions in other states vary considerably upon this subject. In New Jersey, the act of 1795 is the same as that in New York; but Virginia and North Carolina follow in the footsteps of the English statutes, and leave a *scintilla* of interest, in certain events, in the heir as a special occupant. (*c*) In Mas-

(*b*) Bracton, lib. 4, c. 28, sec. 1; Co. Litt. 42, a; The People *v.* Gillis, 24 Wend. 201.

(*a*) Lord Kenyon, in Doe *v.* Luxton, 6 T. R. 289; [Mosher *v.* Yost, 33 Barb. 277.] By the statute of 1 Victoria, c. 26, estates *pur autre vie*, if not devised, were to be chargeable in the hands of the heir, as assets by descent; and if there be no special occupant, they were to go as already provided.

(*b*) N. Y. Revised Statutes, i. 722, sec. 6.

(*c*) Revised Code of Virginia, i. 233; Revised Statutes of North Carolina, i. 278.

sachusetts and Vermont, on the death of the tenant *pur autre vie*, without having devised the same, the estate descends to his lawful representatives, like estates in fee simple. (*d*) In many other states, the real and personal estates, and all interest therein, go in the same course of distribution.

2. **Tenancy by the Curtesy** is an estate for life, created by the act of the law. When a man marries a woman, seised, at any time during the coverture, of an estate of inheritance, in severalty, in coparcenary or in common, and hath issue by her born alive, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life, by the curtesy of England; and it is immaterial whether the issue be living at the time of the seisin, * or at the death of the wife, or whether it was born *28 before or after the seisin. (*a*)

This estate is not peculiar to the English law, as Littleton erroneously supposes, (*b*) for it is to be found with some modifications, in the ancient laws of Scotland, Ireland, Normandy, and Germany. (*c*) Sir Martin Wright is of opinion that curtesy was not of feudal origin, for it is laid down expressly in the Book of Feuds (*d*) that the husband did not succeed to the feud of the wife, without a special investiture; and he adopts the opinion of Craig, who says, that curtesy was granted out of respect to the former marriage, and to save the husband from falling into poverty, and he deduces curtesy from one of the rescripts of the Emperor Constantine. (*e*) But whatever may have been the origin of this title, it was clearly and distinctly established in the English law, in the time of Glanville; and it was described

In Maryland, estates *pur autre vie*, except those granted to the deceased and heirs only, are considered as assets in the hands of the executor or administrator. Act of 1798, c. 101; Dorsey's Testamentary Law of Maryland, 88.

(*d*) Revised Statutes of Massachusetts, 413; Revised Statutes of Vermont, 292.

(*a*) Litt. sec. 35, 53; Co. Litt. 29, b; Paine's Case, 8 Co. 34. [See Day *v.* Cochran, 24 Miss. 261, 274; Ryan *v.* Freeman, 36 Miss. 175, 176.] If the issue take *as purchasers*, the husband is not entitled to take by the curtesy, as where there was a devise to the wife and her heirs, but if she died leaving issue, then to such issue and their heirs. Barker *v.* Barker, 2 Sim. 249; [Janney *v.* Sprigg, 7 Gill, 197.]

(*b*) Litt. sec. 35.

(*c*) Co. Litt. 30, a; Wright on Tenures, 193; 2 Bl. Comm. 126. In Normandy, according to The Coustumier, c. 119, the curtesy lasted only during the widowhood of the husband.

(*d*) Feud. lib. 1, tit. 15; lib. 2, tit. 13.

(*e*) Wright on Tenures, 194; Craig's Jus Feudale, lib. 2, Dieg. 22, sec. 40.

by Bracton, and especially in a writ, in 11 Hen. III., with the fulness and precision of the law of definitions at the present day. (*f*) Though the extent of it, as against the adult heir of the wife, may be justly complained of, yet it is remarkable that curtesy has continued unimpaired in England and Scot-
*29 land, (*g*) * and it remains almost entirely unshaken in our American jurisprudence.[1]

(*f*) Glanville, lib. 7, c. 18; Bracton, lib. 5, c. 30, sec. 7; Hale's Hist. Com. Law, c. 9. In the form of the writ given by Sir Matthew Hale, in which Henry III. directs the English laws to be observed in Ireland, tenancy by the curtesy is stated, even at that time, to be *consuetudo et lex Angliæ;* and the Mirror, c. 1, sec. 3, says, that this title was granted *of the curtesy of King Henry I.*

(*g*) In Scotland, there is this variation in the curtesy from that in England, that

[1] *Curtesy.* — Curtesy is abolished or modified in many states, by statutes which must be consulted. To entitle the husband to it at common law, besides the requirements mentioned in the text, it seems that it was necessary that the child should be born during the life of its mother, although the child's right to inherit from her is independent of that circumstance. Marsellis *v.* Thalhimer, 2 Paige, 35.

In several American cases the strictness of the text (29) is relaxed, and a seisin in law, without actual entry, is thought sufficient to give the husband curtesy. Waas *v.* Bucknam, 38 Me. 356; Childers *v.* Bumgarner, 8 Jones (N. C.), 297, 298; Day *v.* Cochran, 24 Miss. 261, 276, 277; Rabb *v.* Griffin, 26 Miss. 579; Harvey *v.* Wickham, 23 Mo. 112, 115; Stephens *v.* Hume, 25 Mo. 349; Watkins *v.* Thornton, 11 Ohio St. 367, and cases cited. In an equity case where the trustees denied the wife's interest, so that she had nothing corresponding to a seisin, the husband was not allowed curtesy. The language of the court was, that although he was entitled to curtesy in an equitable estate, he was not so in a right not amounting to an estate. Lentill *v.* Robeson, 2 Jones, Eq. 510. But that principle seems better to explain decisions that there is no curtesy in a preëmption right. McDaniel *v.* Grace, 15 Ark. 465, 484. Compare 4 G. Greene (Iowa), 360, and cases cited *post*, 46, n. 1. *x*[1]

A husband has no interest in lands to which his wife is only entitled in remain-

x[1] Actual entry was considered unnecessary where the wife died so soon after the vesting of the estate as to render it impossible. Eager *v.* Furnivall, 17 Ch. D. 115. See further, Withers *v.* Jenkins, 14 S. C. 597; McKee *v.* Cottle, 6 Mo. App. 416. Curtesy exists in an estate limited to the separate use of the wife free from the husband's control, with a power of disposal in the wife. Eager *v.* Furnivall, *supra;* Carter *v.* Dale, 3 Lea, 710. But it has been held that an actual alienation by the wife holding the equitable fee will defeat curtesy. Cooper *v.* MacDonald, 7 Ch. D. 288. Comp. Comer *v.* Chamberlain, 6 Allen, 166. So a limitation over on the death of the wife may operate to prevent the vesting of any right of curtesy. Withers *v.* Jenkins, 14 S. C. 597, 611. Comp Hatfield *v.* Sneden, 54 N. Y. 280. Curtesy also exists in the wife's equitable estate. Cooper *v.* MacDonald, 7 Ch. D. 288; Archer *v.* Lavender, 9 Ir. R Eq. 220; Cushing *v.* Blake, 30 N. J. Eq. 689; Ege *v.* Medlar, 82 Penn. St. 86; *post*, 30, n. (*f*).

South Carolina is an exception, for in that state tenancy by the curtesy *eo nomine* has ceased by the provision of an act in 1791, *relative to the distribution of intestates' estates*, which gives to the husband surviving his wife the same share of her real estate as she would have taken out of his, if left a widow, and that is either one moiety or one third of it, in fee, according to circumstances. In Georgia, also, tenancy by curtesy does not exist; but all marriages, since 1785, vest the real equally with the personal estate of the wife in the husband.

Four things are requisite to an estate by the curtesy, viz., marriage, actual seisin of the wife, issue, and death of the wife. The law vests the estate in the husband immediately on the death of the wife, without entry. His estate is initiate on issue had, and consummate on the death of the wife. (*a*)

The wife, according to the English law, must have been seised in fact and in deed, and not merely of a seisin in law of an estate of inheritance, to entitle the husband to his curtesy. (*b*) The possession of the lessee for years is the possession of the wife as reversioner; but if there be an outstanding estate for life, the husband cannot be tenant by the curtesy of the wife's estate in

the wife must have been seised of the estate as heir, and not have acquired it by purchase, though it is admitted there is no good reason for the distinction. Bell's Comm. i. 5th ed. 61.

(*a*) In Pennsylvania, the husband's curtesy by statute in 1833 is good, though there be no issue of the marriage. Purdon's Dig. 550. In 1831, a bill upon the suggestion of the English Real Property Commissioners was brought into Parliament to abolish the rule that the issue in curtesy must be born alive, but the bill was suffered to drop.

(*b*) Co. Litt. 29, a; Mercer *v.* Selden, 1 How. 37.

der, sufficient to pass to his assignees in bankruptcy. Gibbins *v.* Eyden, L. R. 7 Eq. 371, 376. See Shores *v.* Carley, 8 Allen, 425. But a tenant by the curtesy initiate has an interest which may be assigned or sold on execution. Schemerhorn *v.* Miller, 2 Cowen, 439; Day *v.* Cochran, 24 Miss. 261; Gardner *v.* Hooper, 3 Gray, 398. [See also Koltenbrock *v.* Cracraft, 36 Ohio St. 584.] And it has been held that he is seised of a freehold in his own right, and that the wife has only a reversionary interest after his life estate, so that she cannot be prejudiced by any neglect of his. Foster *v.* Marshall, 2 Fost. (22 N. H.) 491. See also Thompson *v.* Green, 4 Ohio St. 216; Wass *v.* Bucknam, 38 Me. 356; Lancaster County Bank *v.* Stauffer, 10 Penn. St. 398. But see Weisinger *v.* Murphy, 2 Head, 674. His inchoate interest is subject to be devested, however, by the legislature, as in the case of dower. Thurber *v.* Townsend, 22 N. Y. 517. [So the legislature may attach curtesy to property as to which it did not before exist. Brown *v.* Clark, 44 Mich. 309;] *post*, 62, n. 1.

reversion or remainder, unless the particular estate be ended during the coverture. (*c*) This is still the general rule at law, though in equity the letter of it has been relaxed by a free and liberal construction. (*d*) The circumstances of this country *30 have justly required some qualification of the strict letter * of the rule relative to a seisin in fact by the wife; and if she be owner of waste, uncultivated lands not held adversely, she is deemed seised in fact, so as to entitle her husband to his right of curtesy. (*a*) The title to such property draws to it the possession; and that constructive possession continues in judgment of law, until an adverse possession be clearly made out; and it is a settled point in our courts, that the owner of such lands is deemed in possession, so as to be able to maintain trespass for entering upon the land and cutting the timber. To entitle the husband to curtesy, he must be a citizen and not an alien, for an alien husband was not at common law entitled to curtesy, any more than an alien wife was entitled to be endowed; and the wife must have had such a seisin as will enable her issue to inherit; and, therefore, if she claims by descent or devise, and dies before entry, the inheritance will go, not to her heir, but to the heir of the person last seised, and the husband will not have his curtesy. (*b*)

The rule has been carried still further in this country; and in one state, where the title by curtesy is in other respects as in England, it is decided that it was sufficient for the claim of curtesy that the wife had title to the land, though she was not actually seised, nor deemed to be so. (*c*) The law of curtesy in Con-

(*c*) Perkins, sec. 457, 464, Co. Litt. 29, a; De Grey *v.* Richardson, 3 Atk. 469; Gentry *v.* Wagstaff, 3 Dev. (N. C.) 270; Stoddard *v.* Gibbs, 1 Sumner, 263; [Tayloe *v.* Gould, 10 Barb. 388; Hitner *v.* Ege, 23 Penn. St. 305; Keerl *v.* Fulton, 1 Md. Ch. 532; Mackey *v.* Proctor, 12 B. Mon. 433; Orford *v.* Benton, 36 N. H. 395; Planters' Bank *v.* Davis, 31 Ala. 626; Shores *v.* Carley, 8 Allen, 425; Prater *v.* Hoover, 1 Coldw. 544; Malone *v.* McLaurin, 40 Miss. 161; Watkins *v.* Thornton, 11 Ohio St. 367.]

(*d*) De Grey *v.* Richardson, 3 Atk. 469; Sterling *v.* Penlington, 7 Viner, 149, pl. 11; 3 Eq. Ca. Abr. 730.

(*a*) Jackson *v.* Sellick, 8 Johns. 262; Clay *v.* White, 1 Munf. 162; Green *v.* Liter, 8 Cranch, 249; Davis *v.* Mason, 1 Peters, 503; Smoot *v.* Lecatt, 1 Stewart (Ala.), 590; M'Corry *v.* King, 3 Humph. 267; [Barr *v.* Galloway, 1 McL. 476; McDaniel *v.* Grace, 15 Ark. 465. But see Neely *v.* Butler, 10 B. Mon. 48.]

(*b*) Jackson *v.* Johnson, 5 Cowen, 74; Adair *v.* Lott, 3 Hill, 182; [Welsh *v.* Chandler, 13 B. Mon. 420, 480; Rabb *v.* Griffin, 26 Miss. 579; Merritt *v.* Home, 5 Ohio St. 307; Wass *v.* Bucknam, 38 Me. 356; Stephens *v.* Hume, 25 Mo. 349; Malone *v.* McLaurin, 40 Miss. 161.]

(*c*) Bush *v.* Bradley, 4 Day, 298; Kline *v.* Beebe, 6 Conn. 494. The severity of

necticut is made to symmetrize with other parts of their system; and in that state, ownership without seisin is sufficient to govern the descent or devise of real estate. (*d*)

At common law, the husband could not be tenant by the curtesy of a use; (*e*) but it is now settled in equity that he may be a tenant by the curtesy of an equity of redemption, and of lands of which the wife had only a seisin in equity as a *cestui que trust*. (*f*) So, if money be agreed to be laid out * in the * 31 purchase of land, the money is considered as land in the view of a court of equity, and the husband will be allowed his curtesy. (*a*) Though the husband be entitled to his curtesy in a trust estate, it has been a questionable point, whether it must not be such a trust estate as will give him an equitable seisin. The wife must have had a seisin of the freehold and inheritance, *simul et semel*, either at law or in equity, during the coverture. (*b*) In *Roberts* v. *Dixwell*, (*c*) Lord Hardwicke held that the husband might have his curtesy in an estate devised to the wife for her separate use; but afterwards he declared that a seisin in law or in equity was essential to a tenancy by curtesy. The opinions of Lord Hardwicke, in *Hearle* v. *Greenbank* and *Roberts* v. *Dixwell*, are conflicting, and cannot be reconciled; and it would seem to have followed, that if the equitable freehold was out in trustees for the separate use of the wife, and kept distinct during the coverture from her equitable remainder in fee, that she wanted that seisin of the entire equitable estate requisite to a tenancy by the curtesy. But it is now settled otherwise, and the husband is tenant by the curtesy if the wife has an equitable estate of inherit-

the ancient law on the right to curtesy is much relaxed in England, as well as in this country, and a constructive seisin of the wife is sufficient to sustain the husband's right to his curtesy, where it is not rebutted by an actual disseisin. See De Grey *v.* Richardson, and Sterling *v.* Penlington, *supra*, and Ellsworth *v.* Cook, 8 Paige, 643.

(*d*) 4 Day, *ubi supra*. (*e*) Gilbert on Uses, by Sugden, 48, 440.

(*f*) Watts *v.* Ball, 1 P. Wms. 108. In Virginia, by statute, 1 R. C. (1819), the husband has his curtesy in a trust estate. So it is in Maine, and deemed to be so throughout the country. 1 Sumner, 128; [Alexander *v.* Warrance, 17 Mo 228; Rawlings *v.* Adams, 7 Md. 26; Pierce *v.* Hakes, 23 Penn. St. 231; Baker *v.* Heiskell, 1 Coldw. 641; Norman *v.* Cunningham, 5 Gratt. 63.]

(*a*) Sweetapple *v.* Bindon, 2 Vern. 536; Watts *v.* Ball, 1 P. Wms. 108; Chaplin *v* Chaplin, 3 id. 229; Casborne *v.* Scarfe, 1 Atk. 603; Cunningham *v.* Moody, 1 Ves. 174; Dodson *v.* Hay, 3 Bro. C. C. 405.

(*b*) Hearle *v.* Greenbank, 1 Ves. 298; 3 Atk. 716, s. c. (*c*) 1 Atk. 607.

ance, notwithstanding the rents and profits are to be paid to her separate use during the coverture. The receipt of the rents and profits are a sufficient seisin in the wife. (*d*) And if lands be devised to the wife, or conveyed to trustees for her separate and exclusive use, and with a clear and distinct expression that the husband was not to have any life estate or other interest, but the same was to be for the wife and her heirs; in that case, the Court of Chancery will consider the husband a trustee *32 *for the wife and her heirs, and bar him of his curtesy. (*a*)

But the husband of a mortgagee in fee is not entitled to his curtesy, though the estate becomes absolute at law, unless there has been a foreclosure, or unless the mortgage has subsisted so long a time as to create a bar to the redemption. (*b*) The rule has now become common learning, and it is well understood that the rights existing in, or flowing from, the mortgagee, are subject to the claims of the equity of redemption, so long as the same remains in force.

Curtesy applies to qualified as well as to absolute estates in fee, but the distinctions on this point are quite abstruse and subtle. It was declared in *Paine's Case*, (*c*) to be the common law, that if lands had been given to a woman, and the heirs of her body, and she married and had issue which died, and then the wife died without issue, whereby the estate of the wife was determined, and the inheritance of the land reverted to the donor, yet the husband would be entitled to hold the estate tail for life as tenant by the curtesy, for that was implied in the gift. So where an estate was devised to a woman in fee, with a devise over, in case she died under the age of twenty-one, without issue, and she married, had issue which died, and then she died, under age, by which the

(*d*) Pitt *v.* Jackson, 2 Bro. C. C. 51; Morgan *v.* Morgan, 5 Mad. Am. ed. 248, [408; Powell *v.* Gossom, 18 B. Mon. 179. See Payne *v.* Payne, 11 B. Mon. 138.] If the wife's land be sold in partition after her death, the husband, as tenant by the curtesy, will be entitled to the use of the proceeds for life, upon giving security for repayment at his death. Clepper *v.* Livergood, 5 Watts, 113.

(*a*) Bennet *v.* Davis, 2 P. Wms. 316; Cochran *v.* O'Hern, 4 Watts & S. 95; [Stokes *v.* McKibbin, 13 Penn. St. 267; Waters *v.* Tazewell, 9 Md. 291; Pool *v.* Blakie, 53 Ill. 495. But compare Dubs *v.* Dubs, 31 Penn. St. 149; Nightingale *v.* Hidden, 7 R. I. 115.]

(*b*) This is so stated in Chaplin *v.* Chaplin, as reported in 7 Viner, 156, pl. 23; and the same thing is declared by Lord Hardwicke, in a case which Lord Loughborough cited from his note book, in 2 Ves. Jr. 433.

(*c*) 8 Co. 34.

devise over took effect; still, it was held, the husband was entitled to his curtesy. (*d*) But there are several cases in which curtesy, as well as dower, ceases upon the determination of the estate; and this upon the maxim, that the derivative estate cannot continue longer than the primitive estate, *cessante statu primitivo cessat derivativus*. As a general rule, curtesy and dower can only be commensurate with the estate of the grantee, and must cease with the determination of that estate. They cease necessarily where * the seisin was wrongful, and there is an *33 eviction under a title paramount. The distinction is principally between a condition and a limitation. If the wife's seisin be determined by a condition in deed expressly annexed to the estate, and the donor or his heirs enter for breach of the condition, the curtesy is defeated, for the donor reassumes his prior and paramount title, and all intermediate rights and incumbrances are destroyed. On the other hand, a limitation merely shifts the estate from one person to another, and leaves the prior seisin undisturbed. The limitation over takes effect, and the estate next in expectancy vests without entry, and the curtesy is preserved. If, however, instead of being a simple limitation, it be a *conditional* limitation, it is said that, in that case, the curtesy would be defeated, for the conditional limitation cuts off, or produces a *cesser* of the estate upon which it operates. The cases of an estate tail determining by failure of issue, and of a fee determining by executory devise or springing use, are exceptions to the general rule, denying curtesy or dower after the determination of the principal estate. (*a*)

(*d*) Buckworth *v.* Thirkell, 3 Bos. & P. 652, note. [Buckworth *v.* Thirkell is approved in Evans *v.* Evans, 10 Penn. St. 190; Thornton *v.* Krepps, 37 Penn. St. 391; see Wright *v.* Herron, 5 Rich. Eq. 441; 6 id. 406; but thought unsound in Weller *v.* Weller, 28 Barb. 588; Hatfield *v.* Sneden, 42 Barb. 615.] [Hatfield *v.* Sneden was reversed on appeal, *ante*, 29, n. 1, x^1.]

(*a*) Buckworth *v.* Thirkell, 3 Bos. & P. 652, note; Butler's note, 170, to Co. Litt. 241, a; Roper on Husband and Wife, c. 1, sec. 5; Preston on Abstracts of Title, iii. 384; Park on Dower, pp. 172, 186. Mr. Butler, in speaking of limited fees, which by the grant are to continue only to a certain period, observes that curtesy and dower will continue after the expiration of the period to which the fee was to continue. But where the fee was originally created by words importing an absolute fee, and by subsequent words was made determinable upon some particular event, there the curtesy and dower cease with the estate to which the event is annexed. The case of Buckworth *v.* Thirkell stands in the way of the doctrine of Mr. Butler, and Lord Mansfield decided, that the case before him was one of a contingent, and not of a conditional limitation. Lord Alvanley, in 3 Bos. & P. 654, cites the distinction of Mr. Butler as

*34 *Though the wife's dower be lost by her adultery, no such misconduct on the part of the husband will work a forfeiture of his curtesy; nor will any forfeiture of her estate by the wife defeat the curtesy. (*a*) The reason, says Lord Talbot, why the wife forfeits her dower, and the husband does not forfeit his curtesy, in cases of misconduct, is because the statute of Westm. 2 gave the forfeiture in one case and not in the other. (*b*) This is showing the authority, but not the reciprocal justice or equity, of the distinction. There is no parity of justice in the case. (*c*) So, the husband, as well as any other tenant for life, may forfeit his curtesy by a wrongful alienation, or by making a feoffment, or levying a fine importing a grant in fee, suffering a common recovery, joining the *mise* in a writ of right, or by any other act tending to the disherison of the reversioner or remainderman. (*d*) In New York, this rule of the common law existed until lately. The statute of Westm. 2, c. 24, giving a writ applicable to such cases of forfeiture, was reënacted in 1787. (*e*) The injury of the alienation to the heir was removed by the statute of 6 Edw. I. c. 3, also reënacted in 1787. (*f*) That statute declared, that

worthy of attention, and Mr. Roper has varied it and discussed it. Neither of them, as it would seem, have traced the lines of the distinction with satisfactory clearness and precision, or shown any sound principle on which it rests. The subject is replete with perplexed refinements, and it is involved too deep in mystery and technical subtleties to be sufficiently intelligible for practical use. Here arises a proper case for the aid of the reformer. When any particular branch of the law has departed widely from clear and simple rules, or, by the use of artificial and redundant distinctions, has become uncertain and almost incomprehensible, there is no effectual relief but from the potent hand of the lawgiver.

(*a*) Preston on Abstracts of Title, iii. 385; Smoot *v.* Lecatt, 1 Stewart (Ala.), 590; Mass. Revised Statutes, 1836. Whether a divorce *a vinculo* will destroy curtesy depends on circumstances, and there is some variety in the laws of the several states. If the cause of the divorce be for causes arising before marriage, the right to curtesy, as well as to other rights growing out of the marriage, is gone, but if for causes subsequent to marriage, the rule is not absolutely stable and uniform. See Hilliard's Abr. i. 51, 52.

(*b*) Sidney *v.* Sidney, 3 P. Wms. 276.

(*c*) In Indiana, the unequal rule is corrected, and the husband and wife are treated alike on this point, and if he leaves his wife and lives with an adulteress, he loses his right of tenancy by the curtesy. Revised Statutes of Indiana, 1838, p. 240.

(*d*) Co. Litt. 251, a, b, 302, b; 2 Inst. 309.

(*e*) Laws N. Y. sess. 10, c. 50, sec. 6.

(*f*) Laws N. Y., sess. 10, c. 48, sec. 8. The same provision against alienations by the tenant by the curtesy was enacted in New Jersey, in 1798. Elmer's Dig. 78. When the estate by the curtesy is once vested in the husband, it becomes liable to his debts, and cannot be devested by his disclaimer. Watson *v.* Watson, 13 Conn. 83. The creditors have a right to sell the same on execution at law. Canby *v.* Porter,

alienations by the tenant by the curtesy should not bar the issue of the mother, though the father's deed bound his heirs to warranty. But every vestige of this law of forfeiture has recently and wisely been abrogated in New York, by a provision in the new statute code, which *declares that a conveyance by a *35 tenant for life, or years, of a greater estate than he possessed, or could lawfully convey, shall not work a forfeiture of his estate, nor pass any greater estate or interest than the tenant can lawfully convey; except that the conveyance shall operate by way of estoppel, and conclude the grantor and his heirs claiming from him by descent. (*a*)

3. Dower. — The next species of life estates created by the act of the law is that of *dower*. It exists where a man is seised of an estate of inheritance, and dies in the lifetime of his wife. In that case she is at common law entitled to be endowed, for her natural life, of the third part of all the lands whereof her husband was seised, either in deed or in law, at any time during the coverture, and of which any issue which she might have had, might by possibility have been heir. (*b*)

This humane provision of the common law was intended for the sure and competent sustenance of the widow, and the better nurture and education of her children. (*c*) We find the

12 Ohio, 79. A voluntary settlement of that curtesy upon the wife by the husband is void as to his creditors. Van Duzer *v.* Van Duzer, 6 Paige, 366; Wickes *v.* Clarke, 8 id. 161.

(*a*) N. Y. Revised Statutes, i. 739, sec. 143, 145. The Mass. Revised Statutes of 1836 have made the same alteration in this law of forfeiture. The husband's life estate in his wife's land is liable to be taken, and appropriated and sold for his debts. Litchfield *v.* Cudworth, 15 Pick. 23.

(*b*) Litt. sec. 36; Perkins, sec. 301; N. Y. Revised Statutes, i. 740, sec. 1; Park's Treatise on the Law of Dower, 5; Chase's Statutes of Ohio, ii. 1314; 1 Virginia, R. C.; Mass. Revised Statutes of 1836, pt. 2, tit. 1, c. 60, sec. 1; Aikin's Alabama Dig. 2d ed. p. 132. The New Jersey statute of 1799 and of 1847, which reënacts all the essential doctrines of the English law on the subject of dower, omits the condition in the text in respect to the wife's issue. Elmer's Dig. 143. R. S. New Jersey, 1847. So does the Virginia statute of 1792. Revised Code of Virginia, i. 288, and the statute of New York, and the R. L. of Missouri, 1835, p. 226, and of Arkansas. In Arkansas the right of dower is paramount to creditors and purchasers, and the wife also takes her dower in one third of the slaves owned by her husband at his death. Hill *v.* Mitchell, 5 Ark. 608. In Missouri, the widow is also entitled to dower, in leasehold estates, for a term of twenty years or more.

(*c*) Bracton, 92, a; Fleta, lib. 5, c. 23, sec. 2; Co. Litt. 30, b. In the customs of the ancient Germans recorded by Tacitus, de Mor. Germ. c. 18, *dotem non uxor marito, sed uxori maritus offert.* In this custom we probably have the origin of the right of

*36 *law of dower, in the mode of endowing *ad ostium ecclesiæ* in common use in the time of Glanville, (*a*) but limited to the third part of the freehold lands which the husband held *at the time of the marriage*. This limitation is likewise mentioned in Bracton and Fleta; (*b*) whereas, in Magna Charta, (*c*) the law of dower, in its modern sense and enlarged extent, as applying to all lands of which the husband was seised *during the coverture*, was clearly defined and firmly established. It has continued unchanged in the English law to the present times; and, with some modifications, it has been everywhere adopted as part of the municipal jurisprudence of the United States.

To the consummation of the title to dower, three things are requisite, viz.: marriage, seisin of the husband, and his death. (*d*) Dower attaches upon all marriages not absolutely void, and existing at the death of the husband; it belongs to a wife *de facto*, whose marriage is voidable by decree, as well as to a wife *de jure*. It belongs to a marriage within the age of consent, though the husband dies within that age. (*e*) But a *feme covert*, being an alien, was not, by the common law, entitled to be endowed any more than to inherit. (*f*) This rule has been relaxed in some parts of the country; in New Jersey there is no distinction, whether widows be aliens or not, and in Maryland, an alien widow, who married in the United States, and resided here when

dower, which was carried by the northern barbarians into their extensive conquests; and when a permanent interest was acquired in land, the dower of the widow was extended and applied to real estate, from principle and affection, and by the influence of the same generosity of sentiment which first applied it to chattels. Stuart's View of Society, 29, 30, 223–227. Olaus Magnus records the same custom among the Goths; and Dr. Stewart shows it to have been incorporated into the laws of the Visigoths and Burgundians. Mr. Barrington observes, that the English would probably borrow such an institution from the Goths and Swedes, rather than from any other of the northern nations. Qbserv. upon the Ancient Statutes, 9, 10. Among the Anglo-Saxons, the dower consisted of goods; and there were no footsteps of dower in lands until the Norman Conquest. 2 Bl. Comm. 129. Spelman, Gloss. voce *Doarium*, deduces *dos* from the French *douaire*; and Sir Martin Wright says, that dower was probably brought into England by the Normans, as a branch of their doctrine of fiefs or tenures. Wright on Tenures, 192. In the French law, tenancy by curtesy is called *droit de viduité*. Œuvres de D'Aguesseau, iv. 660.

(*a*) Glanv. lib. 6, c. 1.

(*b*) Bracton, lib. 2, c. 39, sec. 2; Fleta, lib. 5, c. 24, sec. 7. (*c*) C. 7.

(*d*) Co. Litt. 31, a.

(*e*) Co. Litt. 33, a; 7 Co. 42; Kenne's Case, Doct. & Stud. 22, [Dial. 1, c. 7.]

(*f*) Co. Litt. 31, b; Kelly *v.* Harrison, 2 Johns. Cas. 29. By statute of 7 & 8 Vict c. 66, foreign women married to British subjects become thereby naturalized.

her husband died, was admitted to dower. (*g*) In New York, the alien widow of a natural * born citizen, who was * 37 an inhabitant of the state at the passage of the act of 1802, *enabling aliens to purchase and hold real estate*, is dowable. (*a*) The act of New York of the 30th April, 1845, (*b*) is more extensive, and gives dower to any woman who is an alien, and has heretofore married, or may thereafter marry a citizen of the United States. The general provision in the Revised Statutes declares, that the widows of aliens, entitled at the time of their deaths to hold real estate, may be endowed thereof, provided the widow was an inhabitant of the state at the time of the death of the husband. (*c*)

The law of marriage belongs to another branch of these disquisitions; and I shall proceed to consider, (1.) Of what estate the wife can be endowed; (2.) How dower will be defeated; (3.) How dower may be barred; (4.) The manner of assigning it.

(1.) *Of what Estate the Wife may be endowed.* — The husband must have had seisin of the land in severalty at some time during the marriage, to entitle the wife to dower. No title to dower attaches on a joint seisin. The mere possibility of the estate being defeated by survivorship prevents dower. (*d*) The old rule went so far as to declare, that if one joint tenant aliens his share, his wife shall not be endowed, notwithstanding the possibility of the other joint tenant taking by survivorship is destroyed by the severance; for the husband was never sole seised. (*e*) It

(*g*) Buchanan *v* Deshon, 1 Harr. & G. 280. By Mass. Revised Statutes of 1836, and in New Jersey by statute in 1799, an alien widow takes dower. In Kentucky, on the other hand, a widow, who was not a citizen of the United States at the time of her husband's death, cannot be endowed of his lands in that state. Alsberry *v.* Hawkins, 9 Dana, 177. So also in Alabama, Cong. Church *v.* Morris, 8 Ala. 183.

(*a*) Priest *v.* Cummings, 16 Wend. 617. But this case seems to be contrary to the decision in Connolly *v.* Smith, 21 Wend. 59. And in Labatut *v.* Schmidt, 1 Speers [Eq] (S. C.), 421, it was left as a doubtful question, whether a wife, being an alien, would, by being naturalized, be entitled to dower in lands previously conveyed by her husband.

(*b*) N. Y. R. S. 3d ed. 6.

(*c*) New York Revised Statutes, i. 740, sec. 2.

(*d*) Litt. sec. 45; Mayburry *v.* Brien, 15 Peters, 21. But in Indiana, a joint tenant's estate is subject to dower. Revised Code, 1831, p. 290; 3 Blackf. (Ind.) 13, note. So in Kentucky, Davis *v.* Logan, 9 Dana, 186, because the *jus accrescendi* is abolished, and there is no good reason why this should not be the consequence in every state, in which the doctrine of survivorship in joint tenancy is abolished.

(*e*) F. N. B. 150, k; Co. Litt. 31, b.

is sufficient to give a title to dower, that the husband had a seisin in law, without being actually seised; and the reason given for the distinction on this point between dower and curtesy is, that it is not in the wife's power to procure an actual seisin by the husband's entry, whereas the husband has always the power of procuring seisin of the wife's land. (*f*) If land descends
* 38 to the husband as heir, and he dies before * entry, his wife will be entitled to her dower; and this would be the case, even if a stranger should, in the intermediate time, by way of abatement, enter upon the land; for the law contemplates a space of time between the death of the ancestor and the entry of the abator, during which time the husband had a seisin in law as heir. (*a*) But it is necessary that the husband should have been *seised* either in fact or in law; and where the husband had been in possession for years, using the land as his own, and conveying it in fee, the tenant deriving title under him is concluded from controverting the seisin of the husband, in the action of dower. (*b*) If, however, upon the determination of a particular freehold estate, the tenant holds over and continues his seisin, and the husband dies before entry, or if he dies before entry in a case of forfeiture for a condition broken, his wife is not dowable, because he had no seisin, either in fact or in law. The laches of the husband will prejudice the claim of dower when he has no seisin in law, but not otherwise; and Perkins states general cases in illustration of the rule. (*c*) So, if a lease for life be made before marriage, by a person seised in fee, the wife of the lessor will be excluded from her dower, unless the life estate terminates during coverture, because the husband, though entitled

(*f*) Bro. tit. Dower, pl. 75; Litt. sec. 448, 681; Co. Litt. 31, a.

(*a*) Perkins, sec. 371, 372; Co. Litt. 31, a.

(*b*) Bancroft *v.* White, 1 Caines, 185; Embree *v.* Ellis, 2 Johns. 119; [May *v.* Tilman, 1 Mann. (Mich.) 262; Wedge *v.* Moore, 6 Cush. 8; Hale *v.* Munn, 4 Gray, 132; Stimpson *v.* Thomaston Bank, 28 Me. 259. Although the husband is an alien. Chapman *v.* Schroeder, 10 Ga. 321.] In an action of ejectment for dower, a purchaser, as well as the heir holding under the husband, or deriving title from under him, is estopped from denying the husband's title. Taylor's Case, cited in Sir William Jones, 317; Hitchcock *v.* Harrington, 6 Johns. 290; Collins *v.* Torry, 7 id. 278; Hitchcock *v.* Carpenter, 9 id. 344; Bowne *v.* Potter, 17 Wend. 164. [But compare Gaunt *v.* Wainman, 3 Bing. N. C. 69; Sparrow *v.* Kingman, 1 Comst. 242; Finn *v.* Sleight, 8 Barb. 401; Edmonson *v.* Welsh, 27 Ala. 578; Foster *v.* Dwinel, 49 Me. 44; Gardner *v.* Greene, 5 R. I. 104.]

(*c*) Perkins, sec. 366, 367, 368, 369, 370; Bro. tit. Dower, pl. 29.

to the reversion in fee, was not seised of *the immediate* freehold. If the lease was made subsequent to the time that the title to dower attached, the wife is dowable of the land, and defeats the lease by title paramount. (*d*)

A transitory seisin for an instant, when the same act that gives the estate to the husband conveys it out of him, as in the case of a conusee of a fine, is not sufficient to give the * wife * 39 dower. (*a*) The land must vest in the husband beneficially for his own use, and then if it be so vested but for a moment, provided the husband be not the mere conduit for passing it, the right of dower attaches. (*b*) Nor is the seisin sufficient when the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person, to secure the purchase-money in whole or in part. Dower cannot be claimed as against rights under that mortgage. The husband is not deemed sufficiently or beneficially seised by such an instantaneous passage of the fee in and out of him, to entitle his wife to dower as against the mortgagee, and this conclusion is agreeable to the manifest justice of the case. (*c*) The widow in this case, on foreclosure of the mortgage and sale of the mortgaged premises, will be entitled to her claim to the extent of her dower in the surplus proceeds after satisfying the mortgage; and if the heir redeems, or she brings her writ of dower, she is let in for her dower, on contributing her proportion of the mortgage debt. (*d*)

(*d*) Co. Litt. 32, a; D'Arcy *v.* Blake, 2 Sch. & Lef. 387; Shoemaker *v.* Walker, 2 Serg. & R. 556.

(*a*) Co. Litt. 31, b, and so declared in Nash *v.* Preston, Cro. Car. 190, and Sneyd *v.* Sneyd, 1 Atk. 442; [Gully *v.* Ray, 18 B. Mon. 107.]

(*b*) Stanwood *v.* Dunning, 14 Me. 299.

(*c*) Holbrook *v.* Finney, 4 Mass. 566; Clark *v.* Munroe, 14 id. 351; Bogie *v.* Rutledge, 1 Bay, 312; Stow *v.* Tifft, 15 Johns. 458; McCauley *v.* Grimes, 2 Gill & J. 318; Gilliam *v.* Moore, 4 Leigh, 30; Mayburry *v.* Brien, 15 Peters, 21; Kittle *v.* Van Dyck, 1 Sandf. Ch. 76; [Gammon *v.* Freeman, 31 Me. 243; Moore *v.* Rollins, 45 Me. 493; Eslava *v.* Lepretre, 21 Ala. 504; Pendleton *v.* Pomeroy, 4 Allen, 510; Hazleton *v.* Lesure, 9 id. 24; King *v.* Stetson, 11 id. 407; Welch *v.* Buckins, 9 Ohio St. 331; Hinds *v.* Ballou, 44 N. H. 619; Nottingham *v.* Calvert, 1 Carter (Ind.), 527. But see McClure *v.* Harris, 12 B. Mon. 261;] [Thomas *v.* Hanson, 44 Iowa, 651; Smith *v.* McCarty, 119 Mass. 519; Glenn *v.* Clark, 53 Md. 580; George *v.* Cooper, 15 W. Va. 666. So also a vendor's lien takes precedence of the right of dower. Price *v.* Hobbs, 47 Md. 359; Boyd *v.* Martin, 9 Heisk. 382.]

(*d*) Tabele *v.* Tabele, 1 Johns. Ch. 45; Swain *v.* Perine, 5 id. 482; Gibson *v.* Crehore, 5 Pick. 146; Russell *v.* Austin, 1 Paige, 192; Bell *v.* Mayor of New York, 10 Paige, 49; [Adams *v.* Hill, 9 Foster (29 N. H.) 202; Mills *v.* Van Voorhis, 23 Barb.

The husband must be seised of a freehold in possession, and of an estate of immediate inheritance in remainder or reversion, to create a title to dower. The freehold and the inheritance must be consolidated, and be in the husband *simul et semel*, during the marriage, to render the wife dowable. A vested estate, not being a chattel interest, but a freehold in a third person, must not intervene between the freehold and the inheritance of the husband; and, therefore, if lands be limited to A. for life, remainder to B. for life, remainder to A. in fee, the wife of A. is not entitled to dower, unless the estate of B. determines during the coverture. If the intervening estate be only a term for years, the wife would be dowable; (*e*) but the intervening freehold of B. preserves the freehold and the inheritance of A. distinct, and protects
*40 them from *merger and consolidation, and consequently prevents the attachment of dower. (*a*)

125.] The New York Revised Statutes, i. 740, sec. 5 and 6, have incorporated in a statute provision these well settled principles in judicial jurisprudence.

(*e*) Bates *v.* Bates, 1 Lord Raym. 326; Co. Litt. 296, 32, a; Weir *v.* Humphries, 4 Ired. Eq. 273; [Beardslee *v.* Beardslee, 5 Barb. 324, 332; Durando *v.* Durando, 23 N. Y. 331; Green *v.* Putnam, 1 Barb. 500; Northcut *v.* Whipple, 12 B. Mon. 65; Apple *v.* Apple, 1 Head, 348.] [It is said the husband must also hold in severalty and not simply as joint tenant. Cockrill *v.* Armstrong, 31 Ark. 580.]

(*a*) Perkins, 333, 335, 338; Bro. tit. Dower, pl. 6; Finch's Law, 125; Bates's Case, 1 Salk. 254; 1 Lord Raym. 326, s. c.; Eldredge *v.* Forrestal, 7 Mass. 253; Dunham *v.* Osborn, 1 Paige, 634; Fisk *v.* Eastman, 5 N. H. 240; Moore *v.* Esty, ib. 479. Mr. Park, in his copious and thorough Treatise on the Law of Dower, 61–73, discusses at large the embarrassing question, whether the interposition of a *contingent* estate of freehold, between a limitation to the husband for life, and a subsequent remainder to his heirs, will prevent dower. The prevailing language with the best property lawyers is, that a remainder to the heirs so circumstanced, is executed in possession in the tenant for life *sub modo*, and that the estates are consolidated by a kind of temporary merger, until the happening of the contingency; and when it does happen, they divide and resume the character of several estates, so as to let in the estate originally limited upon that contingency. The anomalous notion of a remainder executed *sub modo*, involves insuperable difficulties; and it is not easy to perceive how dower can attach to an estate executed in the husband only *sub modo*; for dower at common law does not attach upon a mere possibility. If the wife has a title of dower upon such an estate, and the intervening contingent remainder comes *in esse* after her title is consummated by the husband's death, as by the birth of a posthumous child, will the remainder take effect, subject to the title of dower, or will it defeat and overreach that title? The better opinion, according to Mr. Park, is, that the husband would be considered as seised of several estates, *ab initio*, and the dower must consequently be defeated. Cordal's Case, Cro. Eliz. 316; Boothby *v.* Vernon, 9 Mod. 147, and Hooker *v.* Hooker, 2 Barn. K. B. 200, 232, are severely criticised in reference to this question. Mr. Fearne also speaks of estates executed *sub modo*, that is, to some purposes, though not to all, as if an estate be granted to A. and B. for their lives, and

Dower attaches to all real hereditaments, such as rents, commons in gross or appendant, and piscary, provided the husband was seised of an estate of inheritance in the * same.(a) * 41 But in these cases the wife is dowable only by reason of her right to be endowed of the estate to which they are appendant. So, dower is due of iron or other mines wrought during the coverture, but not of mines unopened at the death of the husband; and if the land assigned for dower contains an open mine, the tenant in dower may work it for her own benefit; but it would be waste in her to open and work a mine. (b) The claim of dower attaching upon all lands whereof the husband was seised at any time during the coverture, is a severe dormant incumbrance upon the use and circulation of real property. In point of fact, it is of little or no use, unless the husband dies seised; for it is, in practice, almost universally extinguished, by the act of the wife in concurrence with the husband, upon sales and mortgages of real estate. The existence of the title only serves to increase the expense, and multiply the forms of alienation; and, consequently, in several of these United States, the title to dower has been reduced down to the lands whereof the husband died seised. This is the case in the states of Vermont, Connecticut, Tennessee, North Carolina, and Georgia. (c) In

after their deaths to the heirs of B., the estates in remainder and in possession are not so executed in possession as to sever the jointure, or entitle the wife of B. to dower. There is no merger of the estate for life; and a joint seisin of the freehold is a bar to dower. And yet these estates are so blended, or executed in the possession, as to make the inheritance not grantable distinct from the freehold. Fearne on Remainders, 5th ed. 35, 36. To enter further into this abstruse learning, would be of very little use, as such recondite points rarely occur.

(a) Perkins, sec. 342, 345, 347; Co. Litt. 32, a; Park on Dower, 112, 4. [Compare Moore v. Rawlins, 45 Me. 493, with Kingman v. Sparrow, 12 Barb. 201; McDougal v. Hepburn, 5 Florida, 568. See also Russell v. Russell, 15 Gray, 159.]

(b) Stoughton v. Leigh, 1 Taunt. 402; Coates v. Cheever, 1 Cowen, 460.

(c) Griffith's Register; Swift's Dig. i. 85; Stewart v. Stewart, 5 Conn. 317; Statutes of Connecticut, 1838, p. 188; Winstead v. Winstead, 1 Hayw. 243; Statute of Vermont, 1799; Statute of Georgia, December 23, 1826; 1 N. C. Revised Statutes, 1837, p. 612; Statute of Tennessee, 1784, c. 22; Combs v. Young, 4 Yerg. 218. This last case gives to the widow's claim of dower a preference over the creditors of the husband; and Ch. J. Catron condemns severely the act of 1784 for destroying the stability of the common-law right of dower, and leaving the wife's support, as widow, entirely at the mercy of the husband. The Tennessee statute leaves the wife to be endowed of the lands whereof her husband died seised, provided he died intestate, or did not make a provision for her by will satisfactory to her, and which dissent must be declared within six months after probate of the will. The court, in Reid v. Camp-

*42 *Maine, New Hampshire, and Massachusetts, the widow is not dowable of land in a wild state, unconnected with any cultivated farm, on the principle that the land would be wholly useless to her if she did not improve it; and, if she did, she would expose herself to disputes with the heir, and to forfeiture of the estate for waste. (*a*) If such land should be sold by the husband during coverture, and subdued and cultivated by the purchaser before the husband's death, yet the widow has no right of dower in it, on the principle that the husband was never seised of any estate in the land of which the widow could be endowed. (*b*) In Pennsylvania, the title to dower does not apply to lands of the husband sold on judicial process before or after the husband's death, nor to lands sold under a mortgage executed by the husband alone during coverture. (*c*) In Tennessee, the restriction upon the widow's dower is substantially the same; (*d*) and in Missouri, it would seem to be subject gen-

bell, Meigs (Tenn.), 388, were of opinion, that the widow's provision was improved by the act of 1784, because it gave her also an indefeasible right to a part of the personalty. In Connecticut, Vermont, and probably in other states, the husband cannot by will deprive his wife of her dower; for the estate in dower is cast upon the wife before the devise attaches. If the husband, shortly before his death, conveys all his estate to his children, without any valuable consideration, and securing the possession to himself while he lives, with the intent to defeat the claims of the wife, the conveyance will be set aside as *fraudulent* against the wife's claim for dower and for her distributive share of his personal estate. Thayer *v.* Thayer, 14 Vt. 107. In Scotland, the widow's dower (called *terce*) extends only to the lands of which the husband died seised. The husband may alienate or incumber the land during the marriage, and thereby defeat the dower; and though, as against creditors, she is entitled only to the use for life of one third of the estate, yet, as against the heir, she will, under circumstances, be entitled to claim an additional aliment. 1 Bell's Comm. 57, 59, 60. So now, in England, the husband may bar his wife's dower by alienation or devise, by statute of 3 and 4 Wm. IV., as see *post*, 44.

(*a*) Conner *v.* Shepherd, 15 Mass. 164; Johnson *v.* Perley, 2 N. H. 56; Griffith's Register, tit. Maine; White *v.* Willis, 7 Pick. 143; Mass. Revised Statutes of 1836, pt. 2, tit. 1, c. 60, sec. 12.

(*b*) Webb *v.* Townsend, 1 Pick. 21.

(*c*) Reed *v.* Morrison, 12 Serg. & R. 18; Shippen, President, in Graff *v.* Smith, 1 Dall. 484; Scott *v.* Crosdale, 2 Dall. 127. [But compare Eberle *v.* Fisher, 18 Penn. St. 526; Helfrich *v.* Obermyer, 15 Penn. St. 118.]

(*d*) According to the old statute of 1715, cited as part of the Tennessee Statute Code, in 1836, the mortgage of the husband did not bar the widow's dower, unless she united in the mortgage; but I should infer, from the statute of 1784, that she was barred as against the mortgagee, for she, by that statute, takes her dower only in the lands whereof her husband "died seised or possessed," and she is only saved from the fraudulent conveyances of her husband, made to defeat her dower. Statute Laws of

erally to the husband's debts; whereas, in North Carolina and Indiana, the widow's dower is declared by statute to be paramount to the claims of creditors. (*e*)

At common law, the wife of a trustee, who had the legal estate in fee, and the wife of a mortgagee, after condition broken, had a valid title at law to dower; for courts of law looked only to the legal estate. (*f*) To avoid this result, it was the ancient practice in mortgages to join another person with the mortgagee in the conveyance, so as by that joint seisin to avoid the attachment of the legal title of dower. (*g*) But a court of equity considered the equity of redemption *as a right inherent in *43 the land, which barred all persons, and it would always restrain the widow from prosecuting her dower, if the mortgage had been redeemed, or the trustee had conveyed the land according to the direction of the *cestui que trust;* and it has been long held, and is now definitely settled, that the wife of a trustee is not entitled to dower in the trust estate, any further than the husband had a beneficial interest therein; and if she attempts it at law, equity will restrain her, and punish her with costs. (*a*) Nor is the wife of a *cestui que trust* dowable in an estate to which her husband had only an equitable and not a legal title during coverture. It has, however, been thought reasonable, and consistent with principle, that a court of equity should apply the rules and incidents of legal estates to trust property, and give the wife her dower in her husband's equitable estate. But at common law, the wife was not dowable of a use, and trusts are now what uses were at the common law; and it is well settled in the English cases, that the wife of a *cestui que trust* is not dowable in equity out of a trust estate, though the husband is entitled to

Tennessee, Caruthers & Nicholson, 1836, pp. 262, 497; London *v.* London, 1 Humph. 1, s. p.

(*e*) Griffith's Register, h. t.; Frost *v.* Etheridge, 1 Dev. 30; Norwood *v.* Marrow, 3 Dev. & Bat. 442; [Steuart *v.* Beard, 4 Md. Ch. 319; Lloyd *v.* Conover, 1 Dutch. 47.] In Indiana, the widow takes two thirds of the personal estate, and one third of the real estate, in fee, subject to debts, or her usual dower, at her option, and her dower stands on the ground of the common law. Revised Statutes of Indiana, 1838, pp. 237, 239.

(*f*) Bro. tit. Dower, pl. 2; Perkins, sec. 392.

(*g*) Cro. Car. 191.

(*a*) Lord Hardwicke, in Hinton *v.* Hinton, 2 Ves. 631; Noel *v.* Jevon, 2 Freeman, 43.

his curtesy in such an estate. (*b*) A widow is consequently not dowable in her husband's equity of redemption; and this anomalous distinction is still preserved in the English law, from the necessity of giving security to title by permanent rules. This policy outweighs the consideration that would naturally be due to consistency of principle. Sir Joseph Jekyll, in *Banks* v. *Sutton*, (*c*) held that the widow might be endowed of an equity of redemption, though the mortgage in fee was executed before the marriage, upon her paying the third of the mortgage money, or keeping down a third of the interest. (*d*) But the reason-
*44 ing of that learned judge did not *prevail to establish his doctrine, and the distinction which he suggested between the case of a trust created by the husband himself, and a trust estate which descended upon, or was limited to him, has been condemned by his successors as loose and unsound. (*a*) The same rule prevails as to an equity of redemption in an estate mortgaged in fee by the husband before marriage, and not redeemed at his death. (*b*)

(*b*) D'Arcy *v.* Blake, 2 Sch. & Lef. 387; Ray *v.* Pung, 5 B. & Ald. 561; Hamlin *v.* Hamlin, 19 Me. 141.

(*c*) 2 P. Wms. 700.

(*d*) The rule in chancery had been vacillating previous to that decision, though the weight of authority and the language of the courts were decidedly against the right to dower. Colt *v.* Colt, 1 Rep. in Chan. 254; Radnor *v.* Rotheram, Prec. in Ch. 65; Bottomley *v.* Fairfax, ib. 336; Ambrose *v.* Ambrose, 1 P. Wms. 321, were all opposed to Fletcher *v.* Robinson, cited in Prec. in Ch. 250, and 2 P. Wms. 710.

(*a*) Chaplin *v.* Chaplin, 3 P. Wms. 229; Godwin *v.* Winsmore, 2 Atk. 525; Sir Thomas Clarke, in Burgess *v.* Wheate, 1 Wm. Bl. 138; Dixon *v.* Saville, 1 Bro. C. C. 326; D'Arcy *v.* Blake, 2 Sch. & Lef. 387.

(*b*) In Maryland, and in the Maryland part of the District of Columbia, the rule of the common law prevails, and a widow is not dowable in her husband's equity of redemption. Stelle *v.* Carroll, 12 Peters, 201. But in England, by the statute of 3 and 4 Wm. IV. c. 105, dower now attaches upon equitable estates of inheritance in possession, other than estates in joint tenancy, and upon lands in which the husband, though he had no seisin, was entitled to a right of entry at his death. On the other hand, the wife is not entitled to dower in lands sold by the husband in his lifetime, or devised by will, or declared by will to be exempt from her dower; and all partial estates and interests created by the husband by any disposition or will, and all debts and incumbrances to which his lands are liable, are declared to be effectual against the claim of dower. A devise of any estate in the land to the widow bars her dower, unless a contrary intention be declared; but not a bequest of personal estate, unless an intention to that effect be declared. These provisions leave the wife's dower completely in the husband's power, and break in upon the common-law right of dower as extensively as any of the alterations in the laws of the American states.

In the United States, the equity of the wife's claim has met with a more gracious reception; and in Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, Tennessee, Alabama, Mississippi, Indiana, and probably in most or all of the other states, the wife is held dowable of an equity of redemption existing at the death of her husband. (*c*) Though the wife joins with her husband in the mortgage, and though the husband should afterwards release the equity, the wife will be entitled, at his death, to her dower in the lands, subject to the mortgage; and if they are sold under the mortgage, then to her claim as for dower in the surplus proceeds, if any there should be. (*d*) If, *however, the mortgage was *45 executed on a purchase before the marriage, and the husband releases the equity after the marriage, his wife's right of dower is entirely gone; for it never attached, as the mortgage was executed immediately on receiving the purchaser's deed. (*a*)[1] In

(*c*) Bird *v.* Gardner, 10 Mass. 364; Snow *v.* Stevens, 15 id. 278; 3 Pick. 481; Walker *v.* Griswold, 6 id. 416; Fish *v.* Fish, 1 Conn. 559; Hitchcock *v.* Harrington, 6 Johns. 290; Collins *v.* Torry, 7 id. 278; Coles *v.* Coles, 15 id. 319; Titus *v.* Neilson, 5 Johns. Ch. 452; New York Revised Statutes, i. 740, sec. 4; Montgomery *v.* Bruere, 2 South. 865; Reed *v.* Morrison, 12 Serg. & R. 18; Heth *v.* Cocke, 1 Rand. 344; 1 Virginia Revised Code, 1819; Mass. Revised Statutes of 1836; Revised Statutes of North Carolina, c. 121, 1828; Taylor *v.* M'Crackin, 2 Blackf. (Ind.) 261; M'Mahan *v.* Kimball, 3 id. 1; Rutherford *v.* Munce, Walker (Miss.), 371. By the New York Revised Statutes, ii. 112, sec. 71, 72; ib. 374, sec. 63, 64, the wife has her dower in the inheritable interest of the husband in lands whereof he died seised of the equitable, but not of the legal title. The same in Illinois, Revised Laws of Illinois, ed. 1833, p. 627; the same in Kentucky, 6 Dana, 204; 1 B. Mon. 91; and in Tennessee, Statute Laws of Tennessee, 1836, p. 265, and act of 1823, c. 37.

(*d*) Tabele *v.* Tabele, 1 Johns. Ch. 45; Swaine *v.* Perine, 5 id. 482; Titus *v.* Neilson, 5 id. 452; Peabody *v.* Patten, 2 Pick. 517; Gibson *v.* Crehore, 5 id. 146; Eaton *v.* Simonds, 14 id. 98; Keckley *v.* Keckley, 2 Hill, Ch. (S. C.) 252, 256. In New York, if the lands of a testator or intestate be sold for the payment of debts, by order of the surrogate, and the widow will not accept of payment of a sum in gross, in lieu of her dower upon the lands sold, the surrogate is directed to set apart one third of the purchase-money, to be invested by him in permanent securities, on annual interest, and the interest to be paid to her during life. The same payment or investment is to be made, with the widow's consent, in the case of the sale of infant's estates. New York Revised Statutes, ii. 106, sec. 36, 37, 45; ib. 196, sec. 181.

(*a*) Jackson *v.* Dewitt, 6 Cowen, 316.

[1] [In such a case the husband has the *equity of redemption* at the time of the marriage, and a wife is certainly entitled to dower in an estate of that nature. It is difficult, therefore, to see how a release by the husband can defeat her claim. She cannot claim in hostility to the mortgage; but it would seem that her situation is no worse than if her husband had given the mortgage for the purchase-money after

the cases of *Harrison* v. *Eldridge* and *Barker* v. *Parker*, (*b*) the wife's interest in the equity of redemption, in a mortgage executed by her and her husband, was held not to be sold by a sale of her husband's equity, under an execution at law against him only; and the purchaser at the sheriff's sale took the land subject to the widow's dower. These cases present a strong instance of the security afforded to the wife's dower in the equitable estate of her husband. But if the mortgagee in such a case enters under a foreclosure, or after forfeiture of the estate, and by virtue of his rights as mortgagee, the wife's dower must yield to his superior title; for, as against the title under the mortgage, the widow has no right of dower, and the equity of redemption is entirely subordinate to that title. The wife's dower in an equity of redemption only applies in case of redemption of the incumbrance by the husband or his representatives, and not when the equity of redemption is released to the mortgagee, or conveyed. (*c*)

The reason of the American rule giving dower in equities of redemption is, that the mortgagor, so long as the mortgagee does not exert his right of entry or foreclosure, is regarded as being legally as well as equitably seised in respect to all the world but the mortgagee and his assigns. Even in the view of the
* 46 English courts of equity, the owner of the * equity of redemption is the owner of the land, and the mortgage is

(*b*) 2 Halst. 392; 17 Mass. 564.

(*c*) Popkin *v.* Bumstead, 8 Mass. 491; Bird *v.* Gardner, 10 id. 364; Hildreth *v.* Jones, 13 id. 525; Gibson *v.* Crehore, 3 Pick. 475, 480, 481, Jackson *v.* Dewitt, 6 Cowen, 316; Van Dyne *v.* Thayre, 19 Wend. 162.

marriage, or she had joined with him in a mortgage for some other debt. In all these cases, the mortgage is paramount to dower; but in all of them, dower exists subject to the incumbrance. A release by the husband of the equity of redemption is doubtless equivalent to a foreclosure as to him; but the widow will be entitled to redeem, unless she has herself released or been foreclosed. Wheeler *v.* Morris, 2 Bosw. 524; Denton *v.* Nanny, 8 Barb. (N. Y.) 618; 1 Revised Statutes of New York, 740, sec. 5; Mills *v.* Van Voorhis, 23 Barb. (N. Y.) 125; Bell *v.* Mayor of New York, 10 Paige, 49. In the State of New York, a conveyance and mortgage back for the purchase-money cannot be justly regarded as an example of merely instantaneous seisin. The mortgage is held to be merely a lien or security for the purchase-money, and the title and seisin both vest in the purchaser. *Vide* Kortright *v.* Cady, 21 N. Y. 343, where the subject was fully considered. C.] On this ground it has been held even that the claim for dower would override the mortgage. Slaughter *v.* Culpepper, 44 Ga. 319.

regarded as personal assets. (*a*) The rule, in several of the states, is carried to the extent of giving to the wife her dower in all trust estates. That is said to be the law of New Jersey, Pennsylvania, Maryland, Virginia, Kentucky, Mississippi, Ohio, Illinois, and Alabama; (*b*) [1] but the rule in those states must be understood

(*a*) Brown *v.* Gibbs, Prec. in Ch. 97; Casborne *v.* Scarfe, 1 Atk. 605.

(*b*) Shoemaker *v.* Walker, 2 Serg. & R. 554; Reed *v.* Morrison, 12 id. 18; Statutes of Virginia, 1785 and 1792; Miller *v.* Beverly, 1 Hen. & Munf. 368; Claiborne *v.* Henderson, 3 id 322; Griffith's Reg.; American Jurist, No. 4, 398; Lawson *v.* Morton, 6 Dana, 471; Elmer's Dig. 147, note, where the New Jersey case of Dennis *v.* Kiernan, in Chancery, 1829, is cited. The Statutes of Ohio, 1824, gives dower not only in all lands whereof the husband was seised as an estate of inheritance during the coverture, but in all his right, title, or interest at the time of his death, in lands and tenements held by bond, article, lease, or other evidence of claim. Chase's Statutes of Ohio, ii. 1314. If the husband purchases land, takes possession, makes improvements, and pays part of the purchase-money without deed, the widow is entitled to dower. Smiley *v.* Wright, 2 Ohio, 506.

In North Carolina, on the other hand, it is said to have been more than once decided that the widow was not entitled to dower in her husband's equity. Henderson, J., in 1 Dev. Eq. 196.

[1] *Dower.* — (*a*) Dower is often modified or abolished by statute. On common-law principles it is obvious that possession under an executory contract for the purchase of land does not give dower. Secrest *v.* McKenna, 6 Rich. Eq. 72; Bowen *v.* Collins, 15 Ga. 100; Pritts *v.* Ritchey, 29 Penn. St. 71; [Latham *v.* McLain, 64 Ga. 320; Morse *v.* Thorsell, 78 Ill. 600.] But in some states dower is given in an equitable estate such as that. Thompson *v.* Thompson, 1 Jones, 430; Hart *v.* Logan, 49 Mo. 47. But even then an equitable seisin would be necessary, and if the trustee or legal owner denied and held adversely to the trust during the life of the *cestui que trust*, his widow would not have dower. Thompson *v.* Thompson, *supra*; Sentill *v.* Robeson, 2 Jones, Eq. 510. It was held that there was no dower in a preëmption right under the act of Congress then in force, in Wells *v.* Moore, 16 Mo. 478; Bowers *v.* Keesecker, 14 Iowa, 301. See Davis *v.* O'Ferrall, 4 G. Greene (Iowa), 358, and, as to curtesy, *ante*, 29, n. 1.

The right of a tenant in common to make partition is paramount to his wife's right of dower. But when he intentionally makes an unequal partition for a valuable consideration, her right to dower is not diminished thereby. Mosher *v.* Mosher, 32 Me. 412.

(*b*) *In Mortgaged Lands.* — Other cases allowing the wife dower in an equity of redemption are McArthur *v.* Franklin, 16 Ohio St. 198; Henry's Case, 4 Cush. 257; Manning *v.* Laboree, 33 Me. 343; Hinchman *v.* Stiles, 1 Stockt. 454; Daniel *v.* Leitch, 13 Gratt. 195, 207; [McMahon *v.* Russell, 17 Fla. 690; Culver *v.* Harper, 27 Ohio St. 464; Glenn *v.* Clark, 53 Md. 580;] and cases below.

If the mortgage is paramount to the widow's right of dower, her only right as against the mortgagee is to redeem. Richardson *v.* Skolfield, 45 Me. 389; Moore *v.* Rollins, 45 Me. 493; Mills *v.* Van Voorhies, 20 N. Y. 412; Harrow *v.* Johnson, 8 Met. (Ky.) 578; Boyer *v.* Boyer, 1 Coldw. 12. See especially McArthur *v.* Franklin, 15 Ohio St. 485.

If the mortgagor or his representative pays off the mortgage, his widow will have

to be limited to the case of trusts in which the husband took a beneficial interest. It could not be applied to trust estates in which the husband was seised in fee of the dry technical title, by way of trust or power, for the sole interest of others. (*c*) In all

(*c*) [Firestone *v.* Firestone, 2 Ohio St. 415; Gomez *v.* Tradesman's Bank. 4 Sandf. 102; White *v.* Drew, 42 Mo. 561, 568. See, especially, Hopkinson *v.* Dumas, 42 N. H. 296, where an equitable estate was merged in a legal estate and let the wife in.] See Rowton *v.* Rowton, 1 Hen. & Munf. 92. In Alabama, the widow is entitled to dower in lands held for the use, or in trust for the benefit of her husband, provided she

dower out of the whole land. Hastings *v.* Stevens, 9 Fost. (29 N. H.) 564. And it is treated as substantially a payment by the debtor, or on his behalf, when a purchaser from him or his administrator pays it, by agreement, as part of the consideration. Peckham *v.* Hadwen, 8 R. I. 160; McCabe *v.* Swap, 14 Allen, 188; Wedge *v.* Moore, 6 Cush. 8; Runyan *v.* Stewart, 12 Barb. 537; Barbour *v.* Barbour, 46 Me 9, 13; Carter *v.* Goodin, 3 Ohio St. 75.

But when a purchaser from the mortgagor pays off a mortgage, to which the right of dower would be subject, merely to clear the estate of the incumbrance, and not because he is under an obligation to do so, he may take an assignment of the mortgage, and then it has been said that no dower can be assigned without payment of the whole mortgage debt by the demandant. McCabe *v.* Swap, 14 Allen, 188, 190; Strong *v.* Converse, 8 Allen, 557; Brown *v.* Lapham, 3 Cush. 551. If the party who might have relied upon the mortgage elects to discharge and extinguish it, the widow may then undoubtedly have dower in the whole land by contribution. Chiswell *v.* Morris, 1 McCarter, 101; Newton *v.* Cook, 4 Gray, 46; McCabe *v.* Swap, *supra*. She has been let into her dower on like terms in some equity cases where the mortgagee had purchased the equity of redemption, but wished to rely upon the mortgage, on the ground that if she had been compelled to redeem the whole mortgage, the mortgagee, in his character of owner of the equity, could not get any advantage from it without repaying her all but her contributory share. Woods *v.* Wallace, 30 N. H. 384; Norris *v.* Morrison, 45 N. H. 490. See Simonton *v.* Gray, 34 Me. 50. It has been held otherwise at law. Thompson *v.* Boyd, 1 Zabr. 58; 2 Zabr. 543. (Strong *v.* Converse, &c., *supra*, were common-law cases also.) By the technical doctrine of merger it would seem that the right of the mortgagor would be the one to disappear, if either, in those states where the mortgagee has the fee as between the parties. And as the purchaser of a right to redeem does not seem to be bound to redeem unless he wants to, it is not perceived why the mortgagee is not at liberty, on equitable grounds, as against one who only stands in the shoes of the mortgagor, to abandon his rights as owner of the equity, or perhaps even to postpone the exercise of them, and to use his mortgage to put the widow to a full redemption in the first place. If the equity were of no value, this might be an important right. It was so held in Wing *v.* Ayer, 53 Me. 138. See McArthur *v.* Franklin, 16 Ohio St. 193, 208, bottom.

If a new mortgage is given after marriage, without a release of dower, in lieu of one given before marriage, with an intent to change the form of the security only, the wife of the mortgagor will not be let in. Swift *v.* Kraemer, 13 Cal. 526.

As to forfeiture of dower for adultery, see 53, n. 1. As to assignment, see 62, n. 1. As to rights of a woman endowed out of several tracts, see 75, n. 1 (*b*)

the other states, except those which have been mentioned, and except Louisiana, where the rights of married women are regulated by the civil law, and except, also, Georgia, where tenancy in dower is said to be abolished, the strict English rule on the subject of trust estates is presumed to prevail. (*d*)

Though the wife be dowable only of an equity of redemption, when the mortgage was given prior to her marriage, or when she joined with her husband in the mortgage, she is, after her husband's death, if she claims her dower, bound to contribute ratably towards the redemption of the mortgage. If the heir redeems, she contributes by paying, during life, to the heir, one third of the interest on the amount of the mortgage debt paid by him, or else a gross sum, amounting to the value of such an annuity. (*e*) In England, the widow entitled to dower in an equity of redemption in a mortgage for years, has also, upon the same principles applicable to that analogous case, the right to redeem, * by paying her proportion of the mortgage debt, and to hold over until she is reimbursed. (*a*) *47

As to the interest of a widow of a *mortgagee*, the case, and the principles applying to it, are different. A mortgage before foreclosure is regarded by the courts in this country, for most purposes, as a chattel interest; (*b*) and it is doubted whether the wife of the mortgagee, who dies before foreclosure or entry on the part of her husband, though after the technical forfeiture of the mortgage at law by non-payment at the day, be now, even at law, entitled to dower in the mortgaged estate. The better opinion I apprehend to be, that she would not be entitled as against the mortgagor. The New York Revised Statutes (*c*) have settled this question in New York, by declaring that a widow shall not be endowed of lands conveyed to her husband

would be entitled if the estate was a legal one. Laws of Alabama, 247, sec. 9. So in Mississippi. R. C. of Mississippi, 1824.

(*d*) In the case of Robison *v.* Codman, 1 Sumn. 129, Judge Story held, at the Circuit Court in Maine, that an estate held by the husband in trust was not liable to the dower of his wife. See also Cooper *v.* Whitney, 3 Hill, 101, s. P.

(*e*) Swaine *v.* Perine, 5 Johns. Ch. 482; Gibson *v.* Crehore, 5 Pick. 146; Bell *v.* Mayor of New York, 10 Paige, 49; House *v.* House, ib. 159; *vide infra*, 75; [Denton *v.* Nanny, 8 Barb. 618; Rossiter *v.* Cossit, 15 N. H. 38.]

(*a*) Palmes *v.* Danby, Prec. in Ch. 137.

(*b*) Waters *v.* Stewart, 1 Caines's Cases, 47; Jackson *v.* Willard, 4 Johns. 41; Huntington *v.* Smith, 4 Conn. 235; Eaton *v.* Whiting, 3 Pick. 484.

(*c*) Vol. i. 741, sec. 7.

by way of mortgage, unless he acquired an absolute estate therein during the marriage. (*d*)

*48 *(2.) *In what way Dower will be defeated.* — Dower will be defeated upon the restoration of the seisin under the prior title in the case of defeasible estates, as in the case of reëntry for a condition broken, which abolishes the intermediate seisin. (*a*) A recovery by actual title against the husband, also defeats the wife's dower; but if he gave up the land by default, and collusively, the statute of Westm. 2, c. 4, preserved the wife's dower, unless the tenant could show affirmatively a good seisin out of the husband and in himself. This statute, according to Perkins, was an affirmance of the common law. (*b*) The principle is, that the wife shall have dower of lands of which her husband was *of right* seised of an estate of inheritance, and not otherwise. If, therefore, a disseisor die seised, and his wife be endowed, or bring her writ of dower, she will be defeated of her dower on recovery of the lands, or upon entry by the disseisee. (*c*) And the sound principle of making the title to dower rest upon the

(*d*) [Foster *v.* Dwinel, 49 Me 44.] By the *absolute estate*, in the revised code, more was intended than the estate which is technically absolute at law on default of payment at the day. I presume the word "absolute" is here to be taken in the strongest sense. In Runyan *v.* Mersereau, 11 Johns. 534, it was held that the freehold was in the mortgagor before foreclosure or entry. If the mortgagee enters without foreclosure, the freehold may then be shifted in contemplation of law; but still the mortgagee has not an *absolute* estate, so long as the equity of redemption hangs over that estate and qualifies it. According to the English law, the wife of the mortgagee would be entitled to her dower, in such a case, from the heir of the mortgagee, who died in possession, though the estate in dower would be defeasible, like her husband's estate, by redemption, on the part of the mortgagor. The words of the new revised statutes were probably intended to stand for an estate with the equity of redemption finally foreclosed and absolutely barred. Upon that construction the restriction has been carried beyond the English rule, and, I apprehend, beyond the necessity or reason of the case.

(*a*) Perkins, sec. 311, 312, 317; [Northcut *v.* Whipp, 12 B. Mon. 65.] [See also Waller *v.* Waller, 33 Gratt. 83. As to conveyances in fraud of creditors, see Humes *v.* Scruggs, 64 Ala. 40; Gross *v.* Lange, 70 Mo. 45.]

(*b*) Perkins, sec. 376. It was, however, reënacted *in totidem verbis*, in New York, 1787. Laws of New York, sess. 10, c. 4, sec. 4. And it is in substance adopted and enlarged by the New York Revised Statutes, i. 742, sec. 16, which declare, that "no judgment or decree confessed by or recovered against the husband; and no laches, default, covin, or crime of the husband shall prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof, if otherwise entitled thereto." See also to s. P. Statute of Ohio, 1824. Chase's Statutes, ii. 1315.

(*c*) Litt. sec. 393; Co. Lit. 240, b; Barkshire *v.* Vanlore, Winch, 77; [Poor *v.* Horton, 15 Barb. 485.]

husband's right is carried so far as to allow the wife to falsify even a recovery against her husband, upon trial, provided the recovery was upon some other point than the abstract question of right. (*d*) But under the complicated modifications of seisin, contemplated in the ancient law, and which are collected and digested by Perkins, in his excellent repository of the black letter learning of the Year Books, the seisin of the husband was sometimes defeated so as to bar dower, though the right remained in him; and in other *cases the dower would be *49 preserved, though the seisin was defeated, by reason of some prior distinct seisin which had attached in the husband. (*a*)

If the husband be seised during coverture of an estate subject to dower, the title will not be defeated by the determination of the estate by its natural limitation; for dower is an incident annexed to the limitation itself, so as to form an incidental part of the estate limited. It is a subsisting interest implied in the limitation of the estate. Thus, if the tenant in fee dies without heirs, by which means the land escheats; or if the tenant in tail dies without heirs, whereby the inheritance reverts to the donor; or if the grantee of a rent in fee dies without heirs; yet, in all these cases, the widow's dower is preserved. (*b*) By the rules of the common law, dower will determine, or be defeated, with the determination of the estate, or avoidance of the title of the husband by entry as for a condition broken, or by reason of a defective title. So, dower will be defeated by the operation of *collateral limitations*, as in the case of an estate to a man and his heirs so long as a tree shall stand; or in the case of a grant of land or rent to A. and his heirs till the building of St. Paul's church is finished, and the contingency happens. (*c*) Whether dower will be defeated by a *conditional limitation*, created by way of shifting use or executory devise, is hitherto an unsettled and vexed question, largely discussed in the books. (*d*) The estate of the husband

(*d*) Perkins, sec. 381. (*a*) Perkins, sec. 379, 380; Park on Dower, 148.

(*b*) Bro. tit. Tenures, pl. 33, tit. Dower, pl. 86; Paine's Case, 8 Co. 34; Jenk. Cent. 1, case 6, p. 5; [Smith's Appeal, 23 Penn. St. 9.]

(*c*) Jenk. Cent. *supra;* Preston on Abstracts of Title, iii. 373; Butler's note, 170, to Co. Litt. 241, a.

(*d*) The cases of Sammes *v.* Payne, 1 Leon. 167; Gouldsb. 81; Flavill *v.* Ventrice, Viner's Abr. ix. 217, F. pl. 1; Sumner *v.* Partridge, 2 Atk. 47, and Buckworth *v.* Thirkell, 3 Bos. & P. 652, n., are ably reviewed by Mr. Park; and the latter case, though decided by the K. B. in the time of Lord Mansfield, after two successive

is, in a more emphatical degree, overreached and defeated *50 *by the taking effect of the limitation over, on these conditional limitations, than in the case of collateral limitations; and the ablest writers on property law are evidently against the authority of the case of *Buckworth* v. *Thirkell*, and against the right of the dowress when the fee of the husband is determined by executory devise or shifting use. (*a*)

As a general principle, it may be observed, that the wife's dower is liable to be defeated by every subsisting claim or incumbrance in law or equity, existing before the inception of the title, and which would have defeated the husband's seisin. An agreement by the husband to convey before dower attaches, will, if enforced in equity, extinguish the claim to dower. In equity, lands agreed to be turned into money, or money into lands, are considered as that species of property into which they were agreed to be converted; and the right of dower is regulated in equity by the nature of the property in the equity view of it. (*b*)

(3.) *How Dower may be barred.* — Dower is a title inchoate, and not consummate till the death of the husband; but it is an interest which attaches on the land as soon as there is the concurrence of marriage and seisin. It may be extinguished in various ways, though the husband alone, according to the common law, cannot defeat it by any act in the nature of alienation or charge, without the assent of his wife, given and proved according to law; and this is now the declared statute law of New *51 York. (*c*) *If the husband and wife levy a fine, or suffer a common recovery, the wife is barred of her dower. (*a*) This

arguments, is strongly condemned, as being repugnant to settled distinctions on this abstruse branch of law. [See 32, n. (*d*).]

(*a*) Butler's note, 170, to Co. Litt. 241, a; Sugden on Powers, 333; Preston on Abstracts of Title, iii. 372; Park on Dower, 168–186; [Weller *v.* Weller, 28 Barb. 588;] [Edwards *v.* Bibb, 54 Ala. 475. But see Jones *v.* Hughes, 27 Gratt. 560.]

(*b*) Greene *v.* Greene, 1 Ohio, 535. In that case the subject is ably discussed; and the whole volume is evidence of a very correct and enlightened administration of justice, in equity as well as in law. Coster *v.* Clarke, 3 Edw. Ch. 437; [Brown *v.* Williams, 31 Me. 403; Clough *v.* Elliott, 3 Fost. (23 N. H.) 182; McClure *v.* Harris, 12 B. Mon. 261; Stribling *v.* Ross, 16 Ill. 122; Rawlings *v.* Adams, 7 Md. 26; Firestone *v.* Firestone, 2 Ohio St. 415; Bowie *v.* Berry, 3 Md. Ch. 359; Whithed *v.* Mallory, 4 Cush. 138; Cranson *v.* Cranson, 4 Mich. 230.]

(*c*) New York Revised Statutes, i. 742, sec. 16; [Rowland *v.* Rowland, 2 Sneed, 543; Jenny *v.* Jenny, 24 Vt. 324.]

(*a*) Lampet's Case, 10 Co. 49, b; Eare *v.* Snow, Plowd. 504; [Dawson *v.* Bank of Whitehaven, 6 Ch. D. 218.]

was until lately the only regular way, in the English law, of barring dower, after it has duly attached; but now, by the statute of 3 & 4 Wm. IV. c. 105, power is given to the husband in various ways, in his discretion, to bar his wife's right of dower, as by conveyance in his lifetime, by devise, or by his declaration by will that his lands shall be exempt from her dower. (*b*) A devise in fee, by will, to a wife, with a power of disposition of the estate, would not enable her to convey, without a fine, for the power would be void, as being inconsistent with the fee. (*c*) But other ingenious devises have been resorted to, in order to avoid the troublesome lien of dower.

If an estate be conveyed to such uses as the purchaser by deed or will should appoint, and in default of appointment to the purchaser in fee, it is settled that the estate vests in the purchaser as a qualified fee, subject to be devested by an exercise of the power (for the power is not merged in the fee), and, consequently, dower attaches. It has been a questionable point, whether the subsequent exercise of the power, as being a prior or paramount right, would not dislocate and carry with it the dower of the purchaser's wife. The better opinion is, that the dower is defeated by the execution of the power; and yet, in order the more certainly to prevent it, the conveyancers have limited the land to the use of the purchaser's appointee, and, in default of the appointment, to his use for life, and then to the use of his heirs in fee. Here it does not require the power of appointment to bar the dower; and yet the whole estate is completely in the purchaser's power. (*d*) A more sure way to bar the dower was by the intro-

(*b*) See *ante*, 44, note.

(*c*) Goodill *v.* Brigham, 1 Bos. & P. 192.

(*d*) Butler's note 119, to Co. Lit. 216, a, and note, 330, to Co. Lit. 379, b; Gilbert on Uses, by Sugden, 321, note; Fearne on Remainders, i. [347] note; Park on Dower, 85, 187, 188; Lord Eldon, in Maundrell *v.* Maundrell, 10 Ves. 263, 265, 266; Heath, J., in 3 id. 657. x^1

x^1 By statute, in England, a husband may bar dower by declaring such intention in the deed to himself, or in a deed executed by him. Roper *v.* Roper, 3 Ch. D. 714. And dower may be barred by antenuptial agreement, provided it is upon adequate consideration independent of the marriage itself. Freeland *v.* Freeland, 128 Mass. 509; Curry *v.* Curry, 10 Hun, 366. It has been held that equity will decline to act in enforcing dower after a delay of twenty years. Barksdale *v.* Garrett, 64 Ala. 277. Of course no acts or admissions of the husband alone can extinguish an inchoate right of dower. Tibbetts *v.* Langley Mfg. Co., 12 S. C. 465.

duction of a trustee into the conveyance, and limiting the lands to such persons as the purchaser should appoint; and in default of, and until such appointment, to the purchaser for life; and in case his wife should survive him, then to B. and his heirs
*52 during the *life of his wife, in trust for the purchaser's heirs and assigns, with remainder to the heirs of the purchaser in fee. (a) But here a very vexatious question arose, whether the trustee must be a party to the conveyance from the purchaser; and eminent counsel have given different opinions on the subject. (b) In this country we are, happily, not very liable to be perplexed by such abstruse questions and artificial rules, which have incumbered the subject of dower in England to a grievous extent. Even in those states where the right of dower, as at common law, exists in full force, the easy mode and familiar practice of barring dower by deed supersedes the necessity of the ingenious contrivances of English counsel. Rather than have the simplicity and certainty of our jurisprudence destroyed by such mysteries, it would be wiser to make dower depend entirely upon the husband's seisin in his own right, and to his own use, of an estate in fee simple, pure and absolute, without any condition, limitation, or qualification whatsoever annexed.

The statute of Westm. 2, 13 Edw. I., made adultery in the wife, accompanied with elopement, a forfeiture of dower by way of penalty; but reconciliation with the husband would reinstate the wife in her right. The statute was reënacted in New York, in 1787, and has undergone a very material modification in the
*53 new revised code. (c) The same provision *was made by

(a) Butler's note, 330, to Co. Lit. lib. 3.

(b) Park on Dower, 93–99, has given us the conflicting opinions of such distinguished and largely experienced conveyancing counsel as Mr. Marriott, Mr. Wilbraham, Mr. Booth, and Mr. Filmer, who flourished in the middle of the last century; and he adds as his own opinion, that, strictly speaking, a purchaser is entitled to the concurrence of the trustee, in every case in which that trustee is *sui juris*, and can convey without the expense of a fine, or an order in chancery.

(c) Laws of New York, sess. 10, c. 4, sec. 7; New York Revised Statutes, i. 741, sec. 8. The statute of 1787 barred the wife of dower who eloped and lived with an adulterer, unless her husband was subsequently reconciled to her. The new Revised Statutes have abridged this ancient bar, by confining it to cases of a dissolution of the marriage contract; or else making it to depend on conviction of adultery in a suit by the husband for a divorce. It is declared that "in case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." See i. 741. Upon this provision it may be observed, that in case of a divorce *a vinculo*, dower would cease, of course, and no such statute provision was necessary;

statute in Connecticut; and there is so much justice in it, that an adulterous elopement is probably a plea in bar of dower in all the states in the Union which protect and enforce the right of dower. (*a*)[1] New York, however, is to be considered an exception to this remark; for, by the Revised Statutes, the wife only forfeits her dower in cases of divorce *a vinculo* for miscon-

and if there should be no divorce, or the husband should die before he had time or the means to obtain it, the adulteress could sue for and recover her dower. It is difficult to know what is exactly meant here by the *misconduct* of the wife. It is much too vague and general to be the ground of such a penal forfeiture. In a subsequent branch of the Revised Statutes (see ii. 146, sec. 48), it is declared that if the wife be convicted of adultery, in a suit for a divorce brought by the husband, she forfeits her right of dower. The word *misconduct* must then have some other meaning, and apply to some other offence than adultery. Marriages are to be dissolved by the chancellor, when made within the age of consent, or when a former husband or wife is living, or when one of the parties is an idiot or lunatic, or the consent of one of the parties was obtained by force or fraud, or *causa impotentiæ*. New York Revised Statutes, ii. 142, 143, 144. It is uncertain how far the term *misconduct* applies to these several causes of divorce, so directly as to work a forfeiture of dower. But in fact there was no need of the provision; for as the law always stood, if the dowress was not the wife *at the death of the husband*, her claim of dower fell to the ground. The provision seems to be absolutely useless; and it ought to be added, in justice to the revisors, that the bill, as originally reported by them, contained on this point the provision and the language of the old law. It would have been safer and wiser to have retained the plain, blunt style of the old law, and confined the loss of dower to a conviction of adultery; or else to have defined in precise terms the additional offence, if any, which was to destroy the dower.

(*a*) Swift's Digest, i. 86; Dane's Abr. iv. 672, 676; Cogswell *v.* Tibbetts, 3 N. H. 41; Statute of Ohio, Jan. 26, 1824, sec. 6; Revised Laws of Illinois, 1833. But in Hethrington *v.* Graham, 6 Bing. 135, adultery is deemed a bar to dower, though the wife does not elope *with the adulterer*. It will bar her dower, if she leaves her husband voluntarily, and afterwards lives in adultery. The Revised Statutes of Connecticut of 1821 give dower to every married woman living with her husband at his death, or *absent by his consent, or default, or by inevitable accident*. An adulterous elopement will of course exclude her. In New Jersey, a decree of divorce, *a vinculo*, for the fault of the wife, forfeits her dower. So does a voluntary elopement with an adulterer, or consent to a ravisher, bar her of dower and jointure, unless her husband be voluntarily reconciled to her, and suffer her to live with him. Elmer's Dig. 145. In Ohio, it has been adjudged that a decree of divorce in another state, for wilful abandonment of the husband by the wife, was no bar to her right of dower in lands lying in the State of Ohio. Mansfield *v.* McIntyre, 1 Wilcox, 27.

[1] See cases below. But see Bryan *v.* Batcheller, 6 R. I. 543; Lakin *v.* Lakin, 2 Allen, 45. A woman forfeits her dower under the statute by remaining in adultery without being reconciled to her husband, although he drove her away by his cruelty in the first place. Bell *v.* Nealy, 1 Bail. (S. C.) 312; Woodward *v.* Dowse, 10 C. B. N. S. 722. But it has been held otherwise in some cases where the husband deserted his wife. Graham *v.* Law, 6 U. C. C. P. 310; Reel *v.* Elder, 62 Penn. St. 308; Shaffer *v.* Richardson, 27 Ind. 122. See, especially, Walters *v.* Jordan, 13 Ired. 361.

*54 duct, or on conviction *of adultery, on a bill in chancery by the husband for a divorce; and every plea of elopement in bar of dower would seem to be annihilated.

A divorce, *a vinculo matrimonii*, bars the claim of dower; for to entitle the party claiming dower, she must have been the wife at the death of the husband. (*b*) But in case of such a divorce for the adultery of the husband, it is provided in the statute law of those states which authorize the divorce, that a right of dower shall be preserved, or a reasonable provision be made for the wife out of the husband's estate, by way of indemnity for the loss of her dower, and of her husband's protection. (*c*) The wife may also be barred of her dower by having a joint estate, usually denominated a *jointure*, settled upon her and her husband, and in case of his death, to be extended to the use of the wife during her life. The jointure, in the English law, is founded on the statute of 27 Hen. VIII. c. 10; and its provisions have been very extensively incorporated into the law of this country. It must take effect immediately on the death of the husband; and must be for the wife's life, and be made and declared to be in satisfaction of her whole dower. (*d*) If the jointure be made before marriage, it bars the dower; but if made after marriage, the wife, on the death of her husband, has her election to accept of the jointure, or to renounce it, and apply for her dower at common law; and if she be at any time lawfully evicted of her jointure, or any part of it, she may repair the loss or deficiency by resorting to her right of dower at common law. Under the English law, adultery is no forfeiture of the jointure, or of articles of agreement to settle a jointure, though it be a bar to dower;

*55 *and the distinction depends upon a positive provision by statute for the one case, and none for the other. (*a*)

(*b*) 2 Bl. Comm. 130; [Whitsell *v.* Mills, 6 Ind. 229; Levins *v.* Sleator, 2 Greene (Iowa), 604; Wait *v.* Wait, 4 Barb. 102; Curtis *v.* Hobart, 41 Me. 230.]

(*c*) New York Revised Statutes, ii. 145, sec. 45; [Wait *v.* Wait, 4 Comst. 95;] Connecticut Statutes, 180, tit. Dower; Mass. Statutes, 1785, c. 69; Statutes of Ohio, Jan. 7, 1824. The same statute confines the bar by divorce to that arising from the aggression of the wife. Mass. Revised Statutes, 1836, part 2, tit. 7, c. 76, sec. 32.

(*d*) Co. Litt. 36, b; Vernon's Case, 4 Co. 1.

(*a*) Sidney *v.* Sidney, 3 P. Wms. 269; Blount *v.* Winter, cited in note to 3 id. 277. The Master of the Rolls, in Seagrave *v.* Seagrave, 13 Ves. 443. Jointure, by the New York Revised Statutes, i. 742, sec. 15, is forfeited in the same cases in which dower is, and consequently adultery forfeits it; and the same provision is in the Virginia act of 1792, concerning jointures in bar of dower.

It was a rule of law deduced from the statute of 27 Hen. VIII., making a jointure a bar, that the settlement, to be a bar of dower, must be to the wife herself, and not to any other person in trust for her, provided the estate remains in the trustee. (*b*) A conveyance to trustees, for the use of the wife after her husband's death, is, in point of law, no jointure; but such a settlement, if in other respects good, will be enforced in chancery as an equitable bar of dower; and courts of equity have greatly relieved the parties from the strict legal construction given to the English statute. (*c*) It has also been settled, after great discussion in the English House of Lords, in the case of *Drury* v. *Drury*, and in New York, in *M'Cartee* v. *Teller*, that a jointure on an infant before coverture bars her dower, notwithstanding her infancy, on the ground of its being a provision by the husband for the wife's support. It was considered to be a bar, *a provisione viri*, and not *ex contractu;* and the assent of the wife was held not to be an operative circumstance, though the antenuptial contract was, in that case, executed by the infant in the presence of her guardian. (*d*) An equitable jointure, or a competent and certain provision for the wife, in lieu of dower, if assented to by the father or the guardian of the infant before marriage, will also, in analogy to the statute, constitute an equitable bar. (*e*) But the conveyance before marriage of an estate to the wife, to continue during widowhood, by way of jointure, * or if made *56 to depend on any other condition, will not bar her dower, even if she be an adult, unless, when a widow, she enters and accepts the qualified freehold. The legal or equitable provisions

(*b*) Co. Litt. 36, b.

(*c*) Lord Hardwicke, in Hervey *v.* Hervey, 1 Atk. 562, 563; Jordan *v.* Savage, Bacon's Abr. tit. Dower and Jointure, c. 3.

(*d*) Earl of Buckingham *v.* Drury, 3 Bro. P. C. 492 [Tomlins's ed.]; 2 Eden, 39; 4 Bro. C. C. 506, note, s. c.; Caruthers *v.* Caruthers, 4 id. 500; M'Cartee *v.* Teller, 2 Paige, 511; 8 Wend. 267, s. c.; [Levering *v.* Heighe, 2 Md. Ch. 81.] See also *supra*, ii. 243, s. p. In Ohio, the more just rule is adopted, that if the jointure was made when the wife was an infant, or after marriage, she has her election, after her husband's death, to waive her jointure and demand her dower. Statute of Ohio, 1824. The same statute secures her from loss or eviction of her jointure, according to the provision of 27 Hen. VIII. Chase's Statutes of Ohio, ii. 1315. [See also Grogan *v.* Garrison, 27 Ohio St. 50.] The assistant vice-chancellor, in Temple *v.* Hawley, 1 Sandf. Ch. 153, after a very elaborate and able examination of cases, adjudged that a female infant could not bind her real estate by a marriage settlement absolutely, but might avoid it after she came of age, if sole.

(*e*) Corbet *v.* Corbet, 1 Sim. & Stu. 612; M'Cartee *v.* Teller, 2 Paige, 511.

must be a fair equivalent to the dower estate, to make it absolutely binding in the first instance. (*a*)

In New York, the statute of 27 Hen. VIII., concerning jointures, was, in 1787, adopted *verbatim*; (*b*) but it has been altered and improved by the new Revised Statutes; and the principle in equity, allowing jointures to exist also by conveyance of lands to a trustee in trust for the wife, has been introduced into the statute law, which provides, that if "an estate in lands be conveyed to a person and his intended wife, or to such intended wife alone, or to any other person in trust for such person and his intended wife, or in trust for such wife alone, for the purpose of creating a jointure for such intended wife, and with her assent, such jointure shall be a bar to any right or claim of dower, &c.; and the evidence of the assent of the wife shall be, by her becoming a party to the conveyance, if of age, and, if an infant, by her joining with her father or guardian therein." (*c*)

The statute of 27 Hen. VIII. further provided, that if the settlement in jointure was made after marriage, the wife should have her election, if she survived her husband, to take it in lieu of dower; or to reject it, and betake herself to her dower at common law. So, if she was fairly evicted by law from her jointure, or any part of it, the deficiency was to be supplied from other

(*a*) M'Cartee *v.* Teller, 2 Paige, 511; [Sheldon *v.* Bliss, 4 Seld. 31; Vincent *v.* Spooner, 2 Cush. 467; Ellicott *v.* Mosier, 11 Barb. 574; Blackmon *v.* Blackmon, 16 Ala. 633; Findley *v.* Findley, 11 Gratt. 434.] An adult female cannot contract before marriage to relinquish her dower without due compensation. Neither a court of law or equity will tolerate such a contract. Power *v.* Sheil, 1 Molloy, 296. [But see Dyke *v.* Rendall, 2 De G., M. & G. 209; 21 L. J. N. S. Ch. 905; Naill *v.* Maurer, 25 Md. 532; Cauley *v.* Lawson, 5 Jones, Eq. 132; Charles *v.* Charles, 8 Gratt. 486. From which it appears, that if a woman, being of age, accepts a particular something in satisfaction of dower, she must take it with all its faults, and must look to the contract alone, and cannot in case of eviction come against any one in possession of the lands on which otherwise her dower might have attached.] In Georgia, the rule of the ancient English law is retained, that if the wife sell or give in fee, or for term of life, her dower land, she forfeits the same, and the heir or reversioner may enter. Hotchkiss's Code, p. 436. But after dower has been duly assigned and set off (but not before), the widow may sell and convey her life interest. 14 Ohio, 520.

(*b*) Laws of New York, sess. 10, c. 4, sec. 8.

(*c*) New York Revised Statutes, i. 741, sec. 9, 10. In Stilley *v.* Folger, 14 Ohio, 610, a reasonable antenuptial agreement, settling property on the wife, was enforced in equity, as an equitable jointure in bar of dower, or a complete equitable estoppel to the claim of dower. The doctrine was elaborately discussed by counsel, and the court gave a very liberal construction to such agreement, as forming a good equitable jointure.

lands, whereof she would have been otherwise dowable. Both these provisions formed a part of the statute of New York in 1787, and they have probably been adopted in all the states where the law of jointure in bar of dower has been introduced. (*d*)

*57 *It is likewise settled, that a collateral satisfaction, consisting of money or other chattel interests, given by will and accepted by the wife after her husband's death, will constitute an equitable bar of dower. The Court of Chancery will give to the widow her election to accept of the testamentary provision, or to refuse it, and betake herself to her dower at law; and will even allow her this election after acceptance, and enjoyment for some time, of the testamentary provision, if it appears that she acted without full knowledge and understanding of her true situation and rights, and of the consequence of her acceptance. (*a*) It is generally said, however, that though such a collateral satisfaction

(*d*) The provisions of the statute of 27 Henry VIII. have always been in force in Massachusetts. Hastings *v.* Dickinson, 7 Mass. 153. They have been incorporated into the Massachusetts Revised Statutes of 1836. And they have been essentially reënacted in Connecticut, though there the jointure may consist of personal as well as real estate. Swift's Dig. i. 86; Revised Statutes of Connecticut, 1821. So, in Virginia, if the widow be evicted of her jointure, she has still a right to claim her dower. Ambler *v.* Norton, 4 Hen. & Munf. 23. The law of jointure under the statute of 27 Hen. VIII. exists in Pennsylvania, Ohio, South Carolina, and Georgia (2 Const. Rep. (S. C.) by Treadway, 747; 1 Dallas, 417; Griffith's Register; Statutes of Ohio, 1824), and doubtless it very generally prevails throughout the Union. In Pennsylvania, it is left as a doubtful question, whether settlement of personal estate would be sufficient to bar the dower, and be held equivalent to a jointure. The case of Drury *v.* Drury, holding that an infant's dower may be barred by jointure, seems, however, to be assumed as the settled law. Shaw *v.* Boyd, 5 Serg. & R. 309. By statute in Pennsylvania, a devise or bequest to the wife bars her dower, though not so expressed in the will, provided she elects to take the property. Purdon's Dig. 972. But in the New York Revised Statutes, the case would appear to have been altogether omitted, for I do not perceive in them the provision in the former law, and in the statute of 27 Hen. VIII. allowing to the wife a compensation by dower in other lands, on eviction from the lands placed in jointure. The Massachusetts Revised Statutes of 1826 give dower anew to the widow, if evicted of the lands assigned as dower, or settled as a jointure, or deprived of the provision by will, or otherwise made in lieu of dower.

(*a*) Wake *v.* Wake, 3 Bro. C. C. 255; 1 Ves. Jr. 335, s. c. In that case the widow was held not to be deprived of her election, though she had taken under the will for three years, she not acting under a full knowledge of the facts. Edwards *v.* Morgan, 13 Price, 782; Duncan *v.* Duncan, 2 Yeates, 302; Jones *v.* Powell, 6 Johns. Ch. 194; Shotwell *v.* Sedam, 3 Ohio, 1. [See further, Chapin *v.* Hill, 1 R. I. 446; Collins *v.* Carman, 5 Md. 503; Copp *v.* Hersey, 11 Fost. (31 N. H.) 317; United States *v.* Duncan, 4 McLean, 99; McCallister *v.* Brand, 11 B. Mon. 370; Dixon *v.* McCue, 14 Gratt. 540.]

be good in equity, it is not pleadable in bar of dower at law. (*b*) But in the modern cases, the language, and the better opinion is, that if the wife has fairly and understandingly made her election between her dower and the testamentary provision, and in
*58 favor of the latter, she * will be held to her election at law as well as in equity. There is no difference in principle between the courts of law and equity on this subject; and the difficulty of reaching the justice of the case has frequently thrown these questions into equity. (*a*) The testamentary provision in lieu of dower, in order to render it such, even with the widow's acceptance of it, must be declared, in express terms, to be given in lieu of dower; or that intention must be deduced by clear and manifest implication from the will, founded on the fact that the claim of dower would be inconsistent with the will, or so repugnant to its dispositions as to disturb and defeat them. (*b*)

(*b*) Co. Litt. 36, b; Harg. note 224, to lib. 1, Co. Litt.; Lawrence *v.* Lawrence, 2 Vern. 365; 1 Dallas, 417; Larrabee *v.* Van Alstyne, 1 Johns. 307.

(*a*) Lord Alvanley, in French *v.* Davies, 2 Ves. 578; Lord Redesdale, in Birmingham *v.* Kirwan, 2 Sch. & Lef. 451; Larrabee *v.* Van Alstyne, 1 Johns. 307; Van Orden *v.* Van Orden, 10 id. 30; Jackson *v.* Churchill, 7 Cowen, 287; Pickett *v.* Peay, 2 Const. Rep. (S. C.) 746. See also Butler and Baker's Case, 3 Leon. 272, arg.; Gosling *v.* Warburton, Cro. Eliz. 128; [Gowen's Appeal, 32 Me. 516; Light *v.* Light, 21 Penn. St. 407; Chew *v.* Farmers' Bank, 9 Gill, 361; Dundas *v.* Hitchcock, 12 How. 256.] Between two inconsistent rights, where it is against the intention of the party creating the right, and against conscience, that both should be enjoyed, an election will be enforced even against *feme coverts* and infants, after a reference to a master [to] inquire which course would be most reasonable. See Gretton *v.* Haward, 1 Swanst. 413; Davis *v.* Page, 9 Ves. 350; and see the learned note in 1 Swanst. 413–417. One cannot take a right as legatee under a will, and then set up a claim in opposition to the will. Hamblett *v.* Hamblett, 6 N. H. 333; Weeks *v.* Patten, 18 Me. 42. [It must appear that the provision was intended in lieu of dower to put the widow to her election. Alling *v.* Chatfield, 42 Conn. 276.]

(*b*) French *v.* Davies, 2 Ves. 572; Strahan *v.* Sutton, 3 Ves. 249; Dowson *v.* Bell, 1 Keen, 761; Harrison *v.* Harrison, ib. 765; Kennedy *v.* Nedrow, 1 Dallas, 415; Adsit *v.* Adsit, 2 Johns. Ch. 448; Jackson *v.* Churchill, 7 Cow. 287; Pickett *v.* Peay, 2 Const. Rep. (S. C.) 746; Evans *v.* Webb, 1 Yeates, 424; Perkins *v.* Little, 1 Greenl. 150; Dickson *v.* Robinson, Jac. 503; Allen *v.* Pray, 3 Fairf. 138; Stark *v.* Hunton, Saxton, Ch. (N. J.) 216; Bull *v.* Church, 5 Hill (N. Y.), 206; [Savage *v.* Burnham, 17 N. Y. 561, 571; Dodge *v.* Dodge, 31 Barb. 413; Lasher *v.* Lasher, 13 Barb. 106; Palmer *v.* Voorhis, 35 Barb. 479; Sandford *v.* Jackson, 10 Paige, 266; Holdrich *v.* Holdrich, 2 You. & C. 18; Leonard *v.* Steele, 4 Barb. 20; Church *v.* Bull, 2 Denio, 430; Caston *v.* Caston, 2 Rich. Eq. 1; Lord *v.* Lord, 23 Conn. 327; Lewis *v.* Smith, 5 Selden, 502; Higginbotham *v.* Cornwell, 8 Gratt. 83; Bailey *v.* Boyce, 4 Strobh. Eq. 84; Buist *v.* Dawes, 3 Rich. Eq. 281; Corriell *v.* Ham, 2 Clarke (Iowa), 552; Gibson *v.* Gibson, 22 L. J. N. S. Ch. 346; Warbutton *v.* Warbutton, 23 id. 467; Parker *v.* Sowerby, 4 De G., M. & G. 321; Norris *v.* Clark, 2 Stockt. (N. J.) 51; Van Arsdale *v.* Van

The New York Revised Statutes (*c*) have embodied most of these principles of law and equity, with some variations and amendments. They declare, and so does the law of Massachusetts and Connecticut, that any pecuniary provision made before marriage in lieu of dower, if duly assented to by the wife, shall bar her dower. But any settlement, by land, or any pecuniary provision, if made after marriage, or if before marriage, without the wife's assent, or if made by will, shall not bind her, though declared to be in lieu of dower; but she shall be obliged to make her election between her dower and the jointure or pecuniary provision. The widow shall be deemed to have elected to have taken the jointure, devise, or pecuniary provision, unless, within one year after the husband's death, she shall enter on the lands to be assigned her for dower, or commence proceedings to *recover the same. (*a*) It is likewise declared that every *59 jointure, devise, and pecuniary provision in lieu of dower, shall be forfeited by the woman for whose benefit the same shall be made, in the same cases in which she would forfeit her dower. (*b*)

It was a principle of the common law, that if the husband, seised of an estate of inheritance, exchanged it for other lands, the wife should not have dower of both estates, but should be put to her election. (*c*) This principle is also introduced into the New York Revised Statutes; and the widow is required to evince

Arsdale, 5 Dutch. 404; Clark *v.* Griffith, 4 Clarke (Iowa), 405; Fulton *v.* Fulton, 30 Miss. 586; Braxton *v.* Freeman, 6 Rich. 35.] If the wife takes a legacy in lieu of dower, she takes as a purchaser for a valuable consideration, and is entitled to be paid in preference to legatees who are mere volunteers. Hubbard *v.* Hubbard, 6 Met. 50.

(*c*) Vol. i. 741, sec. 11, 12, 13, 14. [See Heald's Petition, 2 Fost. (22 N. H.) 265; Borland *v.* Nichols, 12 Penn. St. 38; Gaw *v.* Huffman, 12 Gratt. 628; Thomas *v.* Wood, 1 Md. Ch. 296.]

(*a*) Hawley *v.* James, 5 Paige, 318. The statute of Virginia of 1727 gave the widow nine months; and the statute of Ohio of 1831, six months; and the statute of Vermont of 1799, sixty days, to make her election; and if she made none, she was held exclusively to her dower at common law. The Massachusetts statutes of 1836 give the widow six months to elect, but, like those of New York, they assumed that the substituted provision in lieu of the dower is taken, unless waived within the time prescribed. The Revised Statutes of Illinois, ed. 1833, p. 624, declare, that any provision by will bars dower, unless it be otherwise expressed in the will, and unless the widow in six months renounces the provision. [Sturgis *v.* Ewing, 18 Ill. 176.]

(*b*) New York Revised Statutes, i. 742, sec. 15.

(*c*) Co. Litt. 31, b.

her election to take dower out of the lands given in exchange, by the commencement of proceedings to recover it, within one year after her husband's death, or else she shall be bound to take her dower out of the lands received in exchange. (*d*)

The usual way of barring dower, in this country, by the voluntary act of the wife, is not by fine, as in England, but by her joining with her husband in a deed of conveyance of the land, containing apt words of grant or release on her part, and acknowledging the same privately, apart from her husband, in the mode prescribed by the statute laws of the several states. This practice is probably coeval with the settlement of the country; and it has been supposed to have taken its rise in Massachusetts, from the colonial act of 1644. (*e*) The wife must join with her husband in the deed, and there must be apt words of grant, showing an intention on her part to relinquish her dower. (*f*) This is the English rule in respect to a fine; and the wife's dower is *60 * barred by a fine, either wholly, or only *pro tanto*, according to the declared intent. It is almost a matter of course, in this country, for the wife to unite with her husband in all deeds and mortgages of his lands; and though the formality of her separate acknowledgment is generally required to render her act binding, yet, by the laws of New York and Illinois, if she resides out of the state, the simple execution of the deed by her will be sufficient to bar her dower, as to the lands in the state so conveyed, equally as if she were a *feme sole*. (*a*)

(*d*) New York Revised Statutes, i. 740, sec. 3; [Wilcox *v.* Randall, 7 Barb. 633.] How far a wife may be barred of her dower by a sale under a decree in partition, see *infra*, 365.

(*e*) 8 Mason, 351.

(*f*) Catlin *v.* Ware, 9 Mass. 218; Lufkin *v.* Curtis, 13 id. 223; Powell *v.* M. & B. Man. Company, 3 Mason, 347. [See Manning *v.* Laboree, 33 Me. 343; Page *v.* Page, 6 Cush. 196; Tasker *v.* Bartlett, 5 Cush. 359; Burge *v.* Smith, 7 Foster (27 N. H.), 332; Dundas *v.* Hitchcock, 12 How. 256; Blain *v.* Harrison, 11 Ill. 384; Elwood *v.* Klock, 13 Barb. 50; Graham *v.* Van Wyck, 14 Barb. 531.] By the Massachusetts Revised Statutes of 1836, the wife may bar her dower by joining with her husband in the conveyance of the estate, or by his joining with her in a subsequent release of it. No private examination seems to be requisite.

(*a*) New York Revised Statutes, i. 758, sec. 11; [Cunningham *v.* Knight, 1 Barb. 399;] Revised Laws of Illinois, 1833. In Georgia a conveyance by the husband alone during coverture bars a wife's right of dower, except as to lands whereof he became possessed by his marriage with her. Hotchkiss's Code, &c., 429. So a conveyance of land by sale or execution in the lifetime of the execution bars the right of dower. Ib.

*(4.) *The Manner of assigning Dower.* — To give greater *61 facility to the attainment of the right of dower (and which Lord Coke informs us was one of the three principal favorites of the common law), (*a*) it was provided by Magna Charta, (*b*) that the widow should give nothing for her dower, and that she should tarry in the chief house of her husband for forty days (and which are called the widow's quarantine), after the death of her husband, within which time her dower should be assigned her; and that, in the mean time, she should have reasonable estovers, or maintenance, out of the estate. The provision that the widow should pay nothing for dower was made with the generous intention of taking away the uncourtly and oppressive claim of the feudal lord, for a fine, upon allowing the widow to be endowed. This declaration of Magna Charta is, probably, the law in all the United States. In New York the provision is reënacted, and with the addition that she shall not be liable for any rent during the forty days, though the allowance of maintenance necessarily implied that she was to live free of rent. (*c*) The widow cannot enter for her dower until it be assigned her, nor can she alien it so as to enable the grantee to sue for it in his own name. It is a mere chose or right in action, and cannot be sold on execution at law, though in New York it may be reached by process in chancery for the benefit of creditors. (*d*) She has no estate in the lands until assignment; and after the expiration of her quarantine, the heir may put her out of possession, and drive her to her suit for her dower. She has no right to tarry in her husband's house beyond the forty days; and it is not until her dower * has been duly assigned, that the widow acquires a *62 vested estate for life, which will enable her to sustain her ejectment. (*a*)[1] It was decided in New Jersey, that though the

(*a*) Co. Litt. 124, b. (*b*) C. 7.

(*c*) New York Revised Statutes, i. 742, sec. 17. It is also the law in Massachusetts. Revised Statutes of 1836, pt. 2, tit. 1, c. 60. In the first act of the legislature of the province of New York, under the Duke of York, in 1683, it was, among other things, declared that the widow should have her dower, consisting of one third part of all the lands of her husband during coverture, and that she might tarry in the chief house of her husband forty days after his death, within which time her dower was to be assigned.

(*d*) New York Revised Statutes, ii. 214, sec. 39.

(*a*) Litt. sec. 43; Co. Litt. 32, b, 37, a; Doe *v.* Nutt, 2 Carr. & P. 430; Jackson *v.*

[1] *Assignment of Dower.* — (*a*) *Interest before Assignment.* — Even after the husband's death the widow's claim to dower before it is assigned to her is not an

widow could not enter upon the land until dower was assigned, yet, being in possession, she could not be ousted by the owner of

O'Donaghy, 7 Johns. 247; Jackson *v.* Aspell, 20 id. 411; Jackson *v.* Vanderheyden, 17 id. 167; Chapman *v.* Armistead, 4 Munf. 382; Moore *v.* Gilliam, 5 id. 346; Johnson *v.* Morse, 2 N. H. 49; Sheafe *v.* O'Neil, 9 Mass. 13; Siglar *v.* Van Riper, 10 Wend. 414; McCully *v.* Smith, 2 Bailey (S. C.) 103.

estate which she can transfer, although she may release it. Saltmarsh *v.* Smith, 32 Ala. 404; Lamar *v.* Scott, 4 Rich. 516; Hoxsie *v.* Ellis, 4 R. I. 123; Waller *v.* Mardus, 29 Mo. 25; Summers *v.* Babb, 13 Ill. 483; Hoots *v.* Graham, 23 Ill. 81; Newman *v.* Willetts, 48 Ill. 534; Robie *v* Flanders, 33 N. H. 524; Lawrence *v.* Miller, 2 Comst. 245; [Elmendorf *v.* Lockwood, 57 N. Y. 322; Graves *v.* Braden, 62 Ind. 93. The release in such case operates to extinguish the right, and not simply by way of estoppel. Elmendorf *v.* Lockwood, *supra;* Morton *v.* Noble, 57 Ill. 176. But see French *v.* Lord, 69 Me. 537, where it was held that the release could not be availed of by other than the one claiming under it. Such release clearly constitutes a valuable consideration for a conveyance to the wife. Sin gree *v.* Welch, 32 Ohio St. 320, Bissell *v.* Taylor, 41 Mich. 702.] But compare Strong *v.* Clem, 12 Ind. 37.

It has been held that the inchoate right to dower before the husband's death is wholly devested when land is taken for public uses and the owner paid. It is not such a vested interest in his wife as to remain outstanding, and to ripen into an estate in default of compensation to her. Moore *v.* New York, 4 Seld. (8 N. Y.) 110. See Weaver *v.* Gregg, 6 Ohio St. 547, 550; Magwire *v.* Riggin, 44 Mo. 512, 515. [But it has been held that equity will in such case secure the value of her interest to the wife. Wheeler *v.* Kirtland, 27 N. J. Eq. 534. See also *In re* Hall's Estate, 9 L. R. Eq. 179; De Wolf *v.* Murphy, 11 R. I. 630. But see French *v.* Lord, 69 Me. 537. See further, as to the nature of inchoate dower, Buzick *v.* Buzick, 44 Iowa, 259; State *v.* Wincroft, 76 N. C. 38.] So it is subject to legislative control in other respects, as by a change in the laws affecting dower, which may constitutionally be made applicable where there was a previous marriage and seisin, if the husband was still alive. Melizet's Appeal, 17 Penn. St. 449; Magee *v* Young, 40 Miss. 164; Weaver *v.* Gregg, 6 Ohio St. 547, 549; Barbour *v.* Barbour, 46 Me. 9, 14; Strong *v.* Clem, 12 Ind. 37; [Bennett *v.* Hames, 51 Wis. 251; Taylor *v.* Sample, 51 Ind. 423.] *Contra,* Russell *v.* Rumsey, 35 Ill. 362; Rose *v.* Sanderson, 38 Ill. 247. Compare 29, n. 1, as to curtesy. Such a claim is an incumbrance within the covenant against incumbrances. Smith *v.* Cannell, 32 Me. 128, 126; Bigelow *v.* Hubbard, 97 Mass. 195; Russ *v.* Perry, 49 N. H. 547; Thrasher *v.* Pinckard, 23 Ala. 616. Compare Magwire *v.* Riggin, 44 Mo. 512.

(*b*) *Assignment.*—With regard to the assignment it is clear that a specific sum cannot be decreed in lieu of dower without the consent of all concerned. Blair *v.* Thompson, 11 Gratt. 441; [Harrison's Exec. *v.* Payne, 32 Gratt. 387. See Wilson *v.* Branch, 77 Va. 65.] And an assignment of a part in fee equal in value to dower in the whole is no better. Wilhelm *v.* Wilhelm, 4 Md. Ch. 330. But when a specific sum is allowed by consent, her interest will not be devested by her death before distribution. McLaughlin *v.* McLaughlin, 7 C. E. Green (22 N. J. Eq.) 505. A parol assignment by a guardian is good, Curtis *v.* Hobart, 41 Me. 230; Boyers *v.* Newbanks, 2 (Cart.) Ind. 388; or by the infant heir himself, with the right to a writ of admeasurement

the fee in ejectment, unless her dower was assigned her. (*b*) This decision is against the decided weight of English and American authority, but it was correctly decided, according to the very reasonable statute law of New Jersey, which gives to the widow the right to hold and enjoy the mansion house, and the messuage and plantation thereto belonging, free of rent, until dower be assigned; and she has, therefore, a freehold for life, unless sooner defeated by the act of the heir. (*c*) There is the same reasonable statute provision in Kentucky, Indiana, Illinois, Alabama, Mississippi, and Virginia; the rule in Connecticut and Missouri is the same, and, upon the death of her husband, the widow is by law deemed in possession as a tenant in common with the heirs, to the extent of her right of dower; and her right of entry does not depend upon the assignment of dower, which is a mere severance of the common estate. (*d*) Though in point of tenure she

(*b*) Den *v.* Dodd, 1 Halst. 367.

(*c*) 3 Halst. 129. [And see, under different statutes, McLaughlin *v.* McLaughlin, 7 C. E. Green (22 N. J. Eq.), 505; Burke *v.* Osborne, 9 B. Mon. 579; Inge *v.* Murphy, 14 Ala. 289; Shelton *v.* Carroll, 16 Ala. 148; Cook *v.* Webb, 18 Ala. 810; Pharis *v.* Leachman, 20 Ala. 662; McReynolds *v.* Counts, 9 Gratt. 242; Gorham *v.* Daniels, 23 Vt. 600.]

(*d*) Stedman *v.* Fortune, 5 Conn. 462; Griffith's Reg. tit. Kentucky; Taylor *v.* M'Crackin, 2 Blackf. 260; Revised Laws of Illinois, ed. 1833, and of Indiana, 1838, p. 239; Alabama Dig. 258; 1 Revised Code of Virginia, c. 107, sec. 1, 2, p. 403; Stokes *v.* McAllister, 2 Mo. 163. In Tennessee, by statute, the widow is entitled to a support for herself and her family, for one year, out of the assets.

if the assignment is excessive, McCormick *v.* Taylor, 2 (Cart.) Ind. 336.

(*c*) *Valuation of the Premises.* — The rule that the value at the time of an alienation by the husband must be taken, text, 66, is sanctioned by Parks *v.* Hardey, 4 Bradf. 15; Campbell *v.* Murphy, 2 Jones, Eq. 357; Thrasher *v.* Pinckard, 23 Ala. 616; Summers *v.* Babb, 13 Ill. 483. But in Doe *v.* Gwinnell, 1 Q. B. 682, 695, it was laid down after a careful examination of the authorities that dower attaches on the husband's real property at the period of his death, according to its then actual value, without regard to the hands which brought it into the condition in which it is found, and Sir Edward Sugden was said to hold the same view. American cases have given the widow the benefit of a rise in the value of the land from natural causes, irrespective of improvements made upon it. *Post*, 68; Johnston *v.* Vandyke, 6 McL. 422; Bowie *v.* Berry, 1 Md. Ch. 452; [Westcott *v.* Campbell, 11 R. I. 378; Price *v.* Hobbs, 47 Md. 359; Boyd *v.* Carlton, 69 Me. 200.] And she will have the benefit of improvements made upon her husband's land by his heir, in estimating its total value for the purpose of setting out dower. Husted's Appeal, 34 Conn. 488; *post*, 65; Manning *v.* Laboree, 33 Me. 343. A contrary rule was applied when the improvements were made by a purchaser after the husband's death, in Campbell *v.* Murphy, 2 Jones, Eq. 357. [The Carlisle tables are not authoritative in fixing the value of a life interest. Shippen & Robbins' App., 80 Penn. St. 391; Carnes *v.* Polk, 5 Heisk. 244.]

holds of the heir or reversioner, yet the widow claims paramount to the heir. Her estate is a continuation of that of her husband, and upon assignment she is in by relation from her husband's death. (*e*)

In North Carolina, the law provides for the widow's support for one year, and it is suggested that the time of her quarantine may be thereby enlarged. But though she be an occupant, the legal title before the assignment of dower is exclusively in the heirs, and they are occupants also. (*f*)

*63 * The assignment of dower may be made *in pais* by parol, by the party who hath the freehold; but if the dower be not assigned within the forty days, by the heir or devisee, or other persons seised of the lands subject to dower, the widow has her action at law by writ of dower *unde nihil habet*, or by writ of right of dower against the tenant of the freehold. The former is to be preferred, because the widow, in that case, recovers damages for non-assignment of her dower, which she would not in a writ of right; and the damages by the statute of Merton were one third of the annual profits of the estate from the death of the husband. The writ lies, in every case, excepting only where the widow has received part of her dower of the same person who is sued, and out of lands in the same town. (*a*) The writ of right of dower is of rare occurrence, if not entirely unknown in this country; and the learned author of the Treatise on the Pleadings and Practice in Real Actions, says, (*b*) that he had never known any such action in Massachusetts. On recovery at law, the sheriff, under the writ of seisin, delivers to

(*e*) Norwood *v.* Marrow, 4 Dev. & Bat. 448; [Lawrence *v.* Brown, 1 Seld. 394; Fowler *v.* Griffin, 3 Sandf. 385; Whyte *v.* Nashville, 2 Swan (Tenn.), 364; Childs *v.* Smith, 1 Md. Ch. 483.]

(*f*) Branson *v.* Yancy, 1 Dev. Eq. 77. If it be the case, that in North Carolina the quarantine is enlarged for a year, it is a revival of the ancient law of England; and this enlarged quarantine, Lord Coke says, was certainly the law of England before the conquest. Co. Litt. 32, b. In Ohio, the widow is to remain in the mansion house of her husband, free of charge, for one year after his death, if her dower be not sooner assigned her. Statutes of Ohio, 1824.

(*a*) Co. Litt. 32, b; 2 Inst. 262. [In support of first sentence on the page, see Gibbs *v.* Esty, 22 Hun, 266.]

(*b*) P. 307. The Massachusetts Revised Statutes of 1836 authorize the judge of probate of the county where the lands lie, to assign dower, if the husband dies seised, and the right be not disputed by the heir, by his warrant to three commissioners; and if not so assigned, nor set out by the heir or other tenant of the freehold, she recovers the same by writ of dower in the courts of common law.

the demandant possession of her dower by metes and bounds, if the subjects be properly divisible, and the lands be held in severalty. (*c*) If the dower arises from rent, or other incorporeal hereditament, as commons or piscary, of which the husband was seised in fee, the third part of the profits is appropriated to the widow. (*d*) If the property be not divisible, as a mill, she is dowable in a special manner, and has either one third of the toll, or the entire mill for every third month. (*e*) The assignment of dower of a mine should be by metes and bounds, if practicable; and if not, then by a proportion of the profits, or separate alternate enjoyment *of the whole for short *64 proportionate periods. (*a*) The widow may also consent to take her dower of the undivided third part of the estate, without having it set off by metes and bounds. (*b*) Of lands held in common, the wife has a third part of the share of her husband assigned to her, to be held by her in common with the other tenants. (*c*) A case may occur in which there may be two or more widows to be endowed out of the same messuage. Lord Coke alludes to such a case, (*d*) and the point was proved and learnedly illustrated in *Geer* v. *Hamblin*. (*e*) If A. be seised, and

(*c*) Litt. sec. 36. In North Carolina, Alabama, and Illinois, the husband's mansion house is to be included in the one third, unless manifestly unjust to the children, to include the whole mansion house and offices, and she is then only to have a reasonable portion thereof. Her dower is estimated by one third in value, and not merely in quantity of acres. McDaniel *v.* McDaniel, 3 Ired. 61; Griffith's Register; Revised Laws of Illinois, 1833; Stiner *v.* Cawthorn, 4 Dev. & Batt. 501.

(*d*) Co. Litt. 144, b; Popham, 87; Chase's Statutes of Ohio, ii. 1316, sec. 14. Dunseth *v.* Bank of the United States, 6 Ohio, 76.

(*e*) Co. Litt. 32, a; Perkins, sec. 342, 415; Park on Dower, 112, 252. In this case of a mill, or of other tenement which cannot be divided without damage, the dower, by the Massachusetts Revised Statutes of 1836, is to be assigned out of the rents and profits. The case of Stevens *v.* Stevens, 3 Dana, 373, says, that where the husband died seised of a ferry, the widow was to be endowed of one third of the profits, or to have the use of it one third of the time alternately. The Act of New York, of April 28, 1840, c. 177, provides for the better security of the inchoate, contingent, or vested right of dower in lands divided or sold under judgment or decree in partition.

(*a*) Stoughton *v.* Leigh, 1 Taunt. 402.

(*b*) 5 Bos. & P. 33. In Woods *v.* Clute, V. Ch. in 2 N. Y. Legal Observer, 407, it was declared, that a widow having a right of dower in land, is not a tenant in common with the owner in fee, so as to be made a party to a suit in partition.

(*c*) Litt. sec. 44; Co. Litt. 32, b; [*ante*, 46, n. 1, (*a*).]

(*d*) Co. Litt. 31, a.

(*e*) Decided in the Supreme Court of New Hampshire, in 1808. 1 Greenl. 64, note.

has a wife, and sells to B. who has a wife, and the husbands then die, leaving their wives surviving, the wife of B. will be dowable of one third of two thirds in the first instance, and of the one third of the remaining one third on the death of the widow of A., who, having the elder title in dower, is to be first satisfied of her dower out of the whole farm. (*f*) The widow is not obliged to accept of a single room or chamber in the capital messuage; and unless she consents to it, and there are no other equivalent lands, a rent must be assigned to her, issuing out of the mansion house. (*g*)

*65 *If the husband dies seised, the heirs may assign when they please; but if they delay it, and improve the land, and render it more valuable by cultivation or buildings, the widow will be entitled to her dower according to the value of the land, exclusive of the emblements, at the time of the assignment; and the heir is to be presumed to have made the improvements with a knowledge of his rights and obligations. (*a*) But the widow is not entitled to damages for the detention of the dower, unless the husband died seised. (*b*) The statute of Merton, 20 Hen. III., gave damages in that case, equal to the value of the dower, from the time of the husband's death; but the construction is, that the damages are computed only from the time of making the demand of the heir. (*c*) The provision in the statute of Merton was adopted in New York in 1787, and continued in the Revised Statutes of 1830; and it was adopted in Massachusetts in 1783,

(*f*) Judge Reeve puts the following case for illustration: If A. sells to B., and B. to C., and C. to D., and D. to E., and the husbands all die, leaving their respective wives living; the widow of A. is entitled to be endowed of one third of the estate; the widow of B. is entitled to be endowed of one third of what remains, after deducting the dower of the first wife; the widow of C. of one third of what remains, after deducting the dower of the wives of A. and B.; and so on to the wife of D. And if we suppose the estate to consist of nine acres; the wife of A. would be endowed of three acres; the wife of B. of two acres; the wife of C. of one acre and a third; and the wife of D. of one third of the remaining two acres and two thirds. Reeve's Domestic Relations, 58. So, if lands descend to B. charged with the right of dower of his mother, and it is decreed to her, and B. dies in her lifetime, his widow is only entitled to dower in two thirds of the premises, because he died seised of no greater part. Reynolds *v.* Reynolds, 5 Paige, 161; Safford *v.* Safford, 7 Paige, 259. Had B. survived his mother, the case would have been different. [In the matter of Cregier, 1 Barb. Ch. 599; Elwood *v.* Klock, 13 Barb. 50.]

(*g*) Perkins, sec. 406; White *v.* Story, 2 Hill, 543.

(*a*) Co. Litt. 82, a; Harg. note 192, ib.; 6 Johns. Ch. 260.

(*b*) Co. Litt. 32, b. (*c*) Ibid.

1816, and 1835; and the damages in the case of detention of dower rest probably on similar grounds in most of the United States. (*d*) In cases of alienation by the husband, the general rule is, that the widow takes her dower according to the value of the land at the time of the alienation, and not according to its subsequent increased or improved value. This was the ancient and settled rule of the common law; (*e*) and the reason of the rule is said to be, that the heir was not bound to warrant, except according to the value of the land as it was at the time of the feoffment; and if the wife were to recover according to the improved value, subsequent to the alienation, she would recover more against the feoffee than he would recover in *value against the heir. (*a*) The reason assigned in the *66 old books for the rule has been ably criticised and questioned in this country; but the rule itself is founded in justice and sound policy; and whether the land be improved in value, or be impaired by acts of the party subsequently, the endowment, in every event of that kind, is to be according to the value at the time of the alienation, in case the husband sold in his lifetime, and according to the value at the time of the assignment, if the land descended to the heir.[1]

This is the doctrine in the American cases, and they are in conformity with the general principles of the English law, as to the time from which the value of the dower is to be computed, both as it respects the alienee of the husband, and the heir. (*b*) If the husband continues in possession after he has mortgaged the land, and makes improvements, the wife will have the benefit

(*d*) In South Carolina and Ohio, no damages are allowed on a judgment in dower; and the rule prescribed in the statute of Merton is not adopted or followed. Heyward *v.* Cuthbert, 1 M'Cord, 386; Bank U. States *v.* Dunseth, 10 Ohio, 18. On the assessment of the value of the widow's dower, interest is allowed in cases where the husband aliened during coverture, and none when he died seised. Wright *v.* Jennings, 1 Bailey (S. C.), 277; M'Creary *v.* Cloud, 2 id. 343.

(*e*) Fitz. Abr. tit. Voucher, 288, and tit. Dower, 192, cites 17 Hen. III.; Perkins, sec. 328.

(*a*) Sir Matthew Hale's MSS. cited in Harg. n. 193, to Co. Litt. lib. 1.

(*b*) Humphrey *v.* Phinney, 2 Johns. 484; Catlin *v.* Ware, 9 Mass. 218; Powell *v.* M. & B. Man. Co., 3 Mason, 347; Thompson *v.* Morrow, 5 Serg. & R. 289; Hale *v.* James, 6 Johns. Ch. 258; Russell *v.* Gee, 2 Const. (S. C.) 254; 2 N. H. 58; Wilson *v.* Oatman, 2 Blackf. 223; Tod *v.* Baylor, 4 Leigh, 498; Mahoney *v.* Young, 3 Dana, 588; Wall *v.* Hill, 7 id. 175; Woodbridge *v.* Wilkins, 3 How. (Miss.) 360.

[1] See 62, n. 1, (*c*).

of them, in computing the value of her dower, though the equity of redemption should afterwards be barred or released; for the foreclosure or release is to be deemed the period of alienation. (*c*)

As the title to dower is consummate by the husband's death, when the wife is endowed, she is in from the death of her husband; and, like any other tenant of the freehold, she takes, upon a recovery, whatever is then annexed to the freehold, whether it be so by folly, by mistake, or otherwise. The heir's possession is avoided, as not being rightly acquired, as to the widow's third part, and the rule that subjects the improvements, as well as the land in the possession of the heir, to the claim of dower, seems a natural result of the general principles of the common law, *67 which gave the * improvements to the owner of the soil. (*a*)

But an important distinction is taken on this subject, and it has been made a question, whether the widow be entitled to the advantage of the increased value of the land, arising from extrinsic or collateral circumstances, unconnected with the direct improvements of the alienee by his particular labor and expenditures, such as the enhanced value, arising from the increasing prosperity of the country, or the erection of valuable establishments in the neighborhood. The allowance would seem to be reasonable and just, inasmuch as the widow takes the risk of deterioration, arising from public misfortunes, or the acts of the party. If the land, in the intermediate period, has risen in value, she ought to receive the benefit; if it has depreciated, she sustains the loss. Ch. J. Parsons, in *Gore* v. *Brazier*, (*b*) was inclined to the opinion, that the widow ought to be allowed for the increased value arising from extrinsic causes; and the Supreme Court of Pennsylvania, in an elaborate judgment, delivered by the Chief Justice, in *Thompson* v. *Morrow*, (*c*) decided that the widow was to take no advantage of any increased rise in value, by reason of improvements of any kind *made by the purchaser;* but, throwing those out of the estimate, she was to be endowed according to the value at the time of the assignment. This doctrine is declared, by Mr. Justice Story, (*d*) to stand upon solid

(*c*) Hale *v.* James, 6 Johns. Ch. 258; Powell *v.* M. & B. Man. Co., 3 Mason, 459.
(*a*) Story, J., 3 Mason, 368. (*b*) 3 Mass. 544.
(*c*) 5 Serg. & R. 289; Shirtz *v.* Shirtz, 5 Watts, 255, s. p.
(*d*) 3 Mason, 375.

principles, and the general analogies of the law, and he adopts it. The distinction is supposed not to have been within the purview of the ancient authorities.

In New York, the very point arose, and was discussed, in *Dorchester* v. *Coventry*, (*e*) and the court adhered to the general rule, without giving it any such qualification; and they confined the widow to her dower, computed according * to *68 the value of the land at the time of the alienation, though it had risen greatly in value afterwards, exclusive of buildings erected by the alienee. The same doctrine was followed in *Shaw* v. *White*, (*a*) and the language of the statute to which these decisions alluded (*b*) was, that the dower of any lands sold by the husband should be "according to the value of the lands, exclusive of the improvements made since the sale." That statute required, in case of improvements made by the heir, or other proprietor, upon lands previously wild and unproductive, that the allotment of dower be so made as to give *those improvements* to the heir or owner. The construction of the statute, as to this question, did not arise, and was not given, in *Humphrey* v. *Phinney*; (*c*) and it may be doubted whether the statute has not received too strict a construction in the subsequent cases. The better, and the more reasonable American doctrine upon this subject, I apprehend to be, that the improved value of the land, from which the widow is to be excluded, in the assignment of her dower, as against a purchaser from her husband, is that which has arisen from the actual labor and money of the owner, and not from that which has arisen from extrinsic or general causes. (*d*) [1]

(*e*) 11 Johns. 510.

(*a*) 13 Johns. 179; Walker *v.* Schuyler, 10 Wend. 480, s. P. So, in Tod *v.* Baylor, 4 Leigh, 498, the Court of Appeals of Virginia held that, in equity as well as at law, the widow was to take for dower the lands according to the value at the time of alienation, and not at the time of the assignment of dower; and that she was not entitled to any advantage from enhancement of the value by improvements made by the alienee, or from general rise in value, or from any cause whatever. On the other hand, the Supreme Court of Ohio, in the case of Dunsett *v.* Bank of United States, 6 Ohio, 76, follows the doctrine laid down in Thompson *v.* Morrow, and Gore *v.* Brazier, and by Mr. Justice Story, in 3 Mason, 375.

(*b*) Laws of New York, sess. 29, c. 168. (*c*) 2 Johns. 484.

(*d*) See *supra*, 66, 67, and the cases there referred to, and Taylor *v.* Broderick, 1 Dana (Ky.), 348. Essay on Dower, in the American Jurist, No. 36, for January, 1838, p. 327. In the case of Powell *v.* M. & B. Man. Co., 3 Mason, 373, it

[1] See 62, n. 1, (*c*).

*69 The New York Revised Statutes (*e*) have * declared, that, if the husband *dies seised*, the widow shall recover damages for withholding her dower; and the damages shall be one third of the annual value of the mesne profits of the lands in which she shall recover dower, to be estimated from the time of the husband's death, in the suit against the heirs, and, from the time of the demand of her dower, in the suit against the alienee of the heir, or other persons, and not to exceed six years in the whole. No damages are to be estimated for the use of any permanent improvements made after the death of the husband. A more necessary provision respecting damages, as against the alienee of the husband (for on that point there is a difference between the decisions in this country), is altogether omitted. (*a*)

When the certainty of the estate belonging to the widow as dower is ascertained by assignment, the estate does not pass by assignment, but the seisin of the heir is defeated *ab initio*, and the dowress is in, in intendment of law, of the seisin of her husband; and this is the reason that neither livery nor writing is essential to the validity of an assignment *in pais*. (*b*) Every assignment of dower by the heir, or by the sheriff, on a recovery against the heir, implies a warranty, so far that the widow, on being evicted by title paramount, may recover in value a third

was suggested that in Hale *v.* James, 6 Johns. Ch. 258, the Chancellor adhered to the rule, that the value of the land at the time of alienation was to be taken and acted upon as a clear rule of the common law; and that the common-law authorities do not warrant any such doctrine. I am rather of the opinion that they do warrant the doctrine, to the extent the Chancellor meant to go, viz.: that the widow was not to be benefited by improvements *made by the alienee*. That position does not seem to be denied, and in Hale *v.* James, as well as in Humphrey *v.* Phinney, nothing else was decided, for nothing else was before the court. In the former case the Chancellor did not mean to give any opinion on the distinction between the increased value arising from the acts of the purchaser, and from collateral causes; and so he expressly declared.

(*e*) Vol. i. 742, sec. 19, 20, 21, 22, 23.

(*a*) In Tod *v.* Baylor, 4 Leigh, 498, it was held that the widow was not entitled to an account of profits, as against an alienee of the husband, except from the date of the subpœna. In Maryland, also, the widow recovers damages against the alienee of her husband, only from the time of the demand and refusal to assign. Steiger *v.* Hillen, 5 Gill & J. 121. In Woodruff *v.* Brown, 4 Harr. (N. J.) 246, it was held that *tout temps prist* might be pleaded by the heir in an action of dower, but that the plea was personal and peculiar to him, and could not be pleaded by his alienee or feoffee. They must answer in damages from the death of the husband dying seised, and seek their indemnity upon their covenants against the heir.

(*b*) Co. Litt. 85, a.

part of the two remaining third parts of the land whereof she was dowable. (*c*) In *Bedingfield's Case*, (*d*) it was held that the widow, in such a case, was to be endowed anew of other lands descended to the heir; but where the assignment was by the alienee of the husband, and she was impleaded, she was not to vouch the alienee to be newly endowed, because of the greater privity in the one case than in the other. It is likewise provided by the new statute law of New York, (*e*) that upon the acceptance of an assignment of dower by the heir, * in satisfaction of the widow's claim upon all the lands of her husband, it may be pleaded in bar of any future claim on her part for dower, even by the grantee of the husband. *70

In the English law, the wife's remedy by action for her dower is not within the ordinary statutes of limitation, for the widow has no seisin; but a fine levied by the husband, or his alienee or heir, will bar her by force of the statute of non-claims, unless she brings her action within five years after her title accrues, and her disabilities, if any, be removed. (*a*) In South Carolina, it was held, in *Ramsay* v. *Dozier*, (*b*) and again, in *Boyle* v. *Rowand*, (*c*) that time was a bar to dower, as well as to other claims. But in the English law there is no bar; and in New Hampshire, Massachusetts, and Georgia, it has been adjudged, that the writ of dower was not within the statute of limitations. (*d*) As to the account against the heir for the mesne profits, the widow is entitled to the same from the time her title accrues; and unless some

(*c*) Perkins, sec. 419; Co. Litt. 384, b; [French *v.* Peters, 33 Me. 396; Mantz *v.* Buchanan, 1 Md. Ch. 202.] The widow's remedy, on eviction by paramount title of lands assigned to her for dower, is by a new assignment of dower, and she cannot sustain an action upon the covenant of warranty to her husband, because she does not hold the whole estate. The right of action is in the heirs. St. Clair *v.* Williams, 7 Ohio, 110.

(*d*) 9 Co. 17. (*e*) New York Revised Statutes, i. 793, sec. 23.

(*a*) Davenport *v.* Wright, Dy. 224, a; Sheppard's Touch. by Preston, i. 28, 32; Park on Dower, 311.

(*b*) 1 Tread. Const. (S. C.) 112.

(*c*) 3 Des. Ch. 555. The dowress in South Carolina is now barred by a statute of limitations, after twenty years. Wilson *v.* McLenaghan, 1 McM. 35.

(*d*) Barnard *v.* Edwards, 4 N. H. 107; Parker *v.* Obear, 7 Met. 24; Wakeman *v.* Roache, Dudley, 123. In Maryland, in the case of Wells *v.* Beall, 2 Gill & J. 468, Chancellor Bland held that the statute of limitations was no bar in equity to the claim of dower, or the rent and profits thereof. [May *v.* Rumney, 1 Mann. (Mich.) 1; Tooke *v.* Hardeman, 7 Ga. 20; Chew *v.* Farmers' Bank, 9 Gill, 361; Robie *v.* Flanders, 33 N. H. 524.]

special cause be shown, courts of equity carry the account back to the death of the husband. (*e*) The New York Revised Statutes (*f*) have given a precise period of limitation, and require dower to be demanded within twenty years from the time of the death of the husband, or from the termination of the disabilities therein mentioned, one of which is imprisonment, *on a criminal charge or conviction.* (*g*)

(*e*) Oliver *v.* Richardson, 9 Ves. 222. See also Swaine *v.* Perine, 5 Johns. Ch. 482.

(*f*) Vol. i. 742, sec. 18.

(*g*) In New Jersey, an action of dower is barred by the statute of limitations after twenty years, Berrien *v.* Connover, 1 Harr. 107, and in Ohio, after twenty-one years. Tuttle *v.* Wilson, 10 Ohio, 24. If dower be not assigned to the widow during her life, the right is extinct. I know of no proceedings, said Lord Wynford, by which the fruits of dower could be recovered for her representatives. 1 Knapp, P. C. 225; [Kiddall *v.* Trimble, 1 Md. Ch. 143; Turney *v.* Smith, 14 Ill. 242; but see Harper *v.* Archer, 28 Miss. 212.] In the report of the English real property commissioners, in 1829, it was proposed that no suit for dower should be brought, unless within twenty years next after the death of the husband; and that an account of the rents and profits of the dowable land should be limited to six years next before the commencement of the suit. This rule was adopted by the statute of 3 and 4 William IV. c. 27; and it is the rule precisely in the New York Revised Statutes (see *supra*); and in vol. ii. 303, 332, 343, the writ of dower, as well as other real actions, is abolished, and the action of ejectment substituted and retained, after dismissing all the fictitious parts of it. The common-law remedy, by writ of nuisance, is retained and simplified, and that writ, with some parts of the action of waste, are the only specimens of any of the real actions known to the common law, which are retained in New York. A writ of nuisance was prosecuted to trial in New York, in 1843, in the case of Kintz *v.* McNeal, 1 Den. 438, but this antiquated proceeding was not encouraged, and the court held the parties to strict practice. The real actions are still retained in several of the United States. In Pennsylvania, the ancient real actions have been hitherto retained as part of their remedial law, though the writ of right is not known to have been actually brought, and the assize of nuisance is reluctantly retained as an existing remedy. (Brackenridge's Miscellanies, 438; Barnet *v.* Ihrie, 17 Serg. & R. 174; 1 Rawle, 44, s. c. Report of the Commissioners on the Civil Code of Pennsylvania, in January, 1835, pp. 58, 59. The commissioners recommended the substitution of the writ of nuisance for the assize of nuisance, as more simple, easy, and effectual.) The writ of right, and possessory real actions, are still in use in Maine, New Hampshire, Virginia, and Kentucky, and they were in Virginia placed under statutory limitations, as late as December, 1830. Robinson's Practice, i. 464. The writ of right is retained and regulated by the territorial law of Michigan, of February 26, 1821, and the writ of disseisin in Indiana. Revised Statutes of Indiana, 1838. The action of ejectment, with its harmless, and, as matter of history, curious and amusing English fictions, is retained in New Jersey, Delaware, Ohio, Indiana, Illinois, Maryland, North Carolina, Virginia, Kentucky, Mississippi, Tennessee, and perhaps in some other states. In Pennsylvania, South Carolina, Missouri, and New York, the fictitious part of the action is abolished by statute. In Alabama, the action of trespass is used to try title to lands. In Tennessee, a writ issues and is served by the sheriff on the tenant along with the declaration in ejectment. This is by the statute of 1801. In

*Dower may be recovered by bill in equity, as well as by *71
action at law. The jurisdiction of chancery over the claim of dower has been thoroughly examined, clearly asserted, and definitively established. It is a jurisdiction concurrent with that

Pennsylvania, the revisors of the civil code suggested that the action of ejectment might well be expanded, modified, and applied as a substitute for the principal part of the ancient real actions, and they prepared a bill for that purpose. By the bill it might be brought upon the right of possession of real estate of a corporeal nature, and upon the right of property in incorporeal hereditaments; and upon the right of property in any remainder or reversion in real estate against any other person claiming the same remainder or reversion, and by any person *in possession* of real estate to determine adverse claims thereto. Possession of land might also be recovered in action of trespass *quare clausum fregit*. In Massachusetts, the writ of right, and the possessory real actions, would appear to be in active and familiar use, in all their varied forms and technical distinctions, after having become simplified, and rendered free from every troublesome incumbrance that perplexed the ancient process and pleadings. See Professor Stearns's and Judge Jackson's Treatises on the Pleadings and Practice in Real Actions in Massachusetts, *passim*, and 2 Met. 82, 163. So late as 1834, we perceive a decision in New Hampshire, in the action of *formedon in remainder*, in the case of Frost *v.* Cloutman (7 N. H. 1), and to which the defence was a *common recovery*, levied there in 1819, in bar of an estate tail. The law of common recoveries was familiarly and learnedly discussed. Indeed, it is a singular fact, a sort of anomaly in the history of jurisprudence, that the curious inventions, and subtle, profound, but solid distinctions, which guarded and cherished the rights and remedies attached to real property in the feudal ages, should have been transported, and should for so long a time have remained rooted in soils that never felt the fabric of the feudal system; whilst, on the other hand, the English parliamentary commissioners, in their report, proposed, and parliament executed, a sweeping abolition of the whole formidable catalogue of writs of right, writs of entry, writs of assize, and all the other writs in real actions, with the single exception of writs of dower, and *quare impedit*. This we should hardly have expected in a stable and proud monarchy, heretofore acting upon the great text authority of Lord Bacon, that "it were good if men, in their innovations, would follow the example of time itself, which, indeed, innovateth greatly, but quietly, and by degrees scarce to be perceived."

By the statute of 3 and 4 William IV. c. 27, all real and mixed actions, except the writ of right of dower, and the writ of dower *unde nihil habet*, *quare impedit* and ejectment, were abolished. So, the legislature of Massachusetts, upon the recommendation of the commissioners appointed to revise their laws, have at length yielded to the current of events, the force of examples, and the innovating spirit of the age, which is sweeping rapidly before it, in England and in this country, all vestiges of the ancient jurisprudence. They have abolished all writs of right and of formedon, and all writs of entry, except the writ of entry upon disseisin, and which is regulated and reduced to its simplest form. This last writ was deemed by the commissioners more simple and convenient, and much more effectual than the ejectment, because a final judgment in a writ of entry is a bar to another action of the same kind. The old common-law remedies for private nuisances are also abolished, and the substituted remedies are the action on the case, and an enlarged equity jurisdiction given to the Supreme Judicial Court. Mass. Revised Statutes, 1836, pt. 3, tit. 3, c. 101, 106.

law; and when the legal title to dower is in controversy, it must be settled at law; but if that be admitted or settled, full and effectual relief can be granted to the widow in equity, both *72 as to the assignment of *dower and the damages. The equity jurisdiction was so well established, and in such exercise in England, that Lord Loughborough said that writs of dower had almost gone out of practice. (a) The equity jurisdiction has been equally entertained in this country, (b) though the writ of dower *unde nihil habet* is the remedy by suit most in practice. The claim of dower is considered, in New Jersey, which has a distinct and well organized equity system, as emphatically, if not exclusively, within the cognizance of the common-law courts. (c)

In addition to the legal remedies at law and in equity, the surrogates, in New York, and courts in other states, are empowered and directed, upon the application either of the widow or of the heirs or owners, to appoint three freeholders to set off by admeasurement the widow's dower. (d) This convenient and summary mode of assignment of dower, under the direction of the courts of probates, or upon petition to other competent jurisdictions in the several states, has probably, in a great degree, superseded the common-law remedy by action. When a widow is legally seised of her freehold estate as dowress, she may bequeath the crop in the ground of the land holden by her in dower. (e)

(a) Goodenough v. Goodenough, Dick. 795; Curtis v. Curtis, 2 Bro. C. C. 620; Munday v. Munday, 4 id. 295; 2 Ves. 122, s. c.; [Campbell v. Murphy, 2 Jones, Eq. 357; Shelton v. Carrol, 16 Ala. 148; Blain v. Harrison, 11 Ill. 384; Turner v. Morris, 27 Miss. 733.]

(b) Swaine v. Perine, 5 Johns. Ch. 482; Greene v. Greene, 1 Ohio, 535; Dr. Tucker, note to 2 Bl. Comm. 135, n. 19; Chase's Statutes of Ohio, ii. 1316; Grayson v. Moncure, 1 Leigh, 449; Kendall v. Honey, 5 Monroe, 284; Stevens v. Smith, 4 J. J. Marsh. 64; Badgeley v. Bruce, 4 Paige, 98; London v. London, 1 Humph. 1, 12.

(c) Harrison v. Eldridge, 2 Halst. 401, 402.

(d) New York Revised Statutes, ii. 488–492; Coates v. Cheever, 1 Cowen, 460; Hotchkiss's Code of Statute Law of Georgia, 433.

(e) Perkins, sec. 521; Dy. 316, pl. 2. The statute of Merton, 20 Hen. III., had this provision; and it has been frequently reënacted in New York, and is now included in the new revision of the statute laws. New York Revised Statutes, i. 743, sec. 25. In the revised statute codes of the several states, the law concerning dower is usually one of the titles, and it is well digested upon common-law principles, and power is given to the circuit courts, county courts, probate, surrogate, or orphans' courts, before whom suits in dower are brought, to cause dower to be assigned by commissioners. These revised codes in the western, as well as in the Atlantic states, are ably executed, and wisely conservative in their provisions, not only in this particular case,

4. Incidents to Tenancies for Life. — Having finished a review of the several estates of freehold not of inheritance, we proceed to take notice of the principal incidents which attend them, and which are necessary for their safe and convenient enjoyment, and for the better protection of the inheritance.

*(1.) Every tenant for life is entitled, of common right, *73 to take reasonable *estovers*, that is, wood from off the land, for fuel, fences, agricultural erections, and other necessary improvements. According to Sir Edward Coke, they are *estoveria ædificandi, ardendi, arandi, et claudendi.* (*a*) But, under the pretence of estovers, the tenant must not destroy the timber, nor do any other permanent injury to the inheritance; for that would expose him to the action and penalties of waste. (*b*)

(2.) He is entitled, through his lawful representatives, to the profits of the growing crops, in case the estate determines by his death, before the produce can be gathered. The profits are termed *emblements*, and are given on very obvious principles of justice and policy, as the time of the determination of the estate is uncertain. He who rightfully sows, ought to reap the profits of his labor; and the emblements are confined to the products of the earth, arising from the annual labor of the tenant. The rule extends to every case where the estate for life determines by the act of God, or by the act of the law, and not to cases where the estate is determined by the voluntary, wilful, or wrongful act of the tenant himself. (*c*) The doctrine of emblements is applicable to the products of the earth which are annual, and raised by the yearly expense and labor of the tenant. It applies to grain, garden roots, &c., but not to grass or fruits, which are the natural products of the soil, and do not essentially owe their annual existence to the cultivation of man. (*d*) The tenant, under the protection of this rule, is invited to agricultural industry, without the appre-

but under all the titles and modifications of property. None of the states have gone quite as far in their improvements or innovations as the Revised Statutes of New York of 1830.

(*a*) Co. Litt. 41, b. (*b*) Co. Litt. 73, a, b.

(*c*) Oland's Case, 5 Co. 116; Debow *v.* Titus, 5 Halst. 128; [Hawkins *v.* Skeggs, 10 Humph. 31;] [Hendrixson *v.* Cardwell, 9 Baxt. 389.]

(*d*) Evans *v.* Roberts, 5 B. & C. 829; Com. Dig. Biens. G. 1; Evans *v.* Iglehart, 6 Gill & J. 171. In England, a custom that a tenant shall have the waygoing crop, after the expiration of his term, is good, if not repugnant to his lease. Wigglesworth *v.* Dallison, Doug. 201.

hension of loss by reason of the unforeseen contingency of his death. (*e*)

(3.) Tenants for life have the power of making underleases *74 for any lesser term; and the same rights and privileges * are incidental to those under tenants which belong to the original tenants for life. If the original estate determines, by the death of the tenant for life, before the day of payment of rent from the under tenant, the personal representatives of the tenant for life are entitled to recover from the under tenant the whole, or a proportional part, of the rent in arrear. (*a*) The under tenant is likewise entitled to the emblements, and to the possession, so far as it may be necessary to preserve and gather the crop. (*b*)

(4.) In estates for life, if the estate be charged with an incumbrance, the tenant for life is bound, in equity, to keep down the interest out of the rents and profits; but he is not chargeable with the incumbrance itself, and he is not bound to extinguish it. The doctrine arises from a very reasonable rule in equity, and applies between a tenant for life, and other parties having successive interests. Its object is to make every part of the ownership of a real estate bear a ratable part of an incumbrance thereon, and to apportion the burden equitably between the parties in interest, where there is a possession. The tenant for life contributes only during the time he enjoyed the estate, and the value of his life is calculated according to the common tables. (*c*) If he pays off an incumbrance on the estate, he is, *prima facie*, entitled to that charge for his own benefit, with the qualification of having no interest during his life. (*d*) And if the incumbrancer neglects for years to collect his interest from the tenant for life, he may, notwithstanding, collect the arrears from the remainderman; (*e*) though the assets of the estate of the tenant for life would equi-

(*e*) Co. Litt. 55, b. A dowress may bequeath her emblements, otherwise they go to her personal representatives. Statute of Merton, 20 Hen. III. c. 2.

(*a*) See iii. 471. (*b*) Bevans *v.* Briscoe, 4 Harr. & J. 139.

(*c*) Lord Hardwicke, in Casborne *v.* Scarfe, 1 Atk. 606; Revel *v.* Watkinson, 1 Ves. 93; and in Amesbury *v.* Brown, ib. 480; Tracy *v.* Hereford, 2 Bro. C. C. 128; Penhyrn *v.* Hughes, 5 Ves. 99; Burges *v.* Mawbey, 1 T. & R. 167; Hunt *v.* Watkins, 1 Humph. 498; Foster *v.* Hilliard, 1 Story, 77; [Barnum *v.* Barnum, 42 Md. 251, 320; Wade *v.* Malloy, 16 Hun, 226.]

(*d*) Lord Eldon, in Earl of Buckinghamshire *v.* Hobart, 8 Swanst. 199.

(*e*) Roe *v.* Pogson, 2 Mad. 581, Am. ed.

tably be answerable to the remainderman for his indemnity, and they remain answerable for arrears of interest accrued in his lifetime. The *true principle on this subject is, that the *75 tenant for life is to keep down the annual interest, even though it should exhaust the rents and profits; and the whole estate is to bear the charge of the principal, in just proportions. The old rule was, that the life estate was to bear one third part of the entire debt, and the remainder of the estate the residue. (*a*) But the Master of the Rolls, in *White* v. *White*, (*b*) declared this to be a most absurd rule; and he held, that the interest alone arising during the life estate was the tenant's fair proportion. Lord Eldon said, that this was the rule as to mortgages, and other charges on the whole inheritance. But it is now the doctrine in the English Chancery, in respect to a charge upon renewal leases, that the tenant for life contributes in proportion to the benefit he derives from the renewed interest in the estate. The proportion that he is to contribute depends upon the special circumstances of the case; and the practice is, to have it settled on a reference to a master. (*c*) The rents and profits are to be applied in the discharge of the arrears of interest accruing during the former, as well as during an existing tenancy for life, and remaining unpaid; and this hard rule was explicitly declared by the Master of the Rolls, in *Penhyrn* v. *Hughes*. (*d*) [1] The rule applies to a tenant

(*a*) Rowell *v.* Walley, 1 Rep. in Ch. 219. (*b*) 4 Ves. 24.
(*c*) Lord Eldon, in White *v.* White, 9 Ves. 560; Allen *v.* Backhouse, 2 Ves. & B. 65.
(*d*) 5 Ves. 99.

[1] *Tenant for Life and Remainderman.* — (*a*) In Caulfield *v.* Maguire, 2 Jones & La T. 141, 160; Sharshaw *v.* Gibbs, Kay, 333, 339; 18 Jur. 330, it was said to have been unnecessary to lay down so wide a rule as that mentioned in the text. In the former case, Lord St. Leonards observed that it was as incumbent on the reversioner in fee to look after the tenant for life in possession, as it was on a tenant for life in remainder; and that a tenant for life was liable only for his own time, but that to liquidate the arrears during his own time, he must furnish all the rents, if necessary, during the whole of his life. In the second case similar language was used, and it was held that there was no duty to pay arrears of interest accrued during the life of a former tenant for life of a mortgaged estate, imposed upon the second tenant as between her and the owners of the fee subject to her life estate. [Marshall *v.* Crowther, 2 Ch. D. 199; Jesson *v.* Holt, Romilly's N. of C. 153; Kirwan *v.* Kennedy, 4 Ir. R. Eq. 499. As to the liability of the tenant for life to pay the expenses of managing the estate, see Peirce *v.* Burroughs, 58 N. H. 302; Clark *v.* Middlesworth, 82 Ind. 240; Butterbaugh's App., 98 Penn. St. 351.]

If a tenant for life pays the interest on an incumbrance where the rents and profits are insufficient for the purpose, during his lifetime, without notifying the

in dower, and by the curtesy, as well as to any other tenant for life, with this qualification, that a dowress is only bound to keep

remainderman of his intention to charge the excess on the inheritance, it has been held that his personal representatives are bound by a presumption that he intended to exonerate the inheritance, although it was not denied that he might have made himself an incumbrancer for the excess. Kensington *v.* Bouverie, 7 H. L. C. 557. [But that the presumption is of an intent to charge the inheritance unless the life estate is also benefited, see Isaac *v.* Wall, 6 Ch. D. 706. The remainderman has a corresponding right to be recouped sums paid for interest accruing during life tenancy. Howlin *v.* Sheppard, 6 Ir. R. Eq. 497.] Sums already expended on improvements are never allowed unless they are properly a charge upon the inheritance. *In re* Leigh's Estate, L. R. 6 Ch. 887. See Floyer *v.* Bankes, L. R. 8 Eq. 115. And in most respects, except where there is a statutory provision, improvements which a tenant for life may wish to make must be paid for out of his own pocket. Wms. R. P. 9th ed. 31; *infra*, 76, n. (*b*). The tenant for life must pay ordinary taxes, but a betterment is to be treated as an incumbrance on the whole estate, and he is only bound to pay interest during his life. Plympton *v.* Boston Dispensary, 106 Mass. 544; [Bailey, Petr., 13 R. I. 543.]

The proceeds of timber cut and sold for the benefit of the estate are regarded as part of the estate, and the *corpus* of the fund goes to the reversioner. Gent *v.* Harrison, H. R. V. Johnson, 517; Jodrell *v.* Jodrell, L. R. 7 Eq. 461. But compare Earl Cowley *v.* Wellesley, L. R. 1 Eq. 656; 35 Beav. 635. [See also Lowndes *v.* Norton, 6 Ch. D. 139; Stonebraker *v.* Zollickoffer, 52 Md. 154; Simpson *v.* Simpson, 3 L. R. Ir. 308.]

Other cases on the principles of apportionment between tenant for life and remainderman are Turner *v.* Newport, 2 Phillips, 14; *In re* Grabowski's Settlement, L. R. 6 Eq. 12; Cox *v.* Cox, L. R. 8 Eq. 343; Maclaren *v.* Stainton, L. R. 11 Eq. 382. *x*[1] Cases which turned more or less on the construction of the instrument creating the estate are Mosely *v.* Marshall, 22 N. Y. 200; Stilwell *v.* Doughty, 2 Bradf. 311. [See further, *In re* Barber's Settled Estates, 18 Ch. D. 624, 630 Maddy *v.* Hale, 8 Ch. D. 327.] As to the manner of estimating the proportion of a mortgage debt to be paid, see McArthur *v.* Franklin, 16 Ohio St. 193, 209; Danforth *v.* Smith, 23 Vt. 247. It should be further mentioned that the obligation of the tenant for life to keep down the interest exists only as between him and the remainderman, and not as between him and the incumbrancers. *In re* Morley, L. R. 8 Eq. 594.

(*b*) *As to waste*, see, generally, for the American doctrine, Crockett *v.* Crockett, 2 Ohio St. 180; McCullough *v.* Irvine, 13 Penn. St. 438; Neel *v.* Neel, 19 Penn. St. 323; Irwin *v.* Covode, 24 id. 162; George's Creek Co. *v.* Detmold, 1 Md. Ch. 371; Baugher *v.* Crane, 27 Md. 36. *x*[2] The right of the tenant for life does not extend beyond the proper use of the wood, &c., upon the premises themselves; for in-

x[1] The question is between that which may fairly be regarded simply as a natural increase in the value of the *corpus*, and that which may fairly be regarded as the annual income or profit of the fund. Stock dividends are generally income. Millen *v.* Guerrard, 67 Ga. 284. But *contra* when declared out of the *corpus*. Vinton's App., 99 Penn. St. 434. The natural increase in value of unproductive property while awaiting a sale belongs to the *corpus*. Outcalt *v.* Appleby, 36 N. J. Eq. 73. See further, Van Blarcom *v.* Dager, 31 N. J. Eq. 783 and note.

x[2] A tenant for life may use timber to make ordinary repairs, but not to rebuild. Miller *v.* Shields, 55 Ind. 71. May use mines already opened for same purposes

down one third part of the accruing interest, because she takes only one third part of the estate; and if she redeems the whole mortgage, she would have a claim on the estate for two thirds of the interest of the mortgage so redeemed, and the whole of the principal. (*e*)

But while tenants for life are entitled to these privileges, the law has discovered a similar solicitude for those who * have *76 an interest in the inheritance in remainder or reversion. If, therefore, the tenant for life, or for years, as the case may be, should, by neglect or wantonness, occasion any permanent waste to the substance of the estate, whether the waste be voluntary or permissive, (*a*) as by pulling down houses; suffering them to go to decay

(*e*) *Vide supra*, 46; House *v.* House, 10 Paige, 159.

(*a*) Neither Mr. Hargrave nor Mr. Park were able to find any authority declaring that the dowress was chargeable with *permissive* waste; though both of them were of opinion that she was answerable. Harg. note 877, to Co. Litt. lib. 1; Park on Dower, 357.

stance, he cannot sell or exchange. Miles *v.* Miles, 32 N. H. 147; Webster *v.* Webster, 33 N. H. 18; Phillips *v.* Allen, 7 Allen, 115, 117. A widow who has dower out of two estates cannot take wood from one to burn upon the other. Cook *v.* Cook, 11 Gray, 123. But it has been held otherwise when she had dower out of one estate of her husband, although it was divided into several lots by the commissioners, and there were several reversioners. Owen *v.* Hyde, 6 Yerg. 334; Dalton *v.* Dalton, 7 Ired. Eq. 197. Doubts have been thrown on the liability of a tenant for waste which is merely permissive; and the courts of equity have refused to interfere in such cases. Powys *v.* Blagrave, 4 De G., M. & G. 448, 458; Warren *v.* Rudall, 1 Johns. & Hem. 1; [Barnes *v.* Dowling, 44 L. T. 809. And it must appear that the waste complained of will damage the plaintiff. Doherty *v.* Allman, 3 App. Cas. 709; Jones *v.* Chappell, 20 L. R. Eq. 539.] But these doubts were thought unsound, and an action on the case was held to lie against a tenant for years for permissive waste, in Moore *v.* Townshend, 4 Vroom (33 N.J.), 284; [Newbold *v.* Brown, 44 N. J. L. 266.] A tenant for life without impeachment of waste would be restrained in England from committing equitable waste, by defacing the family mansion, felling ornamental timber, and the like. Morris *v.* Morris, 3 De G. & J. 323. See Micklethwait *v.* Micklethwait, 1 id. 504; [Bulb *v.* Yelverton, 10 L. R. Eq. 465.]

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as they were used before the tenancy began; but may not open new mines, nor use old ones in different and more burdensome ways. Lenfers *v.* Henke, 73 Ill. 405; Westmoreland Coal Co.'s App., 85 Penn. St. 344; Franklin Coal Co. *v.* McMillan, 49 Md. 549; Gaines *v.* Green Pond, &c. Co., 32 N. J. Eq. 86; 33 ib. 603; Elias *v.* Snowdon Slate Quarries Co., 4 App. Cas. 454; Elias *v.* Griffith, 8 Ch. D 521. See further, as to what amounts to waste, Tucker *v.* Linger, 21 Ch. D. 18; Saner *v.* Bilton, 7 Ch. D. 815; Manchester, &c. Co. *v.* Carr, 5 C. P. D. 507; Maunsell *v.* Hort, 11 Ir. R. Eq. 478; Bennett *v.* Danville, 56 N. H. 216; Brooks *v.* Brooks, 12 S. C. 422. In general, the statute of limitations begins to run from the time the waste is committed. Simpson *v.* Simpson, 3 L. R. Ir. 308.

from the want of ordinary care; cutting the timber unnecessarily; (*b*) opening mines; or changing one species of land into another; he becomes liable, in a suit by the person entitled to the immediate estate of inheritance, to answer in damages, as well as to have his future operations stayed. (*c*) If the land be wholly wild and uncultivated, it has been held, that the tenant may clear part of it for the purpose of cultivation; but he must leave wood and timber sufficient for the permanent use of the farm. And it is a question of fact for a jury, what extent of wood may be cut down, in such cases, without exposing the party to the charge of waste. (*d*) The American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged, and better accommodated to the circumstances of a new and growing country. In Pennsylvania, the law, as to the tenant in dower, on the subject of clearing wild lands assigned for dower, accords with the rule in New York. (*e*) In Massachusetts, the inclination of the Supreme Court seemed to be otherwise, and in favor of the strict English rule; and that was one of the reasons assigned for holding the widow not dowable of such lands. (*f*) In Virginia, it is admitted, that the law of waste is varied from that in England; and the tenant in dower, in working coal mines already opened, may penetrate into new seams, and sink new shafts, without *77 being *chargeable with waste. (*a*) So, in North Carolina, it has been held not to be waste to clear tillable land for the necessary support of the tenant's family, though the timber be

(*b*) Clearing land by the tenant, which is bad husbandry, and without pretence that it was for estovers, is waste. 7 N. H. 171. But the tenant for life is bound to keep down ordinary charges for taxes and repairs, out of the rents and profits of the estate. Cairns *v.* Chabert, 3 Edw. Ch. 312. But a tenant for life cannot lay out moneys in building or improvement on the estate, and charge it to the inheritance. The Court of Chancery will not sustain an inquiry whether the improvements were beneficial. The tenant makes them at his own hazard. Caldecott *v.* Brown, 2 Hare, 144.

(*c*) Co. Litt. 53, a, b; Butler's note, 122, to Co. Litt. lib. 3; Dane's Abr. iii. tit. Waste, *passim*; 2 Bl. Comm. 281. Alterations in a tenement become waste, as by converting two chambers into one, or pulling down a house, and rebuilding it in a different fashion, even though it be thereby more valuable. Grave's Case, Co. Litt. 53, a, n. 3; City of London *v.* Græme, Cro. Jac. 182; 2 Rol. Ab. 815, pl. 17, 18.

(*d*) Jackson *v.* Brownson, 7 Johns. 227; Hickman *v.* Irvine, 8 Dana, 123.

(*e*) Hastings *v.* Cruncleton, 3 Yeates, 261.

(*f*) Conner *v.* Shepherd, 15 Mass. 164.

(*a*) Findly *v.* Smith, 6 Munf. 134; Crouch *v.* Puryear, 1 Rand. 258.

destroyed in clearing. (*b*) And in *Ballentine* v. *Poyner*, (*c*) it was admitted, that the tenant in dower might use timber for making staves and shingles, when that was the ordinary use, and the only use to be made of such lands. She was only restricted from clearing lands for cultivation, when there was already sufficient cleared for that purpose. (*d*)

The tenants by the curtesy, and in dower, and for life or years, are answerable for waste committed by a stranger; and they take their remedy over against him; (*e*) and it is a general principle, that the tenant, without some special agreement to the contrary, is responsible to the reversioner for all injuries amounting to waste, done to the premises during his term, by whomsoever the injuries may have been committed, with the exception of the acts of God, and public enemies, and the acts of the reversioner himself. The tenant is like a common carrier, and the law in this instance is founded on the same great principles of public policy. The landlord cannot protect the property against strangers; and the tenant is on the spot, and presumed to be able to protect it. (*f*)

The ancient remedies for waste by writ of *estrepement*, and writ of waste at common law, are essentially obsolete; and the modern practice in this country, as well as in England, is to resort to the prompt and efficacious remedy by an injunction bill, to stop the commission of waste, when the injury would be irreparable; or by * a special action on the case in the *78 nature of waste, to recover damages. (*a*) The modern

(*b*) Parkins *v.* Coxe, 2 Hayw. 339. In Tennessee, also, the law concerning waste is construed liberally in favor of the widow. She may cut down timber for necessary uses, provided the estate be not injured, and enough be left for permanent use. Owen *v.* Hyde, 6 Yerg. 334.

(*c*) 2 Hayw. 110.

(*d*) In Loomis *v.* Wilbur, 5 Mason, 13, it was adjudged not to be waste in a tenant for life, to cut down timber trees, in order to make necessary repairs, and selling them to procure boards for the purpose, if the mode be economical, and for the benefit of the estate.

(*e*) Co. Litt. 54, a; 2 Inst. 145, 303; Cook *v.* Ch. T. Co., 1 Den. 91.

(*f*) White *v.* Wagner, 4 Harr. & J. 373. In Ohio, every tenant seised of lands for life, or having the care of lands, either as guardian or executor, or tenant by curtesy, or in dower, or for life, or in right of his wife, and refusing or neglecting to pay the tax charged thereon, forfeits his estate therein, to the person next entitled in reversion or remainder. Chase's Statutes of Ohio, ii. 1368, 1369; M'Millan *v.* Robbins, 5 Ohio, 30.

(*a*) [Dickinson *v.* Mayor, &c., 48 Md. 583.] In the case of The Governors of Harrow

remedies are much more convenient, simple, and prompt, and a judicious substitute for the dilatory proceedings and formidable apparatus of the ancient law.

At common law, no prohibition against waste lay against the lessee for life or years, deriving his interest from the act of the party. The remedy was confined to those tenants who derived their interest from the act of the law; but the timber cut was, at common law, the property of the owner of the inheritance; and the words in the lease, *without impeachment of waste*, had the effect of transferring to the lessee the property of the timber. (*b*) The modern remedy in chancery, by injunction, is broader than at law; and equity will interpose in many cases, and stay waste, where there is no remedy at law. If there was an intermediate estate for life, between the lessee for life and the remainderman or reversioner in fee, the action of waste would not lie at law; for it lay on behalf of him who had the next immediate estate of inheritance. (*c*) Chancery will interpose in that case; and also where the tenant affects the inheritance in an unreasonable and unconscientious manner, even though the lease be granted without impeachment of waste. (*d*) The chancery remedy is

School *v.* Alderton, 2 Bos. & P. 86, we have the ancient action of waste, on the statute of Gloucester, in which the plaintiff is entitled to recover the place wasted, and treble damages. In Pennsylvania and Delaware, the ancient writ of *estrepement*, to prevent the commission of waste, is in use, and it is regulated and improved in the bill prepared by the commissioners on the revision of the civil code of Pennsylvania in 1835; and it is also applied to prevent trespasses upon "unseated lands." In Virginia, the action of waste at law is never brought. The remedy is exclusively in chancery. 1 Robinson's Practice, 560. In Delaware, the action of waste is in use. 3 Harr. 9.

(*b*) At common law a tenant for life, *without impeachment of waste*, had much of the character of a tenant in fee, except as to the duration of the estate. He might cut down trees and open mines, and take the produce for his own benefit. Lewis Bowles's Case, 11 Co. 79, a, 82, b; Co. Litt. 220, a. But equity gives a more limited construction to the clause, and allows to the tenant for life those powers only which a prudent tenant in fee would exercise. He cannot pull down or dilapidate houses, or destroy pleasure grounds, or prostrate trees planted for ornament or shelter. Vane *v.* Lord Barnard, 2 Vern. 739; 1 Salk. 161; Rolt *v.* Lord Somerville, 2 Eq. Cas. Abr. tit. Waste, pl. 8; Packington *v.* Packington, 3 Atk. 215. But such a clause in leases is not one that is likely to be palatable to lessors, and is not in use in this country.

Timber cut by a stranger belongs to the reversioner, and not to the tenant; and if carried away, the reversioner has a constructive possession, sufficient to maintain trespass *de bonis asportatis* against the stranger. Bulkley *v.* Dolbeare, 7 Conn. 232. If cut by the tenant unnecessarily, he acquires no title to the timber cut, nor can he convey any to a purchaser. Mooers *v.* Wait, 3 Wend. 104.

(*c*) Co. Litt. 53, b, 54, a.

(*d*) Perrot *v.* Perrot, 3 Atk. 94; Aston *v.* Aston, 1 Ves. 264; Vane *v.* Barnard,

limited to cases in which *the title is clear and undis- *79
puted; (a) and the remedy by an action on the case in the nature of waste has been held (b) not to lie for permissive waste. If this last doctrine be well founded (and I think it may very reasonably be doubted), (c) then recourse must be had, in certain cases, as where the premises are negligently suffered to be dilapidated, to the old and sure remedy of a writ of waste; and which, so far as it is founded either upon the common law, or upon the statute of Gloucester, (d) has been generally received as law in this country, and is applicable to all kinds of tenants for life and years. (e) It is frequently said by Lord Coke, in his Commentaries, (f) and it was so declared by the K. B., in the *Countess of Shrewsbury's Case*, (g) that waste would not lie at common law, against the lessee for life or years; for the lessor might have restrained him by covenant or condition. But Mr. Reeves, who was thoroughly read in the ancient English law, insists that the common *law provided a remedy against waste by all *80
tenants for life and for years, and that the statute of Gloucester only made the remedy more specific and certain. (a)

2 Vern. 738; Lord Thurlow, in Tracy *v.* Hereford, 2 Bro. C. C. 138; Kane *v.* Vanderburgh, 1 Johns. Ch. 11; [Briggs *v.* Oxford, 16 Jur. 53.] The New York Revised Statutes, i. 750, sec. 8, have incorporated the doctrine of these chancery decisions, so far as to give to the person seised in remainder or reversion an action of waste for an injury to the inheritance, notwithstanding any intervening estate for life or years. The statute remedy was first introduced, and smothered, amidst the multiplied temporary provisions of the Supply Bill, in 1811! and I presume it was intended to meet the difficulty of some special case. Laws of New York, sess. 34, c. 246, sec. 47. The recovery, in such a case, must be without prejudice to the intervening estate for life or years; and the courts will still have to supply, by construction, the want of specific provision in the statute as to the disposition of the place wasted, and the damages. In Massachusetts, by statute, the person having the next intermediate estate of freehold may also bring an action of waste against a dowress. Jackson on Pleadings in Real Actions, 329.

(a) Pillsworth *v.* Hopton, 6 Ves. 51; Storm *v.* Mann, 4 Johns. Ch. 21.

(b) Gibson *v.* Wells, 4 Bos. & P. 290; Herne *v.* Bembow, 4 Taunt. 764. [See Powys *v.* Blagrave, 4 De G., M. & G. 447.]

(c) See the just and able criticism by counsel on those decisions, in 4 Harr. & J. 378, 379, 388, 389, and the *dictum* of Johnson, J., ib. 390.

(d) 6 Edw. I. c. 5.

(e) An action of waste will not lie against the tenant by elegit. Co. Litt. 54, a; Scott *v.* Lenox, 2 Brock. 57.

(f) 2 Inst. 299. (g) 5 Co. 13.

(a) Reeves's History of the English Law, ii. 73, 184. By the common law, says Lord Coke, 2 Inst. 300, the punishment for waste against the guardian was the forfeiture of his trust, and damages to the value of the waste. So the tenant in dower

The provision in the statute of Gloucester, giving, by way of penalty, the forfeiture of the place wasted, and treble damages, was reënacted in New York, New Jersey, and Virginia, (*b*) and it is the acknowledged rule of recovery, in some of the other *81 states, in the action of waste. (*c*) It may be considered * as

yielded the like damages, and had a keeper set over her, to guard against future waste.

(*b*) Laws of New York, 1787, sess. 10, c. 6; Act of Virginia, 1792, c. 139; Act of New Jersey, 1795; Elmer's Digest, 593.

(*c*) Cameron & Norw. (N. C.) 26; Ch. J. Parsons, in 4 Mass. 563; Johnson, J., in 4 Harr. & J. 391. In Ohio, the tenant in dower, who wantonly commits or suffers waste, forfeits the place wasted in an action of waste; but the statute is silent as to the treble damages. Chase's Statutes of Ohio, ii. 1316. In Pennsylvania, the provisions in the English statutes were always followed; but the commissioners on the revision of the civil code reported a new provision in the case of *permissive* waste, by directing the tenant to repair, and, in default, the usual recovery follows of the place wasted and treble damages. Mr. Dane, in his General Abridgment and Digest of American Law, iii. c. 78, art. 11, sec. 2, art. 13, sec. 3, 4, 5, art. 14, sec. 2, says, that the statute of Gloucester was adopted in Massachusetts, as part of their common law, as to the remedial part only, but not as to the forfeiture of the place wasted, and treble damages. The statute of 1783 gave the forfeiture of the place wasted, and single damages, against the tenant in dower. On the other hand, Judge Jackson, in his Treatise on the Pleadings and Practice in Real Actions, 340, follows the opinion of Ch. J. Parsons, and considers the common law of Massachusetts to be, that the plaintiff will generally, in the action of waste, recover the place wasted, and treble damages. The weight of authority is on that side; but the Mass. Revised Statutes, of 1836, have settled the question, by declaring that the forfeiture for waste, by a tenant in dower, shall be the place wasted, *and the amount of damages done to the premises*, to be recovered in an action of waste. This is also the law of Michigan. And, while on the subject, I take this occasion to say, that I think it must somewhat startle and surprise the learned sergeants at Westminster Hall, if they should perchance look into the above treatise of Judge Jackson, or into the work of Professor Stearns on the Law and Practice of Real Actions, to find American lawyers much more accurate and familiar, than, judging from some of the late reports, they themselves appear to be, with the learning of the Year Books, Fitzherbert, Rastell, and Coke, on the doctrines and pleadings in real actions. Until the late work of Mr Roscoe, on the Law of Actions relating to Real Property, and which was subsequent to that of Professor Stearns, and contains great legal learning, there was no modern work in England on real actions, to be compared with those I have mentioned. Those abstruse subjects are digested and handled by Judge Jackson with a research, judgment, precision, and perspicuity, that reflect lustre on the profession in this country. The Supreme Court of Massachusetts decided, in Padelford *v.* Padelford (7 Pick. 152), the question of the forfeiture for waste on estates in dower, in accordance with the opinion of Mr. Dane. But afterwards, in Sackett *v.* Sackett (8 Pick. 309), the question was much more elaborately discussed and considered; and the conclusion was, that the rule prescribed by the statute of Gloucester was brought over from England by the colonists, when they first emigrated, as part of the common law.

The statute of Gloucester is not law in the State of Maine, and an action of waste cannot be maintained in that state against a tenant in dower, but it is suggested that

imported by our ancestors, with the whole body of the common and statute law then existing, and applicable to our local circumstances. As far as the provisions of that statute are received as law in this country, the recovery in the action of waste, for waste done or permitted, is the place wasted, and treble damages; but the writ of waste has gone out of use, and a special action on the case, in the nature of waste, is the substitute; and this latter action, which has superseded the common-law remedy, relieves the tenant from the penal consequences of waste under the statute of Gloucester. The plaintiff, in this action upon the case, recovers no more than the actual damages which the premises have sustained. (*a*)

Under the head of permissive waste, the tenant is answerable, if the house or other buildings on the premises be destroyed by fire through his carelessness or negligence; and he must rebuild, in a convenient time, at his own expense. (*b*) The statute of 6 Anne, c. 31, guarded the tenant * from the consequences * 82 of accidental misfortune of that kind, by declaring, that no suit should be brought against *any person* in whose house or chamber any fire should *accidentally* begin, nor any recompense be made by such person for any damage suffered or occasioned thereby. Until this statute, tenants by the curtesy and in dower were responsible, at common law, for accidental fire; and tenants for life and years, created by the act of the parties, were responsible, also, under the statute of Gloucester, as for permissive

an action on the case, in the nature of waste, may be maintained by the reversioner, against a tenant in dower, for actual waste. Smith *v.* Follansbee, 13 Me. 273.

(*a*) Parker, J., in Linton *v.* Wilson, Kerr (N. B.), 239, 240; [Williams *v.* Lanier, Busbee, 30; Parker *v.* Chambliss, 12 Ga. 235.] By the New York Revised Statutes, ii. 334–338, 343, the writ of waste, as a real action, is essentially abolished; but an action of waste is substituted, in which the first process by summons is given; and the judgment to be rendered is, that the plaintiff recover the place wasted and treble damages. If the action be brought by a joint tenant, or tenant in common, against his co-tenant; the plaintiff, if he recover, may, at his election, take judgment for the treble damages, or have partition of the premises, with a deduction of the damages from the share of the defendant. In Rhode Island and Ohio, the action of waste is still in use, for the recovery of the freehold wasted. Loomis *v.* Wilbur, 5 Mason, 13; Statutes of Ohio, 1831, 252. This is, probably, the general law in this country. But as the statute of 3 and 4 Wm. IV. c. 27, abolished the writ of waste, it is now considered in England that the place wasted cannot be recovered.

(*b*) Lord Coke says, that burning the house by *negligence or mischance* is waste; and Lord Hardwicke speaks generally, that *the destruction of the house by fire is waste*, and the tenant must rebuild. Co. Litt. 53, a; 1 Ves. 462.

waste. (*a*) There does not appear to have been any question raised, and judicially decided in this country, respecting the tenant's responsibility for accidental fires, as coming under the head of this species of waste. I am not aware that the statute of Anne has, except in one instance, been formally adopted in any of the states. (*b*) It was intimated, upon the argument in the case of *White* v. *Wagner*, (*c*) that the question had not been decided; and conflicting suggestions were made by counsel. Perhaps the universal silence in our courts upon the subject of any such responsibility of the tenant for accidental fires, is presumptive evidence that the doctrine of permissive waste has never been introduced, and carried to that extent, in the common-law jurisprudence of the United States. (*d*)

Estates for life were, by the common law, liable to forfeiture, not only for waste, but by alienation in fee. Such an alienation, according to the law of feuds, amounted to a renunciation of the feudal relation, and worked a forfeiture of the vassal's estate to the person entitled to the inheritance in reversion or remainder. (*e*) Alienation by feoffment, with livery of seisin, or by matter of record, as by fine or recovery, of a greater estate than the * 83 tenant for * life was entitled to, by devesting the seisin, and turning the estate of the rightful owner into a right of entry, operated as a forfeiture of the life estate, unless the person in remainder or reversion was a party to the assurance. (*a*) But an

(*a*) Harg. note 377, to Co. Litt. lib. 1. A tenant from year to year is not liable for permissive waste, nor for the wear and tear of the premises. Torriano *v.* Young, 6 Carr. & P. 8.

(*b*) The statute was adopted in New Jersey, in 1795. Elmer's Digest, 593.

(*c*) 4 Harr. & J. 381–385.

(*d*) In covenants on the part of the tenant to pay rent, he is bound to pay, though the premises be accidentally destroyed by fire. See *supra*, iii. 468. A tenant from year to year, according to the case of Izon *v.* Gorton, 5 Bing. N. C. 501, is liable for use and occupation, though the premises be destroyed by fire.

A valuable treatise on the Law of Dilapidations and Nuisances, by David Gibbons, Esq., was published in London, 1838, in which waste of every description by tenants for life and for years; by mortgagor and mortgagee; by joint tenants and tenants in common; and in which dilapidations of party walls, fences, highways, bridges, and sewers, are treated at large with learning and accuracy.

(*e*) Nihil de jure facere potest quis quod vertat ad exhæredationem domini sui; si super hoc convictus fuerit fœdum de jure amittet. Glanville, lib. 9, c. 1; Litt. sec. 415; 2 Bl. Comm. 274.

(*a*) Co. Litt. 251, b, 252, a, 356, a; 2 Inst. 309; Statute of Gloucester, 6 Edw. I. c. 7; Preston on Abstracts of Title, i. 352–356. In Sir William Pelham's Case, 1 Co. 14, b, it was adjudged, that if a tenant for life conveyed in fee, by bargain and sale,

alienation for the life of the tenant himself did not work any wrong; and, therefore, says Lord Coke, (*b*) it was not within the statute of Gloucester. So, a mere grant or release by the tenant for life, passed, at common law, only what he might lawfully grant. In Massachusetts, Connecticut, New York, Pennsylvania, and Kentucky, this feudal notion of forfeiture is expressly renounced, and the doctrine placed upon just and reasonable grounds. Any conveyance by a tenant for life, or years, of a greater estate than he possessed, or could lawfully convey, passes *only the title and estate which the tenant could *84 lawfully grant. (*a*) It is, therefore, an innocent conveyance, whatever the form of the conveyance may be, and produces no forfeiture of the particular estate. It does not, like a feoffment with livery at common law, *ransack the whole estate*, and extinguish every right and power connected with it.

The same conclusion must follow from the general provision in the statute of Virginia, of December, 1783, and from the forms of conveyance in use in other states. A conveyance in fee by a tenant for life, by bargain and sale, or by lease and release, does not work a discontinuance. Conveyances under the Statute of Uses are innocent conveyances, since they operate only to the extent of the grantor's right, and occasion no forfeiture; though, if a general warranty be annexed to these conveyances, it would,

and then suffered a common recovery, he forfeited his life estate. But in Smith *v.* Clyfford, 1 T. R. 738, it was held that the estate of a tenant for life was not forfeited by suffering a recovery. Mr. Preston thinks the elder case the better decision and authority (1 Preston on Convey. 202); but Mr. Ram, in his Outline of the Law of Tenure and Tenancy, 125–140, has discussed this point, and examined those authorities, with much ability; and he holds the later decision to be sound, on the ground that the recovery, being absolutely void, was harmless. We, in this country, have very little concern with such questions; but this instance strikingly illustrates the matchless character of the English jurisprudence for stability, and the spirit which sustains it. Here were two cases, at the distance of two centuries apart, on an abstruse and technical point of hard law; and the attention of two learned lawyers is immediately attracted by the apparent contrariety between them. The one justifies the later case, by showing that it went on new ground, furnished by the statute of 14 Eliz. subsequent to the first case; whereas, the other, not being able to reconcile the cases on principle, condemns the later decision with unceremonious and blunt severity.

(*b*) 2 Inst. 309.

(*a*) New York Revised Statutes, i. 739, sec. 143, 145; Massachusetts Revised Statutes, 1836, pt. 2, c. 59, sec. 6; M'Kee *v.* Prout, 3 Dallas, 486; 11 Conn. 557; 1 B. Monr. 94; [Quimby *v.* Dill, 40 Me. 528;] [Griffin *v.* Fellows, 81* Penn. St. 114.]

at common law, work a discontinuance, when the warranty descends upon him who has the right to the lands. (*b*) We have never adopted, in this country, the common-law conveyance by feoffment and livery, and we rarely use that by fine, or common recovery, or any other than the conveyance by lease and release, or, more commonly, by deed of bargain and sale. In New Jersey, by an act in 1798, alienations by the husband of the wife's lands or of his curtesy, or by a dowress, having an estate in dower, or other estate for life, and whether made with or without warranty, do not produce any prejudice to the persons entitled to the inheritance, but the dowress forfeits her particular estate. If, however, there be, in any state, a forfeiture of the life estate by the act of the tenant for life, the party entitled to enter by reason of the forfeiture, is not bound to enter, and may wait until the natural termination of the life estate. (*c*)

(*b*) Co. Litt. 329, a; Gilbert on Tenures, tit. Discontinuance, 112.

(*c*) Elmer's Dig. 77; Doe *v.* Danvers, 7 East, 299; Wells *v.* Prince, 9 Mass. 508; Jackson *v.* Mancius, 2 Wendell, 357; [Moore *v.* Luce, 29 Penn. St. 260.] By statute, in Kentucky, in 1798, no conveyance by the husband of the wife's estate works a discontinuance thereof; nor does any alienation pass a greater estate than might lawfully be conveyed, or bar the residue of the estate, except that, if the alienation be with warranty, the heirs will be barred to the value of the heritage descended. 8 Dana, 291, 292.

LECTURE LVI.

OF ESTATES FOR YEARS, AT WILL AND AT SUFFERANCE.

1. Of Estates for Years. — A lease for years is a contract for the possession and profits of land for a determinate period, with the recompense of rent; and it is deemed an estate for years, though the number of years should exceed the ordinary limit of human life. An estate for life is a higher and greater estate than a lease for years, notwithstanding the lease, according to Sir Edward Coke, (*a*) should be for a thousand years or more; and if the lease be made for a less time than a single year, the lessee is still ranked among tenants for years. (*b*)

In the earlier periods of English history, leases for years were held by a very precarious tenure. The possession of the lessee was held to be the possession of the owner of the freehold, and the term was liable to be defeated at the pleasure of the tenant of the freehold, by his suffering a common recovery. (*c*) In the reign of Henry VI., it would seem that the law gave to the lessee, who was unduly evicted, the right to recover, not only damages for the loss of the possession, but the possession itself. (*d*) But the interest of the lessee was still insecure, until the statute of 21 * Hen. VIII. c. 15, removed the doubts arising from the * 86 conflicting authorities, and enabled the lessee for years to falsify a recovery suffered to his prejudice. (*a*) A term was now a certain and permanent interest, and long terms became common, when they could be purchased and held in safety. They were converted to the purpose of raising portions for children, in family settlements, and by way of mortgage. (*b*)

(*a*) Co. Litt. 46, a. See *supra*, ii. 342. (*b*) Litt. sec. 67.

(*c*) Co. Litt. 46, a; Lord Parker, in Theobalds *v.* Duffoy, 9 Mod. 102.

(*d*) F. N. B. 198, cites 19 Hen. VI.

(*a*) See a list of the authorities, *pro* and *con*, taken principally from the Year Books, cited in the margin to Co. Litt. 46, a.

(*b*) F. N. B. 221; 2 Bl. Comm. 142; Reeves's History of the English Law, iv. 232, 233.

It was said, in *The Duke of Norfolk's Case*, (*c*) that there was nothing in the books before the reign of Elizabeth, respecting terms attendant upon the inheritance; but that in the latter part of her reign, mortgages for long terms of years came into use; and then it was deemed, in chancery, advisable to keep the term outstanding, to wait upon and protect the inheritance. A long lease, in modern times, has been considered a muniment of title, and equivalent, in some respects, to an estate in fee. No man, said Lord Mansfield, held a lease for 2000 years as a lease, but as a term to attend the inheritance; and half the titles in the kingdom were so. (*d*) Long terms, as for one hundred, or five hundred, or a thousand years, created by way of trust to secure jointures, and raise portions, or money on mortgage for family purposes, and made attendant upon the inheritance, first came into extensive discussion, in the case of *Freeman* v. *Barns*. (*e*) They now occupy a large space in the English law; and the practice of keeping outstanding terms on foot, to attend and protect the inheritance, after the performance of the trusts for which they were raised, renders the learning on this subject extremely interesting to conveyancers, and to the profession at large in the country where that practice prevails. This
* 87 learning is, * fortunately, not of much use or application in the United States; but a cursory view of its general principles seems due to the cause of legal science, and it will at least excite and gratify the curiosity of the American student.

(1.) *History of Attendant Terms.* — The advantage derived from *attendant terms* is the security which they afford to purchasers and mortgagees. If the *bona fide* purchaser or mortgagee should happen to take a defective conveyance or mortgage, by which he acquires a mere equitable title, he may, by taking an assignment of an outstanding term to a trustee for himself, cure the defect, so far as to entitle himself to the legal estate during the term, in preference to any creditor, of whose incumbrance he had not notice, at or before the time of completing his contract for the purchase or mortgage. He may use the term to protect his possessions, or to recover it when lost. This protection extends generally as against all estates and incumbrances created intermediately between the raising of the term and the time of the pur-

(*c*) 8 Ch. Cas. 24. (*d*) Denn v. Barnard, Cowp. 597.
(*e*) 1 Vent. 55, 80; 1 Lev. 270, s. c.

chase or mortgage; and the outstanding term, so assigned to a trustee for the purchaser or mortgagee, will prevail over the intermediate legal title to the inheritance. In the case of *Willoughby* v. *Willoughby*, (*a*) Lord Hardwicke took a full view of the doctrine; and he may be considered as having established the principle of applying old outstanding terms to the protection of purchasers and incumbrancers. Mr. Butler considered that case as the Magna Charta of this branch of the law. It was observed, that a term for years attendant upon the inheritance was the creature of a court of equity, and invented to protect real property, and keep it in the right channel; and a distinction was made between these *attendant terms* and *terms in gross*, though, in the consideration of the common law, they are the same. At law, every term is a term in gross. It is a term in active operation, without having the purpose of its creation fulfilled. Such terms are considered as separate from the inheritance, and a distinct and different species * of property. The reversioner or remainderman has no interest in them other than a right to redeem, on fulfilling the purpose of their creation. *88

When the legal ownership of the inheritance and the term meet in the same person, a legal coalition occurs; and, at law, the term, which before was personal property, falls into the inheritance, and ceases to exist. But in equity, another kind of ownership takes place, being an equitable or beneficial ownership, as distinguished from the mere legal title. Where that ownership of the term and the inheritance meet in the same person, undivided by any intervening beneficial interest in another, an equitable union exists, and the term, which before was personal property, becomes annexed to the inheritance, and attendant upon it, as part of the same estate, unless the owner of the property had expressed a contrary intention, and which would prevent the union of the term and the inheritance. The relation between the ownership of such a term and the inheritance forms their union in equity, and gives the term the capacity of being considered as attendant upon the inheritance, where no trust is declared for that purpose. But, though equity considers the trust of the term as annexed to the inheritance, yet the *legal* estate of the term is always separate from it, and existing in a trustee, otherwise it would be merged.

(*a*) 1 T. R. 763; 1 Coll. Jurid. 337, s. c.

It is this existence of the legal estate that enables a court of equity to protect an equitable owner of the inheritance against mesne conveyances, which would carry the fee at common law, and also to protect the person who is both legal and equitable owner of the inheritance, against such mesne incumbrances, with which he ought not in conscience to be affected. It was accordingly decided by Lord Hardwicke, that if a subsequent purchaser or mortgagee had notice of a former purchase or incumbrance, he could not avail himself of an assignment of an old outstanding term prior to both, in order to gain a preference; but that without such notice he could protect himself under the old
*89 term. (a) *The same doctrine received the sanction of Lord Eldon, in *Maundrell* v. *Maundrell;* (a) and he observed, that if a term be created for a particular purpose, and that purpose has been satisfied, if the instrument does not provide, on the happening of that event, for the *cesser* of the term, the beneficial interest in it becomes a creature of equity, to be disposed of and moulded according to the equitable interests of all persons having claims upon the inheritance. When the purposes of the trust are satisfied, the ownership of the term belongs, in equity, to the owner of the inheritance, and will attend the inheritance, whether declared by the original conveyance to attend it or not. The trustee will hold the term for equitable incumbrancers, according to priority; and it is a general rule, that in all cases where the term and the freehold would, if legal estates, merge by being vested in the same person, the term will, in equity, be construed to be attendant on the inheritance unless there be evidence of an intention to sever them. (b)

These attendant terms will not be permitted to deprive creditors of any benefit they would have of the term for payment of their debts; nor will they protect the inheritance in fee from debts due from the vendor, by specialty, to the crown. (c) They protect the purchaser against an act of bankruptcy in the vendor, if the purchaser had not notice of it; and equity denies permission to the assignees of the bankrupt to call, to the prejudice of

(a) See the strong and lucid opinion of Mr. Fearne on the subject of these attendant terms in 2 Coll. Jurid. [297, wrongly paged, for 267.]

(a) 10 Ves. 246. (b) Capel v. Girdler, 9 Ves. 509.

(c) The King v. Smith, Sugden's Treatise of Vendors and Purchasers, app. No. xviii.; The King v. St. John, 2 Price, 317.

the purchaser, for an assignment of a term standing out in trustees. (*d*) They likewise protect against a claim of dower, if the purchase or mortgage was made previous to the right of dower attaching, and the assignment of the term be actually made before the husband's death. (*e*)

*The purchaser or mortgagee may call for the assignment *90 of all terms conferring a title to the legal estate, and of which he can avail himself in an action of ejectment; and that includes every term which is not barred, or merged, or extinguished, by a proviso or *cesser*, or presumed to be surrendered. The question whether the term be validly subsisting as an outstanding estate, has led, in the English courts, to the most protracted and vexatious discussions; and it may become interesting to the American lawyer, standing on his "vantage ground," and happily exempted from the control of those subtle and perplexing modifications of property, to trace the progress of the discussions, and witness the ability and searching inquiry which they have displayed. He will find new occasion to cherish and admire the convenience and simplicity of our own systems, which on this subject afford better security to title, and greater certainty to law.

A proviso or *cesser* is usually annexed to long terms, raised by mortgage, marriage settlement, or annuity, whereby the term is declared to be determinable on the happening of a certain event; and until the event provided for in the declaration of *cesser* has occurred, the term continues. And if there be no such proviso, it will continue until expressly merged, or surrendered, even though the special purpose for which it was created be answered. But the doctrine of a presumed surrender of a term is that which has occupied the most intense share of professional attention, and given rise to a series of judicial decisions, distinguished for a strong sense of equity, as well as for the spirit and talent with which they handle this abstruse head of the law.

According to the old rule of practice, if the term had been once assigned to attend the inheritance, there could be no presumption of a surrender, and it would be treated as a subsisting term; for, a direct trust being annexed to the term, it followed the inheritance through all its channels and descents from ancestor to heir. But

(*d*) Wilkes *v.* Bodington, 2 Vern. 599.
(*e*) Wynn *v.* Williams, 5 Ves. 130.

if the term was once satisfied, and had not been assigned, it was subject to be barred by the operation of the statute of lim-
* 91 itations. * So, if it had been assigned, and lain dormant for forty, fifty, or sixty years, without any notice being taken of it, in the changes which the title had undergone, a surrender might be presumed. The current of the decisions at law has, for some time, been setting strongly in favor of a presumed surrender of the term, when set up as a defence in ejectment, provided there be circumstances to induce the presumption. Such circumstances exist, if the term had been passed over in silence, on a change of property, and the parties had not taken an actual assignment of the term, or a declaration from the trustee, when they had the means of knowing that the term existed. A declaration, however, by the trustee, or an actual assignment, or the fact that the term has not been satisfied, will rebut the presumption of a surrender. Courts of law do now take notice of trusts of attendant terms, and have departed from the ancient rigid rule, of considering every trust term to be a term in gross. The two latest cases at law on the subject are those of *Doe* v. *Wright* and *Doe* v. *Hilder*. (*a*) In the first of those cases, a term for one thousand years was created by deed, and, eighteen years thereafter, it was assigned for the purpose of securing an annuity, and then to attend the inheritance. The estate remained undisturbed in the hands of the owner of the inheritance and his devisee, for seventy-eight years, without any material notice having been taken of the term; and it was held that a surrender of the term was to be presumed, in favor of the owner of the inheritance. In the other case, a term for years, created in 1762, by the owner of the fee, was assigned to a trustee, in 1779, to attend the inheritance; and, in 1814, the owner of the inheritance executed a marriage settlement. In 1816, he conveyed his life interest, and his reversion in the estate, under the settlement, to a purchaser, as a security for a debt; but no assignment of the term, on delivery of the deeds relating to it, took place; and, in 1819, an actual assignment of the
* 92 term was * made by the administrator of the trustee, to a new trustee, for the purchaser in 1816. It was decided, that a surrender was here to be presumed prior to 1819, and that the term could not be set up, to protect the purchaser against a prior incumbrancer. The presumption of a surrender was deemed

(*a*) 2 B. & Ald. 710, 783.

necessary, to prevent the more unfavorable inference, either of want of integrity in the purchaser in suffering the attendant term to pass neglected, or of want of care and caution on the part of the professional men engaged in the transactions.

This last decision threw the English conveyancers into consternation; and it was very much condemned, as shaking the landmarks of real property, and rendering insecure the title of every purchaser, by destroying all reliance upon attendant terms. (*a*) Lord Eldon was strongly opposed to the modern facility, in courts of law, of sustaining the presumption of the surrender of a term. (*b*) But the Vice-Chancellor, Sir John Leach, in *Emery* v. *Grocock*, (*c*) supports the doctrine of the K. B. in clear and decided language; and this would seem to be the most authoritative conclusion from the review of the cases on the subject. (*d*)

*As the owner of the fee is entitled to all the benefits *93 which he can make of a term attendant upon the inheritance during its continuance in trust, the equitable interest in the term will devolve in the same channel, and be governed by the same rules as the inheritance. The tenant in whose name the term for years stands, is but a trustee for the owner of the inheritance, and he cannot obstruct him in his acts of ownership. The term becomes consolidated with the inheritance, and follows it in its descent or alienation. On the death of the ancestor, it vests, technically, in his personal representatives; but in equity, it goes to the heir, and is considered as part of the inheritance, notwithstanding it formally goes in a course of administration, and not in a course of descent. Being part of the inheritance, it cannot

(*a*) See Sir Edward B. Sugden's Letters to Charles Butler, Esq., on the doctrine of presuming a surrender of terms assigned to attend the inheritance.

(*b*) The cases of Townsend *v.* Bishop of Norwich, Hays *v.* Bailey, and Aspinal *v.* Kempson, are referred to, in the appendix to the sixth edition of Sugden's Essays on Vendors and Purchasers, for Lord Eldon's continued marks of disapprobation of the recent doctrine.

(*c*) 6 Madd. 54.

(*d*) The leading cases on the question have been collected, and the doctrine of attendant terms clearly and neatly condensed, by Mr. Butler, in Co. Litt. 290, b, note, 249, sec. 13; but the whole subject is much more fully examined by Mr. Coventry, in his voluminous notes to 2 Powell on Mortgages, 477–512.

The English real property commissioners, in their second common-law report, in 1830, proposed, as an improvement of the doctrine of outstanding terms, that the plaintiff be not defeated in his recovery by proof of the existence of a term, unless it be shown to be held adversely to him, or unless the defendant, with his plea, give notice of the existence of the term, and of his intention to set it up.

be severed from it or made to pass by a will, not executed with the solemnities requisite to pass real estate. (*a*)

In this country, we have instances of long terms of near one thousand years; but they are treated altogether as personal estate, and go, in a course of administration, as chattel interests, without any suggestion of their being of the character of attendant terms. (*b*) Our registry acts, applicable to mortgages and conveyances, determine the rights and title of *bona fide* purchasers and mortgagees, by the date and priority of the record; and outstanding terms can have no operation when coming in collision with a registered deed. We appear to be fortunately relieved from the necessity of introducing the intricate machinery of attendant terms, which have been devised in England with so much labor and skill, to throw protection over estates of inheritance. Titles are more wisely guarded, by clear and certain rules,

which may be cheaply discovered and easily understood;
* 94 and it would be deeply to be regretted if we * were obliged

to adopt so complex and artificial a system as a branch of the institutes of real property law. In New York, under the recently *revised statutes* relative to uses and trusts, (*a*) these trust terms cannot exist for the purposes contemplated in the

(*a*) Levet *v.* Needham, 2 Vern. 138; Whitchurch *v.* Whitchurch, 2 P. Wms. 236; Villiers *v.* Villiers, 2 Atk. 71. Since the last [5th] edition of these Commentaries, the English statutes of 8 and 9 Vict. c. 112, *relating to satisfied terms*, of the first of January, 1846, put an end to satisfied terms by not allowing them to be any longer kept on foot, as an attendant term by assignment. The Revised Constitution of New York, of 1846, has demolished all long leases, by declaring that no lease or grant of agricultural land, thereafter to be made, for a longer period than twelve years, in which shall be reserved any rent or service of any kind, shall be valid. [Stephens *v.* Reynolds, 2 Selden, 454.]

(*b*) Gay's Case, 5 Mass. 419; Brewster *v.* Hill, 1 N. H. 350; Dillingham *v.* Jenkins, 7 Smedes & M. 487. In Massachusetts, by the Revised Statutes of 1836, it was declared that the lessees and assignees of lessees of real estate, for the term of one hundred years or more, in cases where there is an unexpired residue of fifty years or more of the term, should be regarded as freeholders, and the estate subject, like freehold estates, to descent, devise, dower, and execution. And, in Ohio, by statute in 1821, lands held by the tenure of permanent leases were to be considered real estate in respect to judgments and executions. Chase's Statutes of Ohio, ii. 1185. A judgment in Ohio is a lien on permanent leaseholds, or, for instance, on a lease for the term of ninety-nine years, renewable forever, equally as upon other real estate. And in the purview of the Ohio statutes, leasehold estates for the most essential purposes, as judgments, executions, descent, and distribution, are regarded as freeholds or real estate. The Northern Bank of Kentucky *v.* Roosa, 13 Ohio, 334.

(*a*) New York Revised Statutes, i. 727, 728, 729, 730, sec. 45, 49, 55, 60, 61, 65, 67.

English equity system. All trusts, except those authorized and modified by the statute, are abolished; and express trusts may be created to "sell lands for the benefit of creditors, and to sell, mortgage, or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon, and to receive the rents and profits of land, to be applied to the use of any person; and the trustees cannot sell, convey, or do any other act in contravention of the trust; and when the purposes for which the express trust shall have been created have ceased, the estate of the trustees ceases also." (*b*) This strict limitation of the power of creating and continuing trusts would, in its operation, have totally destroyed these attendant terms, had they otherwise existed in New York.

Leases, among the ancient Romans, were usually of very short duration, as the *quinquennium*, or term for five years; and this has been the policy and practice of several modern nations, as France, Switzerland, and China. But the policy has been condemned by distinguished writers, as discouraging agricultural enterprise and costly improvements. (*c*)

(2.) *Creation of Leases.* — Leases for years may be made to commence *in futuro;* for, being chattel interests, they never were required to be created by feoffment and livery of seisin. The tenant was * never technically seised, and derived no *95 political importance from his tenancy. He could not defend himself in a real action. He held in the name of his lord, and was rather his servant than owner in his own right. This was the condition of the tenant for years, in early times, as described

(*b*) See *infra*, 310.

(*c*) Gibbon's Hist. viii. 86, note; Lord Kames's Gentleman Farmer, 407, cited in 1 Bro. Civil Law, 198. note; Jefferson's Remarks on Short Leases in France; Jefferson's Works, ii. 105. Dr. Browne, 191–198, has given an interesting detail of the condition of the Roman lessee. In Scotland very long leases are considered as within the prohibition of alienation; and Mr. Bell says, that a lease for nineteen years is alone to be relied on, under a general clause in a deed of entail prohibiting alienation. 1 Bell's Comm. 69, 70. It is stated in the Edinburgh Review for July, 1834, p. 392, that it is believed that not more than a third part of England is occupied by tenants holding under leases. They must, then, be tenants from year to year, and this must be very unfavorable to agricultural improvement. The fact would seem to be almost incredible; and yet see what Lord Mansfield says on the subject, *infra*, 111. See also Edinburgh Review for April, 1836, p. 111, where it is said, that a great part of the best cultivated region of England is in the occupation of farmers who hold from year to year.

by Bracton and Fleta, and other ancient authorities; (*a*) and this distinctive character of terms for years has left strong and indelible lines of distinction in the law between leases for years and freehold estates. But the statute of frauds of 29 Car. II. c. 3, secs. 1, 2, 3 (and which has been generally adopted in this country), rendered it necessary that these secondary interests should be created in writing. The statute declared, that "all leases, estates, or terms of years, or any uncertain interests in lands, created by livery only, or by parol, and not put in writing, and signed by the party, should have the force and effect of leases, or estates at will only, except leases not exceeding the term of three years, whereupon the rent reserved during the term shall amount to two third parts of the full improved value of the thing demised." "And that no lease or estate, either of freehold or term of years, should be assigned, granted, or surrendered, unless in writing." The general provisions of the statute of frauds have been adopted by statute in New York, and the statute declares, that no estate or interest in lands, other than leases for a term not exceeding one year, shall be created, assigned, or declared, unless by a deed or conveyance in writing, subscribed by the party; and every contract for the leasing for a longer period than one year, or for the sale of lands, or any interest therein, is declared void, unless in writing, and subscribed by the party. (*b*)

(*a*) Fleta, lib. 5, c. 5, sec. 18, 19, 20; Dalrymple on Feudal Property, c. 2, sec. 1, p. 25; Preston on Estates, i. 204, 205, 206.

(*b*) New York Revised Statutes, ii. 135, sec. 8. The Massachusetts Revised Statutes, 408, declare *all* estates and interests in land, created without writing, to be estates at will only. By the Statutes of Connecticut, 1838, p. 391, no leases of land, *exceeding a year*, are valid, except against the grantor, &c., unless in writing, signed and witnessed. The Pennsylvania statute of 1772 follows the English statute, and allows parol leases not exceeding *three years*, without adding anything as to the reservation of rent. Purdon's Dig. 779. In other states, as New Jersey, Georgia, &c., the English statute of frauds is strictly followed. Elmer's Dig. 213; Prince's Dig. 915. See *infra*, 115, and see *supra*, ii. 336, n. (*a*), as to the character of *betterments*. In Scotland, leases of land exceeding the term of a year are not effectual unless in writing, and followed by possession. 1 Bell's Comm. 20. It was the old rule that a lease *commencing from the day of the date*, or *from the date*, began to operate the day after the date. Co. Litt. 46, b; [Atkins *v.* Sleeper, 7 Allen, 487.] But this rule was afterwards shaken, and *from the date*, or *from the day of the date*, may be either inclusive or exclusive of that day, according to the context or subject-matter, and the courts will construe the words so as to effectuate the deeds of parties, and not destroy them. Pugh *v.* Duke of Leeds, Cowp. 714. There is no general rule on the subject, and in computing time from act or an event, the day is to be inclusive or exclusive, according

(3.) *Right of Lessees.* — If land be let upon shares, for a single crop only, that does not amount to a lease; and the possession

to the reason of the thing, and the circumstances of the case. R. *v.* Stevens, 5 East, 244; Presbrey *v.* Williams, 15 Mass. 193; Lester *v.* Garland, 15 Ves. 248. The principle of that latter case was, that when time from a particular period is allowed to a party to do an act, the first day is to be reckoned exclusively, and that case was deemed a sound authority in Blaymire *v.* Haley, 6 M. & W. 55; [Weeks *v.* Hull, 19 Conn. 376;] [Bemis *v.* Leonard, 118 Mass. 502; Koltenbrock *v.* Cracraft, 36 Ohio St. 584.] The tendency of the recent English decisions is to exclude the day of the act, unless some special reason renders it necessary to reckon it inclusive. But in New Hampshire, when a computation is to be made from an act done, or from the time of an act, the day when the act is to be done is to be included; though in the computation of time from a date, or from the day of a date, the day of the date is to be excluded. Blake *v.* Crowninshield, 9 N. H. 304. It was truly observed in this latter case, that it would be very difficult to deduce from the cases a general rule. In Illinois, the rule is, when an action is to be performed within a particular time from and after a specified day, to exclude the day named, and include the day in which the act is to be done. 4 Scam. 420. But ordinarily the day of a demise is inclusive, and to be considered in computing the time of its commencement and termination. The reason is, that this construction is here used, not by way of *computation*, but of *passing an interest*; and when there is nothing else to guide the construction, that one is assumed which is most beneficial to him in whose favor the instrument is made, and an immediate interest passes. Lysle *v.* Williams, 15 Serg. & R. 135; Donaldson *v.* Smith, 1 Ashm. 197; [Marys *v.* Anderson, 24 Penn. St. 272.] In New York, a lease from the first day of May to the first day of May has been supposed to be exclusive of the first day, though contrary to the English rule. But it was admitted to be a very unsettled point, and the usage in Albany was said to be a reasonable one, that such a lease commences and terminates at twelve at noon on the first of May. Savage, Ch. J., in Wilcox *v.* Wood, 9 Wend. 346. See *ante*, i. 161. In The King *v.* Justices of Cumberland, 4 Nev. & M. 378, it was held that where a certain number of days' notice of an intention to do an act was requisite, the day of the service of the notice was *excluded* from the computation, and that on which the act was to be done *included*. In Glassington *v.* Rawlins, 3 East, 407, the general rule was declared to be, that where the computation of time is to be made *from an act done*, the day when such act is done is to be included. See also *supra*, i. 161. This rule was also laid down in Clayton's Case, 5 Co. 1, a; Bellasis *v.* Hester, 1 Ld. Raym. 280; The King *v.* Adderley, Doug. 463; Castle *v.* Burditt, 3 T. R. 623; Norris *v.* The Hundred of Gautris, 1 Brownlow, 156; Hob. 139, s. c. Insurance on goods to be shipped *between* two certain days, does not cover goods shipped on either of those days. Atkins *v.* Boylston F. & M. Ins. Co., 5 Met. 439. Though a day in legal contemplation is *punctum temporis*, without fractions, yet, where justice requires it, the exact time in the day in which an act was performed may be shown by proof. Brainard *v.* Bushnell, 11 Conn. 17; [Clarke *v.* Bradlaugh, 7 Q. B. D. 151.] It may be well here to observe, that a month *ex vi termini*, in the English law, means a lunar month. 2 Bl. Comm. 141; Catesby's Case, 6 Co. 61, b. But in mercantile contracts the usage or rule is to calculate the months as calendar, (Jolly *v.* Young, 1 Esp. 186;) and in other contracts the lunar is made to yield to the calendar month, if such was the intention of the contract. Dyke *v.* Sweeting, Willes, 585; Lang *v.* Gale, 1 Maule & Selw. 111. In this country, the old English rule is considerably impaired, and the term "month" is usually computed, and especially in statutes and judicial proceedings, as calendar. Commonwealth *v.* Cham-

remains in the owner. (*c*) [1] The occupant is, however, a tenant in common with the owner of the growing crop, and he continues so until the tenancy be severed by a division. (*d*) But if
*96 the contract be, that the lessee possess * the land with the usual privileges of exclusive enjoyment, it is the creation of a tenancy for a year, though the land be taken to be cultivated upon shares. (*a*)

A lessee for years may assign or grant over his whole interest,

bre, 4 Dall. 142; Tilghman, Ch. J., in 3 Serg. & R. 184; Alston *v.* Alston, 2 Treadway, Const. (S. C.) 604; Williamson *v.* Farrow, 1830, S. C. Law Journal, No. 2, 184. The New York Revised Statutes, i. 606, declare that the term *month* shall be construed to mean calendar in all statutes, deeds, and contracts, unless otherwise expressed. This is now the statute law in Georgia.

(*c*) Hare *v.* Celey, Cro. Eliz. 143; Bradish *v.* Schenck, 8 Johns. 151; Bishop *v.* Doty, 1 Vt. 37. Corn growing is a chattel interest, and may be sold by parol. Austin *v.* Sawyer, 9 Cowen, 39. [See 451, n. 1.]

(*d*) Walker *v.* Fitts, 24 Pick. 191.

(*a*) Jackson *v.* Brownell, 1 Johns. 267.

[1] *Letting on Shares.* — The text is confirmed by Warner *v.* Hoisington, 42 Vt. 94. See Herskell *v.* Bushnell, 37 Conn. 36. Cases in which the parties were thought to be tenants in common are Williams *v.* Nolen, 34 Ala. 167; Aiken *v.* Smith, 21 Vt. 172; Lowe *v.* Miller, 3 Gratt. 205; Ferrall *v.* Kent, 4 Gill, 209; Moore *v.* Spruill, 13 Ired. 55; Tripp *v.* Riley, 15 Barb. 333; Otis *v.* Thompson, Hill & Denio, 131; Smyth *v.* Tankersley, 20 Ala. 212; Bernal *v.* Hovious, 17 Cal. 541; Guest *v.* Opdyke, 2 Vroom (N. J.), 552; Fobes *v.* Shattuck, 22 Barb. 568; Brazier *v.* Ansley, 11 Ired. 12; Daniels *v.* Brown, 34 N. H. 454; Moulton *v.* Robinson, 7 Fost. (27 N. H.) 550; Creel *v.* Kirkham, 47 Ill. 344. Some of the cases show that when the intention of the parties was that rent should be paid, although in the form of a share in the crops, the tenant is sole owner of the crop before severance, as under any other lease. Alwood *v.* Ruckman, 21 Ill. 200; Creel *v.* Kirkham, 47 Ill. 344, 347; Walls *v.* Preston, 25 Cal. 59; Hatchell *v.* Kimbrough, 4 Jones (N. C.), 163; Blake *v.* Coats, 4 G. Greene (Iowa), 548; Symonds *v.* Hall, 37 Me. 354. But see Hatch *v.* Hart, 40 N. H. 93, 97. *x*[1]

As to difference of lease and license, see iii. 452, n. 1, (*b*).

x[1] The rule of the original text is one of presumption only. The intention may be that the title to an undivided portion of the crop shall vest in the owner of the land as grown, thus creating a tenancy in common, Cooper *v.* McGrew, 8 Oreg. 327; Smith *v.* Rice, 56 Ala. 417; Swanner *v.* Swanner, 50 Ala. 66; Johnson *v.* Hoffman, 53 Mo. 504; Ponder *v.* Rhea, 32 Ark. 435; or that the title is to be in the tenant, the amount of rent being fixed by a share of the crop, Atkins *v.* Womeldorf, 53 Iowa, 150; Brown *v.* Jaquette, 94 Penn. St. 113; Sargent *v.* Courrier, 66 Ill. 245; Frout *v.* Hardin, 56 Ind. 165; or the title to the whole may be intended to vest in the owner of the land, a share of the crop being given as compensation to the cultivator, Jeter *v.* Penn, 28 La. An. 230. See also Wentworth *v.* Portsmouth, &c. R. R. Co., 55 N. H. 540.

unless restrained by covenant not to assign without leave of the lessor. He may underlet for any fewer or less number of years than he himself holds; and he may incumber the land with rent and other charges. (*b*) If the deed passes all the estates, or time of the termor, it is an assignment; but if it be for a less portion of time than the whole term, it is an underlease, and leaves a reversion in the termor. The tenant's right to create an under tenancy, by the grant of a less estate than his own, is a native principle of the feudal system, and a part of the common law.[1]

(*b*) The value of agricultural leases, of the duration of twenty-one years and under, depends so much upon the personal character of the tenants, that the rule in Scotland is, that they cannot be assigned, or subletted, without the landlord's consent; but the lease of a city tenement is assignable, or may be underlet, unless there be a clause of prohibition. 1 Bell's Comm. 75–77.

[1] *Assignment.* — If the lessee parts with his whole interest in the whole or a part of the premises, it will amount to an assignment so far that there will be no tenure between the parties, and no reversion in the lessee, although the lessee uses words of demise and reserves rent and a right of reëntry. Langford *v.* Selmes, 8 Kay & J. 220, 228, disapproving Sergt. Manning's note to King *v.* Wilson, 5 Mann. & Ry. 140, 157, on that point; Ragsdale *v.* Estis, 8 Rich. 429; Smiley *v.* Van Winkle, 6 Cal. 605; Lee *v.* Payne, 4 Mich. 106, 117; [Woodhull *v.* Rosenthal, 61 N. Y. 382; Allcock *v.* Moorhouse, 9 Q. B D. 366.] So an underlease of the whole term was treated as an assignment so far as to discharge the party making it, who was himself an assignee of the term, from further liability on his covenant to repair, in Beardman *v.* Wilson, L. R. 4 C. P. 57, qualifying Pollock *v.* Stacy, 9 Q. B. 1033. See Field *v.* Mills, 4 Vroom (33 N. J.), 254. For it is to be remembered that the assignee of the term may always put an end to his liability by assigning over. *Post*, 473, n. (*b*); Thursby *v.* Plant, 1 Wms. Saund. 241, n. (*g*); Carter *v.* Hammet, 18 Barb. 608; Van Schaick *v.* Third Av. R. R., 30 Barb. 189; Childs *v.* Clark, 3 Barb. Ch. 52, 60; [Stern *v.* Florence, &c. Co., 53 How. Pr. 478.] See, especially, Williams *v.* Earle, 9 Best & S. 740, 753; L. R. 3 Q. B. 739, 750. *x*[1]

While his privity of estate continues, it has been thought that the assignee, even if unaccepted, could sue upon covenants which run with the land. Rights of

x[1] Whether a transaction amounts to an assignment or only to a sub-lease depends upon the intention of the parties as legally proved. If the intent is to transfer the whole interest in the whole or a part of the premises, it is an assignment; but if the intent appears to leave any right of reversion or reëntry in the grantor, it is only a sub-lease. Dunlap *v.* Bullard, 131 Mass. 161; Collins *v.* Hasbrouck, 56 N. Y. 157. So it is only a sublease if a portion of an entire estate is transferred, and not the entire estate in a portion of the premises. McNeil *v.* Kendall, 128 Mass. 245. The liability of an assignee has been held to depend upon his legal right to possession, and not upon his actual possession. Hence an assignee of one of two lessees was held liable for only half the rent, though he had exclusive possession of the premises. St. Louis Public Schools *v.* Boatmen's Ins. Co., 5 Mo. App. 91. But see Damainville *v.* Mann, 32 N. Y. 197.

The lessee so underleasing may distrain for the rent due him on the underlease; though, if he assign over the whole term, he cannot, because he has no reversion. The under or derivative lessee is not liable for the rent reserved in the original lease, except so far as his goods and chattels, while on the premises, are liable to a distress for the rent in arrear to the original landlord. There is no privity between him and the original lessor, and he is not liable to an action of covenant for such rent. (*c*) But the assignee

(*c*) Holford *v.* Hatch, Doug. 183; Bacon, tit. Leases, i. 3.

Assignment and Underlease, 7 Am. Law Rev. 245. And it has been held that even an equitable assignee was liable for rent accruing during his occupation of the premises. Astor *v.* Lent, 6 Bosw. 612. But Lucas *v.* Comerford, 3 Bro. C. C. 166, the English case which gave rise to the doctrine, seems to be overruled by Moore *v.* Greg, 2 Phillips, 717, where Lord Cottenham also explained and distinguished Close *v.* Wilberforce, 1 Beav. 112.

If a landlord assents to an assignment, the language of some cases is that his right of action against the original lessee is gone. Patten *v.* Deshon, 1 Gray, 325, 330; Way *v.* Reed, 6 Allen, 364, 369. But it is supposed that unless there is something more than an acceptance of the assignee as his tenant, the landlord may still have an action of covenant upon the express covenant for the payment of rent. 1 Wms. Saund. 240 *a*, n. 10; note to Spencer's Case, 1 Sm. L. C. 6th ed. 60; [Lodge *v.* White, 30 Ohio St. 569; Taylor *v.* De Bus, 31 Ohio St. 468; Hunt *v.* Gardner, 39 N. J. L. 530; Almy *v.* Greene, 13 R. I. 350; Farrington *v.* Kimball, 126 Mass. 313. See Fry *v.* Patridge, 73 Ill. 51.] So far as the assignee is tenant by reason of being such assignee, and not as holder of a new lease after the surrender of the former one, he continues the former lease and the liability of the original lessee. 7 Am. Law Rev. 244. If the tenant assents to a lease being granted to another, and gives up his own possession to the new lessee, that is a surrender by operation of law, and under those circumstances the former lessee would be liable no longer. Nickells *v.* Atherstone, 10 Q. B. 944; Davison *v.* Gent, 1 Hurlst. & N. 744; [Amory *v.* Kannoffsky, 117 Mass. 351. See also Fifty Associates *v.* Grace, 125 Mass. 161.] The distinctions as to covenants against assignment, underlease, and permissive occupancy, are learnedly discussed in the article above referred to. 7 Am. Law Rev. 240. It is there observed that a covenant not to assign does not of itself render an assignment void in the absence of a condition to that effect; and so it is held in Williams *v.* Earle, 10 Best & Sm. 740, 753; L. R. 3 Q. B. 739, 750; although there are cases looking the other way, Elliott *v.* Johnson, 8 Best & Sm. 38; Bemis *v.* Wilder, 100 Mass. 446; and earlier Massachusetts cases referred to in the article.

The relation of the original lessee to his immediate or any subsequent assignee with regard to those covenants for the performance of which they are each liable to the lessor, is treated in England as like that of a surety. As between himself and the lessee, the assignee ought to perform the covenants while he has the estate, and there is held to be an implied promise on the part of each assignee to indemnify the original lessee against liability for breaches of covenant while he is assignee. Moule *v.* Garrett, L. R. 5 Ex. 132; L. R. 7 Ex. 101; [Farrington *v.* Kimball, 126 Mass. 313; Bender *v.* George, 92 Penn. St. 36.]

of the lessee is liable to the assignee of the lessor, in an action of debt, for the time he holds; for, though there be no privity of contract, there is a privity of estate, which creates a debt for * the rent. (*a*) So, on the other hand, the covenantor *97 and his representatives, under a covenant to pay rent, are liable for the non-payment of rent by reason of the privity of contract, after an assignment, and though there may be good remedy against the assignee. (*b*) At common law, actual entry was requisite to give the lessee the rights and privileges of a tenant in possession; for until then he was not capable of receiving a release of the reversion by way of enlargement of the estate. But when the words, and the consideration inserted in the lease, were deemed sufficient to raise a use, the statute of uses operated upon the lease, and annexed the possession to the use without actual entry. (*c*) Before entry under the lease, as a demise at common law, the lessee had only an executory interest, or *interesse termini*, and no possession. (*d*) An *interesse termini* is a right to the possession of a term at a future time; and, upon an ordinary lease to commence *instanter*, the lessee, at common law, and independent of the statute of uses, has an *interesse termini* only until entry. Its essential qualities, as a mere interest, in contradistinction to a term in possession, seem to arise from a want of possession. It is a right or interest only, and not an estate, and it has the properties of a right. It may be extinguished by a release to the lessor, and it may be assigned or granted away, but it cannot, technically considered, be surrendered; for there is no reversion before entry, in which the interest may drown. Nor will a release from the lessor operate by way of enlargement, for the lessee has no estate before entry. (*e*)

(*a*) Lekeux *v.* Nash, Str. 1221; Howland *v.* Coffin, 9 Pick. 52.

(*b*) Orgill *v.* Kemshead, 4 Taunt. 642.

(*c*) Bacon's Abr. tit. Leases, M.

(*d*) Co. Litt. 270, a; Shep. Touch. by Preston, 267.

(*e*) Co. Litt. 46, b, 270, a, b, 338, a; Preston on Convey. ii. 211-217; Doe *v.* Walker, 5 B. & C. 111. Mr. Preston arraigns Sir William Blackstone, and even Littleton and Coke, for not speaking with sufficient precision in respect to the difference between an *interesse termini*, and a term for years in possession. But the Court of K. B., in the case last cited, collected and stated, with great clearness, upon the authority of Co. Litt., all the leading characteristics of an *interesse termini*. There are subtleties upon the subject that betray excessive refinement, and lead to useless abstruseness. Thus, the interest "may be *released*, but it cannot be *enlarged by release*; it may be *assigned*, but it cannot be *surrendered*; though it is no impediment to a *sur-*

*98 *(4.) *Operate by Estoppel.* — Leases may operate by estoppel, when they are not supplied from the ownership of the lessor, but are made by persons who have no vested interest at the time. If an heir apparent, or a person having a contingent remainder, or an interest under an executory devise, or who has no title whatever at the time, makes a valid lease, or duly conveys, for years, and afterwards an estate vests in him, the lease or conveyance will operate by way of estoppel, to entitle the lessee to hold the land for the term specified. (*a*) But if the lease takes effect, by passing an interest, it cannot operate by way of estoppel, even though it cannot operate by way of interest to the full extent of the intention of the parties. If any interest, however small, passes by a deed, it creates no estoppel. The deed which creates an estoppel to the party undertaking to convey or demise real estate, when he has nothing in the estate at the time of the conveyance, passes an interest or title to the grantee, or his assignee, by way of estoppel, from the moment the estate comes to the grantor, and creates a perfect title as against the grantor and his heirs. (*b*) [1] The estoppel works an interest in the land. An ejectment is maintainable on a mere estoppel. If the conveyance be with general warranty, not only the subsequent title acquired by the grantor will enure by estoppel to the benefit of the grantee, but a subsequent purchaser from the grantor, under his after acquired title, is equally estopped, and the estoppel runs with the land. (*c*) Lord Kenyon was inclined

render or merger of a prior interest, in a more remote interest." 2 Preston on Convey. 216. When the law is overrun with such brambles, it loses its sense and spirit, and becomes metamorphosed; *subita radice retenta est; stipite crura tenentur.*

(*a*) Weale *v.* Lower, Pollexf. 54; Helps *v.* Hereford, 2 B. & Ald. 242; Com. Dig. Estoppel, E. 10; Hubbard *v.* Norton, 10 Conn. 422; Blake *v.* Tucker, 12 Vt. 39.

(*b*) Co. Litt. 45, a, 47, b, 265, a; Bacon's Abr. tit. Leases, O.; Preston on Convey. ii. 136, 189; Brown *v.* M'Cormick, 6 Watts, 60; Logan *v.* Moore, 7 Dana, 76; Fletcher *v.* Wilson, 1 Smedes & M. Ch. 876, 889; Willis *v.* Watson, 4 Scam. 67; [Bank of Utica *v.* Mersereau, 3 Barb. Ch. 528; Crocker *v.* Pierce, 31 Me. 177; Bush *v.* Cooper, 18 How. 82.] But if the estate comes to him as trustee to convey to a *bona fide* purchaser, the estoppel does not apply. Burchard *v.* Hubbard, 11 Ohio, 316.

(*c*) Trevivan *v.* Lawrence, 1 Salk. 276. The learned editor has annexed to this

[1] When the parties have agreed that the relation of landlord and tenant shall exist between them, the tenant will be estopped to set up that the other party had not the legal reversion, although the truth appears on the deed. Morton *v.* Woods, L. R. 4 Q. B. 293; L. R. 3 Q. B. 658; Jolly *v.* Arbuthnot, 4 De G. & J. 224; [Kearsley *v.* Philips, 11 Q. B. D 621.]

to the opinion that a subsequent purchaser would be equally estopped, though the conveyance *creating the estoppel *99 was without warranty; but he was embarrassed by the conflicting authorities, and particularly Co. Litt. 265. (*a*) In *Jackson* v. *Bradford*, (*b*) it was held, that though a covenant of warranty would bar, by way of estoppel, the heir and his issue, the estoppel would not affect the purchaser, under a judgment entered against the heir, in the lifetime of his ancestor, and previous to the conveyance creating the estoppel.

(5.) *Extinguished by Merger.* — A term for years may be defeated by way of merger, when it meets another term immediately expectant thereon. The elder term merges in the term in reversion or remainder. A merger also takes place, when there is a union of the freehold or fee and the term, in one person, in the same right, and at the same time. In this case, the greater estate merges and drowns the less, and the term becomes extinct; because they are inconsistent, and it would be absurd to allow a person to have two distinct estates, immediately expectant on each other, while one of them includes the time of both; *nemo potest esse dominus et tenens.* There would be an absolute incompatibility in a person filling, at the same time, the characters of tenant and reversioner in one and the same estate; and hence the reasonableness, and even necessity, of the doctrine of merger. (*c*) The estate in which the merger takes place is not enlarged by the accession of the preceding estate; and the greater or only subsisting estate continues after the merger, precisely of the same quantity and extent of ownership as it was before the accession of the

short case of Trevivan *v.* Lawrence, in Smith's Leading Cases, vol. ii., an elaborate essay on the doctrine of estoppels. Coe *v.* Talcott, 5 Day, 88; Jackson *v.* Stevens, 13 Johns. 316; M'Williams *v* Nisly, 2 Serg. & R. 507; Somes *v.* Skinner, 3 Pick. 52; White *v.* Patten, 24 id. 324; Middlebury College *v.* Cheney, 1 Vt. 336; Gardner *v.* Johnston, 1 Peck (Tenn.), 24; Douglass *v.* Scott, 5 Ohio, 194; Lawry *v.* Williams, 13 Me. 281. In Doswell *v.* Buchanan, 3 Leigh, 365, A., having only an equitable title, conveyed lands by bargain and sale *without warranty* to B. in trust for C., and afterwards acquired the legal title, and sells it to D. with warranty. It was held that the legal estate subsequently acquired by A. did not enure to B. in trust for C.

(*a*) Goodtitle *v.* Morse, 3 T. R. 365. In Comstock *v.* Smith, 13 Pick. 116, the estoppel was held not to apply to the case of a deed with warranty, when the warranty was restricted to the grantor, and those claiming under him.

(*b*) 4 Wend. 619.

(*c*) 2 Bl. Comm. 177; Preston on Convey iii. 7, 15, 18, 23; [Liebschutz *v.* Moore, 70 Ind. 142. But a grant of the lessor's estate *from the termination of the lease* does not have this effect. Hyde *v.* Warden, 3 Ex. D. 72.]

estate which is merged, and the lesser estate is extinguished. (*d*)

As a general rule, equal estates will not drown in each
*100 other. The merger is *produced either from the meeting of an estate of higher degree with an estate of inferior degree, or from the meeting of the particular estate and the immediate reversion in the same person. An estate for years may merge in an estate in fee, or for life; and an estate *pour autre vie* may merge in an estate for one's own life; and an estate for years may merge in another estate or term for years, in remainder or reversion. (*a*) There is no incompatibility, and, therefore, there is no merger, where the two estates are successive, and not concurrent. Thus, a lease may be granted to a tenant *pour autre vie*, to commence when his life estate ceases; and he will never, in that case, stand in the character, which the law of merger is calculated to prevent, of the reversioner to himself. (*b*)

Merger bears a very near resemblance, in circumstances and effect, to a surrender; but the analogy does not hold in all cases, though there is not any case in which merger will take place, unless the right of making and accepting a surrender resided in the parties between whom the merger takes place. (*c*) To a surrender, it is requisite that the tenant of the particular estate should *relinquish* his estate in favor of the tenant of the next vested estate, in remainder or reversion. But merger is confined to the cases in which the tenant of the estate in reversion or remainder *grants* that estate to the tenant of the particular estate, or in which the particular tenant grants his estate to him in reversion or remainder. (*d*) Surrender is the act of the party, and merger is the act of the law. The latter consolidates two estates, and sinks the lesser in the greater estate. The merger is coextensive with the interest merged, as in the case of joint tenants and tenants in common; and it is only to the extent of the part in which the owner has two several estates. An
*101 *estate may merge for one part of the land, and continue in the remaining part of it. (*a*)

(*d*) Ib. 7.

(*a*) Preston on Convey. iii. 182, 188, 201, 213, 219, 225, 261. The merger applies if there be a unity of seisin of the land, and of a right of way over it, in the same person. Tindal, Ch. J., in James *v.* Plant, 4 Ad. & El. 749.

(*b*) Doe *v.* Walker, 5 B. & C. 111.

(*c*) Preston on Convey. iii. 23, 153.

(*d*) Preston on Convey. iii. 25. (*a*) Ib. 88, 89.

To effect the operation of merger, the more remote estate must be the next vested estate in remainder or reversion, without any intervening estate, either vested or contingent; and the estate in reversion or remainder must be at least as large as the preceding estate. (*b*) The several estates must generally be held in the same legal right; but this rule is subject to qualification, and merger *may* take place even when the two estates are held by the same person in different rights, as when he holds the freehold in his own right, and the term *en autre droit*. If they are held in different legal rights, there will be no merger, provided one of the estates be an accession to the other merely by the act of law, as by marriage, by descent, by executorship, or intestacy. This exception is allowed, on the just principle that, as merger is the annihilation of one estate in another by the conclusion of law, the law will not allow it to take place to the prejudice of creditors, infants, legatees, husbands, or wives. (*c*) But the accession of one estate to another is when the person in whom the two estates meet is the owner of one of them, and the other afterwards devolves upon him by the act of the party, or by act of law, or by descent, or in right of his wife, or by will. If the other estate, held in another's right, as in right of the wife, had been united to the estate in immediate reversion or remainder, by act of the party, as by purchase, the merger would take place. (*d*) The power of alienation must extend to the one estate as well as to the other, in order to allow the merger, as where the husband has a term for years in right of his wife, and a reversion in his own right by purchase. (*e*)

* Merger is not favored in equity, and is never allowed, *102 unless for special reasons, and to promote the intention of the party. The intention is considered in merger at law, but it is not the governing principle of the rule, as it is in equity; and the rule sometimes takes place without regard to the intention, as in the instance mentioned by Lord Coke. (*a*) At law, the doctrine of merger will operate, even though one of the estates be held in

(*b*) Ib. 50, 55, 87, 107, 166.

(*c*) Ib. 273, 285, 394; Donisthorpe *v.* Porter, 2 Eden, 162; [Chambers *v.* Kingham, 10 Ch. D. 743.]

(*d*) Preston on Convey. iii. 294, 295, 309.

(*e*) Ib. 306, 307.

(*a*) Co. Litt. 54, b; Preston on Convey. iii. 43–49; [Loomer *v.* Wheelwright, 3 Sandf. Ch. 135, 157.]

trust, and the other beneficially, by the same person; or both the estates be held by the same person, on the same or different trusts. But a court of equity will interpose, and support the interest of the *cestui que trust*, and not suffer the trust to merge in the legal estate, if the justice of the case requires it. (*b*) Unless, however, there exists some beneficial interest that requires to be protected, or some just intention to the contrary, and the equitable or legal estates unite in the same person, the equitable trust will merge in the legal title; for, as a general rule, a person cannot be a trustee for himself. Where the legal and the equitable interests descended through different channels, and united in the same person, and were equal and coextensive, it has been held that the equitable estate merges in the legal, in equity as well as at law. (*c*) The rule at law is inflexible; but in equity it depends upon circumstances, and is governed by the intention, either expressed or implied (if it be a just and fair intention), of the person in whom the estates unite, and the purposes of justice, whether the equitable estate shall merge or be kept in exist-
* 103 ence. (*d*) If the person in whom the estates unite, be * not competent, as by reason of infancy or lunacy, to make an election, or if it be for his interest to keep the equitable estate on foot, the law will not imply such an intention. (*a*)

It would be inconsistent with the object of these Lectures, to pursue the learning of merger into its more refined and complicated distinctions; and especially when it is considered, according to the language of a great master in the doctrine of merger, that the learning under this head is involved in much intricacy and confusion, and there is difficulty in drawing solid conclusions from cases that are at variance, or totally irreconcilable with each other. (*b*)

(*b*) 1 P. Wms. 41; Atk. 582; Preston on Convey. iii. 314, 315, 557, 558.

(*c*) Preston, *ubi supra*, 314–342; Donisthorpe *v.* Porter, 2 Eden, 162; Goodright *v.* Wells, Doug. 771; Wade *v.* Paget, 1 Bro. C. C. 363; Selby *v.* Alston, 3 Ves. 339.

(*d*) Forbes *v.* Moffatt, 18 Ves. 384; Gardner *v.* Astor, 3 Johns. Ch. 53; Starr *v.* Ellis, 6 Johns. Ch. 393; Freeman *v.* Paul, 3 Greenl. 260; Gibson *v.* Crehore, 3 Pick. 475.

(*a*) Lord Rosslyn, in Compton *v.* Oxenden, 2 Ves. Jr. 264; James *v.* Johnson, 6 Johns. Ch. 417; James *v.* Morey, 2 Cowen, 246.

(*b*) The third volume of Mr. Preston's extensive Treatise on Conveyancing is devoted exclusively to the law of merger. It is the ablest and most interesting discussion in all his works. It is copious, clear, logical, and profound; and I am the more ready to render this tribute of justice to its merits, since there is great reason

(6.) *Extinguished by Surrender.* — Surrender is the yielding up of an estate for life or years, to him that hath the next immediate estate in reversion or remainder, whereby the lesser estate is drowned by mutual agreement. (*c*) The underlessee cannot surrender to the original lessor, but he must surrender to his immediate lessor or his assignee. (*d*) The surrender may be made expressly, or it may be implied in law. The latter is when an estate, incompatible with the existing estate, is accepted; *or the lessee takes a new lease of the same lands. (*a*) *104 As there is a privity of estate between the parties, no livery of seisin is necessary to a perfect surrender, though (as we have already seen) (*b*) the surrender is required by the statute of frauds to be in writing. It has accordingly been held, by Lord Chief Baron Gilbert, (*c*) that a lease for years cannot be surrendered by merely cancelling the indenture, without writing. The surrender must not be taken from the *cestui que trust*, but from the legal tenant; and if an old satisfied term has lain dormant for a long time, though still outstanding in the trustee, the surrender of it to the *cestui que use* is sometimes presumed to support the legal title in him. (*d*)

To guard against the mischievous consequences which some-

to complain of the manner in which his other works are compiled. He has been declared, by one of his pupils, to have "stupendous acquirements as a property lawyer." The evidence of his great industry, and extensive and critical law learning, is fully exhibited; but I must be permitted to say, after having attentively read all his voluminous works, that they are in general encumbered with much loose matter, and with unexampled and intolerable tautology; *magnitudine laborant sua.*

(*c*) Co. Litt. 337, b.

(*d*) Preston on Abstracts of Title, ii. 7.

(*a*) Livingston *v.* Potts, 16 Johns. 28; Shep. Touch. by Preston, ii. 300, 301. In that old and venerable work, under the title Surrender, the whole law is fully and clearly laid down; but Mr. Preston said, that in a fourth volume to his Treatise on Conveyancing (and which I have not seen), the theory and practice of the law of surrenders was to be examined. On a demise in writing of a house to C., the key was delivered to C.'s wife, and he entered into possession. But the wife afterwards delivered back the key to the lessor, who accepted it. It was held that the delivering back the key, *animo sursum reddendi*, and the acceptance of it, amounted to a surrender by operation of law within the statute of frauds. Dodd *v.* Acklom, 6 Mann. & Gr. 672; [Nickells *v.* Atherstone, 10 Q. B. 944; Greider's Appeal, 5 Penn. St. 422; Lawrence *v.* Brown, 1 Seld. 394, 404.]

(*b*) *Supra*, 95.

(*c*) Magennis *v.* M'Cullough, Gilb. Eq. 236.

(*d*) Doe *v.* Sybourn, 7 T. R. 2; Goodtitle *v.* Jones, ib. 47; Doe *v.* Hilder, 2 B. & Ald. 782.

times result from a surrender, in discharging the underlessee from the payment of rent, and the conditions and dependent covenants annexed to his lease, the statute of 4 Geo. II. c. 28, sec. 6, provided, that if a lease be surrendered to be renewed, and a new lease given, the privity and relation of landlord and tenant, between the original lessee and his underlessees, should be reserved; and it placed the chief landlord and his lessees, and the underlessees, in reference to rents, rights, and remedies, exactly in the same situation as if no surrender had been made. This provision has been incorporated in the New York Revised Statutes; (*e*) but in those states in which it has not been adopted, the question may arise, how far the under tenant (whose derivative *105 estate still continues) is discharged from * all the rents and covenants annexed to his tenancy, according to the authority of *Barton's Case*, (*a*) and of *Webb* v. *Russel*, (*b*) in which that inequitable result is indicated. The same rule is declared in the text books of the old law. (*c*) *y*[1]

(7.) *Extinguished by Forfeiture. — Of Contracts for a Lease.* — A term for years may be defeated by a condition, or by a proviso

(*e*) New York Revised Statutes, i. 744, sec. 2; [Cousins *v.* Philips, 3 Hurlst. & C. 892. A surrender does not destroy outstanding rights of third persons, but as to them operates only as a grant subject to their right. Doe *v.* Pyke, 5 M. & S. 146; Piggott *v.* Stratton, 1 De G., F. & J. 33, 46.]

(*a*) Moore, 94. (*b*) 3 T. R. 401.

(*c*) Shep. Touch. by Preston, ii. 301.

y[1] A voluntary surrender by a lessee does not affect the rights of a sub-lessee. Great Western Ry. Co. *v.* Smith, 2 Ch. D. 235; Mellor *v.* Watkins, 9 L. R. Q. B. 400; Eten *v.* Luyster, 60 N. Y. 252; Krider *v.* Ramsay, 79 N. C. 354. And the landlord may in such a case reserve the right to sue the sub-lessee for rent. Beal *v.* Boston Car Spring Co., 125 Mass. 157. There may be a surrender by mutual agreement between landlord and tenant, and either may be estopped from denying a surrender by having done acts inconsistent with the continuance of the lease. This last is usually termed "surrender by operation of law." In neither of these cases is a writing required. Oastler *v.* Henderson, 2 Q. B. D. 575; Jones *v.* Bridgman, 39 L. T. 500; Beall *v.* White, 94 U. S. 382; Amory *v.* Kannoffsky, 117 Mass. 351; Hanham *v.* Sherman, 114 Mass. 19; Smith *v.* Pendergast, 26 Minn. 318; Dayton *v.* Craik, ib. 133; Nelson *v.* Thompson, 23 Minn. 508; Martin *v.* Stearns, 52 Iowa, 345; Donkersley *v.* Levy, 88 Mich. 54; Thomas *v.* Nelson, 69 N. Y. 118. See also Holme *v.* Brunskill, 3 Q. B. D. 495; Deane *v.* Caldwell, 127 Mass. 242. In several of the above cases it is held that a mere taking of the keys is not sufficient to estop the landlord. There must be a reletting to another party or a taking of possession. In Coe *v.* Hobby, 72 N. Y. 141, a parol reletting to the same tenant, void under the statute of frauds, was held not to operate as a surrender.

of *cesser* on the happening of a specified event, or by a release to the disseisor of the reversioner. (*d*)

It is sometimes a question, whether the instrument amounts to a lease, or is merely a contract for a lease. It is purely a question of intention; and the cases sufficiently establish the rule of construction to be, that though an agreement may, on one part of it, purport to be a lease, yet if, from the whole instrument, taken and compared together, it clearly appears to have been intended to be a mere executory agreement for a future lease, the intention shall prevail. So, a contrary conclusion is drawn, when the intention from the instrument appears to create a subsisting term, though it contemplated a more formal lease to be made. (*e*) The case of *Poole* v. *Bentley* (*f*) contains the leading and the sound doctrine on the subject. Where agreements have been adjudged not to operate by passing an interest, but to rest in contract, there has been, usually, either an express agreement for a further lease, or the construing of the agreement to be a lease *in præsenti* would work a forfeiture, or the terms have not been fully settled, and something further was to be done.

*Leases for years may be forfeited, by any act of the *106 lessee, which disaffirms the title and determines the relation of landlord and tenant. If he acknowledges or affirms, by matter of record, the fee to be in a stranger, or claims a greater estate than he is entitled to, or aliens the estate in fee by feoffment, with livery, which operates upon the possession, and effects a disseisin, or if he breaks any of the conditions annexed to the lease, he forfeits the same. (*a*) But these forfeitures are very

(*d*) Co. Litt. 276, a.

(*e*) Chapman *v.* Tonner, 6 M. & W. 100; Brashier *v.* Jackson, ib. 549; Sturgeon *v.* Painter, Noy, 128; Foster *v.* Foster, 1 Lev. 55; Baxter *v.* Browne, 2 Wm. Bl. 973; Goodtitle *v.* Way, 1 T. R. 735; Doe *v.* Clare, 2 id. 739; Roe *v.* Ashburner, 5 id. 163; Doe *v.* Smith, 6 East, 530; Poole *v.* Bentley, 12 id. 168; Morgan *v.* Bissell, 3 Taunt. 65; Jackson *v.* Myers, 3 Johns. 388; Jackson *v.* Clark, ib. 424; Thornton *v.* Payne, 5 id. 77; Jackson *v.* Kisselbrack, 10 id. 336; Jackson *v* Delacroix, 2 Wend. 433; Bacon *v.* Bowdoin, 22 Pick. 401; Preston on Convey. ii. 177; Pinero *v.* Judson, 6 Bing. 206. In Chipman *v.* Bluck, 1 Arnold, 27, it was held that the intention of the parties as whether a lease was meant, or only an agreement for a lease, may be gathered not only from the instrument, but from the concurrent or subsequent acts of the parties. By the acts of 7 and 8 Vict. c. 76, and 8 and 9 Vict. c. 106, any instrument, not under seal, will operate only as an agreement for a lease, though in the terms of a lease.

(*f*) 12 East, 168. [See also Hunter *v.* Silvers, 15 Ill. 174.]

(*a*) Co. Litt. 251, b; Bacon, tit. Leases, sec. 2. See *infra*.

much reduced, in this country, by the disuse or abolition of fines and feoffments, and by the statute provision, that no conveyance, by a tenant for life or years, of a greater estate than he could lawfully convey, should work a forfeiture, or be construed to pass any greater interest. (*b*) As conveyances, with us, are in the nature of grants, and as grants pass nothing but what the grantor may lawfully grant, (*c*) it would follow, of course, upon sound legal principles, even without any statute provision, that conveyances to uses would not work a forfeiture of the particular estate.

(8.) *Of Powers to lease.* — It was a clear principle of the common law, that no man could grant a lease to continue beyond the period at which his own estate was to determine; and, therefore, a tenant for life could not, by virtue of his ownership, make an estate to continue after his death. But a lease made under a power may continue, notwithstanding the determination of the estate by the death of the person by whom the power is exercised. (*d*) The limitation and modifying of estates by virtue of powers came from equity into the common law with the *107 statute of uses, and the intent of *the party who gave the power governs the construction of it. Powers to make leases are treated liberally, for the encouragement of agricultural improvement and enterprise, which require some permanent interest. If a man hath a power to lease for ten years, and he leases for twenty years, the lease is bad at law, but good in equity for the ten years, because it is a complete execution of the power, and it appears how much it has been exceeded. (*a*) If the power to lease be uncircumscribed, it is liable to abuse, and to be carried, even with upright intentions, to an extent prejudicial to the interest of the *cestui que trusts*, or parties in remainder. Thus, the implied power in trustees to lease was carried to a great extent, and received a very large and liberal

(*b*) New York Revised Statutes, i. 739, sec. 143, 145; Massachusetts Revised Statutes, 1836, pt. 2, tit. 1, c. 59, sec. 6.

(*c*) Litt. secs. 608, 609, 610, 618; Co. Litt. 330, b, 332, a.

(*d*) Hale *v.* Green, 2 Rol. Abr. 261, pl. 10; Ram on Tenure and Tenancy, 75.

(*a*) Lord Mansfield, in 1 Burr. 120; Campbell *v.* Leach, Amb. 740; *Ex parte* Smyth, 1 Swanst. 337, 357; Hale, Ch. B., in Jenkins *v.* Kemishe, Hard. 395; Sugden on Powers, 2d Lond. ed. 545; Roe *v.* Prideaux, 10 East, 158. [But a lease void under the statute of frauds, because for over a year, is not valid for the year. Coe *v.* Hobby, 72 N. Y. 141.]

construction, in the Court of Appeals in South Carolina, in the case of *Black* v. *Ligon*. (*b*) The trustees of a charity raised by will were under an express prohibition against selling or alienating the land; but it was adjudged, that a power to lease was implied. A lease for ninety-nine years, without any annual reservation of rent, and for a very moderate gross sum, payable in eight years, was confirmed upon appeal; inasmuch as great improvements had been made by the purchaser, and the power had been exercised in good faith, and lessees and sublessees had a strong interest in the confirmation of the lease. This was pushing an implied power to lease very far, and, I apprehend, it went beyond the established precedents. The final decision in the Court of Appeals (and which was contrary to the opinion of the Chancellor in the court below) was directly contrary to the decisions in the House of Lords, in the Queensbury cases from Scotland; where it was finally settled, that leases for ninety-nine * years, though at an adequate rent, were a breach of *108 the prohibition against alienation. Even a lease for fifty-seven years was held to fall within the prohibition. (*a*) It has been made a question, how far equity could relieve against a defective execution of a power of leasing, as against the party entitled in remainder. But if the lessee be in the nature of a purchaser, and has been at expense in improvements, and there is no fraud on the remainderman, or there is merely a defect in the execution of the power, equity will interfere, and help the power. (*b*)

(*b*) Harper, Eq. 205.

(*a*) 2 Dow. 90, 285; 5 id. 293; 1 Bligh, 839; Bell's Comm. i. 69.

(*b*) Campbell *v.* Leach, Amb. 740; Shannon *v.* Bradstreet, 1 Sch. & Lef. 52; Sugden on Powers, 364–368, 564, 565. In c. 10 of Mr. Sugden's Treatise on Powers, he considers extensively the law *of powers to lease*, and to which I must refer the student for a detailed view of that doctrine. In the New York Revised Statutes, i. 731, art. 3, the subject of powers in general is ably digested, and the doctrine is discharged, in a very considerable degree, from the subtleties which have given it so forbidding a character, and it is placed on clear and rational grounds. The doctrine will be noticed hereafter, in its application to different subjects; and I would now only observe, that the Revised Statutes provide, in relation to the immediate subject before us, that a special and beneficial power may be granted to a tenant for life, of the lands embraced in the power, to make leases for not more than twenty-one years, and to commence in possession during his life; that such a power is not assignable as a separate interest, but is annexed to the estate, and will pass (unless specially excepted) by any conveyance of such estate; and if specially excepted in the conveyance, it is extinguished. So, it may be extinguished by a release of it by the tenant to any person entitled to

(9.) *Covenants for Renewal.* — Covenants for renewal are frequently inserted in leases for terms of years, and they add much to the stability of the lessee's interest, and afford induce-
*109 ment to permanent * improvements. But the landlord is not bound to renew, without a covenant for the purpose; (*a*) and covenants by the landlord for continual renewals are not favored, for they tend to create a perpetuity. When they are explicit, the more established weight of authority is in favor of their validity. (*b*) These beneficial covenants to renew the lease at the end of the term run with the land, and bind the grantee of the reversion. (*c*)

(10.) *Emblements.* — The tenant for years is not entitled to emblements, provided the lease be for a certain period, and does not depend upon any contingency; for it is his own folly to sow when he knows for a certainty that his lease must expire before harvest time. (*d*) *y*[1] If, however, the lease for years depends upon

an expectant estate in the lands. The power is not extinguished or suspended by a mortgage executed by the tenant for life, having a power to make leases, but it is bound by the mortgage in the same manner as the lands are bound; and the mortgagee is entitled, in equity, to the execution of the power, so far as the satisfaction of the debt may require. New York Revised Statutes, i. 732, 733, sec. 73, 87, 88, 89, 90, 91.

(*a*) Lee *v.* Vernon, 7 Bro. P. C. 432, ed. 1784; Robertson *v.* St. Johns, 2 Bro. C. C. 140.

(*b*) Furnival *v.* Crew, 3 Atk. 83; Cooke *v.* Booth, Cowp. 819. Lord Eldon, in Willan *v.* Willan, 16 Ves. 84; Rutgers *v.* Hunter, 6 Johns. Ch. 215. Lord Alvanley, as Master of the Rolls, in Baynham *v.* Guy's Hospital, 3 Ves. 295, spoke strongly against covenants for a perpetual renewal. In Attorney General *v.* Brooke, 18 Ves. 326, Lord Eldon said that it was impossible to contend in chancery that trustees for a charity could make leases with covenants for perpetual renewal. It would be equivalent to an alienation of the inheritance. A covenant to *renew the lease* implies the same term and rent, and perhaps the same conditions. But a covenant to renew upon such terms as might be agreed on is void for uncertainty. Rutgers *v.* Hunter, *supra*; Whitlock *v.* Duffield, 1 Hoff. Ch. 110.

(*c*) Moore, 159, pl. 300. [See further as to renewals, Bastin *v.* Bidwell, 18 Ch. D. 238; Maddy *v.* Hale, 8 Ch. D. 327; Brice *v.* Fulton Nat. Bank, 79 N. Y. 154.] In covenants by the tenant *to repair*, he is to take care that the tenements do not suffer more than the natural operation of time and nature would effect. He is not bound to go further. He is only bound to keep up an old house as an old house. Tindal, Ch. J., Harris *v.* Jones, 1 Moo. & Rob. 173; Guttridge *v.* Munyard, ib. 334; Stanley *v.* Twogood, 3 Bing. N. C. 4. This head of covenants to repair is treated fully, with a review of all the distinctions, in Gibbons on Dilapidations, 68–71.

(*d*) Litt. sec. 68. By the reasonable custom in Pennsylvania, the tenant for years

y[1] *Emblements.* — In case of a tenancy from year to year, the tenant is not entitled to emblements beyond the end of the year. Hendrixson *v.* Cardwell, 9 Barr.

an uncertain event, as if a tenant for life, or a husband seised in right of his wife, should lease the estate for five years, and die before the expiration of the term, by reason whereof the lease is determined, the lessee would be entitled to his emblements, on the same principle that the representatives of a tenant for life take them, if there would have been time to have reaped what had been sowed, provided the lessor had lived. (*e*) The common law made a distinction between the right to emblements, and the expense of ploughing and manuring the ground; and the determination by the landlord of an estate at will would *give to the lessee his emblements, but not any compen- *110 sation for ploughing and manuring the land, provided the lease was determined before the crop was actually in the ground. (*a*)

The doctrine of emblements is founded on principles so very reasonable, that it could not have escaped the wisdom of the Roman law. They must have existed, as at common law, in tenancies depending on uncertainty; and we find it proposed as a question by Marcellus, (*b*) whether a tenant for the term of five years could reap the fruits of his labor, arising after the extinguishment of the lease; and he was correctly of opinion that the tenant was not entitled, because he must have foreseen the termination of the lease. The Roman law made some compensation to the lessee for the shortness of his five years' lease, for it gave him a claim upon the lessor for reimbursement for his reasonable improvements. The landlord was bound to repair, and the tenant was discharged from the rent, if he was prevented from reaping and enjoying the crops, by an extraordinary and

is entitled to the waygoing crop, which is confined to grain sown in the autumn before the expiration of the lease, and cut in the summer after it is determined. Demi *v.* Bossler, 1 Penn. 224; [Shaw *v.* Bowman, 91 Penn. St. 414.] [So in New Jersey. Howell *v.* Schenck, 4 Zabr. 89.]

(*e*) Co. Litt. 56, a.

(*a*) Bro. Abr. tit. Emblements, pl. 7, tit. Tenant pour Copie de Court Roll, pl. 8; Stewart *v.* Doughty, 9 Johns. 108.

(*b*) Dig. 19. 2. 9.

93; Reeder *v.* Sayre, 70 N. Y. 180. The tenant does not take the emblements where he had notice to quit in time to avoid putting in the crop, nor where the tenancy is terminated by his own fault. Reeder *v.* Sayre, *supra*; Samson *v.* Rose, 65 N. Y. 411. The right to emblements may of course be sold. Dayton *v.* Vandoozer, 39 Mich. 749.

unavoidable calamity, as tempests, fire, or enemies. (*c*) In these respects the Roman lessee had the advantage of the English tenant; for, if there be no agreement or statute applicable to the case, the English landlord is not bound to repair, or to allow the tenant for repairs made without his authority; and the tenant is bound to pay the rent, and to repair at his own expense, to avoid the charge of permissive waste. (*d*) [1]

(*c*) Dig. 19. 2. 15. 1, 2.

(*d*) Pindar *v.* Ainsley, cited by Buller, J., in 1 T. R. 312; Mumford *v.* Brown, 6 Cowen, 475. The rule in the French law is the same: the landlord is not bound to indemnify the tenant for his meliorations. Lois des Batimens, par Le Page, ii. 205. But though a tenant for years as well as a tenant for life is answerable for waste, as see *supra*, 77, 80, 82, yet a tenant from year to year is only bound to make ordinary tenantable repairs, such as to keep the house wind and water tight, and to repair windows and doors broken by him, and not to make lasting repairs. Auworth *v.* Johnson, 5 Carr. & P. 239; Ferguson's Case, 2 Esp. 590. But if the house be in want of substantial repairs, or be otherwise unfit for occupation, the tenant is not bound to repair, and may quit without notice or paying rent. Edwards *v* Etherington, 7 T. R. 117; s. c. Ryan & Mood. 268; Collins *v.* Barrow, 1 Moo. & Rob. 112; Cowie *v.* Goodwin, 9 Carr. & P. 378. But see *contra*, *supra*, iii. 464.

[1] *Responsibility of Landlord.* — The notion of a complemental duty on the landlord to make such repairs as the tenant is not to make, although it seems to be upheld in Johnson *v.* Dixon, 1 Daly, 178; Eagle *v.* Swayze, 2 Daly, 140, is unsound. Kellenberger *v.* Foresman, 13 Ind. 475; Elliott *v.* Aiken, 45 N. H. 30, 36; Moffat *v.* Smith, 4 Comst. 126. The landlord is not bound to protect the tenant of a lower story from the weather when the roof has been injured by fire. Doupe *v.* Genin, 45 N. Y. 119. When he occupies the upper part of a house he is not liable to a tenant of the ground floor for damage from such extraordinary causes as a rat's gnawing a hole in a box used in draining the roof. Carstairs *v.* Taylor, L. R. 6 Ex. 217, distinguishing Rylands *v.* Fletcher, L. R. 8 H. L. 330, on various grounds. The same principle has been applied to damage without negligence when the occupant of the upper story was another tenant. Ross *v.* Fedden, L. R. 7 Q. B. 661. But compare Marshall *v.* Cohen, 44 Ga. 489. In Rylands *v.* Fletcher, the defendant built a reservoir upon his land, from which the water escaped, and flooded the plaintiff's mine, and he was held liable, although not shown to have been guilty of negligence personally. The principle of cases of this class seems to be that if a man will keep extra hazardous articles on his land, or follow an extra hazardous employment, he takes the risk, and the limit of the principle must be determined by policy. In some western states a man is not required to keep his cattle fenced in. *Ante*, iii. 488, n. 1; 6 Am. Law Rev. 723, 725. See also Smith *v.* Fletcher, *ante*, iii. 440, n. 1; Wilson *v.* Newberry, L. R. 7 Q. B. 31. *x*[1]

x[1] The liability, whether of landlord or tenant, is based upon the neglect of some duty cast upon one or the other by the law. The tenant, being in possession and control of the premises, is bound to keep them in proper repair, and hence is ordinarily liable for an injury caused by their being out of repair; and as the landlord does not warrant that premises leased by him are in repair, it is immaterial that

2. Of Estates at Will. — An estate at will is where one man lets land to another, * to hold at the will of the *111 lessor. (*a*) It was determined very anciently, by the common law, and upon principles of justice and policy, that estates at will were equally at the will of both parties, and neither of them was permitted to exercise his pleasure in a wanton manner, and contrary to equity or good faith. (*b*) The lessor could not determine the estate after the tenant had sowed, and before he had reaped, so as to prevent the necessary egress and regress, to take the emblements. (*c*) The possession of the land, on which the crop is growing, continues in the tenant, until the time of taking it arrives. (*d*) Nor could the tenant, before the period of payment of the rent arrived, determine the estate, so as to cut off the landlord from his rent. (*e*) The tenant at will is also

(*a*) Litt. sec. 68. A tenancy at will is determined *instanter* by a demand of possession, though perhaps the tenant might afterwards enter, solely for the purpose of removing his goods, without being a trespasser. Doe *v.* M'Kaeg, 10 B. & C. 721.

(*b*) If the tenant at will voluntarily commits waste, and injuriously affects the permanent value of the property, the owner of the land may bring trespass *quare clausum fregit*. This point was examined, with thorough learning and great ability, by Ch. J. Parker, in Starr *v.* Jackson, 11 Mass. 519. Such a tenant is liable for wilful, but not for permissive waste. Gibson *v.* Wells, 1 N. R. 290. The estate of a tenant at will is too infirm to hold him bound to make repairs, or to be responsible for permissive waste. Gibbons on the Law of Dilapidations, 47.

(*c*) 21 Hen. VI. 37; 35 Hen. VI. 24, pl. 30; 13 Hen. VIII. Keilw. 16, pl. 4; 13 Hen. VIII. 16, pl. 1; Litt. sec. 68; Co. Litt. 55, a; Viner's Abr. x. tit. Estate, 406, b, c, pl. 5; Kighly *v.* Bulkly, 1 Sid. 338.

(*d*) Boraston *v.* Green, 16 East, 71.

(*e*) Kighly *v.* Bulkly, 1 Sid. 338; Leighton *v.* Theed, 2 Salk. 413.

the defect existed at the time of the lease. Jaffe *v.* Harteau, 56 N. Y. 398; Clancy *v.* Byrne, ib. 129; Shindelbeck *v.* Moon, 32 Ohio St. 264; Pretty *v.* Bickmore, 8 L. R. C. P. 401. In order to make the landlord liable, it must appear that he has the control and management of that part of the premises in which the defect exists, in which case, aside from the doctrine of contributory negligence, his responsibility is perhaps the same to tenants of other parts of the premises as to third persons. Looney *v.* M'Lean, 129 Mass. 33; Readman *v.* Conway, 126 Mass. 374; Priest *v.* Nichols, 116 Mass. 401; Toole *v.* Becket, 67 Me. 544; Friedenburg *v.* Jones, 63 Ga. 612. Compare Woods *v.* Naumkeag Steam Cotton Co., 134 Mass. 357. The landlord was held to be under no obligation to repair a common roof in Krueger *v.* Ferrant, 29 Minn. 385. The landlord has been held liable for defective construction of the premises, Scott *v.* Simons, 54 N. H. 426; and also where the defect was of such a nature as to be a nuisance, Shindelbeck *v.* Moon, 32 Ohio St. 264; Wenzler *v.* McCotter, 22 Hun, 60; Marshall *v.* Cohen, 44 Ga. 489. See further, as to the liability of a landowner in the use of his land, *ante*, iii. 437, n. 1, and x^2. As to his liability to one whom he invites to come upon his premises, see Bennett *v.* Railroad Co., 102 U. S. 577; Davis *v.* Cent. Cong. Soc., 129 Mass. 367.

entitled to his reasonable estovers, as well as to the profits of his crop, and he is entitled to a reasonable time to remove his family and property. (*f*)

Estates at will, in the strict sense, have become almost extinguished, under the operation of judicial decisions. Lord Mansfield observed, (*g*) that an infinite quantity of land was holden in England without lease. They were all, therefore, in a technical sense, estates at will; but such estates are said to exist only notionally, and, where no certain term is agreed on, they are construed to be tenancies from year to year, and each party is *112 bound to *give reasonable notice of an intention to terminate the estate. The language of the books now is, that a tenancy at will arises from grant or contract, and that general tenancies are constructively taken to be tenancies from year to year. (*a*) If the tenant holds over by consent given, either expressly or constructively, after the determination of a lease for years, it is held to be evidence of a new contract, without any definite period, and is construed to be a tenancy from year to year. The moment the tenant is suffered by the landlord to enter on the possession of a new year, there is a tacit renovation of the contract for another year, subject to the same right of distress; and half a year's notice to quit must be given prior to the end of the term. (*b*) The tenant does not know in what year the lessor may determine the tenancy, and in that respect he has an uncertain interest, on which the doctrine of notice and of emblements is grounded. (*c*) The ancient rule of the common law required, in the case of all tenancies from year to year, six months' notice on either side, and ending at the expiration of the year, to deter-

(*f*) Litt. sec. 69; Co. Litt. 55, b, 56, a; Ellis *v.* Paige, 1 Pick. 43.

(*g*) 3 Burr. 1607.

(*a*) Preston on Abstracts of Title, ii. 25; Wilmot, J., 3 Burr. 1609; Clayton *v.* Blakey, 8 T. R. 3. But tenancies at will are not to be understood by this general language as not existing. A simple permission to occupy creates a tenancy at will, unless there are circumstances to show an intention to create a tenancy from year to year. Doe *v.* Wood, 14 M. & W. 682; [Pugsley *v.* Aiken, 1 Kern. 494; Lockwood *v.* Lockwood, 22 Conn. 425; Huger *v.* Dibble, 8 Rich. 222; Hunt *v.* Morton, 18 Ill. 75, Hall *v.* Wadsworth, 28 Vt. 410. See Manchester *v.* Doddridge, 3 Ind. 360.]

(*b*) Bro. Abr. tit. Lease, pl. 53; Layton *v.* Field, 3 Salk. 222; Jackson *v.* Salmon, 4 Wend. 327; Webber *v.* Shearman, 3 Hill, 547; [Ames *v.* Schuesler, 14 Ala. 600; Vrooman *v.* McKaig, 4 Md. 450; Prickett *v.* Ritter, 16 Ill. 96. But see Kendall *v.* Moore, 30 Me. 827; Chesley *v.* Welch, 37 Me. 106.]

(*c*) Kingsbury *v.* Collins, 4 Bing. 202.

mine the tenancy; and there must be a special agreement, or some particular custom, to prevent the application of the rule. This tenancy from year to year succeeded to the old tenancy at will, and it was created under a contract for a year, implied by the courts. The tenancy cannot be determined by either party except at the end of the year. (*d*) The English * rule .* 113 of six months' notice prevails in many of the United States, in New York, Vermont, Kentucky, North Carolina, and Tennessee; (*a*) but there is a variation in the rule, or perhaps no fixed established rule on the subject, in other parts of the United States. In Massachusetts, it was said, in *Rising* v. *Stannard*, (*b*) that the English rule of six months' notice had not been adopted, but that reasonable notice must be given to a tenant at will. Afterwards, in *Coffin* v. *Lunt*, (*c*) it was left as a point unsettled, whether notice to quit was requisite; but the better opinion is that notice is necessary in that state; and it was the opinion of Mr. Justice Putnam, upon an elaborate and thorough view of the subject, in *Ellis* v. *Paige*, (*d*) that, in a tenancy at will, the parties must give to each other reasonable notice of a determination of the will. (*e*)

(*d*) Leighton *v.* Theed, 1 Ld. Raym. 707; Doe *v.* Snowdon, 2 Wm. Bl. 1224; Doe *v.* Porter, 3 T. R. 13; Parker *v.* Constable, 3 Wils. 25; Right *v.* Darby, 1 T. R. 159; Roe *v.* Wilkinson, cited from MSS. in Butler's note, 228, to Co. Litt. lib. 3; [Baker *v.* Adams, 5 Cush. 99; Doe d. King *v.* Grafton, 18 Q. B. 495.] By the New York Revised Statutes, i. 744, sec. 1, if lands or tenements be occupied in the city of New York, without any specified term of duration, the occupation is deemed valid until the first day of May next after the possession, under the agreement commenced; and the rent is deemed payable at the usual quarter days, if there be no special agreement to the contrary.

(*a*) Jackson *v.* Bryan, 1 Johns. 322; Hanchet *v.* Whitney, 1 Vt. 315; Hoggins *v.* Becraft, 1 Dana (Ky.), 80; Trousdale *v.* Darnell, 6 Yerg. 431; Den *v.* McIntosh, 4 Ired. 291.

(*b*) 17 Mass. 287. (*c*) 2 Pick. 70. (*d*) 2 id. 71, note.

(*e*) The opinion of Judge Putnam, in the case referred to, contains a full and broad view of the whole ancient and modern law on the question; and he established, by authority and illustration, the necessity of reasonable notice to quit, in all cases of uncertain tenancy, whether under the name of tenancies from year to year, or tenancies at will. He showed that the doctrine was grounded on the immutable principles of justice and the common law, and was introduced for the advancement of agriculture and the maintenance of justice; and to prevent the mischievous effects of a capricious and unreasonable determination of the estate. By the Massachusetts Revised Statutes of 1836, pt. 2, tit. 1, c. 60, sec. 26, all estates at will may be determined by either party, by three months' notice in writing; and in cases of neglect or refusal to pay rent due on a lease at will, fourteen days' notice in writing to quit is sufficient. If there be no tenancy, or existing relation of landlord and tenant, the doctrine of notice to quit does not apply. Jackson *v.* Deyo, 3 Johns. 422.

Justice and good sense require that the time of notice should vary with the nature of the contract and the character of the estate. Though the tenant of a house is equally under the protection of notice as the tenant of a farm, yet if lodgings be hired, for instance, by the month, the time of notice must be pro-
* 114. portionably reduced. (*f*)[1] In * Pennsylvania, the com-

(*f*) Right *v.* Darby, 1 T. R. 159; Doe *v.* Hazell, 1 Esp. 94. If the tenant holds from month to month, a month's notice to quit must be given. Prindle *v.* Anderson, 19 Wend. 391.

[1] *Notice to Quit.* — This is not necessary at the expiration of a lease, whether written or oral, for a definite time; or in many cases of breach of condition; or when the tenancy is to terminate on some other specified event, People *v.* Schackno, 48 Barb. 551; Ashley *v.* Warner, 11 Gray, 43; Creech *v.* Crockett, 5 Cush. 133; [Hulett *v.* Nugent, 71 Mo. 131; Smith *v.* Littlefield, 51 N. Y. 539.] A tenant under such a lease who holds over is a tenant at sufferance, although the lease stipulates for rent during such further term as the tenant may hold. Edwards *v.* Hale, 9 Allen, 462. A tenancy at will will be determined without statutory notice if the landlord conveys his estate, McFarland *v.* Chase, 7 Gray, 462; Rooney *v.* Gillespie, 6 Allen, 74; Robinson *v.* Deering, 56 Me. 357; although the conveyance was merely colorable and made for the purpose of terminating the tenancy, Curtis *v.* Galvin, 1 Allen, 215. A written lease will have the same effect, Pratt *v.* Farrar, 10 Allen, 519; Furlong *v.* Leary, 8 Cush. 409; Casey *v.* King, 98 Mass. 503, 504; Alexander *v.* Carew, 13 Allen, 70, 72. See Dillon *v.* Brown, 11 Gray, 179; Hilbourn *v.* Fogg, 99 Mass. 11; as will also an assignment by the tenant at will if the lessor have notice, but not otherwise, Pinhorn *v.* Souster, 8 Exch. 763; Pratt *v.* Farrar, 10 Allen, 519, 520. See Cooper *v.* Adams, 6 Cush. 87; King *v.* Lawson, 98 Mass. 309, 311.

As to the time allowed the tenant to remove after a termination of the tenancy in this manner, see Pratt *v.* Farrar, 10 Allen, 519; Antoni *v.* Belknap, 102 Mass. 193.

It is said that the proper day for quitting under a notice to do so is the last day of the term. This was usually the rent day, and accordingly it is often said that a notice to quit must terminate on a rent day, and this is applied in Walker *v.* Sharpe, 14 Allen, 43, to a case where the rent day was the first instead of the last day of the term. This case, however, is criticised in Taylor on Landl. & T. § 477, note.

A party who is let into possession under a contract to purchase is said to be a mere licensee, and not to be entitled to notice after a breach of his contract, such as failure to pay an instalment of the purchase-money. The English cases, cited 114, n. (*g*), do not seem to be followed to their full extent in this country. Burnett *v.* Caldwell, 9 Wall. 290; Dolittle *v.* Eddy, 7 Barb. 74; Dean *v.* Comstock, 32 Ill. 173. See Dennett *v.* Penobscot F. Co., 57 Me. 425; Woodbury *v.* Woodbury, 47 N. H. 11. But see Dowd *v.* Gilchrist, 1 Jones (N. C.), 353. *x*[1]

x[1] One entering under a void oral lease, and paying rent at stated intervals, is held to become a tenant from year to year. Koplitz *v.* Gustavus, 48 Wis. 48; Williams *v.* Ackerman, 8 Or. 405; Brownell *v.* Welch, 91 Ill. 523. The mere fact of holding over beyond the term, without any assent on the part of the landlord, is

mon-law notice of six months is understood to be shortened to three months, as well in cases without as within the statute of that state, passed in the year 1772. (*a*)

The reservation of an annual rent is the leading circumstance that turns leases for uncertain terms into leases from year to year. (*b*) If the tenant be placed on the land, without any terms prescribed, or rent reserved, and as a mere occupier, he is strictly a tenant at will; (*c*) and an actual tenant at will has not any assignable interest, though it is sufficient to admit of an enlargement by release. (*d*) On the other hand, estates which are constructively tenancies for the term of a year, or from year to year, may be assigned. (*e*) A strict tenant at will, in the primary sense of that tenancy, has been held not to be entitled to notice to quit, (*f*) but the later and more liberal rule seems to be, that tenants at will are regarded as holding from year to year, so far as to be entitled to notice to quit, before they can be evicted by process of law. Or even without that assumption, if the party came into possession with the consent of the owner, and for an indefinite period, he is entitled to notice to quit. (*g*) There is no

(*a*) Gibson, J., in Logan *v.* Herron, 8 Serg. & R. 459.

(*b*) De Grey, Ch. J., in 2 Wm. Bl. 1173, [Herrell *v.* Sizeland, 81 Ill. 457.]

(*c*) Jackson *v.* Bradt, 2 Caines, 169; [Sallabah *v.* Marsh, 34 La. An. 1053.]

(*d*) Litt. sec. 460; Co. Litt. 270, b.

(*e*) Preston on Abstracts of Title, ii. 25.

(*f*) Jackson *v.* Bradt, 2 Caines, 169.

(*g*) Parker *v.* Constable, 3 Wils. 25; Right *v.* Beard, 13 East, 211; Jackson *v.* Bryan, 1 Johns. 322; Jackson *v.* Laughhead, 2 id. 75; Jackson *v.* Wheeler, 6 id. 272; Phillips *v.* Covert, 7 id. 1, 4; Bradley *v.* Covell, 4 Cowen, 349; Ellis *v.* Paige, *supra*, 113; [Larned *v.* Hudson, 60 N. Y. 102.]

insufficient to create such a tenancy. C. & St. L. R. R. Co. *v.* Wiggins Ferry Co., 82 Ill. 230; Meno *v.* Hoeffel, 46 Wis. 282. Compare Usher *v.* Moss, 50 Miss. 208. But if, upon a holding over, the landlord receives rent at stated intervals, a tenancy from year to year will be presumed upon the same terms as the former lease. Hall *v.* Myers, 43 Md. 446; Allen *v.* Bartlett, 20 W. Va. 46; Gardner *v.* Commissioners, 21 Minn. 33. The presumption as to the continuance of the old terms has been held to apply where the lessor was himself a lessee, and the sub-lease was terminated by the expiration of the original lease, the premises being then leased to another, who afterwards received rent from the sub-lessee. Kelly *v.* Patterrson, 9 L. R. C. P. 681. Parties continuing upon premises upon an agreement for a new lease were held tenants at will in Emmons *v.* Scudder, 115 Mass. 367. In New York, a landlord has the option to treat a tenant from year to year holding over as a trespasser or as tenant for another year. Schuyler *v.* Smith, 51 N. Y. 309. See also Wolffe *v.* Wolff, 69 Ala. 549. See the nature of a tenancy from year to year considered in Wright *v.* Tracey, 8 Ir. R. C. L. 478; Holmes *v.* Day, ib. 235.

uniform rule on the subject, for it was held, in *Doe* v. *Baker*, (*h*) that where a person takes possession of land by the license of the owner for an indeterminate period, without any rent reserved, he is not a tenant from year to year, but a remaining instance of the old strict common-law tenancy at will, and is not entitled to notice to quit. It is settled, however, that notice is not requisite to a tenant whose term is to end at a certain time; for, in that case, both parties are apprised of their rights and duties. The lessor may enter on the lessee when the term expires, without further notice. (*i*) Except for the purpose of notice to quit, tenancies at will seem even still to retain their original character; (*j*) and the distinction between tenants from year to year, and tenants at will, was strongly marked in the case of *Nichols* v. *Williams*. (*k*) The New York Revised Statutes (*l*) authorize a summary proceeding to regain the possession, where the tenant for one or more years, or for a part of a year, or at will, or sufferance, holds *115 wrongfully against *his landlord; but it requires one month's notice to be given to a tenant at will, or sufferance, created by holding over or otherwise, to remove, before application be made for process under the act. It was held, in the case last cited, that a tenant from year to year was not entitled to any notice, in proceedings under a similar statute provision, though in the action of ejectment he would still be entitled to his six months' notice to quit. There is a summary mode of proceeding, provided also by statute, in Pennsylvania, Maryland, South Carolina, Maine, and other states, for such cases; and the statute requires, in one state three months, and in others thirty days, or one month's notice only; and they make no discrimination between different kinds of tenants. (*a*)

(*h*) 4 Dev. (N. C.) 220.

(*i*) Messenger *v.* Armstrong, 1 T. R. 54; Right *v.* Darby, ib. 162; Jackson *v.* Bradt, 2 Caines, 169; Jackson *v.* Parkhurst, 5 Johns. 128; Bedford *v.* M'Elherron, 2 Serg. & R. 49; Ellis *v.* Paige, 1 Pick. 43. Nor is a tenant who disclaims his landlord's title entitled to notice to quit. Woodward *v.* Brown, 13 Peters, 1. When a lease expires by its own limitation, the lessee becomes a tenant at will, and the landlord may enter forthwith and dispossess him without notice, using only the requisite force. Duncan *v.* Blashford, 2 Serg. & R. 480; Overdeer *v.* Lewis, 1 Watts & S. 90; Clapp *v.* Paine, 18 Me. 264.

(*j*) 7 Johns. 4; Nichols *v.* Williams, 8 Cow. 13; [Post *v.* Post, 14 Barb. 253.]

(*k*) 8 Cow. 13.

(*l*) Vol. i. 745, sec. 7, 8, 9, and ii. 512, 513, sec. 28. See *infra*, 118, and *supra*, iii. 480, 481.

(*a*) Statute of Pennsylvania, March, 1772, and of Maryland, Dec. 1793, and of

The resolutions of the courts, turning the old estates at will into estates from year to year, with the right on each side of notice to quit, are founded in equity and sound policy, as they put an end to precarious estates, which are very injurious to the cultivation of the soil, and subject to the abuses of discretion. But they are a species of judicial legislation, tempering the strict letter of the law by the spirit of equity. Estates at will, under the salutary regulation of the reasonable notice to quit, have still a strong foundation in the language of the statute of frauds, (*b*) which declared, that "all leases, estates, or uncertain interests in land, made by parol, and not in writing, should have the force and effect of estates at will only, and should not, in law or equity, be deemed or taken to have any other or greater force or effect." The statute of frauds made an exception in favor of leases not exceeding the term of three years, and on which the rent reserved amounted to two third parts of the full improved value of the land demised. But it appears that the English decisions have never alluded to that exception. They have moved on broader ground, and on general principles, so as to have rendered the exception * practically useless. (*a*) The exception is *116 now dropped, in the Massachusetts, Connecticut, New York, and Ohio statutes of frauds. (*b*)

The Roman law, like the English, was disposed, as much as possible, and upon the same principles of equity, to construe tenancy at will to be a holding from year to year; and, therefore, if the tenant held over, after the term had expired, and the lessor seemed in any way to acquiesce, his silence was construed into a tacit renewal of the lease, at least for the following year, with its former conditions and consequences; and the lessee became tenant from year to year, and could not be dispossessed without regular notice. (*c*) The whole of the title in the Pandects upon this

South Carolina of 1812, 1817, and 1839. The Revised Statutes of Massachusetts, 1836, pt. 3, tit. 3, c. 104, provide a short proceeding before a justice of the peace, in cases of tenants holding over after the expiration of the term. Statute of Maine, 1824, is to the same effect.

(*b*) 29 Charles II. c. 3.

(*a*) Putnam, J., in Ellis *v.* Paige, 2 Pick. 71, note.

(*b*) New York Revised Statutes, ii. 135, sec. 8; Statute of Ohio, 1831; Massachusetts Revised Statutes, 1836; Statutes of Connecticut, 1838; [Larkin *v.* Avery, 23 Conn. 304; compare Barlow *v.* Wainwright, 22 Vt. 88.]

(*c*) Dig. 19. 2. 13. 11; ib. 1. 14; Pothier's Pandectæ, ii. 225; Browne's Civil Law, i. 198. I have assumed the existence of the rule in the Roman law, requiring notice

subject (*d*) contains the impression of a very cultivated jurisprudence, under the guidance of such names as Papinian, Ulpian, Julian, and Gaius. And when the sages at Westminster were called to the examination of the same doctrines, and with a strong, if not equally enlightened and liberal sense of justice, they were led to form similar conclusions, even though they had to contend, in the earlier period of the English law, when the doctrine was first introduced, with the overbearing claims of the feudal aristocracy, and the scrupulously technical rules of the common law.

3. **Of Estates at Sufferance.** — A tenant at sufferance is one that comes into the possession of land by lawful title, but holdeth over by wrong, after the determination of his interest. (*e*) He has only a naked possession, and no estate which he can *117 transfer or * transmit, or which is capable of enlargement by release; for he stands in no privity to his landlord, nor is he entitled to notice to quit; (*a*) and, independent of statute, he is not liable to pay any rent. (*b*) He holds by the laches of the landlord, who may enter, and put an end to the tenancy when he pleases; but before entry he cannot maintain an action of trespass against the tenant by sufferance. (*c*) There is a material distinction between the cases of a person coming to an estate by act of the party, and afterwards holding over, and by act of the law, and then holding over. In the first case, he is regarded as a tenant at sufferance, and, in the other, as an intruder, abator, or trespasser. (*d*) This species of estate is too hazardous to be frequent, and it is not very likely to occur, since the statutes of 4 Geo. II. c. 28, and 11 Geo. II. c. 19, declaring, that if a tenant held over after demand made, and notice in writing to deliver up the possession, or if he held over after having himself given notice of his intention to quit, he should be liable to pay double rent, so long as he continued to hold over. The provisions of these statutes have been reënacted in New York, though they are not gen-

to quit, upon the credit of Dr. Browne; but he cites no authority for it, and I have not perceived it in the text of the Digest.

(*d*) Lib. 19, tit. 2. Locati, conducti.

(*e*) Co. Litt. 57, b.

(*a*) Co. Litt. 270, b; Jackson *v.* Parkhurst, 5 Johns. 128; Jackson *v.* M'Leod, 12 id. 182.

(*b*) Cruise's Dig. tit. 9, c. 2, sec. 6. (*c*) 2 Bl. Comm. 150.

(*d*) Co. Litt. 57, b; 2 Inst. 134.

erally adopted in this country. (*e*) There is, likewise, in New York, a further provision by statute, against holding over without express consent, after the determination of their particular estates, by guardians and trustees to infants, and husbands seised in right of their wives, or by any other persons having estates determinable upon any life or lives. They are declared to be trespassers, and liable for the full value of the profits received during the wrongful possession. (*f*) This last provision was taken * from the statute of 6 Anne, c. 18; and the common law * 118 itself held the guardian, in such a case, to be an abator, and it gave an assize of *mort d'ancestor;* and so it equally gave an action of trespass, after entry, against the tenant *pour autre vie*, and against the tenant for years holding over. (*a*)

In the case of the tenant holding over after the expiration of his term, the landlord may recover the possession of the premises by an action of ejectment; and in New York, as we have already seen, a summary remedy is given to the landlord by statute, under the process of a single judge. (*b*) Independent of any statute provision, the landlord may reënter, upon the tenant holding over, and remove him and his goods, with such gentle force as may be requisite for the purpose; and the tenant would not be entitled to resist or sue him. The plea of *liberum tenementum* would be a good justification, in an action of trespass, by the party, for the entry and expulsion. (*c*) [1] But the landlord would,

(*e*) New York Revised Statutes, i. 745, sec. 10, 11. In South Carolina, under the act of 1808, the tenant holding over, after the expiration of his lease, is chargeable with double rent.

(*f*) New York Revised Statutes, i. 749, sec. 7.

(*a*) Co. Litt. 57, b; 2 Inst. 184.

(*b*) See *ante*, iii. 480, and New York Revised Statutes, i. 745, sec. 7, 8, 9. A summary process to oust tenants at sufferance is also given to the landlord by the statute of 1 and 2 Vict. 74. In Randolph *v.* Carlton, 8 Ala. 606, it was adjudged, that although a tenant, as a general rule, could not controvert the title of his landlord, yet his tenancy or lease would not estop him from showing that his landlord's title had *expired or been extinguished by operation of law.* The court were not unanimous in this decision, and its effect was considered to be dangerous to the solidity of the general rule. [Wolf *v.* Johnson, 30 Miss. 518; Bettison *v.* Budd, 17 Ark. 546. But see Tondro *v.* Cushman, 5 Wis. 279.]

(*c*) Taylor *v.* Cole, 3 T. R. 292; 1 H. Bl. 555, s. c.; Taunton *v.* Costar, 7 T. R. 431; Argent *v.* Durrant, 8 id. 408; Turner *v.* Meymott, 1 Bing. 158; Jackson *v.*

[1] *Forcible Entry and Detainer.* — The case of Newton *v.* Harland, cited at the end of note (*c*), as changing the doctrine of the text, went no farther than to hold the landlord liable for an assault. The assertion of his civil liability in some

in the case of an entry by force, and with strong hand, be liable to an indictment for a forcible entry, either under the statutes of

Farmer, 9 Wend. 201; Jones *v.* Muldrow, 1 Rice (S. C.), 64. In Richardson *v.* Anthony, 12 Vt. 273, and Chambers *v.* Bedell, 2 Watts & S. 225, it was held that the owner of cattle or other chattels found on another's land may enter peaceably and take them away, though placed there wrongfully by or with the assent of the owner of the land. Chapman *v.* Thumblethorp, Cro. Eliz. 329, s. p. [But see for the limit, McLeod *v.* Jones, 105 Mass. 403.] In Sampson *v.* Henry, 11 Pick. 379, the court would not sustain a plea of justification in an action of trespass and assault and battery, and which was, that the possession of the land was unlawfully withheld, and that the defendant used no more force than was requisite to enable him to enter and hold possession. The English cases justify the doctrine in the text. But since the above decisions, the language of the English judges has changed, and it is now held that the landlord is not justified in entering and expelling by force the tenant at sufferance. Newton *v.* Harland, 1 Mann. & Gr. 644. This last is the most sound and salutary doctrine.

form, seems consistent with the St. Westm. 2, c. 50, Couch *v* Steel, 3 El. & Bl. 402, &c.; *ante*, i. 467, n. 1, that when a certain thing is made penal by statute for the benefit of a person, the law is to be taken as giving him a civil remedy as well as imposing a penalty. But perhaps that case is to be distinguished on the ground that the question must be more or less one of construction (see Wilson *v.* Merry, L. R. 1 H. L. Sc. 326, 339–341), and that in view of the relation between the parties and the evils sought to be prevented, the present statute is satisfied if confined to imposing a criminal liability. The words of the act are very broad, however. But it is clearly the English law that, inasmuch as the tenant had not rightful possession as against the landlord, he could not bring trespass *qu. cl.* against the latter for his entry. Davison *v.* Wilson, 11 Q. B. 890; Pollen *v.* Brewer, 7 C. B. N. S. 371; Sampson *v.* Henry, 13 Pick. 36; Zell *v.* Ream, 31 Penn. St. 304; Kellam *v.* Janson, 17 Penn. St. 467. And Newton *v.* Harland is said to be overruled by Harvey *v.* Brydges, 14 M. & W. 437, in Blades *v.* Higgs, 10 C. B. N. S. 718, 721, though that is not strictly true. See also Davis *v.* Burrell, 10 C. B. 821, 825; Burling *v.* Read, 11 Q. B. 904. See also 4 Am. Law Rev. 436 *et seq*; Stearns *v.* Sampson, 59 Me. 568, 576; Adams *v.* Adams, 7 Philad. 160. *x*[1]

On the other hand, some American cases have gone so far in the other direction as to hold the landlord liable in trespass *quare clausum*. Dustin *v.* Cowdrey, 23 Vt. 631; severely criticised in a learned and able article, 4 Am. Law Rev. 439 *et seq.*, and thought to be overruled by Mussey *v.* Scott, *infra*; but followed by Page *v.* Depuy, 40 Ill. 506; Reeder *v.* Purdy, 41 Ill. 279.

If the landlord can gain legal possession in his tenant's absence, a reëntry by the latter will be a trespass. Todd *v.* Jackson, 2 Dutch. 525; Mussey *v.* Scott, 32 Vt. 82. See Miner *v.* Stevens, 1 Cush. 482. And the landlord may defend his possession by force. Davis *v.* Burrell, 10 C. B. 821. See further, as to what he may do after peaceable entry, Stearns *v.* Sampson, 59 Me. 568; Mugford *v.* Richardson, 6 Allen, 76.

x[1] The cases are reviewed in Low *v.* Elwell, 121 Mass. 309, and it is held that a landlord is not liable to a tenant at sufferance for an assault committed in the act of forcibly entering and expelling the tenant, though he may be liable criminally for breach of the peace.

forcible entry, or at common law; and in the cases which justify the entry as against the tenant, it is admitted that the landlord would be indictable for the force. (*d*)

It may be further observed, in respect to the rights of landlords, that, by the English statute of 11 Geo. II., they were entitled to be admitted to defend, in ejectment, suits brought against the tenant of the premises. This provision, probably, has been universally adopted or practised upon in this country. It is just and reasonable, and supplies the place of the process of voucher and aid-prayer in *the real actions. The New York Re- *119 vised Statutes (*a*) have retained the provision; and the privilege applies to any person having any privity of estate or interest with the tenant or the landlord in the premises in question. There has been some difficulty in this country, as to the right of the landlord to bring trespass for an injury to the land, while there was a tenant lawfully in possession. In *Campbell* v. *Arnold*, and, again, in *Tobey* v. *Webster*, (*b*) it was held that he could not, in such case, bring an action of trespass for waste committed upon the estate by a third person, though he might be entitled to a special action on the case, in the nature of waste. In *Starr* v. *Jackson*, (*c*) this rule was held not to apply, if the tenant in possession was one at will merely; whereas, in *Catlin* v. *Hayden*, (*d*) it was adjudged to apply, provided the tenant was one holding from year to year. The question as to the competency of the landlord to bring trespass for an injury to the freehold, while a tenant at will was in possession, was ably discussed in *Little* v. *Palister*. (*e*) There was no decision, however, on the various views afforded by the cases; inasmuch as the trespass complained of in that instance affected exclusively the rights of the tenant at will, and not any permanent rights of the landlord. The decisions in New York arose in cases in which the

(*d*) In the State of Maine, process under the statute of forcible entry and detainer may be maintained against a tenant at will, at the expiration of thirty days from the time of notice, in writing given to quit; for the notice itself terminates the tenancy. Davis *v.* Thompson, 13 Me. 209. A summary process is given in Connecticut to obtain possession on the expiration of a lease in writing, or by parol. Statutes of Connecticut, 1838, p. 399.

(*a*) Vol. ii. 341, sec. 17. [But see Merritt *v.* Thompson, 13 Ill. 716.]

(*b*) 1 Johns. 511; 8 id. 468.

(*c*) 11 Mass. 519.

(*d*) 1 Vt. 375.

(*e*) 3 Greenl. 6.

tenancy was not one strictly at will; and perhaps the cases which have been mentioned may be reconciled, on the distinction between tenancies at will and tenancies for years, or from year to year. The suit is in case for trespass to the injury of the reversion, unless the lessee in possession be at will only, and then trespass will lie by the reversioner. (*f*) A disseisee, without reëntry, may have trespass for the disseisin itself; and after reëntry, he may have trespass for any immediate injury to the freehold, because he is restored to his possession *ab initio*. (*g*) In *120 the English Court of K. B., *in the time of Lord Mansfield, it was decided, that the landlord of a tenant from year to year, though there was no reservation of the timber on the premises, might bring trespass against a third person for carrying it away, after it had been cut down. (*a*) The general rule is, that, to maintain trespass *quare clausum*, there must have been an actual possession in the plaintiff when the trespass was committed, or a constructive possession in respect of the right being actually vested in him. The ground of the action of trespass is the injury to the possession. (*b*)

(*f*) Lienow *v.* Ritchie, 8 Pick. 235; [Halligan *v.* Chicago & R. I. R. R., 15 Ill. 558; Davis *v.* Nash, 42 Me. 411; Lyford *v.* Toothaker, 39 Me. 28. But see Clark *v.* Smith, 25 Penn. St. 137.]

(*g*) Co. Litt. 257, a; Tobey *v.* Webster, 3 Johns. 468.

(*a*) Ward *v.* Andrews, 2 Chitty, 636.

(*b*) 3 Bl. Comm. 210; Ashurst, J., in 1 T. R. 480; Cooke *v.* Thornton, 6 Rand. 8; 3 Wooddeson, 198; Campbell *v.* Arnold, 1 Johns. 511, s. p.; 3 Greenl. 6. The reversioner cannot sue a stranger for acts of trespass on the land, unless they be attended with some tangible injury to the reversion. Baxter *v.* Taylor, 1 Nev. & Mann. 11; 4 B. & Ad. 72, s. c. Be the property real or personal, the plaintiff, to maintain trespass, must show possession, or a right of taking possession, at the time. Lunt *v.* Brown, 13 Me. 236; Rowland *v.* Rowland, 8 Ohio, 40; Anderson *v.* Nesmith, 7 N. H. 167. A party, into whose lands agisted cattle escape and do damage, may, at common law, have an action of trespass at his election, either against the general owner of the cattle or the agistor. Sheridan *v.* Bean, 8 Met. 284.

LECTURE LVII.

OF ESTATES UPON CONDITION.

ESTATES upon condition are such as have a qualification annexed to them, by which they may, upon the happening of a particular event, be created, or enlarged, or destroyed. (*a*) They are divided by Littleton (*b*) into estates upon condition implied or in law, and estates upon condition express or in deed.

1. **Of Conditions in Law.** — Estates upon condition in law are such as have a condition impliedly annexed to them, without any condition being specified in the deed or will. (*c*) If the tenant for life or years aliened his land by feoffment, this act was, at common law, as we have already seen, an implied forfeiture of the estate, being a fraudulent attempt to create a greater estate than the tenant was entitled to; and the reversioner might have entered, as for a breach of the condition in law. (*d*) Those estates were likewise subject to forfeiture, not only for waste, but for any other act which, in the eye of the law, tended to defeat or devest the estate in reversion, or pluck the seigniory out of the hands of the lord. (*e*) It was a tacit * condition annexed * 122 to every tenancy, that the tenant should not do any act to the prejudice of the reversion.

The doctrine of estates upon condition in law is of feudal extraction, and resulted from the obligations arising out of the feudal relation. The rents and services of the feudatory were considered as conditions annexed to his fief, and strictly construed. If the vassal was in default, by the non-payment of rent or non-performance of any feudal duty or service, the lord might resume the fief, and the rents and services were implied conditions inseparable from the estate. The remedy for breach of the con-

(*a*) Co. Litt. 201, a. (*b*) Litt. sec. 325.
(*c*) Litt. sec. 378, 380; Co. Litt. 215, b, 233, b, 234, b.
(*d*) Co. Litt. 215, a, 251, b.
(*e*) Glanv. lib. 9, c. 1; Fleta, lib. 3, c. 16; Wright on Tenures, 203.

dition was confined to the resumption of the estate by the donor and his heirs; and that resumption was required by the just interposition of the law, to be by judicial process. (*a*) The obligation of fidelity, resulting from the feudal solemnity of homage, was mutual; and if the lord neglected to protect his feudatory according to his estate, he was liable to be condemned to lose his seigniory, as well as the tenant, for default on his part, to forfeit his freehold. (*b*) At common law, a condition annexed to real estate could not be reserved to any one except the grantor and his heirs; (and the heir might enter for a condition broken, though not expressly named;) (*c*) and no other person could take advantage of a condition that required a reëntry to revest the estate.[1] The

(*a*) Wright on Tenures, 196–199; Butler's note, 84, to Co. Litt. lib. 3.

(*b*) Fleta, lib. 3, c. 16, sec. 9, 16, 25.

(*c*) This ancient rule is noticed in the modern case of Jackson *v.* Topping, 1 Wend. 388.

[1] *Conditions.* — (*a*) The text is confirmed by Nicoll *v.* N. Y. & Erie R. R., 12 N. Y. 121, 132. The principle of the text was applied in Massachusetts to a case in which a party conveyed land upon condition, and afterwards, before breach of condition, made a deed purporting to convey the same premises to his son, and died, leaving his son his heir. It was held that the latter could not enter for a subsequent breach, either as grantee or heir. Rice *v.* Boston & Worcester R. R., 12 Allen, 141. See Hooper *v.* Cummings, 45 Me. 359. *x*[1]

(*b*) *The Statute of Henry VIII.* only applies to such conditions as touch and concern the thing demised, in like manner as to covenants. Stevens *v.* Copp, L. R. 4 Ex. 20. But the cases as to what does touch or concern the land have generally arisen upon covenants in leases. It has been held that a covenant to use as a private dwelling-house only, concerns the land. Wilkinson *v.* Rogers, 10 Jur. N. S. 5.

x[1] That only the original grantor or his heirs can take advantage of a condition broken, see further, Ruch *v.* Rock Island, 97 U. S. 693; Wellons *v.* Jordan, 83 N. C. 371. Some cases state generally that entry is necessary to take advantage of a breach. Wellons *v.* Jordan, *supra*; Adams *v.* Lindell, 5 Mo. App. 197; Chapman *v.* Pingree, 67 Me. 198. In others it is said there must be an entry or some other unequivocal act showing an intention to insist on the forfeiture. Kenner *v.* American Contr. Co., 9 Bush, 202; M. & C. R. R. Co. *v.* Neighbors, 51 Miss. 412. In Ruch *v.* Rock Island, *supra*, bringing suit was held sufficient without either entry or demand of possession. A forfeiture for breach of condition will be waived by subsequent receipt of rent with knowledge of the breach. Davenport *v.* The Queen, 3 App. Cas. 115; Camp *v.* Scott, 47 Conn. 366. And it has been held that such a waiver will excuse future breaches of the same kind. Murray *v.* Harway, 56 N. Y. 337. But see Alexander *v.* Hodges, 41 Mich. 691. In Kentucky, &c. Co. *v.* Commonwealth, 13 Bush, 435, it was held that equity might rescind a lease where the lessee was entirely unable to do the work contemplated, even though there was no technical breach of condition.

grantor had no devisable interest by means of the condition, until he had restored his estate by entry, or by action; though he might extinguish his right by feoffment or fine to a stranger, or by release to the person who had the estate subject to the condition. (*d*) The assignee of the reversion could not enter for a condition broken, for at common law a covenant did not pass by the assignment of the reversion, and for this purpose he was considered a mere stranger. The statute of 32 Hen. VIII. c. 34, altered the common law in *this respect, so far as *123 to enable assignees of reversions of particular estates, to which conditions and covenants were annexed, to take advantage of the same; and it gave to the tenant the like remedies against the assignee, that he would have had against the assignor. This statute has been formally reënacted in some of the United States; and though the statute was made for the special purpose of relieving the king and his grantees, under the numerous forfeitures and grant of estates that had belonged to monasteries and other religious houses, yet the provision is so reasonable and just, that

(*d*) Litt. sec. 347, 348; Co. Litt. 215, a.

(A covenant not to carry on a particular trade will be enforced in equity against a sublessee who has not actual notice, but who has not made careful inquiries, and has not contracted not to examine his lessor's title. Parker *v.* Whyte, 1 H. & M. 167. See Clements *v.* Welles, L. R. 1 Eq. 200.) A covenant to keep and return in repair concerns the land, Martyn *v.* Clue, 18 Q. B. 661; so to keep, repair, &c., tenant's fixtures fixed to the premises; but not movable chattels, Williams *v.* Earle, L. R. 3 Q. B. 739; to insure a building not yet built, the money, in case of loss, to be spent in rebuilding, Masury *v.* Southworth, 9 Ohio St. 340; so, to pay for buildings erected, to pay assessments, &c., Post *v.* Kearney, 2 Comst. 394; Hunt *v.* Danforth, 2 Curtis, 592, 603; but see Tallman *v.* Coffin, 4 Comst. 134; so to leave the land well stocked with game, Hooper *v.* Clark, L. R. 2 Q. B. 200; so a covenant not to assign without license, Williams *v.* Earle, L. R. 3 Q. B. 739; so one to convey during the term, Hagar *v.* Buck, 44 Vt. 285. As to a covenant to deliver up the premises at the end of the term, *quære*. *Semble*, not. Sargent *v.* Smith, 12 Gray, 426; Doe *v.* Seaton, 2 Cr., M. & R. 728, 730. A condition of reëntry, if the tenant be lawfully convicted of an offence against the game laws, does not touch the land. Stevens *v.* Copp, L. R. 4 Ex. 20.

(*c*) The statute of Henry VIII. has no operation when the conveyance is not by deed. Bickford *v.* Parson, 5 C. B. 920; Standen *v.* Chrismas, 10 Q. B. 135. But stipulations pass to successors in yearly tenancies also, for the jury may infer a consent to go on on the old terms from payments of rent by the successor of the tenant to the landlord, or by the tenant to the successor of the landlord, the latter receiving it without objection, and from the fact that no notice to quit has been given. Cornish *v.* Stubbs, L. R. 5 Q. B. 334, 339; Buckworth *v.* Simpson, 1 C. M. & R. 834.

it has doubtless been generally assumed and adopted as part of our American law. (*a*) In the exposition of the statute it has been held that the grantee of part of the reversion could not take advantage of the condition, and it is destroyed by such a grant. The provision is confined to such conditions as are incident to the reversion, or for the benefit of the estate. (*b*) It only created a priority [privity] of contract between those who had priority [privity] of estate, as between the grantees of the reversion and the lessees and their assigns, and did not extend to covenants between grantors and grantees in fee. (*c*)

2. **Of Conditions in Deed.** — These conditions are expressly mentioned in the contract between the parties, and the object of them is either to avoid or defeat an estate; as if a man (to use the case put by Littleton) (*d*) enfeoffs another in fee, reserving to himself and his heirs a yearly rent, with an express condition annexed, that if the rent be unpaid, the feoffor and his heirs may enter, and hold the lands free of the feoffment. So, if a grant be to A. in fee, with a proviso, that if he did not pay twenty pounds by such a day, the estate should be void. It is usual in the grant to reserve in express terms, to the grantor and his heirs, a right of entry for the breach of the condition; but the grantor or his heirs may enter, and take advantage of the breach, by ejectment, *124 though there be no clause of entry. (*e*) *A condition in deed is either general or special. The former puts an end altogether to the tenancy, on entry for the breach of the condition; but the latter only authorizes the reversioner to enter on the land, and take the profits to his own use, and hold the land by way of pledge until the condition be fulfilled. (*a*) The stipulations in the form of a condition are various, and may be of any kind consistent with the general rules of law, as that the tenant pay a rent yearly or quarterly, or enfeoff B., or do a specified service for A., or sow the land with some particular grain, or do

(*a*) Laws of New York, sess. 11, c. 7, and N. Y. R. S. i. 747, sec. 23, 24, and Act of Virginia, Nov. 29, 1792; Territorial Act of Michigan, March 12, 1827; 1 N. C. R. S. 259.

(*b*) Co. Litt. 215, a, b.

(*c*) Lewes *v.* Ridge, Cro. Eliz. 863.

(*d*) Litt. sec. 325.

(*e*) Lord Hardwicke, in Wigg *v.* Wigg, 1 Atk. 383; Doe *v.* Watt, 1 Mann. & Ry. 694.

(*a*) Litt. sec. 325, 327; Co. Litt. 203, a; Shep. Touch. 157.

not assign or underlet without license, or do not marry a particular person. (*b*) A covenant in a lease, that if lessee, or his assigns, sells, the lessor shall have the right of preëmption, and one tenth of the purchase-money, is a valid covenant; and the estate is forfeited if that be made a condition of the breach of it. (*c*) The covenant not to assign without license is understood to apply only to voluntary sales, by the act of the lessee. It does not apply to sales by act of law, or proceedings *in invitum*; and creditors may seize and appropriate the value of the leases, as in cases of insolvency or bankruptcy, or on judgment and execution; unless the judgment be confessed with a view to evade the covenant, or unless it be part of the express agreement, that the lease shall not so pass by operation of law. (*d*)

These conditions are also either precedent or subsequent; and as there are no technical words to distinguish them, it follows, that whether they be the one or the other, is matter of construction, and depends upon the intention of the *party *125 creating the estate. (*a*) A precedent condition is one

(*b*) Co. Litt. 206, 207; Shep. Touch. by Preston, i. 128–130; Jackson *v.* Silvernail, 15 Johns. 278; Perrin *v.* Lyon, 9 East, 170. A conveyance on condition that the grantee shall keep a saw and grist mill on the land, doing business, is a valid condition, and a failure of performance forfeits the estate. Lessee of Sperry *v* Pond, 5 Ohio, 389; [Hadley *v.* Hadley Manufacturing Co., 4 Gray, 140.]

(*c*) Jackson *v.* Schutz, 18 Johns. 174; Jackson *v.* Groat, 7 Cowen, 285. In the case of Livingston *v.* Stickles, 8 Paige, 398, the chancellor held that a condition and covenant, in a lease in perpetuity, that upon every sale of the premises, the lessee or his assigns must obtain the consent in writing of the owner of the rent and reversion, and should offer him the right of preëmption, and if sold after such offer, one tenth of the purchase-money was to be paid to the lessor, was in restraint of, and in the nature of a fine upon alienation, and inconsistent with the spirit of our institutions; that the remedy, if any, was at law, and not in equity, and that if the landlord had not secured to himself a remedy at law, the Court of Chancery would not interfere to help him. [De Peyster *v.* Michael, (2 Seld.) 6 N. Y. 467.]

(*d*) Doe *v.* Carter, 8 T. R. 57, 300; Doe *v.* Bevan, 3 Maule & S. 358; Wilkinson *v.* Wilkinson, Cooper, Eq. 259; Jackson *v.* Corlis, 7 Johns. 531. Where a lease contained a condition that the lessees or their assigns should not alien without license, a license given to one of three lessees dispensed with the condition as to all, on the ground that the condition, being entire, could not be divided or apportioned. Dumpor's Case, 4 Co. 119, b. This hard rule is considered as unshaken law, down to this day. 4 Taunt. 735; 14 Ves. 173; Dakin *v.* Williams, 17 Wend. 447. See also note a, to Dumpor's Case, in Thomas & Fraser's excellent edition of Lord Coke's Reports, and also in the notes to that case in Smith's Leading Cases, Law Library, N. S. xxvii.

(*a*) Ashurst, J., in 1 T. R. 645; Lord Eldon, in 2 Bos. & P. 295; Heath, J., ib. 297; Finlay *v.* King, 3 Peters, 346; [Underhill *v.* The Saratoga & Washington R. R.

which must take place before the estate can vest, or be enlarged; as if a lease be made to B. for a year, to commence from the first day of May thereafter, upon condition that B. pay a certain sum of money within the time; or if an estate for life be limited to A. upon his marriage with B.; here the payment of the money in the one case, and the marriage in the other, are precedent conditions, and until the condition be performed, the estate cannot be claimed, or vest. (*b*) Precedent conditions must be literally performed, and even a court of chancery will never vest an estate, when, by reason of a condition precedent, it will not vest in law. It cannot relieve from the consequences of a condition precedent unperformed. (*c*)

Subsequent conditions are those which operate upon estates already created and vested, and render them liable to be defeated. Of this kind are most of the estates upon condition in law, and which are liable to be defeated on breach of the condition, as on failure of payment of the rent, or performance of other services annexed to the estate. So long as these estates upon subsequent condition continue unbroken, they remain in the same situation as if no such qualification had been annexed. The persons who have an estate of freehold subject to a condition are seised, and may convey or devise the same, or transmit the inheritance to their heirs, though the estate will continue defeasible until the condition be performed, or destroyed, or released, or barred by the statute of limitations, or by estoppel. (*d*) A devise of lands to a town for a schoolhouse, *provided it be built within one hundred rods of the place where the meeting house stands*, was held to be valid as a condition subsequent; and the vested estate *126 would be *forfeited, and go over to the residuary devisee

Co., 20 Barb. 455; Parmelee *v.* The Oswego & Syracuse R. R., (2 Seld.) 6 N. Y. 74; Nicoll *v.* The New York & Erie R. R. Co., 12 N. Y. 121, and s. c. 12 Barb. 460.]

(*b*) 2 Bl. Comm. 154.

(*c*) Popham *v.* Bampfield, 1 Vern. 83; Harvey *v.* Aston, 1 Atk. 361; West, 350, s. c.; Reynish *v.* Martin, 3 Atk. 330; Scott *v.* Tyler, 2 Bro. C. C. 431. Hargrave's argument in this latter case is distinguished for its learning and skill, and he has republished it separately in the volume of his Judicial Arguments. Stackpole *v.* Beaumont, 3 Ves. 89; Wells *v.* Smith, 2 Edw. Ch. 78; [Nevius *v.* Gourley, 95 Ill. 206.] But see City Bank *v.* Smith, 3 Gill & J. 265, where it is said that equity will relieve against penalties and forfeitures, when the matter admits of compensation, whether the condition on which they depend be precedent or subsequent. [Bowser *v.* Colby, 1 Hare, 109.]

(*d*) 2 Bl. Comm. 156; Preston on Abstracts of Title, ii. 185.

as a contingent interest, on non-compliance, in a reasonable time, with the condition. (*a*) So, if land be given, on condition that the public buildings of the parish be erected thereon, it has been held to revert to the donor, if the seat of justice of the parish be removed, under the sanction of an act of the legislature passed subsequent to the grant. (*b*) Though an estate be conveyed, it passes to the grantee, subject to the condition, and laches are chargeable upon the grantee, even though such grantee, or his assignee, be an infant or *feme covert*, for non-performance of a condition annexed to the estate. (*c*) It is a general principle of law, that he who enters for a condition broken, becomes seised of his first estate · and he avoids, of course, all intermediate charges and incumbrances. (*d*)

If the condition subsequent be followed by a limitation over to a third person, in case the condition be not fulfilled, or there be a breach of it, that is termed a conditional limitation. (*e*) Words of *limitation* mark the period which is to determine the estate; but words of *condition* render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate, or completion of the period described by the limitation. The one specifies the utmost time of continuance, and the other marks some event, which, if it takes place in the course of that time, will defeat the estate. (*f*) The material distinction between a condition and a limitation consists in this, that a condition does not defeat the estate, although it be broken, until entry by the * grantor or his *127 heirs; and when the grantor enters, he is in as of his former estate. His entry defeats the livery made on the creation of the original estate, and, consequently, all subsequent estates or remainders dependent thereon. Conditions can only be reserved for the benefit of the grantor and his heirs. A stranger cannot take advantage of the breach of them. There must be an actual entry

(*a*) Hayden *v.* Stoughton, 5 Pick. 528.

(*b*) Police Jury *v.* Reeves, 18 Mart. (La.) 221; [Pickle *v.* McKissick, 21 Penn. St. 232.]

(*c*) Co. Litt. 246, b.; [Garrett *v.* Scouten, 3 Den. 334.]

(*d*) Perkins, sec. 840; Shep. Touch. by Preston, i. 121, 155; [Great Western Ry. Co. *v.* Smith, 2 Ch. D. 235.]

(*e*) Pells *v.* Brown, Cro. Jac. 591; Holt, C. J., Page *v.* Hayward, 11 Mod. 61; Lord Hardwicke, in Wigg *v.* Wigg, 1 Atk. 383; 2 Bl. Comm. 155; Doe *v.* Hawk, 2 East, 488; [Brattle Square Church *v.* Grant, 3 Gray, 142.]

(*f*) Shep. Touch. by Preston, i. 117; Preston on Estates, i. 45, 49, 128, 129; [*In re* Machu, 21 Ch. D. 838.]

for the breach of the condition, or there must be, in the case of non-payment of rent, an action of ejectment, brought as a substitute, provided by the statute of 4 Geo. II. c. 2, for the formal reëntry at common law, and which provision on this point is adopted in New York, (*a*) and in several of the other states which have followed the English system. But it is in the nature of a limitation to determine the estate when the period of the limitation arrives, without entry or claim; and no act is requisite to vest the right in him who has the next expectant interest. Were it otherwise, the heir might defeat the limitation over, by refusing to enter for breach of the condition. (*b*) To get rid of the difficulty under the old rule of law, that an estate could not be limited to a stranger upon an event which went to abridge or determine the previously limited estate, a distinction was introduced, in the case of wills, between a condition and a conditional limitation, and which has been supposed to partake more of refinement and subtlety than of solidity. A *conditional limitation* is of a mixed nature, and partakes of a condition and of a limitation: as if an estate be limited to A. for life, provided that when C. returns from Rome, it shall thenceforth remain to the use of B. in fee; it partakes of the nature of a condition, inasmuch as it defeats the estate previously limited; and is so far a limitation, and to be distinguished from a condition, that upon the *128 contingency taking place the estate passes to the * stranger without entry, contrary to the maxim of law, that a stranger cannot take advantage of a condition broken. (*a*) These conditional limitations, though not valid in the old conveyances at

(*a*) New York Revised Statutes, ii. 505, sec. 30.

(*b*) Co. Litt. 214, b, 218, a; 10 Co. 40, b; 2 Bl. Comm. 155; Preston on Estates, i. 46–48; Shep. Touch. by Preston, i. 121; Den *v.* Hance, 6 Halst. 244. Mr. Justice Wilde, in Fifty Associates *v.* Howland, [11 Met. 99,] says that Blackstone correctly lays down the distinction between words of condition or conditional limitation.

(*a*) Butler's note, 99, to Co. Litt. lib. 3; Stearns *v.* Godfrey, 16 Me. 158. Douglas, in a note to Doug. 755, thinks the distinction between a conditional limitation, and a remainder, merely verbal; but Fearne (Fearne on Remainders, 10–18) vindicates the distinction, and relies on the authority of the case of Cogan *v.* Cogan, Cro. Eliz. 360. Conditional limitations which are contingent remainders are limited to commence *when* the first estate is, by its original limitation, to determine; but conditional limitations, which are not remainders, are so limited as to be independent of the extent and measure given to the first estate, and are to take effect upon an event which may happen *before* the regular determination of the first estate, and so rescind it. This is Mr. Fearne's distinction; but he is not clear and fortunate when he comes to illustrate it by examples; and they appear to be quite refined, and essentially verbal.

common law, yet, within certain limits, they are good in wills and conveyances to uses. (*b*)

There is this further distinction to be noticed between a condition annexed to an estate for years, and one annexed to an estate of freehold, that in the former case the estate *ipso facto* ceases as soon as the condition is broken; whereas, in the latter case, the breach of the condition does not cause the *cesser* of the estate, without an entry or claim for that purpose. *y*[1] It was a rule of the common law, that where an estate commenced by livery, it could not be determined before entry. When the estate has, *ipso facto*, ceased, by the operation of the condition, it cannot be revived without a new grant; but a voidable estate may be confirmed, and the condition dispensed with. (*c*)

(*b*) Fearne on Remainders, 10, 391–393, 409, 410. In Lady Ann Fry's Case, 1 Vent. 199, Sir Matthew Hale said, the point was too clear for argument; and that though the word "condition" be used, yet, limiting a remainder over made it a limitation. If there be no limitation over of the estate upon a breach of the condition annexed, it is not a conditional limitation, but an estate upon a condition subsequent at the common law, and the heir must enter for a breach of the condition. The New York Revised Statutes, i. 725, sec. 27, declare, that a remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder shall be construed a conditional limitation, and shall have the same effect as such a limitation would have by law. An able writer in the American Jurist, xi. 61, says, that those words were merely declaratory of the common law, which is, that a remainder whether termed such, or a contingent limitation, or improperly, as in the statute, a conditional limitation, takes effect on the happening of a contingent event which puts an end to the precedent estate. [Mayor, &c. of New York *v.* Stuyvesant, 17 N. Y. 34.]

(*c*) Co. Litt. 215, a; Pennant's Case, 3 Co. 64; Preston on Abstracts of Title, iii. 397. This distinction between leases for years and for life no longer prevails. In relation to leases for years as well as for life, the cause of forfeiture only renders the lease void as to the lessee, and it may be affirmed by the lessor, and the rights and obligations of both parties will in that case continue. The courts will not so construe the contract as to enable the lessee to put an end to it at pleasure, by his own improper conduct. Clark *v.* Jones, 1 Den. 516. Mr. Preston says, that every limitation which is to vest an interest on a contingency, or upon an event which may or may not happen, is a *conditional limitation*. A contingent remainder is a conditional limitation; and estates which have their operation by resulting or springing use, or by executory devise, and are to commence on an event, are all raised by conditional limitations. It is the uncertainty of the happening of the event that distinguishes an absolute limitation from a conditional limitation, or a limitation upon contingency. Though all contingent interests are executory, yet all executory interests are not contingent. Preston on Estates, i. 40, 41, 63. Mr. Preston here confounds conditional and contingent limitations; but Lord Mansfield, in Buckworth *v.* Thirkell, 3 Bos. & P. 652, note, (s. c.) 1 Coll. Jurid. 247, marked the distinction, and said there might be a limitation depending on a contingency, without any condition in it.

y[1] Kenner *v.* American Contract Co., 9 Bush, 202.

*129 *A *collateral limitation* is another refinement belonging to this abstruse subject of limited and conditional estates. It gives an interest for a specified period, but makes the right of enjoyment to depend on some collateral event, as a limitation of an estate to a man and his heirs, tenants of the manor of Dale, or to a woman during widowhood, or to C. till the return of B. from Rome, or until B. shall have paid him twenty pounds. The event marked for the determination of the estate is *collateral* to the time of continuance. These superadded clauses of qualification give to the estate a determinable quality; and, as we have already seen in a former lecture, (*a*) if the estate be one of inheritance, it is distinguished, as a qualified, base, or determinable fee. The estate will determine as soon as the event arises, and it never can be revived. (*b*)

Conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates; and the rigorous exaction of them is a species *summum jus*, and in *130 many cases hardly reconcilable with conscience. (*c*) *If the condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, either by the act of God, or of the law, or of the grantor; or if it be impossible at the time of making it, or against law, the estate of the grantee, being once vested, is not thereby devested, but becomes absolute. (*a*) *y*[1] So, if the condition be personal, as that

(*a*) Lect. liv.

(*b*) Poole *v.* Nedham, Yelv. 149; Baldwin & Cock's Case, 1 Leon. 74; Preston on Estates, i. 43, 44, 49, 50; [Leonard *v.* Burr, 18 N. Y. 96.]

(*c*) Co. Litt. 205, b, 219, b; 8 Co. 90, b.

(*a*) Co. Litt. 206, a, 208, b; 2 Bl. Comm. 156; Parker, C. J., in Mitchell *v.* Reynolds, 1 P. Wms. 189; Lord Chief Justice Treby, in Cary *v.* Bertie, 2 Vern. 339; [Doe dem. Anglesea *v.* Rugeley, 6 Q. B. 107, 114; Martin *v.* Ballou, 13 Barb. 119.]

y[1] *Void Conditions.* — A condition subsequent which is in general restraint of marriage is invalid as to personalty, as to realty directed to be converted into personalty, and as to mixed funds. Bellairs *v.* Bellairs, 18 L. R. Eq. 510; Duddy *v.* Gresham, 2 L. R. Ir. 442. But if real estate alone is involved and there is no intention to restrain marriage, or in any case if the restraint is only as to a special class, or is of a second marriage, the condition will be valid. Jenner *v.* Turner, 16 Ch. D. 188; Jones *v.* Jones, 1 Q. B. D. 279; Allen *v.* Jackson, 1 Ch. D. 399. See Randall *v.* Marble, 69 Me. 310. With Allen *v.* Jackson compare Duddy *v.* Gresham, *supra*. A condition in partial restraint of alienation has been held valid. *In re* Macleay, 20 L. R. Eq. 186. A condition that land shall not be used for a specified purpose was held valid in Cowell *v.* Springs Co., 100 U. S. 55. Where

the lessee shall not sell without leave, the executors of the lessee, not being named, may sell without incurring a breach. (*b*) A court of equity will never lend its *aid* to devest an estate for the breach of a condition subsequent. The cases, on the contrary, are full of discussions, how far chancery can *relieve* against subsequent conditions. The general rule formerly was, that the court would interfere, and relieve against the breach of a condition subsequent, provided it was a case admitting of compensation in damages. (*c*) But the relief, according to the modern English doctrine in equity, is confined to cases where the forfeiture has been the effect of inevitable accident, and the injury is capable of a certain compensation in damages. (*d*) In the case of *Hill* v. *Barclay*, (*e*) Lord Eldon said, relief might be granted against the breach of a condition to pay money, but not where anything else was to be done; and he insisted, that where the breach of the condition consisted of acts of commission, directly in the face of it, as by assigning a lease without license, and the law had ascertained the contract, and the rights of the parties, a court of equity could not interfere. * A court of equity cannot *131 control the lawful contracts of parties, or the law of the land.

Conditions are not sustained when they are repugnant to the nature of the estate granted, or infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience. A condition annexed to a conveyance in fee, or by devise, that the purchaser or devisee should not alien, is unlawful and void. The restraint is admitted in leases for life or years, but it is incompatible with the absolute right appertain-

(*b*) Dyer, 66, a, pl. 8; Moore, 11, pl. 40; [Kellam *v.* Kellam, 2 P. & H. (Va.) 257.]

(*c*) Popham *v.* Bampfield, 1 Vern. 83.

(*d*) Rolfe *v.* Harris, 2 Price, 207, note; Bracebridge *v.* Buckley, Ib. 200; City Bank *v.* Smith, 3 Gill & J. 265; Jeremy's Eq. Jur. 475; Schermerhorn *v.* Negus, 1 Den. 460.

(*e*) 18 Ves. 56.

the condition is that the devisee is to do some act, ignorance on his part of the condition will not prevent its operation. Astley *v.* Earl of Essex, 18 L. R. Eq. 290; *In re* Hodge's Legacy, 16 L. R. Eq. 92. Comp. Murphy *v.* Broder, 9 Ir. R. C. L. 123. But where performance of the condition is rendered impossible by the testator himself it will cease to be operative. Jones *v.* C. & O. Ry. Co., 14 W. Va. 514; Yates *v.* University College, 7 L. R. H. L. 438. See also Booth *v.* Meyer, 78 L. T. 125; L. P. & C. Ry. Co. *v.* Hood, 67 Ind. 580.

ing to an estate in tail or in fee. (*a*)[1] If the grant be upon the condition that the grantee shall not commit waste, or not take

(*a*) In a bequest to a daughter, with a proviso that if she attempted to sell or dispose of it, it should be void, the restriction was held to be void. Newton *v.* Reid, 4 Sim. 141. A restraint upon alienation in *cases of leases in perpetuity*, with a reservation of rent, and with covenants and conditions annexed, is tolerated and held valid in law. *Vide supra*, 124.

[1] *Restraints on Alienation.* — A simple proviso against alienation annexed to a life estate was held to be void in Brandon *v.* Robinson, 18 Ves. 429; 1 Rose, Cas. in Bank. 197; *post*, 311, n. (*b*). This case is explained in Rochford *v.* Hackman, *infra*, as decided on the ground that there was no proviso determining the life interest on the happening of the event sought to be prevented; and it is clear on general principles that a mere prohibition against alienating a definite estate during its continuance is nugatory, Renaud *v.* Tourangeau, L. R. 2 P. C. 4; [Turley *v.* Massengill, 7 Lea, 353; Anderson *v.* Cary, 36 Ohio St. 506; McCleary *v.* Ellis, 54 Iowa, 311; Mandlebaum *v.* McDonnell, 29 Mich. 78; *In re* Wolstenholme, 43 L. T. 752;] Davidson *v.* Chalmers, 33 Beav. 653; although there are American cases which go far towards sustaining such prohibitions, Rife *v.* Geyer, 59 Penn. St. 393; White *v.* White, 30 Vt. 338. *x*[1] But a limitation over on alienation, bankruptcy, &c., of one entitled to a life interest, is very common, and is valid by the English

x[1] There is no doubt that if property is so left in trust that it is optional with the trustee whether to pay to a given person or not, such person obtains no alienable interest, and none which can be availed of by his creditors. Gray, Restraints on Alienation, §§ 166, 167; Hall *v.* Williams, 120 Mass. 344; Foster *v.* Foster, 133 Mass. 179; Nichols *v.* Eaton, 91 U. S. 716; Wetmore *v.* Truslow, 51 N. Y. 338. The English law, as stated in the note, does not go beyond this. In this country the decisions are conflicting. It seems that a provision that an equitable fee shall not be subject to the claims of creditors is invalid. Taylor *v.* Harwell, 65 Ala. 1; Gray *v.* Obear, 54 Ga. 231. But see s. c. 59 Ga. 675; Keyser's App., 57 Penn. St. 236. See also Daniels *v.* Eldredge, 125 Mass. 356. But it has been held that a provision that an equitable life estate shall not be alienable or subject to the claims of creditors is valid, even where the trustee has no discretion as to payment. Broadway Nat. Bank *v.* Adams, 133 Mass. 170; Overman's App., 88 Penn. St. 276; Ashurst's App., 77 Penn. St. 464. And such has been declared to be the law in a *dictum* of Miller, J., in Nichols *v.* Eaton, 91 U. S. 716, 725, which *dictum* has been cited in several cases where the point was not really involved. Wallace *v.* Campbell, 53 Tex. 229; Morriss *v.* Morriss, 33 Gratt. 51, 73. In Massachusetts, the rule was held not to extend to a case where a person created a trust for her own benefit, with a provision that it should not be liable for her debts. Pacific Bank *v.* Windram, 133 Mass. 175. The rule as established in Pennsylvania has been looked upon there with regret. See Agnew, C. J., in Overman's App., *supra*. Upon principle, there would seem to be no ground upon which a testator can, by an arbitrary provision, take away the natural incidents of an estate granted; and the true question in every case would seem to be as to the extent of the rights of the *cestui*. Gray, Restraints on Alienation, *passim*; Hardenburgh *v.* Blair, 30 N. J. Eq. 42; Hooberry *v.* Harding, 10 Lea, 392, overruling as to this point s. c. 3 Tenn. Ch. 677. See also 10 Am. L. R. 591.

the profits, or his wife not have her dower, or the husband his curtesy, the condition is repugnant and void, for these rights are

law. Rochford *v.* Hackman, 9 Hare, 475; 21 L. J. N. S. Ch. 511; 10 Eng. L. & Eq. 64; Craven *v.* Brady, L. R. 4 Ch. 296; White *v.* Chitty, L. R. 1 Eq. 372; Cox *v.* Fonblanque, L. R. 6 Eq. 482; Oldham *v.* Oldham, L. R. 3 Eq. 404; Roffey *v.* Bent, ib. 759; [Ancona *v.* Waddell, 10 Ch. D. 157.] A clause of cesser would be equally effectual. Rochford *v.* Hackman, *supra*; Joel *v.* Mills, 3 Kay & J. 458, 468; [*In re* Throckmorton, 7 Ch. D. 145. *Contra* where a fee is granted. *In re* Machu, 21 Ch. D. 838.] A most comprehensive clause will be found in many of the above cases, the general intent of which has been said to be that the gift is to be for the personal enjoyment of the beneficiary, and if that personal enjoyment is not to be had by reason of the bankruptcy, alienation, or any other act or omission by which the property would be vested in any other person or persons, then the forfeiture takes effect; but if not, it does not take effect. Trappes *v.* Meredith, L. R. 9 Eq. 229, 232; [7 L. R. Ch. 248.]

When, however, a fee, or an absolute interest in personalty is given, an executory devise over upon alienation by mortgage, fine, or recovery, is void. Ware *v.* Cann, 10 B. & C. 433; Bradley *v.* Peixoto, Tud. L. C. on R. P., 3 Ves. 824; Attwater *v.* Attwater, 18 Beav. 330.[x2] In order to give a person the whole benefit of a fund, and at the same time secure the *corpus* against the donee's creditors, as well as his own acts, it should be given to a trustee, with discretionary power to give or withhold it, and what remains unapplied at the decease or bankruptcy of the beneficiary should be limited over. Without the latter provision bankruptcy has been held to determine the discretion of the trustee, so that the fund passed to the assignee. Piercy *v.* Roberts, 1 My. & K. 4; Hayes & Jarm. on Wills, 7th ed. 199, note to Prec. XII. Even with such a limitation over, if the fund is to be applied after bankruptcy to the support of the bankrupt and his family, his assignees will take the surplus over a reasonable support for his family, so far as the benefit derived by the bankrupt is capable of severance. Kearsley *v.* Woodcock, 3 Hare, 185; Wallace *v.* Anderson, 16 Beav. 533; Carr *v.* Living, 28 Beav. 644; Lord *v.* Bunn, 2 Younge & Coll. C. C. 98; *Re* Coe's Trust, 4 Kay & J. 199; Bramhall *v.* Ferris, 14 N. Y. 41. But see White *v.* White, 30 Vt. 338; Rife *v.* Geyer, 59 Penn. St. 393.

The peculiar case of married women has been considered ii. 170, n. 1. The exception as to charities will be found *post*, 283, n. 1, on the rule against perpetuities, which is there shown to have a somewhat different scope from the prohibition of indefinite restraints on alienation. Another exception to the rule has been held to exist in the case of pews. French *v.* Old South Society in Boston, 106 Mass. 479.

[x2] In Shaw *v.* Ford, 7 Ch. D. 669, two exceptions are stated to the rule that an estate given by will may be defeated by the happening of any event, viz.: (1) "that any executory devise, defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution and at no other time, is bad;" (2) "that any executory devise which is to defeat an estate, and which is to take effect on the exercise of any of the rights incident to that estate, is void." The right to alienate and to hold without alienating being both incident to an estate, it follows that a devise over, either upon alienation or upon non-alienation, is void. The existence of the first exception is denied in Gray on Restraints on Alienation, § 63. But the second exception is thought to furnish the most satisfactory ground which has been stated for the rule that a devise over upon intestacy is bad. Ib. §§ 64–74.

inseparable from the estate in fee. (*b*) Nor could a tenant in tail, though his estate was originally intended as a perpetuity, be restrained by any proviso in the deed creating the estate, from suffering a common recovery. (*c*) Such restraints were held by Lord Coke to be absurd, and repugnant to reason and to "the freedom and liberty of freemen." The maxim which he cites contains a just and enlightened principle worthy of the spirit of the English law in the best ages of English freedom; *iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem.* (*d*) If, however, a restraint upon alienation be confined to an individual named, to whom the grant is not to be made, it is said by very high authority (*e*) to be a valid condition. But this case falls within the general principle, and it may be very questionable whether such a condition would be good at this day. In
* 132 *Newkirk* v. *Newkirk*, (*f*) the * court looked with a hostile eye upon all restraints upon the free exercise of the inherent right of alienation belonging to estates in fee; and a devise of lands to the testator's children, *in case they continue to inhabit the town of Hurley, otherwise not*, was considered to be unreasonable, and repugnant to the nature of the estate.

If it be doubtful whether a clause in a deed be a covenant or a condition, the courts will incline against the latter construction; for a covenant is far preferable to the tenant. If a condition be broken, the landlord may indulge his caprice, and even malice, against the tenant, without any certain relief; but equity will not enforce a covenant embracing a hard bargain; and, at law, there can be no damages without an injury. (*a*) Whether the words amount to a condition, or a limitation, or a covenant, may be matter of construction, depending on the contract. The intention of the party to the instrument, when clearly ascertained, is of controlling efficacy; though conditions and limitations are not readily to be raised by mere inference and argument. (*b*)

(*b*) Mildmay's Case, 6 Co. 40; Litt. sec. 360; Co. Litt. 206, b, 223, a; Stukeley *v.* Butler, Hob. 168; Lord Kenyon, 8 T. R. 61.

(*c*) Mary Portington's Case, 10 Co. 42, a.

(*d*) Co. Litt. 223, a.

(*e*) Litt. sec. 361; Co. Litt. 223.

(*f*) 2 Caines, 345.

(*a*) Best, Ch. J., in Doe *v.* Phillips, 9 Moore, 46. If words, both of covenant and condition, be used in the same instrument, both are allowed to operate. Bayley, J., in Doe *v.* Watt, 8 B. & C. 308.

(*b*) Berkley *v.* Pembroke, Moore, 706; Cro. Eliz. 884; Argument of Pollexfen, in Carpenter *v.* Smith, Pollexf. 70. The words usually employed in creating a condition

The distinctions on this subject are extremely subtle and artificial; and the construction of a deed, as to its operation and effect, will after all depend less upon artificial rules than upon the application of good sense and *sound equity to *133 the object and spirit of the contract in the given case. A tender of performance at the day will save a condition, and if the tender be refused, the land may be discharged, as in the case of a mortgage, while the debt remains. (*a*) [1]

are, *upon condition;* and this, says Lord Coke, is the most appropriate expression; or the words may be, *so that; provided; if it shall happen,* &c. The apt words of limitation are, *while; so long as; until; during,* &c. The words *provided always,* may, under the circumstances, be taken as a condition, or as a limitation, and sometimes as a covenant. Litt. sec. 325–330; Co. Litt. 203, a, b; Mary Portington's Case, 10 Co. 41, b, 42, a; Lord Cromwell's Case, 2 Co. 69; Bacon's Abr. tit. Conditions, H.; [Vanatta *v.* Brewer, 32 N. J. Eq. 268.]

(*a*) Litt. sec. 338; Co. Litt. 209, b; Jackson *v.* Crafts, 18 Johns. 110; Swett *v.* Horn, 1 N. H. 332.

[1] See 194, n. 1, (*d*).

LECTURE LVIII.

ON THE LAW OF MORTGAGE.

A MORTGAGE is the conveyance of an estate, by way of pledge for the security of debt, and to become void on payment of it. The legal ownership is vested in the creditor; but, in equity, the mortgagor remains the actual owner, until he is debarred by his own default, or by judicial decree.

There is no branch of the law of real property which embraces a greater variety of important interests, or which is of more practical application. The different, and even conflicting views, which were taken of the subject by the courts of law and of equity, have given an abstruse and shifting character to the doctrine of mortgages. But the liberal minds and enlarged policy of such judges as Hardwicke and Mansfield gave expansion to principles, tested their soundness, dispersed anomalies, and assimilated the law of the different tribunals on this as well as on other heads of jurisprudence. The law of mortgage, under the process of forensic reasonings, has now become firmly established on the most rational foundations.

In the examination of so extensive a title, I shall endeavor to take a just and accurate, though it must necessarily be only a very general view of the subject, under the following heads: —

1. Of the general nature of mortgages:
2. Of the mortgagor's estate and equity of redemption:
3. Of the estate and rights of the mortgagee:
4. Of foreclosure.

1. Of the General Nature of Mortgages. — (1.) *Different Kinds of Mortgages.* — The English law of mortgages appears to have been borrowed, in a great degree, from the civil law; and the Roman *hypotheca* corresponds very closely with the description of a mortgage in our law. The land was retained by the debtor, and the creditor was entitled to his *actio hypothecaria*, to obtain possession

of the pledge, when the debtor was in default; and the debtor had his action to regain possession, when the debt was paid, or satisfied out of the profits, and he might redeem at any time before a sale. (*a*) The use of mortgages is founded on the wants and convenience of mankind, and would naturally follow the progress of order, civilization, and commerce. In the time of Glanville, the mortgage of lands, as security for a loan, was in use, though, during the feudal ages, it was doubtless under the same check as the more absolute alienation of the fee; and both the alienation and mortgage of land were permitted only with the concurrence *of the lord. (*a*) The English books distinguish *137 between a *vadium vivum* and *vadium mortuum*. The first is when the creditor takes the estate to hold and enjoy it, without any limited time for redemption, and until he repays himself out of the rents and profits. In that case, the land *survives* the debt; and, when the debt is discharged, the land, by right of reverter, returns to the original owner. In the other kind of mortgage, the fee passed to the creditor, subject to the condition of being defeated, and the title of the debtor to be resumed, on his discharging the debt at the day limited for the payment; and if he did not, then the land was lost, and became *dead* to him for

(*a*) Mr. Butler is of opinion that mortgages were introduced less upon the model of the Roman *pignus*, or *hypotheca*, than upon the common-law doctrine of conditions. But, upon a view of the Roman *hypotheca*, it is impossible to withhold our belief, that the English law of mortgages, taken in its most comprehensive sense, was essentially borrowed from the civil law. Thus, in the Roman law, the mortgage could be held as security for further advances (Code, 8. 27. 1), and a covenant that the mortgage should be forfeited absolutely on a default was void. Code, 8. 35. 3. So, a mortgagor was entitled to due notice and opportunity to redeem, before his right was extinguished; and the pledge could not be sold without a protracted notice, or judicial decree. Code, 8. 28. 4; ib. 34. 3, sec. 1. The mortgagee was allowed to tack subsequent debts, in the case of the mortgagor seeking redemption, though this was not permitted to the extent of impairing the rights of intermediate incumbrancers. Dig. 20. 4. 3; ib. 20. 4. 20; Code, 8. 27. 1. See Story's Comm. on Eq. Jur. ii. 276, note. The analogy might be traced in other important particulars. See Pothier's Pandectæ Justinianeæ, lib. 27, and Dict. du Digeste, par Thevénot-Dessaules, tit. Hypothèque, *passim*. In Dr. Browne's View of the Civil Law, i. 200–210, the general features of similitude between the Roman *hypotheca* and the English mortgage are strongly delineated. In Burge's Comm. on Colonial and Foreign Laws, vol. ii. 164–246, there is a full and instructive view of the law of mortgages, under the Roman civil law, and the law of those modern nations which have adopted the civil law; and such a view gives us a profound impression of the wisdom, refinement, and justice of the property regulations of the Roman law.

(*a*) Glanville, lib. 10, c. 6. Nulli liceat feudum vendere vel pignorare sine permissione illius domini. Feud. lib. 2, tit. 55.

ever. (*b*) This latter kind of mortgage is the one which is generally in use in this country. The Welsh mortgages, which are very frequently mentioned in the English books, though they have now entirely gone out of use, resembled the *vivum vadium* of Coke, or the *mortuum vadium* of Glanville; for though in them the rents and profits were a substitute for the interest, and the land was to be held until the mortgagor refunded the principal; yet, if the value of the rents and profits was excessive, equity would, notwithstanding any agreement to the contrary, decree an account. (*c*)

*138 (2.) *Of the Pledge and Mortgage of Chattels.* — * There is material distinction also to be noticed between a pledge and a mortgage. A pledge, or pawn, is a deposit of goods redeemable on certain terms, and either with or without a fixed period for redemption. Delivery accompanies a pledge, and is essential to its validity. The general property does not pass, as in the case of a mortgage, and the pawnee has only a special property. (*a*) If no

(*b*) Co. Litt. 205, a; 2 Bl. Comm. 157.

(*c*) Fulthorpe *v.* Foster, 1 Vern. 476. The Welsh mortgage, under its strict contract, without any mitigation of its severity in equity, was analogous to the contract termed *antichresis* in the Roman law. Dig. 20. 1. 11. 1. It was likewise analogous to the mortgage of lands in the age of Glanville; and he gives to a mortgage, by which the creditor was to receive the rents and profits during the detention of the debt, without account and without applying them to reduce it, the name of *mortuum vadium*. It was a hard and unconscientious, but a lawful contract; and Glanville, with primeval frankness and simplicity, does not scruple to condemn it as unjust, while he admits it to be lawful: *injusta est et honesta*. Glanv. lib. 10, c. 6, 8. The French Code Civil, n. 2085, has adopted the Roman antichresis, with this mitigation, that the rents and profits are to be applied to keep down the interest, and the surplus, if any, to extinguish the principal. Under the Civil Code of Louisiana, taken from the Code Napoleon, there are two kinds of pledges: the pawn, when a movable is given as security, and the *antichresis*, when the security given consists in immovables or real estate. Under the latter the creditor acquires the right to take the rents and profits of the land, and to credit, annually, the same to the interest, and the surplus to the principal of the debt, and is bound to keep the estate in repair, and to pay the taxes. Upon default upon the part of the debtor, the creditor may prosecute the debtor, and obtain a decree for selling the land pledged. Civil Code, art. 3143–3148. Livingston *v.* Story, 11 Peters, 351. Judge Ruffin, in Poindexter *v.* M'Cannon, 1 Dev. Eq. (N. C.) 877, speaks in indignant terms of the *vadium vivum*: "No mortgagee or mortgagor ever yet made a contract, upon which the possession was to change immediately, unless it were the veriest grinding bargain that could be driven with a distressed man, who had no way to turn."

(*a*) Thompson *v.* Dolliver, 182 Mass. 103. In the Roman law, the *pignus*, pledge, or pawn, answered to a pledge of movables in the common law, and possession was requisite. But the *hypotheca* answered to a mortgage of real estate, where the title

time of redemption be fixed by the contract, the pawnor may redeem at any time; and though a day of payment be fixed, he may redeem after the day. He has his whole lifetime to redeem, provided the pawnee does not call upon him to redeem, as he has a right to do at any time, in his discretion, if no time for redemption be fixed; and if no such call be made, the representatives of the pawnor may redeem after his death. (*b*) As early as the time of Glanville, these just and plain principles of the law of pledges were essentially recognized; and it was declared, that if the pledge was not redeemed by the time appointed, the creditor might have recourse to the law, and compel the pawnor to redeem by a given day, or be forever foreclosed and barred of his right. And if no time of redemption was fixed, the creditor might call upon the debtor at any time, by legal process, to redeem or lose his pledge. (*c*) The distinction between a pawn and mortgage of chattels is equally well settled in the English and in the American law; and a mortgage of goods differs from a pledge or pawn in this, that the former is a conveyance of the title upon condition, and it becomes an absolute interest at law, if not redeemed by a given time, and it may be valid in certain cases without actual delivery. (*d*) According to the civil law, * a *139 pledge could not be sold without judicial sanction, unless there was a special agreement to this effect; and this is, doubtless, the law at this day in most parts of Europe. The French Civil Code has adopted the law of Constantine, by which even an agreement at the time of the original contract of loan, that if the debtor did not pay at the day, the pledge should be absolutely forfeited, and become the property of the [creditor], was declared to be void. (*a*) While on this subject of pledges, it may be proper

to the thing might be acquired without possession. Inst. 4. 6. 7; Dig. 13. 7. 35. *Vide supra*, ii. 577, n.

(*b*) Bro. Abr. tit. Pledges, pl. 20, tit. Trespass, pl. 271; Burnet, J., in Ryall *v.* Rowles, 1 Ves. Sen. 358, 359; Mores *v.* Conham, Owen, 123; Ratcliff *v.* Davis, 1 Bulst. 29; Cro. Jac. 244; Yelv. 178, s. c.; Com. Dig. tit. Mortgage by Pledge of Goods, b; Demandray *v.* Metcalf, Prec. in Ch. 419; Vanderzee *v.* Willis, 3 Bro. C. C. 21; Perry *v.* Craig, 3 Mo. 516. (*c*) Glanville, lib. 10, c. 6, 8.

(*d*) The Master of the Rolls, in Jones *v.* Smith, 2 Ves. Jr. 378; Powell on Mortgages, 3; Barrow *v.* Paxton, 5 Johns. 258; Brown *v.* Bement, 8 id. 96; M'Lean *v.* Walker, 10 id. 471; Garlick *v.* James, 12 id. 146; Wilde, J., in 2 Pick. 610; Haven *v.* Low, 2 N. H. 13; De Lisle *v.* Priestman, 1 Browne (Penn.), 176; Langdon *v.* Buel, 9 Wend. 80; Gifford *v.* Ford, 5 Vt. 532.

(*a*) Inst. lib. 2, tit. 8, sec. 1; Vinnii, Com. h. t.; Code, 8. 35. 3; Perezius on the

further to observe, that the pawnee, by bill in chancery, may bar the debtor's right of redemption, and have the chattel sold. This has frequently been done in the case of stock, bonds, plate, or other personal property pledged for the payment of debt. (*b*) But without any bill to redeem, the creditor, on a pledge or mortgage of chattels, may sell at auction, on giving reasonable opportunity to the debtor to redeem, and apprising him of the time and place of sale; and this is the more convenient and usual practice. (*c*) *y*[1] While the debtor's right in the pledge remains unextinguished, his interest is liable to be sold on execution; and the purchaser, like any other purchaser or assignee of the interest of the pawnor, succeeds to all his rights, and becomes entitled to redeem. (*d*)

* 140 * The law of pledges shows an accurate and refined sense of justice; and the wisdom of the provisions by which the interests of the debtor and creditor are equally guarded, is to be traced to the Roman law, and shines with almost equal advantage, and with the most attractive simplicity, in the pages of Glanville.

It forms a striking contrast to the common-law mortgage of the freehold, which was a feoffment upon condition, or the creation of a base or determinable fee, with a right of reverter attached to it. The legal estate vested immediately in the feoffee, and a mere right of reëntry, upon performance of the condition, by payment of the debt strictly at the day, remained with the mortgagor and his heirs, and which right of entry was neither alienable nor devisable. If the mortgagor was in default, the condition was for-

Code, ii. 62, tit. 34, sec. 4, 5, p. 63, sec. 8; Bell's Comm. on the Law of Scotland, ii 22, 5th ed.; Merlin's Répertoire, art. Gage; Code Civil, art. 2078; Institutes of the Laws of Holland, by J. Vander Linden, translated by J. Henry, Esq., 180.

(*b*) Kemp *v.* Westbrook, 1 Ves. Sen. 278; Demandray *v.* Metcalf, Prec. in Ch. 419; Vanderzee *v.* Willis, 3 Bro. C. C. 21.

(*c*) Tucker *v.* Wilson, 1 P. Wms. 261; 1 Bro. P. C. 494, ed. 1784; Lockwood *v.* Ewer, 2 Atk. 303; Hart *v.* Ten Eyck, 2 Johns. Ch. 100; Johnson *v.* Vernon, 1 Bailey (S. C.), 527; Perry *v.* Graig, 3 Mo. 516. See *supra*, ii. 582.

(*d*) Kemp *v.* Westbrook, 1 Ves. Sen. 278. New York Revised Statutes, ii. 366, sec. 20. See *supra*, ii. 577–585, on the doctrine of pledging.

y[1] A pledgee of commercial paper has no such right, it being his duty to hold and collect. Joliet Iron Co. *v.* Scioto, &c. Co., 82 Ill. 548; Whitteker *v.* Charleston Gas Co., 16 W. Va. 717. But it was held that such right existed after maturity in Potter *v.* Thompson, 10 R. I. 1. See, generally, Jones on Pledges, § 651 *et seq.* If the property is divisible, the pledgee has no right to sell more than sufficient to pay his debt. Fitzgerald *v.* Blocher, 32 Ark. 742.

feited, and the estate became absolute in the mortgagee, without the right or the hope of redemption. (*a*) So rigorous a doctrine, and productive of such forbidding, and, as it eventually proved, of such intolerable injustice, naturally led to exact and scrupulous regulations concerning the time, mode, and manner of performing the condition, and they became all important to the mortgagor. The tender of the debt was required to be at the time and place prescribed; and if there was no place mentioned in the contract, the mortgagor was bound to seek the mortgagee, and a tender upon the land was not sufficient. (*b*) If there was no time of payment mentioned, the mortgagor had his whole lifetime to pay, unless he was quickened by a demand; but if he died before the payment, the heir could not tender and save the forfeiture, because the time was passed. (*c*) If, however, the money was declared to be payable by the mortgagor, *or his heirs*, then the tender might be made by them at any time indefinitely after the mortgagor's death, unless the performance was hastened by request; and if a time for payment was fixed, and the mortgagor died in the mean time, his heir might redeem, though he was not mentioned, for he had an interest in the condition. (*d*) * If the representatives of the mortgagee were * 141 mentioned in the feoffment, whether they were heirs, executors, or assignees, the payment could rightfully be made to either of them. (*a*)

(3.) *The Defeasance.* — The condition upon which the land is conveyed is usually inserted in the deed of conveyance, but the defeasance may be contained in a separate instrument; and if the deed be absolute in the first instance, and the defeasance be executed subsequently, it will relate back to the date of the principal deed, and connect itself with it, so as to render it a security in the nature of a mortgage. The essence of the defeasance is,

(*a*) Litt. sec. 332.

(*b*) Co. Litt. 210, b. (*c*) Litt. sec. 337.

(*d*) The Lord Cromwell's Case, 2 Co. 79; Litt. sec. 334; Co. Litt. 208, b.

(*a*) Goodall's Case, 5 Co. 95; Co. Litt. 210. This case of Goodall, and Wade's Case, 5 Co. 114, are samples of the discussions on what was, in the time of Lord Coke, a very momentous question, whether the absolute forfeiture of the estate had or had not been incurred by reason of non-payment at the day. Such a question, which would now be only material as to the costs, was in one of those cases decided, on error from the K. B., after argument and debate, by all the judges of England.

that it defeats the principal deed, and makes it void if the condition be performed. In order, however, to render the deed a security against subsequent purchasers and mortgagees, it is necessary that the deed and defeasance should be recorded together. An omission to have the defeasance registered would operate to make the estate, which was conditional between the parties, absolute against every person but the original parties and their heirs. (*b*) The practice of placing the conveyance in fee
*142 and * the condition or defeasance which is to qualify it, in separate instruments, is liable to accidents and abuse, and may be productive of injury to the mortgagor; and the Court of Chancery has frequently, and very properly, discouraged such transactions. (*a*) This must more especially be productive of hazard to the rights of the mortgagor, in those states where the powers of a court of equity are very sparingly conferred, and where the character of an instrument of defeasance is to be determined upon the strict technical principles of the common law, and must take effect concurrently with the deed, as part of the one and the same transaction. (*b*)

In equity, the character of the conveyance is determined by the clear and certain intention of the parties; and any agreement in the deed, or in a separate instrument, showing that the parties

(*b*) Dey *v.* Dunham, 2 Johns. Ch. 182; New York Revised Statutes, i. 756; Harrison *v.* The Trustees of Phillips' Academy, 12 Mass. 456; Blaney *v.* Bearce, 2 Greenl. 132; Wright *v.* Bates, 13 Vt. 341. The words of the New York statute are, that if a deed appears, by a separate instrument, to have been intended as a mortgage, it shall be deemed a mortgage; and the grantee shall not derive any advantage from the recording of it, unless the defeasance be also recorded, and at the same time. [Stoddard *v.* Rotton, 5 Bosw. 378.] In Pennsylvania, upon a similar point, it has been decided that if the separate defeasance be not recorded, the absolute deed is to be considered as an unrecorded mortgage, and postponed, according to the rule in that state in such cases, to a subsequent judgment creditor. Friedley *v.* Hamilton, 17 Serg. & R. 70.

(*a*) Lord Talbot, in Cotterell *v.* Purchase, Cases Temp. Talbot, 89; Baker *v.* Wind, 1 Ves. Sen. 160. In New Hampshire this evil is guarded against by statute of July 3, 1829, which declared that no estate in fee should be defeated or incumbered by any agreement or writing of defeasance, unless the same be inserted in the conveyance as part thereof. But though such an absolute deed, accompanied with a bond to reconvey on payment of a loan, be void as against the creditors of the grantor, yet the agreement constitutes a secret trust, which might, perhaps, be enforced in equity as between the parties. Tifft *v.* Walker, 10 N. H. 150.

(*b*) Lund *v.* Lund, 1 N. H. 39; Bickford *v.* Daniels, 2 id. 71; Runlet *v.* Otis, ib. 167; Erskine *v.* Townsend, 2 Mass. 493; Kelleran *v.* Brown, 4 id. 443; Stocking *v.* Fairchild, 5 Pick. 181; Newhall *v.* Burt, 7 Pick. 157.

intended that the conveyance should operate as a security for the repayment of money, will make it such, and give to the mortgagor the right of redemption. (*c*) A deed absolute on the face of it, and though registered as a deed, will be valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt, and this would be the case though the defeasance was by an agreement resting in parol; for parol evidence is admissible in equity, to show that an absolute deed was intended as a mortgage, and that the defeasance has been *omitted or destroyed by fraud, surprise, or mistake. (*a*) *143 When it is once ascertained that the conveyance is to be considered and treated as a mortgage, then all the consequences appertaining in equity to a mortgage are strictly observed, and the right of redemption is regarded as an inseparable incident. (*b*)

(*c*) Taylor *v.* Weld, 5 Mass. 109; Cary *v.* Rawson, 8 id. 159; Wharf *v.* Howell, 5 Binney, 499; Menude *v.* Delaire, 2 Desaus. 564; Reed *v.* Lansdale, Hardin, 6; James *v.* Morey, 2 Cowen, 246; Anon., 2 Hayw. 26; Dabney *v.* Green, 4 Hen. & Munf. 101; Thompson *v.* Davenport, 1 Wash. 125; Hughes *v.* Edwards, 9 Wheaton, 489; Hicks *v.* Hicks, 5 Gill & Johns. 75; Kelly *v.* Thompson, 7 Watts, 401; Holmes *v.* Grant, 8 Paige, 243.

(*a*) Maxwell *v.* Montacute, Prec. in Ch. 526; Lord Hardwicke, in Dixon *v.* Parker, 2 Ves. Sen. 225; Marks *v.* Pell, 1 Johns. Ch. 594; Washburne *v.* Merrills, 1 Day, 139; Strong *v.* Stewart, 4 Johns. Ch. 167; James *v.* Johnson, 6 id. 417; Clark *v.* Henry, 2 Cowen, 324; Murphy *v.* Trigg, 1 Monroe, 72; Slee *v.* Manhattan Company, 1 Paige, 48; Hunt *v.* Rousmaniere, 1 Peters, 1; Story, J., in Taylor *v.* Luther, 2 Sumner, 232, and in Flagg *v.* Mann, ib. 538; McIntyre *v.* Humphreys, 1 Hoff. Ch. 31; Brainerd *v.* Brainerd, 15 Conn. 575; Jenkins *v.* Eldredge, 3 Story, 292, 293; [Russell *v.* Southard, 12 How. 139; Hills *v.* Loomis, 42 Vt. 562; Hodges *v.* Tennessee M. & F. Ins. Co., 8 N. Y. (4 Seld.) 416; Reitenbaugh *v.* Ludwick, 31 Penn. St. 131, 138; Weathersly *v.* Weathersly, 40 Miss. 462, 469; Lincoln *v.* Wright, 4 De G. & J. 16; Douglass *v.* Culverwell, 3 Giff. 251. See Osgood *v.* Thompson Bank, 30 Conn. 27;] [Haigh *v.* Kaye, 7 L. R. Ch. 469; Peugh *v.* Davis, 96 U. S. 332; Villa *v.* Rodriguez, 12 Wall. 323; Campbell *v.* Dearborn, 109 Mass. 130; Pond *v.* Eddy, 113 id. 149. See Hassam *v.* Barrett, 115 id. 256; Radford *v.* Folsom, 58 Iowa, 473.]

It was adjudged in the Court of Errors in New York, in Webb *v.* Rice, 6 Hill, 219, that parol evidence was not admissible in a *court of law*, to show that a deed absolute on its face, was intended as a mortgage. [Watson *v.* Dickens, 12 Sm. & Marsh. 608; Bragg *v.* Massie, 38 Ala. 89, 106; Bryant *v.* Crosby, 36 Me. 562 (compare Richardson *v.* Woodbury, 43 Me. 206.) *Contra*, Hannay *v.* Thompson, 14 Texas, 142.]

It is often a perplexed question, whether a conveyance was intended to be absolute or as a security merely: the cases were extensively reviewed by the Ass. V. Ch. of New York, in Brown *v.* Dewey, 1 Sandf. Ch. 57, and it was considered that the absence of the personal liability of the grantor to repay the money was not a conclusive test.

(*b*) Jaques *v.* Weeks, 7 Watts, 261; Wright *v.* Bates, 13 Vt. 341, s. p.

An agreement, at the time of the loan, to purchase for a given price, in case of default, is not permitted to interfere with the right of redemption; (*c*) though an agreement to give the mortgagee the right of preëmption, in case of a sale, has been assumed to be valid. (*d*) But at our public sales, which always take place when the equity of redemption is foreclosed, either by judicial decree, or under the operation of a power to sell, no such agreement could have application; and it may be questioned whether it does not come within the equity and policy of the general principle, which does not permit agreements at the time of the loan, for a purchase, in case of default, to be valid.

The mortgagee may contract subsequently to the mortgage, for the purchase or release of the equity of redemption upon fair terms; and yet no agreement for a beneficial interest out of the mortgaged premises, while the mortgage continues, is permitted to stand, if impeached in a reasonable time. The reason is, that the mortgagee, from his situation, wields a very influential motive, and he has great advantage over the mortgagor in such a transaction. (*e*) y^1 He may become the purchaser at the sale of the

(*c*) Bowen *v.* Edwards, 1 Rep. in Ch. 221; Willett *v.* Winnell, 1 Vern. 488. But if the agreement be subsequent and independent, that the grantee will reconvey upon repayment of the purchase-money, it does not convert the first deed into a mortgage. Kelly *v.* Thompson, 7 Watts, 401.

(*d*) Orby *v.* Trigg, 3 Eq. Cas. Abr. 599, pl. 24; 9 Mod. 2, s. c.

(*e*) Wrixon *v.* Cotter, 1 Ridgw. P. C. 295; Austin *v.* Bradley, 2 Day, 466. Lord Redesdale, in Hickes *v.* Cooke, 4 Dow, 16. [See Russell *v.* Southard, 12 How. 139, 154; Ford *v.* Olden, L. R. 3 Eq. 461; Sheckell *v.* Hopkins, 2 Md. Ch. 89; Locke *v.* Palmer, 26 Ala. 312; West *v.* Reed, 55 Ill. 242.]

y^1 A mortgagee is in a similar position to a trustee, and can only maintain a purchase of the mortgagor's interest by showing the utmost fairness and good faith. Peugh *v.* Davis, 96 U. S. 332; Villa *v.* Rodriguez, 12 Wall. 323, 339; Talbot *v.* Provine, 7 Baxt. 502; Brown *v.* Cowell, 116 Mass. 461; Tatum *v.* McLellan, 50 Miss. 1; Pairo *v.* Vickery, 37 Md. 467. But in England it has been held that, in the absence of proof to the contrary, mortgagee and mortgagor are to be deemed to contract with each other on the ordinary footing of vendor and purchaser. Melbourne Banking Corp. *v.* Brougham, 7 App. Cas. 307. See Prees *v.* Coke, 6 L. R. Ch. 645; Hickley *v.* Hickley, 2 Ch. D. 190. The general proposition that equity will narrowly watch transactions where one party is in a position to exercise pressure upon the other is, however, well established in England. O'Rorke *v.* Bolingbroke, 2 App. Cas. 814; Eyre *v.* Hughes, 2 Ch. D. 148; Earl of Aylesford *v.* Morris, 8 L. R. Ch. 484; *In re* Biel's Estate, 16 L. R. Eq. 577. See Judd *v.* Green, 45 L. J. Ch. 108. Whether there will be a merger in case of such a purchase depends, as in other cases of merger, upon the actual or presumed intention of

*144 *mortgaged premises by the master under a decree; (*a*) and, in New York, he is permitted, by statute, to purchase at the sale under a power, though he be the person who sells, provided he acts fairly and in good faith; and in that case no deed is requisite to make his title perfect; but the affidavit of the sale, when recorded, is sufficient evidence of the foreclosure. (*b*) Without such a statute provision, the purchase would be subject to the scrutiny of a court of equity, and liable to be impeached, though the purchase is defeasible only by the *cestui que trust*, and not *ipso facto* void. (*c*)

(4.) *Of Conditional Sales and Covenants to pay.* — The case of sale, with an agreement for a repurchase within a given time, is totally distinct, and not applicable to mortgages. Such conditional sales or defeasible purchases, though narrowly watched, are valid, and to be taken strictly as independent dealings between strangers; and the time limited for the repurchase must be precisely observed, or the vendor's right to reclaim his property will be lost. (*d*)

(*a*) *Ex parte* Marsh, 1 Mad. 148.

(*b*) New York Revised Statutes, ii. 546, sec. 7, 14.

(*c*) Munroe *v.* Allaire, cited in 1 Caines, 19; Davoue *v.* Fanning, 2 Johns. Ch. 252; Downes *v.* Grazebrook, 3 Meriv. 200; Slee *v.* Manhattan Company, 1 Paige, 48.

(*d*) Barrell *v.* Sabine, 1 Vern. 268; Endsworth *v.* Griffith, 15 Viner, 468, pl. 8; Longuet *v.* Scawen, 1 Ves. Sen. 405; 1 Powell on Mortgages, 138, note T. If it be doubtful whether the parties intended a mortgage or a conditional sale, courts of equity incline to consider the transaction a mortgage as more benign in its operation. Poindexter *v.* M'Cannon, 1 Dev. Eq. 373. The test of the distinction is this: If the relation of debtor and creditor remains, and a debt still subsists, it is a mortgage; but if the debt be extinguished by the agreement of the parties, or the money advanced is not by way of loan, and the grantor has the privilege of refunding, if he pleases, by a given time, and thereby entitle himself to a reconveyance, it is a conditional sale. Slee *v.* Manhattan Company, 1 Paige, 48; Goodman *v.* Grierson, 2 Ball & Beat. 274; Marshall, Ch. J., in Conway *v.* Alexander, 7 Cr. 237; Robinson *v.* Cropsey, 2 Edw. Ch. 138; Flagg *v.* Mann, 14 Pick. 467; 2 Sumner, 534; Holmes *v.* Grant, 8 Paige, 243. [See Alderson *v.* White, 2 De G. & J. 97; Brewster *v.* Baker, 20 Barb. 364; Locke *v.* Palmer, 26 Ala. 312; Murphy *v.* Barefield, 27 id. 634; West *v.* Hendrix, 28 id. 226; Hoopes *v.* Bailey, 28 Miss. 328; Davis *v.* Stonestreet, 4 Ind. 101; Lucketts *v.* Townsend, 8 Texas, 119; Brown *v.* Dewey, 2 Barb. 28; Baker *v.* Thrasher,

the one in whom the two estates are united. Hence there will be no merger against the mortgagee's interest. If merger takes place, it would seem clear that the mortgage estate, at least where it is regarded as simply a lien, must merge in the equity. Adams *v.* Angell, 5 Ch. D. 634; O'Loughlin *v.* Fitzgerald, 7 Ir. R. Eq. 483; Fellows *v.* Dow, 58 N. H. 21; Duffy *v.* McGuiness, 13 R. I. 595; Smith *v.* Roberts, 91 N. Y. 470. See Dickason *v.* Williams, 129 Mass. 182.

Property of every kind, real and personal, which is capable of sale, may become the subject of a mortgage; *quod emptionem, venditionemque recipit, etiam pignorationem recipere potest.* It will, consequently, include rights in reversion and remainder, possibilities coupled with an interest, rents, and franchises; but a mere expectancy as heir is a naked possibility, and not an interest capable of being made the subject of contract. (*e*)

If a leasehold estate be mortgaged, it is usual to take the mortgage by way of underlease, reserving a few days of the original term; and this is done that the mortgagee may avoid being liable for the rents and covenants which run with the land.

*145 *It is now settled, that the mortgagee of the whole term is liable on these covenants even before entry; and the case of *Eaton* v. *Jaques*, (*a*) which had declared a contrary doctrine, after being repeatedly attacked, was at last entirely destroyed as an authority. (*b*) A mortgage is usually accompanied with a bond for the debt intended to be secured by it; but a covenant for the payment of the money, inserted in the mortgage, will be sufficient and equally effectual with us; though in England, upon a very narrow construction of the statute of 3 W. & M., the remedy by an action of covenant does not lie against a devisee. (*c*) The covenant must be an express one, for no action of covenant will lie on the proviso or condition in the mortgage; and the remedy of the mortgagee for non-payment of the money according to the proviso, would seem to be confined to the land, where the mortgage is without any express covenant or separate instrument. The absence of any bond or covenant to pay the money will not make the instrument less effectual as a mortgage. (*d*) [1]

4 Denio, 493; Bethlehem *v.* Annis, 40 N. H. 34. See, as to a conveyance in trust, Bell *v.* Carter, 17 Beav. 11;] [O'Reilly *v.* O'Donoghue, 10 Ir. R. Eq. 73.] The court of equity never relieves the grantor who neglects to perform the condition on which the privilege of repurchasing depended. Davis *v.* Thomas, 1 Russ. & M. 506.

(*e*) Lord Eldon, in Carleton *v.* Leighton, 3 Meriv. 667. (*a*) Doug. 438.

(*b*) Williams *v.* Bosanquet, 1 Brod. & Bing. 238. It is, however, said to be better for the mortgagee to take an assignment of the whole time, than an underlease by way of mortgage; for then the right of renewal of the lease will be in him. 1 Powell on Mort. 197, n. 1. By the New York Revised Statutes, i. 739, lands held adversely may be mortgaged, though they cannot be the subject of grant.

(*c*) Wilson *v.* Knubley, 7 East, 128.

(*d*) Floyer *v.* Lavington, 1 P. Wms. 268; Briscoe *v.* King, Cro. Jac. 281; Yelv.

[1] Culver *v.* Sissons, 3 Comst. 264. The only way in which the assignee of the equity can be affected is by charging the land in his hands, for there is no privity

(5.) *Of the Power to sell.* — *It is usual to add to the *146 mortgage a power of sale in case of default, which enables the mortgagee to obtain relief in a prompt and easy manner, without the expense, trouble, formality, and delay of foreclosure by a bill in equity. The vexatious delay which accrues upon foreclosure arises not only from the difficulty of making all proper persons parties, but chiefly from the power that chancery assumes to enlarge the time for redemption on a bill to foreclose. There are cases in which the time has been enlarged, and the sale post-

206; Lord Hardwicke, in Lawley *v.* Hooper, 3 Atk. 278; Drummond *v.* Richards, 2 Munf. 337; Scott *v.* Fields, 7 Watts, 360. This doctrine has been made a statute provision in the New York Revised Statutes, i. 738, sec. 139, where it is declared, that no mortgage shall be construed as implying a covenant for the payment of the money; and if there be no express covenant for such payment in the mortgage, and no bond or other separate instrument to secure payment, the mortgagee's remedy is confined to the land mortgaged. [Hone *v.* Fisher, 2 Barb. Ch. 559.] In Ancaster *v.* Mayer, 1 Bro. C. C. 454, Lord Thurlow, however, intimated very strongly, that though the mortgage was unaccompanied with either bond or covenant, yet that the mortgagee would have the rights of a contract creditor, for there was still a debt; but the statute in New York has disregarded the suggestion, and it is in opposition to the current of authority and the reason of the thing.

of contract between the mortgagee and him; and a promise to pay the debt made to the mortgagor for his benefit will not alter the case. Mellen *v.* Whipple, 1 Gray, 317; Garnsey *v.* Rogers, 47 N. Y. 233. *x*[1] So a covenant to pay the mortgage debt cannot be made to run with the mortgaged premises. Glenn *v.* Canby, 24 Md. 127.

x[1] The statement of the note would seem to be sound upon principle, but it has been held that a grantee of the equity, by a deed reciting that the grantee assumes the payment of the mortgage debt, and that this is a part of the consideration, does become liable to the mortgagee, and this though his grantor was not so liable, being himself an assignee of the equity. Dean *v.* Walker (Ill., 1883), 16 Rep. 589; Mechanics' Savings Bank *v.* Goff, 13 R. I. 516; Merriman *v.* Moore, 90 Penn. St. 78. But as to last part of statement, see Vrooman *v.* Turner, 69 N. Y. 280; Carter *v.* Holahan, 92 N. Y. 498. See further, Dunning *v.* Leavitt, 85 N. Y. 30; and see, especially, Meech *v.* Ensign, 49 Conn. 191, where many of the cases are cited and the various reasons given for the decisions discussed; s. c. 44 Am. R. 225, and note; Moore's App., 88 Penn. St. 450; Woodbury *v.* Swan, 58 N. H. 380; George *v.* Andrews, 60 Md. 26. The liability of such grantee to his own grantor rests, of course, upon ordinary principles of contract. It is held that such grantor may recover the full amount of the debt even before he has paid it. Locke *v.* Homer, 131 Mass. 93; Furnas *v.* Durgin, 119 Mass. 500; Sparkman *v.* Gove, 44 N. J. L. 252. See further, as to the effect of an agreement between two persons, that one of them shall pay money to a third, in making such third person a *cestui que trust*, *In re* Empress Engineering Co., 16 Ch. D. 125; Lloyds *v.* Harper, ib. 290; *In re* Flavell, 25 Ch. D. 89. For a statement of the different questions that may be presented, see Drury *v.* Hayden, 111 U. S. 223.

poned, again and again, from six months to six months, to the great annoyance of the mortgagee. (*a*) These powers are found, in England, to be so convenient, that they are gaining ground very fast upon the mode of foreclosure by process in chancery. Lord Eldon considered it to be an extraordinary power, of a dangerous nature, and one which was unknown in his early practice. (*b*) He was of opinion that the power ought, for greater safety, to be placed in a third person, as trustee for both parties; and this appears to be still a practice, (*c*) though it is considered as rather unnecessary and cumbersome. The mortgagee
* 147 * himself, under such a power, becomes a trustee for the surplus; and if due notice of the sale under the power be not given, the sale may be impeached by bill in chancery. (*a*) The title under the power from the mortgagee himself is sufficient in law, and the mortgagor will not be compelled to join in the conveyance. (*b*)

A power given to the mortgagee to sell on default may be given by any person otherwise competent to mortgage, of the age of twenty-one years, though formerly in New York he was required to be of the age of twenty-five; and the power, before any proceedings are had under it, must be duly registered or recorded. (*c*) These powers fall under the class of powers appendant or annexed to the estate, and they are powers coupled with an interest, and

(*a*) In Edwards *v.* Cunliffe, 1 Mad. 287, the usual order on foreclosure was, that the mortgagor pay in six months or stand foreclosed. This was afterwards enlarged to six months more, then to five, then to three, and to three again.

(*b*) Roberts *v.* Bozon, February, 1825. The power to sell inserted in a mortgage, though unknown to Lord Eldon in his early practice, is of a more ancient date than even the life of Lord Eldon; for we find an instance of it in Croft *v.* Powell, Comyns, 603. It was there insisted to be a valid power; and the court, without questioning its operation, decided the cause on the ground that the mortgagee had not conveyed an absolute estate under the power. Lord Eldon's aversion to innovation has grown with his growth, and breaks out on every occasion; but who does not revere, even in his errors, the *justum et tenacem propositi virum*?

(*c*) Anon., 6 Mad. 10.

(*a*) Ibid.

(*b*) Corder *v.* Morgan, 18 Ves. 344. After a sale under a power, the mortgagor's interest is devested, and he becomes a tenant at sufferance. Kinsley *v.* Ames, 2 Met. 29.

(*c*) New York Revised Statutes, ii. 545, sec. 1, 2. A notice of sale under the power must be published, at least once in each week, for twelve weeks successively, in a county newspaper, and by affixing the notice, for the same period, on the court-house door. Ib. sec. 3. In Maine, the publication is to be three weeks, either in a county newspaper, or by notice on the party, and having it recorded. Act of Maine, 1838, c. 333.

are irrevocable, and are deemed part of the mortgage security, and vest in any person, who, by assignment or otherwise, becomes entitled to the money secured to be paid. (*d*) But the power is not divisible, and an assignment by the mortgagee of a part of his interest in the mortgage debt and estate will not carry with it a corresponding portion of the power. (*e*) There may be difficult questions arising, as to the competency of persons to mortgage, who have only qualified interests in the estate, or are invested with beneficial or trust powers. But a power to mortgage includes in it a power to execute a mortgage, with a power to sell; (*f*) and the better opinion would seem to be, that a power to sell for the purpose of raising money will imply a power to mortgage, which is a conditional sale, and within the object of the power. (*g*) Such powers are construed liberally, in furtherance of the beneficial *object. A *148 power to appoint land has been held to be well executed, by creating a charge upon it; and a power to charge will include a power to sell. (*a*) The case falls within the reason and policy of the doctrine that a trust to raise money out of the profits of land will include a power to sell or mortgage; and such a construction of the power has been long an established principle in the courts of equity. (*b*) But if the execution of a power be prescribed by a particular method, it implies that the mode proposed is to be followed, and it contains a negative upon every other mode. (*c*) This rule more strongly applies to extended, than to restricted executions of powers, for *omne majus in se minus continet*, and, generally, the execution of a power will be good, though it falls short of the full extent of the authority. (*d*) [1] In

(*d*) Bergen *v.* Bennett, 1 Caines, 1; Wilson *v.* Troup, 2 Cowen, 195; New York Revised Statutes, i. 735, sec. 108; ib. 737, sec. 133.

(*e*) Wilson *v.* Troup, *ubi supra*.

(*f*) Wilson *v.* Troup, 7 Johns. Ch. 25; [*Re* Chawner's Will, 22 L. T. 262.]

(*g*) 1 Powell on Mortgages, 61, Am. ed. Boston, 1828.

(*a*) Roberts *v.* Dixall, 3 Eq. Cas. Abr. 668, pl. 19; Kenworthy *v.* Bate, 6 Ves. 793.

(*b*) Lingon *v.* Foley, 2 Ch. Cas. 205; Sheldon *v.* Dormer, 2 Vern. 310; Trafford *v.* Ashton, 1 P. Wms. 415; Allan *v.* Backhouse, 2 Ves. & B. 65.

(*c*) Ivy *v.* Gilbert, 2 P. Wms. 13; Mills *v.* Banks, 3 id. 1.

(*d*) Isherwood *v.* Oldknow, 3 Maule & S. 383; Sugden on Powers, 447, 449, 2d London ed.

[1] *Powers of Sale.* — (*a*) *Execution.* — Powers of sale are now in very general use, and their validity is unquestioned. A sale in pursuance of such a power, to

respect, however, to the execution of a power to sell contained in a mortgage, the specific directions usually contained in the mort-

be valid, must strictly comply with its terms. Mitchell *v.* Bogan, 11 Rich. 686; Cranston *v.* Crane, 97 Mass. 459; Walthall *v.* Rives, 34 Ala. 91; Roarty *v.* Mitchell, 7 Gray, 243; Simson *v.* Eckstein, 22 Cal. 590; Bradley *v.* The Chester Valley R. R. Co., 36 Penn. St. 141; Smith *v.* Provin, 4 Allen, 518; Wing *v.* Cooper, 37 Vt. 169. Not only is a literal compliance necessary, but the mortgagee is bound to use reasonable diligence to protect the mortgagor's interests. Jenkins *v.* Jones, 2 Giff. 99, 108. *x*[1] If he sells, and himself becomes the purchaser, the transaction will be

x[1] The nature of the duties of a mortgagee or trustee selling depend on the wording of the power. If any discretion is given, it must be exercised in good faith, for the benefit of all concerned. Beyond this a court of equity will not interfere. Markey *v.* Langley, 92 U. S. 142; Olcott *v.* Bynum, 17 Wall. 44. See, generally, as to the control a court of equity will exercise over the discretion given to trustees, Gisborne *v.* Gisborne, 2 App. Cas. 300; Davey *v.* Ward, 7 Ch. D. 754; Tabor *v.* Brooks, 10 Ch. D. 273; Coates *v.* Brittlebank, 30 W. R. 99; Feltham *v.* Turner, 23 L. T. 845; Weiland *v.* Townsend, 33 N. J. Eq. 393, and note. It is well settled that if a trustee, or one in a fiduciary capacity, purchases the property as to which he stands in that relation, equity at least will examine the transaction narrowly, and will set aside the sale on slight grounds; and perhaps the better rule is that the parties interested have an absolute right to have such a sale set aside, if such relief is asked within a reasonable time. Hayward *v.* National Bank, 96 U. S. 611; Twin Lick Oil Co. *v.* Marbury, 91 U. S. 587; Morse *v.* Hill, 136 Mass. 60; Union Slate Co. *v.* Tilton, 69 Me. 244; Dyer *v.* Shurtleff, 112 Mass. 165; Smith *v.* Drake, 23 N. J. Eq. 302; Stephen *v.* Beall, 22 Wall. 329; Aberdeen Town Council *v.* Aberdeen University, 2 App. Cas. 544. See further, McPherson *v.* Watt, 3 App. Cas. 254; Panama, &c. Co. *v.* India Rubber, &c. Co., 10 L. R. Ch. 515; Smith *v.* Sorby, 3 Q. B. D. 552. But it would seem that where one who has not the legal title attempts to become the purchaser at a sale by himself under a power which gives him no right to become himself the purchaser, he gets no title, and holds as before. The holder of the power in such case acts simply as the agent of the true owner, the conveyance being made in legal contemplation by the latter, and his assent being absolutely necessary to the passing of the title. Middlesex Bank *v.* Minot, 4 Met. 325; Canfield *v.* Minneapolis, &c. Assn., 14 Fed. Rep. 801; Twin Lick Oil Co. *v.* Marbury, *supra*. See Woonsocket Inst. Sav. *v.* Am. Worsted Co., 13 R. I. 255; Dawkins *v.* Patterson, 87 N. C. 384. Compare Clark *v.* Blackington, 110 Mass. 369. No clear rule has been, or perhaps can be, laid down for fixing the time within which suit must be brought when the sale is only voidable. The delay to constitute a bar must be such as amounts to equitable laches. There will be held to be such laches where the true owner stands by and allows the purchaser to materially alter his position upon the reasonable belief that the owner assents to the sale, and also where the owner does or omits to do acts the doing or omission of which furnishes sufficient evidence of an intention to ratify or confirm the sale. Perhaps the rule does not extend further than this, except where the analogy of the statute of limitations is applied. Lindsay Petroleum Co. *v.* Hurd, 5 L. R. P. C. 221, 239; Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218, 1230, 1279; Morse *v.* Hill, 136 Mass. 60; Nudd *v.* Powers, ib. 273; Knox *v.* Gye, 5 L. R. H. L. 656.

gage, and particularly when they are the subject of a statute provision, will preclude all departure from those directions, and consequently the power in the mortgage to sell would not include a power to lease. It is declared by statute, in New York, that where any formalities are directed by the grantor of a power to be observed in the execution of the power, the observance of them is necessary; and the intentions of the grantor as to the mode, time, and conditions of its execution, unless those conditions are merely nominal, are to be observed. (*e*)

(6.) *Mortgage of Reversionary Terms.* — A very vexatious question has been agitated, and has distressed the English courts from the early case *of *Graves* v. *Mattison* (*a*) *149 down to the recent decision in *Winter* v. *Bold*, (*b*) as to the time at which money provided for children's portions may be raised by sale or mortgage of a reversionary term. The history of the question is worthy of a moment's attention, as a legal curiosity, and a sample of the perplexity and uncertainty which complicated settlements "rolled in tangles," and subtle disputation, and eternal doubts, will insensibly incumber and oppress a

(*e*) New York Revised Statutes, i. 736, sec. 119, 120, 121. A power of sale cantained in a mortgage is held valid in Missouri, and a sale by the mortgagee under the power conveys a valid title to the purchaser. Carson *v.* Blakey, 6 Mo. 273. Such a power is said to be invalid in Virginia. A power of sale in a mortgage is valid, and the proceedings regulated by statute, in New York. N. Y. R. S. ii. 545; and by statute in 1842, c. 277, § 8, every sale duly made under a power is equivalent to a foreclosure in equity, so far as to be a bar to the mortgagor and his representatives, and all persons claiming under him by any title subsequent to the mortgage, or having any lien by or under any judgment or decree subsequent to the mortgage.

(*a*) Sir T. Jones, 201.

(*b*) 1 Sim. & Stu. 507.

voidable by the mortgagor, unless there is an express agreement or a statute allowing him to do so. Richards *v.* Holmes, 18 How. 143, 148; Edmondson *v.* Welsh, 27 Ala. 578; Hall *v.* Towne, 45 Ill. 493; Roberts *v.* Fleming, 53 Ill. 196; Griffin *v.* Marine Co. of Chicago, 52 Ill. 130; Benham *v.* Rowe, 2 Cal. 387. But see Elliott *v.* Wood, 53 Barb. 285. In such case he will be held to the strictest good faith and utmost diligence. Montague *v.* Dawes, 14 Allen, 369.

(*b*) *Effect.* — A sale validly executed passes an absolute title free of any right of redemption, Capron *v.* Attleborough Bank, 11 Gray, 492, 493; Hyman *v.* Devereux, 63 N. C. 624; Bloom *v.* Van Rensselaer, 15 Ill. 503; although made after entry to foreclose, and receipt of rents insufficient to pay the debt, Montague *v.* Dawes, 12 Allen, 397; see *In re* Wilkinson's Mortgaged Estates, L. R. 13 Eq. 634; and although a second mortgagee is the purchaser, Shaw *v.* Bunny, 33 Beav. 494.

free and civilized system of jurisprudence. If nothing appears to gainsay it, the period at which they are to be raised is presumed to have been intended to be that which would be most beneficial to those for whom the portions were provided. If the term for providing portions ceases to be contingent, and becomes a vested remainder in trustees, to raise portions out of the rents and profits, *after the death of the parents*, and payable to the daughters coming of age, or marriage, a court of equity has allowed a portion to be raised by sale or mortgage *in the lifetime of the parents*, subject, nevertheless, to the life estate. The parent's death is anticipated, in order to make provision for the children. The result of the very protracted series of these discussions for one hundred and fifty years is, that if an estate be settled to the use of the father for life, remainder to the mother for life, remainder to the sons of the marriage in strict settlement, and, in default of such issue, with remainder to trustees to raise portions, and the mother dies without male issue, and leaves issue female, the *term is vested in remainder in trustees*, and they may sell or mortgage such a reversionary term, in the lifetime of the surviving parent, for the purpose of raising the portions, unless the contingencies on which the portions were to become vested had not happened, or there was a manifest intent that the term should not be sold or mortgaged in the lifetime of the par-
*150 ents, nor until it had become vested in the trustees in *possession. (*a*) The inclination of the Court of Chancery has been against raising portions out of reversionary terms, by sale or mortgage, in the lifetime of the parent, as leading to a sacrifice of the interest of the person in reversion or remainder; and modern settlements usually contain a prohibitory clause against it. (*b*)

(*a*) Sir Joseph Jekyll, in Evelyn *v.* Evelyn, 2 P. Wms. 661; 14 Viner, 240, pl. 11.

(*b*) See Coote's Treatise on the Law of Mortgages, 147–163, and 1 Powell on Mortgages, 74–100, Boston ed. 1828, where numerous cases on this question are collected; and the review of them becomes a matter of astonishment, when we consider the ceaseless litigation which has vexed the courts on such a point. Most of the great names which have adorned the English chancery, from the reign of Charles II., when the first adjudication was made, down to the present day, have expressed an opinion, either for or against the expediency and solidity of the rule. Such a contingent limitation to trustees, as the one in the instance stated, would be too remote, and void, under the New York Revised Statutes, i. 723, sec. 14–17; but the great point touching the power to sell or mortgage the remainder to raise portions may arise in New York, as well as elsewhere.

(7.) *Of Deposit of Title Deeds.* — A mortgage may arise in equity, out of the transactions of the parties, without any deed or express contract for that special purpose. It is now well settled in the English law, that if the debtor deposits his title deeds with a creditor, it is evidence of a valid agreement for a mortgage, and amounts to an equitable mortgage, which is not within the operation of the statute of frauds. The earliest leading decision in support of the doctrine of equitable mortgages, by the deposit of the muniments of title, was that of *Russel* v. *Russel*, in 1783. (*c*) It was followed by the decision in *Birch* v. *Ellames*, (*d*) and the principle declared is, that the deposit is evidence of an agreement to make a mortgage, which will be carried into execution by a court * of equity, against the * 151 mortgagor, and all who claim under him, with notice, either actual or constructive, of such deposits having been made. Lord Eldon and Sir William Grant considered the doctrine as pernicious, and they generally expressed a strong disapprobation of it, as breaking in upon the statute of frauds, and calling upon the court to decide, upon parol evidence, what is the meaning of the deposit. (*a*) But the decision in *Russell* v. *Russell* has withstood all the subsequent assaults upon it, and the principle is now deemed established in the English law, that a mere deposit of title deeds upon an advance of money, without a word passing, gives an equitable lien. (*b*) The decisions on this subject have, however, shown a determined disposition to keep within the letter of the precedents, and not to give the doctrine further extension; and it is very clear, that a mere parol agreement to make a mortgage, or to deposit a deed for that purpose, will not give any title in equity. There must be an actual and *bona fide* deposit of all the title deeds with the mortgagee himself, in order to create the

(*c*) 1 Bro. C. C. 269. (*d*) 2 Anst. 427.

(*a*) *Ex parte* Haigh, 11 Ves. 403; Norris *v.* Wilkinson, 12 id. 192; *Ex parte* Hooper, 19 id. 477.

(*b*) *Ex parte* Whitbread, 19 Ves. 209; *Ex parte* Langston, 17 Ves. 230; Lord Ellenborough, in Doe *v.* Hawke, 2 East, 481; *Ex parte* Kensington, 2 Ves. & B. 79; Fector *v.* Philpott, 12 Price, 197; [Lord Cairnes, in Shaw *v.* Foster, 5 L. R. H. L. 321, 339;] Rockwell *v.* Hobby, 2 Sandf. Ch. 9. In the case of an equitable mortgage given by the deposit of deeds, the mortgagee is entitled to enforce it by a bill and a decree for a sale of the estate; and the mortgagor is allowed six months to redeem the deposited deeds, and pay the debt, whether the decree be for sale or for a strict foreclosure. Pain *v.* Smith, 2 My. & K. 417; Parker *v.* Housefield, ib. 419; [Carter *v.* Wake, 4 Ch. D. 605.]

lien. (*c*) Nor will such an equitable mortgage be of any avail against a subsequent mortgage, duly registered, without notice of the deposit; and if there be no registry, it is the settled English doctrine, that the mere circumstance of leaving the title deeds with the mortgagor is not, of itself, in a case free from fraud, sufficient to postpone the first mortgagee to a second, who takes the title deeds with his mortgage, and without notice of the first mortgage. (*d*) [1]

(8.) *Equitable Lien of Vendor.* — The vendor of real estate has a lien, under certain circumstances, on the estate sold, for the purchase-money. The vendee becomes a trustee to the vendor *152 for the purchase-* money, or so much as remains unpaid; and the principle is founded in natural equity, and seems to be inherent in the English equity jurisprudence. The Court of Chancery will appoint a receiver in behalf of the vendor, if the vendee has obtained [the property] and refuses to pay. (*a*) This equitable mortgage will bind the vendee and his heirs, and volunteers, and all purchasers from the vendee, with notice of the existence of the vendor's equity. *Prima facie* the lien exists without any special agreement for that purpose, and it remains with the purchaser to show, that from the circumstances of the case, it results that the lien was not intended to be reserved, as by the taking other real or personal security, or where the object of the sale was not money, but some collateral benefit. (*b*) In

(*c*) *Ex parte* Coombe, 4 Mad. 249; Lucas *v.* Dorrien, 7 Taunt. 279; *Ex parte* Coming, 9 Ves. 115; *Ex parte* Bulteel, 2 Cox, 243; Norris *v.* Wilkinson, 12 Ves. 192; *Ex parte* Pearse, 1 Buck. B. C. 525. [See *Ex parte* Chippendale, 1 Deac. 67; s. c. 2 Mont. & A. 299; *Ex parte* Edwards, 1 Deac. 611.]

(*d*) Berry *v.* Mutual Ins. Company, 2 Johns. Ch. 603. [Comp. British, &c. Co. *v.* Smart, 10 L. R. Ch. 567; *In re* Burke's Est., 9 L. R. Ir. 24.]

(*a*) Payne *v.* Atterbury, Harr. Ch. (Mich.) 414.

(*b*) Chapman *v.* Tanner, 1 Vern. 267; Lord Hardwicke, in Walker *v.* Preswick, 2 Ves. Sen. 622; Lord Eldon, in Austin *v.* Halsey, 6 id. 483; Sir William Grant, in

[1] *Deposit of Title Deeds.* — Some American courts have declined to recognize this species of mortgage. Shitz *v.* Dieffenbach, 3 Penn. St. 233; Vanmeter *v.* McFaddin, 8 B. Mon. 435, 437; Bicknell *v.* Bicknell, 31 Vt. 498. But they are valid in many states, although not a usual form of security. Gothard *v.* Flynn, 25 Miss. 58; Chase *v.* Peck, 21 N. Y. 581, 584; Mounce *v.* Byars, 16 Ga. 469; Jarvis *v.* Dutcher, 16 Wis. 307; Hackett *v.* Reynolds, 4 R. I. 512; [Gale *v.* Morris, 29 N. J. Eq. 222.] See, as to notice and negligence, Hunt *v.* Elmes, 2 De G., F. & J. 578; Ratcliffe *v.* Barnard, L. R. 6 Ch. 652; 152, n. 1. [An equitable mortgage was held to have been created under the circumstances by an agreement for a lease in Tebb *v.* Hodge, 5 L. R. C. P. 73. See also Bilbinger *v.* Continental Bank, 99 U. S. 143.]

Mackreth v. *Symmons*, (*c*) Lord Eldon discusses the subject at large, and reviews all the authorities; and he considers this doctrine of equitable liens to have been borrowed from the text of the civil law; (*d*) and it has been extensively recognized and adopted in these United States. (*e*) [1] It has been a question much

Nairn *v.* Prowse, ib. 759; Hughes *v.* Kearney, 1 Sch. & Lef. 132; Meigs *v.* Dimock, 6 Conn. 458; Stafford *v.* Van Rensselaer, 9 Cowen, 316; Marsh *v.* Turner, 4 Mo. 253; Deibler *v.* Barwick, 4 Blackf. (Ind.) 339; Marshall, Ch. J., in Bayley *v.* Greenleaf, 7 Wheaton, 46; Magruder *v.* Peter, 11 G. & J. 217; Carroll *v.* Van Rensselaer, Harr. Ch. (Mich.) 226.

(*c*) 15 Ves. 329. (*d*) Dig. lib. 18, tit. 1, 19.

(*e*) Cole *v.* Scot, 2 Wash. (Va.) 141; Cox *v.* Fenwick, 3 Bibb, 183; Garson *v.* Green, 1 Johns. Ch. 308; Fish *v.* Howland, 1 Paige, 20; Warner *v.* Van Alstyne, 3 id. 513; Bayley *v.* Greenleaf, 7 Wheaton, 46; Gilman *v.* Brown, 1 Mason, 191; Watson *v.* Wells, 5 Conn. 468; Jackman *v.* Hallock, 1 Ohio, 318; Tiernan *v.* Beam, 2 id. 383; Patterson *v.* Johnson, 7 id. 226; Eskridge *v.* M'Clure, 2 Yerg. 84; Sheratz *v.* Nicodemus, 7 id. 9; Wynne *v.* Alston, 1 Dev. Eq. (N. C.) 163; Evans *v.* Goodlet, 1 Blackf. (Ind.) 246; Lagow *v.* Badollet, ib. 416; Van Doren *v.* Todd, 2 Green (N. J.), 397. But this doctrine of an equitable lien for the purchase-money has been judicially declared not to exist in Pennsylvania, after the vendor has conveyed the legal title, as against a subsequent judgment creditor. Kauffelt *v.* Bower, 7 Serg. & R. 64; Semple *v.* Burd, ib. 286; Megargel *v.* Saul, 3 Wharton, 19. It is said, also, not to have been adopted in all its extent in Connecticut. Daggett, J., 6 Conn. 464; Church, J., in 17 Conn. 583; and it does not exist in Massachusetts; Story, J., in Gilman *v.* Brown, *supra*; and has been exploded in North Carolina. Womble *v.* Battle, 3 Ired. Eq. 182.

[1] *Vendor's Lien.* — (*a*) The equitable charge of a vendor on the land for the unpaid purchase-money is recognized as an incident of the debt in Chilton *v.* Braiden, 2 Black, 458; Russell *v.* Watt, 41 Miss. 602; Trotter *v.* Erwin, 27 Miss. 772; Manly *v.* Slason, 21 Vt. 271, 278, and many cases cited; Merritt *v.* Wells, 18 Ind. 171; Cowl *v.* Varnum, 37 Ill. 181; English *v.* Russell, Hempstead, 35; Chase *v.* Peck, 21 N. Y. 581, 584; Pell *v.* McElroy, 36 Cal. 268; Kyles *v.* Tait, 6 Gratt, 44; [Norman *v.* Harrington, 62 Ala. 107; Baltimore & Ohio R. R. Co. *v.* Trimble, 51 Md. 99; Wooten *v.* Bellinger, 17 Fla. 289; Moshier *v.* Meek, 80 Ill. 79; Corlies *v.* Howland, 26 N. J. Eq. 311;] and many other cases, some of which are cited below. Some states do not adopt the doctrine. *Supra*, n. (*e*); Simpson *v.* Munder, 3 Kans. 172; Strauss's Appeal, 49 Penn. St. 353, 358; [Edminster *v.* Higgins, 6 Neb. 265. See, especially, Ahrend *v.* Odiorne, 118 Mass. 261.]

(*b*) This species of security is purely equitable, Porter *v.* Dubuque, 20 Iowa, 440; and has been thought to have originated when lands were not generally liable for debts, in the natural equity of a creditor to charge the land which was the consideration of his debt upon failure of personal assets. Mackreth *v.* Symmons, 1 L. C. in Eq. Am. note, *ad f.* And there is no analogy from which a common-law lien on the title deeds can be established in favor of one who has conveyed the legal estate. Goode *v.* Burton, 1 Exch. 189. The lien does not arise on a sale of chattels, nor upon a sale of real and personal property together for a gross price. McCandlish *v.* Keen, 11 Gratt. 615, 629. If the sale

discussed, as to the facts and circumstances which would amount to the taking of security from the vendee, so as to destroy

be made in consideration of an annuity, the existence of a lien depends on the circumstances of the case. Mr. Williams thinks that a lien will subsist for such annuity, Matthew *v.* Bowler, 6 Hare, 110; unless a contrary intention can be inferred from the nature of the transaction. Dixon *v.* Gayfere, 1 De G. & J. 655; 21 Beav. 118; Wms. R. P. 9th ed. 414, 415. Lord Cranworth says, 1 De G. & J. 661, that no general rule can be laid down. *x*[1]

(*c*) *Waiver.* — The equitable lien may be waived by taking distinct collateral security. Mattix *v.* Weand, 19 Ind. 151; Burger *v.* Potter, 32 Ill. 66; Hummer *v.* Schott, 21 Md. 307; McCandlish *v.* Keen, 13 Gratt. 615, 624; Johnston *v.* Union Bank, 37 Miss. 526. But it has been treated as very much a question of actual intention, and when the circumstances show that no waiver was intended, taking such security is thought not to have that effect. Mims *v.* Macon & W. R. R., 8 Kelly (Ga.), 333. So, taking the note of a third person. Tiernan *v.* Thurman, 14 B. Mon. 277, 281. [See Andrus *v.* Coleman, 82 Ill. 26.] It is undoubted law that the mere fact of taking a new note in place of an old one secured by mortgage and about to expire does not discharge the mortgage security. Chase *v.* Abbott, 20 Iowa, 154; Hyman *v.* Devereux, 63 N. C. 624, 627; Baxter *v.* McIntire, 13 Gray, 168. And the same principle has been applied to the vendor's lien, Mims *v.* Lockett, 23 Ga. 237. See Cleveland *v.* Martin, 2 Head, 128; Dubois *v.* Hull, 43 Barb. 26 (where a judgment taken on the debt was held no waiver); although it is supposed that it would be otherwise if a contrary intent were manifested; when, for instance, the negotiable bonds of a city are expressly accepted as payment of the indebtedness of the city as purchaser. Porter *v.* Dubuque, 20 Iowa, 440, 445. *x*[2]

(*d*) *Extinguishment.* — The lien, being more clearly a mere incident to or means of collecting the debt than a mortgage, has been more generally held to be extinguished when the debt is barred by the statute of limitations. Trotter *v.* Erwin, 27 Miss. 772; Borst *v.* Corey, 15 N. Y. 505, 510; [Ball *v.* Hill, 48 Tex. 634. But see B. & O. Ry. Co. *v.* Trimble, 51 Md. 99;

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x[1] The lien only arises where the amount of the purchase-money is fixed. Hiscock *v.* Norton, 42 Mich. 320; Patterson *v.* Edwards, 29 Miss. 67; Jordan *v.* Wimer, 45 Iowa, 65. Some cases hold that suit must be brought at law on the debt before the lien can be availed of. Martin *v.* Cauble, 72 Ind. 67. But see Pratt *v.* Clark, 57 Mo. 189. Conversely to the vendor's lien is the lien which the vendee has where he pays part of the purchase-money without obtaining a conveyance. Rose *v.* Watson, 10 H. L. C. 672; Stewart *v.* Wood, 63 Mo. 252.

x[2] The law, as stated in n. 1, (*c*), is but an application of the general principle of waiver. There must be shown an intention to relinquish the right manifested to the vendee, and in legal contemplation acted upon by him so as to give a good consideration or to raise an estoppel. The taking of other security from the vendee only presumptively waives the lien. Cordova *v.* Hood, 17 Wall. 1; Stuart *v.* Harrison, 52 Iowa, 511; Ledos *v.* Kupfrian, 28 N. J. Eq. 161; Stroud *v.* Allison, 35 Ark. 100; Thames *v.* Caldwell, 60 Ala. 644. So, taking note of third person. Haskell *v.* Scott, 56 Ind. 564. Taking mortgage for part of purchase-money was held no waiver as to the rest in De Forest *v.* Holum, 38 Wis. 516. No lien arises when an intent to rely on other security is shown. *In re* Brentwood, &c. Co., 4 Ch. D. 562.

the existence of the lien. In several cases * it is held that *153 taking a bond from the vendee, for the purchase-money, or the unpaid part of it, affected the vendor's equity, as being evidence that it was waived; but the weight of authority, and the better opinion is, that taking a note, bond, or covenants, from the vendee, for the payment of the money, is not of itself an act of waiver of the lien, for such instruments are only the ordinary evidence of the debt. (*a*) Taking a note, bill, or bond, with distinct security, or taking distinct security exclusively by itself, either in the shape of real or personal property from the vendee, or taking the responsibility of a third person, is evidence that the seller did not repose upon the lien, but upon independent security, and it discharges the lien. (*b*) Taking the deposit of

(*a*) Winter *v.* Lord Anson, 3 Russ. 488; Lagow *v.* Badollet, 1 Blackf. (Ind.) 416; Van Doren *v.* Todd, 2 Green (N. J.), 397; Eskridge *v.* M'Clure, 2 Yerg. 84; Ross *v.* Whitson, 6 id. 50. But it is held that the assignment of the note given for the purchase-money will not carry with it the vendor's lien. Brush *v.* Kinsley, 14 Ohio, 20.

(*b*) Taking a promissory note with an indorser is not a waiver of the lien. Magruder *v.* Peter, 11 Gill & Johns. 217. But the vendor's lien for the purchase-money does not

Bizzell *v.* Nix, 60 Ala. 281;] *post*, 194, n. 1.

(*e*) *Assignment.* — The doctrine of 153, n. (*a*) and (*b*), is confirmed by Niel *v.* Kinney, 11 Ohio St. 58; Shall *v.* Biscoe, 18 Ark. 142; [Rogers *v.* James, 33 Ark. 77; Elder *v.* Jones, 85 Ill. 384; Cowan *v.* Sharp, 11 Heisk. 450;] but is not adopted by Fisher *v.* Johnson, 5 Ind. 492; Honore *v.* Bakewell, 6 B. Mon. 67; [Lang *v.* Wilkinson, 57 Ala. 259; Buford *v.* McCormick, ib. 428; Cordova *v.* Hood, 17 Wall. 1 (stating Texas law).] See Dixon *v.* Dixon, 1 Md. Ch. 220; [Perkins *v.* Gibson, 51 Miss. 699.] In some states the lien is held to go with the note if the vendor has not parted with the legal title, seemingly on the ground that the vendor is then substantially a mortgagee. Cleveland *v.* Martin, 2 Head, 128; Davidson *v.* Allen, 36 Miss. 419, and cases cited; Magruder *v.* Campbell, 40 Ala. 611.

(*f*) *Notice.* — In the case of a conflict of equities, *post*, 154, constructive notice is sufficient to postpone a subsequent purchaser to the claimant of the lien. Tiernan *v.* Thurman, 14 B. Mon. 277, 284; Mackreth *v.* Symmons, 1 L. C. in Eq. Am. note, 3d ed. 370; cf. *post*, 172, 179, n. 1. See Robinson *v.* Williams, 22 N. Y. 380, 387; Hunt *v.* Elmes, 2 De G., F. & J. 578; Ratcliffe *v.* Barnard, L. R. 6 Ch. 652; Rolland *v.* Hart, L. R. 6 Ch. 678. So a volunteer has an inferior equity. Burlingame *v.* Robbins, 21 Barb. 327; [Tucker *v.* Hadley, 52 Miss. 414.] The general doctrine stated in the text, 154, as to judgment creditors, is admitted; but a distinction is taken in favor of one who advances his money without notice on the faith of a clear record title, and of a judgment confessed for the amount by which he expects to obtain a lien, in Hulett *v.* Whipple, 58 Barb. 224. See Fisk *v.* Potter, 2 Keyes, 64. And the whole doctrine is thought unsound in the Am. note to Mackreth *v.* Symmons, 1 L. C. in Eq. 3d ed. 372 *et seq.*

stock is also a waiver of the lien; (*c*) and, notwithstanding the decision of the Master of the Rolls, in *Grant* v. *Mills*, (*d*) holding that a bill of exchange, drawn by the vendee, and accepted by him and his partner, did not waive the lien; the sounder doctrine, and the higher authority is, that taking the responsibility of a third person for the purchase-money is taking security, and extinguishes the lien. (*e*)

It has also been decided by the Supreme Court of the United States, after a full examination of the question, and upon grounds that will probably command general assent, that the ven- *154 dor's lien cannot be retained against creditors * holding under a *bona fide* mortgage or conveyance from the vendee, nor against a subsequent purchaser without notice. (*a*) The

pass to the assignee of his note taken for the purchase-money. Bland, Ch. 524; White v. Williams, 1 Paige, 506; Briggs v. Hill, 6 How. (Miss.) 362.

(*c*) Nairn v. Prowse, 6 Ves. 752; Lagow v. Badollet, 1 Blackf. (Ind.) 416.

(*d*) 2 Ves. & B. 306.

(*e*) Gilman v. Brown, 1 Mason, 191; 4 Wheaton, 255, s. c.; Williams v. Roberts, 5 Ohio, 35; Eskridge v. M'Clure, 2 Yerg. 84; Foster v. The Trustees of the Athenæum, 8 Ala. 302. In the Roman law, from whence the doctrine of the vendor's lien is supposed to be derived, the absolute property passed to the buyer, if the seller took another pledge, or other personal security; venditæ vero res et traditæ non aliter emptori acquiruntur, quam si is venditori pretium solverit, vel alio modo ei satisfecerit, *veluti ex promissore aut pignore dato.* Inst. 2. 1. 41. Hoc nomine fidejussor hic intelligi videtur. Vinnius in Inst. h. t.

(*a*) Bayley v. Greenleaf, 7 Wheaton, 46; and to the same point, see Roberts v. Salisbury, 3 Gill & J. 425; Gann v. Chester, 5 Yerg. 205; [Thurman v. Stoddard, 63 Ala. 336. Purchasers with notice take subject to the lien. Kettlewell v. Watson, 21 Ch. D. 685.] The opinion in Wheaton is decidedly condemned in Twelves v. Williams, 3 Wharton, 493. So, also, in Shirley v. Sugar Refinery, 2 Edw. Ch. 511, the Vice-Chancellor in New York dissents from the opinion of the Supreme Court of the United States, unless the conveyance or mortgage to the creditor be founded upon some new consideration, and without notice of the lien; and he refers to the cases of Grant v. Mills, 2 Ves. & B. 306, and of *Ex parte* Peake, 1 Mad. [346] 191, Phil. ed. But those cases only go to establish the position, that the assignees of bankrupts and insolvents take the estate subject to the existing equities against the vendee, and that they are in no better condition than the bankrupt, for they come in by operation of law, and without paying value. That point was, however, not decided by the Supreme Court. The court took a distinction between an assignment by a bankrupt, under the direction of a bankrupt or insolvent act, and an absolute conveyance by the vendee to *bona fide* creditors as *purchasers*. As the registry of deeds is the policy and practice in this country, I think the decision in Wheaton is correct, and that this latent equitable lien ought not to prevail over *bona fide* purchasers from the vendee, and for valuable consideration, and that they are not bound to take any notice of this dormant lien, resting for its validity on the state of the accounts between the vendee and his vendor.

lien will prevail, however, against a judgment creditor of the vendor, intervening between the time of the agreement to convey and receipt of the consideration money, and the actual conveyance. Under these circumstances, the vendor is justly considered in the light of a trustee for the purchaser. But in that case, an intervening mortgagee or purchaser, for a valuable consideration, and without notice, would be preferred. (*b*)

2. **Of the Rights of Mortgagor.** — (1.) *His Character at Law.* — Upon the execution of a mortgage, the legal estate vests in the mortgagee, subject to be defeated upon performance of the condition.[1] There is usually in English mortgages a clause inserted in the mortgage, that until default in payment, the mortgagor shall retain possession. This was a very ancient practice, as early as the time of James the First; and if there be no such express agreement in the deed, it is the general understanding of the parties, and, at *this day, almost the universal prac- *155 tice, founded on a presumed or tacit assent. Technically speaking, the mortgagor has, at law, only a mere tenancy, and that is subject to the right of the mortgagee to enter immediately, and at his pleasure, if there be no agreement to the contrary. He may, at any time when he pleases, and before a default, put the mortgagor out of possession, by ejectment, or other proper

(*b*) Finch *v.* Earl of Winchelsea, 1 P. Wms. 277; Hoagland *v.* Latourette, 1 Green, Ch. (N. J.) 254; Money *v.* Dorsey, 7 Smedes & Marsh. 15. The last case admitted it to be a well established doctrine, that from the sale of land the vendor becomes a trustee of the title for the vendee, and the latter a trustee of the purchase-money for the former. In each instance a lien is created upon the estate for the money. See, also, 1 Atk. 572; 1 Paige, 129; 4 id. 15, s. P. The question, whether taking a bond or bill destroyed the lien, has been quite a vexed one in the books. In Fawell *v.* Healis, Amb. 724, taking a bond was considered to have destroyed the lien. In Blackburn *v.* Gregson, 1 Bro. C. C. 420, 1 Cox, 90, s. c., the question was raised, and left undecided, though Lord Loughborough said he had a decided remembrance of a case where it was held that a lien continued, although a bond was given. In Winter *v.* Anson, 1 Sim. & Stu. 434, it was held that there was no lien where the bond was taken for the purchase-money, payable at a future day, with interest. It was decided to the same effect in Wragg *v.* The Comptroller General, 2 Desaus. (S. C.) 509. But we have decisions directly to the contrary in White *v.* Casanove, 1 Har. & Johns. 106, and Cox *v.* Fenwick, 3 Bibb, 183; and Mr. Justice Story also draws a contrary conclusion, in Gilman *v.* Brown, 1 Mason, 214; and he considers a note, bond, or covenant, from the vendee, to be consistent with the preservation of the lien. The same opinion is given in Kennedy *v.* Woolfolk, 3 Hayw. 199, and in Fish *v.* Howland, 1 Paige, 20, where this doctrine of lien is laid down with comprehensive accuracy and precision.

[1] See 194, n. 1.

suit. This is the English doctrine, and I presume it prevails very extensively in the United States. (*a*) The mortgagor cannot be treated by the mortgagee as a trespasser, nor can his assignee, until the mortgagee has regularly recovered possession, by writ of entry or ejectment. The mortgagor in possession is considered to be so with the mortgagee's assent, and is not liable to be treated as a trespasser. (*b*) The mortgagor is allowed, in New York, even to sustain an action of trespass against the mortgagee, or those claiming under him, if he undertakes an entry while the mortgagor is in possession. (*c*) It was anciently held, that so long as the mortgagor remained in possession, with the acquiescence of the mortgagee, and without any covenant for the purpose, he was a tenant at will. (*d*) This is also the language very frequently used in the modern cases; but its accuracy has been questioned, and the prevailing doctrine is, that he is not a tenant at will, for no rent is reserved; and so long as he pays his interests, he is not accountable, in the character of a receiver, * 156 for the * rents. The contract between the parties is for the payment of interest, and not for the payment of rent. He is only a tenant at will, *sub modo*. He is not entitled to the emblements, as other tenants at will are; *y*[1] and he is no better than a tenant at sufferance, and is not entitled to notice to quit before an ejectment can be maintained against him. (*a*) But what-

(*a*) Buller, J., in Birch *v.* Wright, 1 T. R. 378; Rockwell *v.* Bradley, 2 Conn. 1; Blaney *v.* Bearce, 2 Greenl. 132; Erskine *v.* Townsend, 2 Mass. 493; Parsons, Ch. J., in Newall *v.* Wright, 3 id. 138; Colman *v.* Packard, 16 id. 39; Simpson *v.* Ammons, 1 Binn. 176; M'Call *v.* Lenox, 9 Serg. & R. 302. Though I should infer, from the language of the last case cited, that the ejectment would not lie until after a default. In Michigan, by statute in 1843, an ejectment will not lie upon a mortgage until after a foreclosure, and the time of redemption passed.

(*b*) See the opinion of Jackson, J., in Fitchburg Cotton Man. Company *v.* Melven, 15 Mass. 268, and the case of Wilder *v.* Houghton, 1 Pick. 87.

(*c*) Runyan *v.* Mersereau, 11 Johns. 534; Jackson *v.* Bronson, 19 id. 325; Dickenson *v.* Jackson, 6 Cowen, 147.

(*d*) Powsely *v.* Blackman, Cro. Jac. 659.

(*a*) Keech *v.* Hall, Doug. 21; Moss *v.* Gallimore, ib. 279; Buller, J., in Birch *v.* Wright, 1 T. R. 383; Thunder *v.* Belcher, 3 East, 449; Sir Thomas Plumer, in Chris-

y[1] The mortgagor was held entitled to emblements in Heavilon *v.* Farmers' Bank, 81 Ind. 249, on the ground that, having the title, which could only be devested by foreclosure proceedings taken by the mortgagee, the time of the termination of his estate was uncertain. See further as to the position held by a mortgagor in possession, Miles *v.* Murphy, 5 Ir. R. C. L. 382; Gibbs *v.* Cruikshank, 8 L. R. C. P. 454; Fairclough *v.* Marshall, 4 Ex. D. 37.

ever character we may give to the mortgagor in possession by sufferance of the mortgagee, he is still a *tenant*. (*b*) He is a tenant, however, under a peculiar relation; and he has been said to be a tenant from year to year, or at will, or at sufferance, or a *quasi* tenant at sufferance, according to the shifting circumstances of the case; and perhaps the denomination of *mortgagor* conveys distinctly *and precisely the qualifications which *157 belong to his anomalous character, and is the most appropriate term that can be used. (*a*)

It is the language of the English books, that a mortgagor, being in the nature of a tenant at will, has no power to lease the estate; and his lessee upon entry (but not the mortgagor) would be liable to be treated by the mortgagee as a trespasser, or disseisor, or lessee, at his election. This is supposed by Mr. Coventry to be the better opinion. (*b*) The lease of the mortgagor is said to amount to a disseisin of the mortgagee, which renders the lessee upon entry a wrong doer. But the justice and good sense of the case is, that the assignee of the mortgagor is no more a trespasser than the mortgagor himself; and the mortgagor has a right to

topher *v.* Sparke, 2 Jac. & Walk. 234; 5 Bing. 421. With respect to notice to quit, the American authorities differ. In Massachusetts, Connecticut, North Carolina, and Pennsylvania, and probably in other states, the English rule is followed, and the notice is not requisite. Rockwell *v.* Bradley, 2 Conn. 1; Wakeman *v.* Banks, ib. 445; Groton *v.* Boxborough, 6 Mass. 50; Duncan, J., in 9 Serg. & R. 311; Williams *v.* Bennett, 4 Ired. 122. But in New York, by a series of decisions, notice to quit was required before the mortgagor could be treated as a trespasser, and subjected to an action of ejectment. It was required, on the ground of the privity of estate, and the relationship of landlord and tenant, and which is a tenancy at will by implication; but the rule did not apply to a purchaser from the mortgagor, for there the privity had ceased. Jackson *v.* Laughhead, 2 Johns. 75; Jackson *v.* Fuller, 4 id. 215; Jackson *v.* Hopkins, 18 id. 487. By the New York Revised Statutes, ii. 312, sec. 57, all this doctrine of notice is superseded, and the action of ejectment itself, by a mortgagee or his assigns or representatives, abolished. The mortgagee is driven to rely upon a special contract for the possession, if he wishes it, or to the remedy by foreclosure and sale, upon a default; and this alteration in our local law would appear to be a reasonable provision, and a desirable improvement. The action of ejectment, not being a final remedy, is vexatious, and the possession under it terminates naturally in a litigious matter of account, and a deterioration of the premises. [Cf. 114, n. 1.]

(*b*) Patridge *v.* Bere, 5 B. & Ald. 604.

(*a*) Buller, J., in Birch *v.* Wright, 1 T. R. 383; Sir Thomas Plumer, in Cholmondeley *v.* Clinton, 2 Jac. & Walk. 183; Coote on the Law of Mortgage, 327–334; Coventry, notes to 1 Powell, 157, 175, ed. Boston, 1828; [Waterman *v.* Matteson, 4 R. I. 539, 544.]

(*b*) 1 Powell, 159, n.; 160–162. See also Thunder *v.* Belcher, 3 East, 449.

lease, sell, and in every respect to deal with the mortgaged premises as owner, so long as he is permitted to remain in possession, and so long as it is understood and held, that every person taking under him takes subject to all the rights of the mortgagee, unimpaired and unaffected. (*c*) Nor is he liable for the rents; and the mortgagee must recover the possession by regular entry, by suit, before he can treat the mortgagor, or the person holding under him, as a trespasser. This is now the better and the more intelligible American doctrine; and, in New York, in particular, since the action of ejectment by the mortgagee is abolished, a court of law would seem to have no jurisdiction over the mortgagee's interest. He is not entitled to the possession, nor to the rents and profits; and he is turned over entirely to the courts of equity. (*d*) [1]

*158 (2.) *His Rights in Equity.* — * In ascending to the view of a mortgage in the contemplation of a court of equity, we leave all these technical scruples and difficulties behind us. Not only the original severity of the common law, treating the mortgagor's interest as resting upon the exact performance of a condition, and holding the forfeiture or the breach of a condition to be absolute, by non-payment or tender at the day, is entirely relaxed; but the narrow and precarious character of the mortgagor at law is changed, under the more enlarged and liberal jurisdiction of the courts of equity. Their influence has reached the courts of law, and the case of mortgages is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law. Without any prophetic anticipation, we may

(*c*) In Chinnery *v.* Blackman, 3 Doug. 391, Lord Mansfield said, as early as 1784, that until the mortgagee takes possession, the mortgagor is owner to all the world, and is entitled to all the profits made. [Teal *v.* Walker, 111 U. S. 242.] A grant by the mortgagor of his equity of redemption with covenants of warranty, passes the covenants real, annexed to the conveyance, to the grantee. White *v.* Whitney, 3 Met. 81. In Evans *v.* Elliot, 9 Ad. & El. 342, the Court of K. B. was disposed to qualify the universality of the rule, that the mortgagee might always treat both the mortgagor and his lessee as trespassers. He may, by his own conduct, preclude himself from so doing.

(*d*) Jackson, J., in 15 Mass. 270; Parker, Ch. J., 1 Pick. 90; Duncan, J., 9 Serg. & R. 811; New York Revised Statutes, ii. 312.

[1] See 194, n. 1.

well say, that "returning justice lifts aloft her scale." The doctrine, now regarded as a settled principle, was laid down in the reign of Charles I., very cautiously, and with a scrupulousness of opinion. "The court conceived, as it was observed in chancery, that the said lease being but a security, and the money paid, though not at the day, the lease ought to be void in equity." (*a*) The equity of redemption grew in time to be such a favorite with the courts of equity, and was so highly cherished and protected, that it became a maxim, *that "once a mortgage *159 always a mortgage." The object of the rule is to prevent oppression; and contracts made with the mortgagor, to lessen, embarrass, or restrain the right of redemption, are regarded with jealousy, and generally set aside as dangerous agreements, founded in unconscientious advantages assumed over the necessities of the mortgagor. The doctrine was established by Lord Nottingham, as early as 1681, in *Newcomb* v. *Bonham;* (*a*) for, in that case, the mortgagor had covenanted, that if the lands were not redeemed in his lifetime, they should never be redeemed; but the Chancellor held that the estate was redeemable by the heir, notwithstanding the agreement; and though the decree in that case was subsequently reversed, it was upon special circumstances, not affecting the principle. The same general doctrine was pursued in *Howard* v. *Harris*, (*b*) and it pervades all the subsequent and modern cases on the subject, both in England and in this country. (*c*)

(*a*) Emanuel College *v.* Evans, 1 Rep. in Ch. 18. In the case of Roscarrick *v.* Barton, 1 Cases in Ch. 217, Sir Matthew Hale, when Chief Justice, showed that he had not risen above the mists and prejudices of his age on this subject, for he complained very severely of the growth of equities of redemption, as having been too much favored, and been carried too far. In 14 Rich. II., the Parliament, he said, would not admit of this equity of redemption. By the growth of equity, the heart of the common law was eaten out. He complained that an equity of redemption was transferable from one to another, though at common law a feoffment or fine would have extinguished it; and he declared he would not favor the equity of redemption beyond existing precedents.

(*a*) 1 Vern. 7, 232, and 2 Vent. 364. (*b*) 1 Vern. 190.

(*c*) In Seton *v.* Slade, 7 Ves. 273, Lord Eldon observed that the doctrine of the court gave countenance to the strong declaration of Lord Thurlow, that no agreement of the parties would alter the right of redemption. And as to the recognition of the doctrine with us, see Holdridge *v.* Gillespie, 2 Johns. Ch. 30; Clark *v.* Henry, 2 Cowen, 324; Wilcox *v.* Morris, 1 Murphy, 117; Perkins *v.* Drye, 8 Dana (Ky.), 176–178. In Newcomb *v.* Bonham, 1 Vern. 7, Lord Nottingham held that the mortgagee might compel the mortgagor, at any time, to redeem, or be foreclosed, *even*

The equity doctrine is, that the mortgage is a mere security for the debt, and only a chattel interest, and that until a decree of foreclosure, the mortgagor continues the real owner of the fee.

The equity of redemption is considered to be the real and
* 160 beneficial estate, tantamount to * the fee at law; and it is accordingly held to be descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law. (*a*) The courts of law have, also, by a gradual and almost insensible progress, adopted these equitable views of the subject, which are founded in justice, and accord with the true intent and inherent nature of every such transaction. Except as against the mortgagee, the mortgagor, while in possession, and before foreclosure, is regarded as the real owner, and a freeholder, with the civil and political rights belonging to that character; whereas the mortgagee, notwithstanding the form of the conveyance, has only a chattel interest, and his mortgage is a mere security for a debt. This is the conclusion to be drawn from a view of the English and American authorities. (*b*) The equity of redemption is not liable, under the English law, to sale on execution as real estate. (*c*) It is held to be equitable assets, and is marshalled according to equity principles. (*d*) But, in this country, the rule has very extensively prevailed, that an

though there was a special agreement in the mortgage that the mortgagor was to have his whole lifetime to redeem; but his successor, on a rehearing (1 Vern. 232), reversed his decision, and held that the party had his whole lifetime, according to his contract; and this last decree was affirmed in Parliament.

(*a*) Casborne *v.* Scarfe, 1 Atk. 603; 2 Jac. & Walk. 194, n. [App. ii.] s. c.

(*b*) The King *v.* St. Michaels, Doug. 630; The King *v.* Edington, 1 East, 288; Jackson *v.* Willard, 4 Johns. 41; Runyan *v.* Mersereau, 11 id. 534; Huntington *v.* Smith, 4 Conn. 235; Willington *v.* Gale, 7 Mass. 138; M'Call *v.* Lenox, 9 Serg. & R. 302; Ford *v.* Philpot, 5 Harr. & Johns. 312; Wilson *v.* Troup, 2 Cowen, 195; Eaton *v.* Whiting, 3 Pick. 484; Blaney *v.* Bearce, 2 Greenl. 132. The growth and consolidation of the American doctrine, that until foreclosure the mortgagor remains seised of the freehold, and that the mortgagee has, in effect, but a chattel interest, and that it goes to the executor, as personal assets, and though, technically speaking, the fee descends to the heir, yet he is but a trustee for the personal representatives, and need not be a party to a bill by the executor for a foreclosure, was fully shown and ably illustrated by the Chief Justice of Connecticut, in Clark *v.* Beach, 6 Conn. 142, and by the Chief Justice of Maine, in Wilkins *v.* French, 20 Me. 111, and by the Chancellor of New Jersey, in Kinna *v.* Smith, 2 Green, 14; and these general principles were not questioned by the courts.

(*c*) Lyster *v.* Dolland, 1 Ves. Jr. 431; Scott *v.* Scholey, 8 East, 467; Metcalf *v.* Scholey, 5 Bos. & P. 461.

(*d*) Plunket *v.* Penson, 2 Atk. 290; 1 Ves. 436, s. c.

equity of redemption was vendible as real property on an execution at law;[1] and it is also * chargeable with the * 161 dower of the wife of the mortgagor. (*a*) On the other hand, the estate of the mortgagee before foreclosure, or at least before entry, is not the subject of execution, not even though there has been a default, and the condition of the mortgage forfeited. (*b*) The English policy led to an early adoption of these just and reasonable views of the character of a mortgagor; and it was settled in the reign of Charles II., that the executor, and not the heir of the mortgagee in fee, was entitled to the mortgage money; for, as Lord Nottingham observed, the money first came from the personal estate, and the mortgagee's right to the land was only as a security for the money. (*c*) By the statute of 7 and 8

(*a*) Waters *v.* Stewart, 1 Caines' Cas. 47; Hobart *v.* Frisbie, 5 Conn. 592; Ingersoll *v.* Sawyer, 2 Pick. 276; Ford *v.* Philpot, 5 Harr. & Johns. 312; Carpenter *v.* First Parish in Sutton, 7 Pick. 49; Collins *v.* Gibson, 5 Vt. 243; M'Whorter *v.* Huling, 8 Dana (Ky.), 349; Fitch *v.* Pinckard, 4 Scamm. 70, 88. In Connecticut, the interest of a *cestui que trust* in real estate is subject to the lien of attachment and the levy of execution. Davenport *v.* Lacon, 17 Conn. 278; Hunter *v.* Hunter, 1 Walk. (Miss.) 194; Garro *v.* Thompson, 7 Watts, 416; Phelps *v.* Butler, 2 Ohio, 373; Bank of Canton *v.* Commercial Bank, 10 Ohio, 71; Bagley *v.* Bailey, 16 Me. 151; Revised Laws of Missouri, 1835, p. 256; 1 Revised Statutes of North Carolina, 1837, p. 266. But in Maryland, and in the Maryland part of the District of Columbia, the wife of the mortgagor is not entitled to dower, nor *can* the mortgagor maintain trespass against the mortgagee, nor is the equity of the redemption of the mortgagor liable to execution at law. The rules of the common law are retained. Van Ness *v.* Hyatt, 13 Peters, 294. So also in New York, under the Revised Statutes, ii. 368, on a judgment at law for a debt *secured by mortgage*, the equity of redemption cannot be sold on execution under that judgment. The creditor in that case must resort to a court of equity. New Hampshire would appear, however, to form an exception to the general practice of selling an equity of redemption on execution at law. Woodbury, J., in 2 N. H. 16. But that power of selling an equity of redemption has been since given by the statute of July 3, 1822; 9 N. H. 405.

(*b*) Jackson *v.* Willard, 4 Johns. 41; Blanchard *v.* Colburn, 16 Mass. 345; Eaton *v.* Whiting, 3 Pick. 484; Huntington *v.* Smith, 4 Conn. 235; Rickert *v.* Madeira, 1 Rawle, 325; Buck *v.* Sanders, 1 Dana (Ky.), 188; Glass *v.* Ellison, 9 N. H. 69.

(*c*) Thornborough *v.* Baker, 3 Swanst. 628; Tabor *v.* Tabor, ib. 636.

[1] Brace *v.* Shaw, 16 B. Mon. 43; Funk *v.* McReynold, 33 Ill. 481; Sanborn *v.* Chamberlin, 101 Mass. 409; Dunbar *v.* Starkie, 19 N. H. 160; Coe *v.* McBrown, 22 Ind. 252. The subject is regulated by statute in most states. Some cases deny the right of the mortgagee, while he retains his security, to levy on the equity. *Post*, 184, n. (*b*); Baldwin *v.* Jenkins, 23 Miss. 206; Thornton *v.* Pigg, 24 Mo. 249; Barker *v.* Bell, 37 Ala. 354, 358. *Contra*, Crooker *v.* Frazier, 52 Me. 405. Additional cases to the same point as those cited, 161, n. (*b*), are Brown *v.* Bates, 55 Me. 520; McLaughlin *v.* Shepherd, 32 Me. 143; Thornton *v.* Wood, 42 Me. 282; Trapnall *v.* The State Bank, 18 Ark. 53. *Contra*, Cotten *v.* Blocker, 6 Fla. 1.

William III., mortgagors in possession were allowed to vote for members of Parliament.

The mortgagor may exercise the rights of an owner while in possession, provided he does nothing to impair the security; and a court of chancery will always, on the application of the mortgagee, and with that object in view, stay the commission of waste by the process of injunction. (*d*) But an action at law by the mortgagee will not lie for the commission of waste, because he has only a contingent interest; (*e*) and yet actions of trespass *162 *quare clausum fregit*, * by the mortgagee, for the commission of waste, by destroying timber, or removing fixtures, have been sustained against the mortgagor in possession, in those states where they have no separate equity courts with the plenary powers of a court of chancery. (*a*) [1] The interference with the discretion of the mortgagor is not carried further, and, in ordinary cases, he is not bound to repair, and keep the estate in good order; (*b*) and there is no instance in which a court of equity has undertaken to correct permissive waste, or to compel the mortgagor to repair; though cases of negligence rapidly impairing the security, without any overt act whatever, would address themselves with peculiar force to the courts of equity in New York, since the mortgagee is now deprived by statute of the power of taking the estate into his own management. As the law stands, it would seem, that the mortgagee is left to guard his pledge against such contingencies, by his own provident foresight and vigilance in making his contract, or to seek for aid in the en-

(*d*) Lord Hardwicke, in Robinson *v.* Litton, 3 Atk. 209; ib. 723; Brady *v.* Waldron, 2 Johns. Ch. 148; Cooper *v.* Davis, 15 Conn. 556. In England, the mortgagee out of possession is not entitled as of course to an injunction to restrain the mortgagor from cutting timber. There must be a special case, as that the security may become insufficient, before the court will interfere. King *v.* Smith, 2 Hare, 243. [See further, Angier *v.* Agnew, 98 Penn. St. 587; Searle *v.* Sawyer, 127 Mass. 491.]

(*e*) Peterson *v.* Clark, 15 Johns. 205.

(*a*) Smith *v.* Goodwin, 2 Greenl. 173; Stowell *v.* Pike, ib. 387.

(*b*) Campbell *v.* Macomb, 4 Johns. Ch. 534.

[1] It is so held after default, although the mortgagee has not entered and taken possession, in Page *v.* Robinson, 10 Cush. 99; Hapgood *v.* Blood, 11 Gray, 400, 402; Burnside *v.* Twitchell, 43 N. H. 390. See Waterman *v.* Matteson, 4 R. I. 539; Wilmarth *v.* Bancroft, 10 Allen, 348. And in states where he has only a lien, *post*, 194, n. 1, he has been allowed to maintain an action on the case for waste materially diminishing the security. Southworth *v.* Van Pelt, 3 Barb. 347; Van Pelt *v.* McGraw, 4 Comst. 110; Manning *v.* Monaghan, 23 N. Y. 539 (chattel mortgage).

larged discretion of a court of equity, which would interfere for his indemnity in special cases, in which justice manifestly required it.

(3.) *His Equity of Redemption.* — The right of redemption exists, not only in the mortgagor himself, but in his heirs and personal representatives, and assignee, and in every other person who has an interest in, or a legal or equitable lien upon, the lands; and, therefore, a tenant in dower, or jointress, a tenant by the curtesy, a remainderman and reversioner, a judgment creditor, and every other incumbrancer,[1] unless he be an incum-

[1] [In Pardee *v.* Van Auken, 3 Barb. 534, the senior mortgagee filed a bill to foreclose, making a junior mortgagee a party. It was held that the junior mortgagee could maintain a cross bill to redeem and compel an assignment of the prior mortgage. It is known, however, to the annotator, who was in the case, that this decision, after two arguments, was reversed in the New York Court of Appeals. But in reversing the judgment, the court did not distinctly pronounce upon the general question which the case was supposed to involve. No doubt a junior creditor, whether by judgment or mortgage, has, in a general sense, the right of redemption from a senior mortgage. In this form the proposition is stated, not only in the text, but in other authorities. But this does not necessarily mean anything more than that the junior creditor has a lien on the equity of redemption. In opposition to the ancient strict law of mortgage, the courts of equity began by holding that the estate of the mortgagee, having become absolute by non-payment at the day, could be redeemed from the forfeiture for the benefit of the mortgagor. It was a just and necessary conclusion, that persons who had acquired derivative rights or liens upon the same land, under the mortgagor, should be entitled to the benefit of the same benign principle, when necessary for their protection. This conclusion has the simplicity of an axiom now, since it is settled that the prior mortgagee has a security merely, and not the title or estate. When, therefore, it is said that a junior mortgagee or judgment creditor may redeem, the just meaning of the proposition is, that the *principle* of redemption exists in their favor, and is not confined to the mortgagor. But when, and how, is the principle to be asserted? The mortgagor, or he who has the title and estate, may always pay off the incumbrance whenever it is due. This is a necessary incident of ownership. The same right exists in favor of a person in possession of the land having an estate for years under a lease from the mortgagor, junior to the mortgage, where the mortgagee threatens to foreclose, and a foreclosure would necessarily result in destroying the lease. Averill *v.* Taylor, 8 N. Y. 44. The lessee is entitled specifically to the *use and possession* of the land, and this is a plain reason for allowing him to take up an incumbrance, under which he is liable to be deprived of the possession and use. And inasmuch as the lessor, in such a case, ought himself to pay the mortgage, the lessee, who is compelled to pay it to protect his possession, is entitled, on such payment, to be subrogated and have an assignment. Averill *v.* Taylor, *supra*. But the situation of a mere creditor having a second lien or security does not seem to require relief in this form. He can sell, subject to the paramount or senior mortgage;

brancer *pendente lite*, may redeem; and the doubts as to the extent of the right to redeem beyond the mortgagor and his representatives arise only in courts of limited, and not of general, equity jurisdiction. (*c*) Lord Hardwicke felt himself
*163 * bound to allow a prowling assignee, who had bought in the equity of redemption for an inconsiderable sum, to redeem. (*a*) But the redemption must be of the entire mortgage, and not by parcels. He who redeems must pay the whole debt, and he will then stand in the place of the party whose interest in the estate he discharges. (*b*) If the judgment creditor seeks to redeem against the mortgagee of the leasehold estate, he must, as it is but a chattel interest, have first sued out a *fieri facias*, in order to create a lien on the estate. (*c*) The power of enforcing the right of redemption is an equitable power residing in the courts of chancery; and if there be no formal, distinct equity tribunal, the power is exercised upon equitable principles in courts of law clothed with a greater or less proportion of equity

(*c*) Lord Ch. B. Comyns, in Jones *v.* Meredith, Comyns, 670; Bateman *v.* Bateman, Prec. in Ch. 198; Sharpe *v.* Scarborough, 4 Ves. 538; 1 Powell on Mortgages, 312, 369, *in notis*; Grant *v.* Duane, 9 Johns. 591; Hitt *v.* Holliday, 2 Litt. 332; Smith *v.* Manning, 9 Mass. 422; Bird *v.* Gardner, 10 id. 364.

(*a*) Anon., 8 Atk. 313. A mortgagor may redeem, though the consideration of the note secured by the mortgage was illegal. Cowles *v.* Raguet, 14 Ohio, 38.

(*b*) The Master of the Rolls, in Palk *v.* Clinton, 12 Ves. 59; Calkins *v.* Munsell, 2 Root, 333.

(*c*) Shirley *v.* Watts, 3 Atk. 200; Brinckerhoff *v.* Brown, 4 Johns. Ch. 671.

and when, by such sale, he has acquired the estate, he can pay off any incumbrance upon it. An outstanding senior mortgage does not even embarrass the sale under a junior one. The purchaser can immediately redeem. So, if the senior lien be foreclosed, the proceeding is for the benefit of all lien holders. Those who are junior take the surplus moneys in due order of priority. This is giving full force to the principle and right of redemption. Can, then, a junior creditor by mortgage or judgment, arbitrarily and even capriciously compel a prior one to accept payment, and demand of him an assignment by way of subrogation? The authorities, properly understood, do not go to this length. Why should one creditor take from another his investment, when the situation of neither requires it to be done, and when the common debtor may be willing that both investments should stand? Take it that A. and B. hold successive mortgages, but B., who is junior, wishes to increase his investment. Can he do this by forcing an assignment from A.? Or, take it that B. wishes simply to recover his debt, which is the only right possessed by either. If it can be shown that, by paying the mortgage of A., and obtaining subrogation against the will of the latter, his situation is improved, then the right so to proceed may exist. But can this be shown? — C.]

jurisdiction. (*d*) In carrying the right of redemption into effect, a * court of equity is sometimes obliged to marshal * 164

(*d*) In New Jersey, Mississippi, and North Carolina, the jurisdiction and proceedings in chancery are ably digested by statute law; Elmer's Digest; Revised Code of Mississippi, 1824; Revised Statutes of North Carolina, 1837, vol. i.; and it is worthy of remark, that, in New Jersey in particular, there is less innovation upon the common and statute law of the land, as they existed at the Revolution, than in any other state. This contributes to render their system of jurisprudence very intelligible, familiar, and attractive to persons educated in the school of the common law. The statute law of Mississippi, under the revised code of 1824, is of the same character, and resembles the statute law of New York, prior to the memorable revision of 1830. In Delaware, South Carolina, Alabama, and Mississippi, equity powers reside in, and are exercised by, distinct and independent tribunals, upon the English model. This was also the case in New York, until 1823; but the exclusive jurisdiction in equity was withdrawn from the chancellor, and equity powers were, at that period, by the amended constitution of New York, partially vested in the circuit judges, as vice-chancellors, and in a special vice-chancellor, and in an assistant vice-chancellor, in the city of New York; and the circuit judges, except in the city of New York, exercised, in distinct capacities, a mixed jurisdiction of law and equity. The same mixed jurisdiction is conferred on the courts in Maryland and Virginia, and on the circuit courts in Tennessee and Missouri, and was on the circuit courts in Alabama, until the statute of January, 1839, established separate courts of chancery, and detached them from an alliance with the courts of law. In Florida, power is given by their constitution to the legislature to detach the courts of chancery from the circuit courts, and to establish separate courts, with original equity jurisdiction. In Virginia, the high Court of Chancery, with a single judge, was organized, and its powers and proceedings declared in 1791; but it being found productive of great delay, three superior courts of chancery, one for each great district, were established in 1802. Revised Code of Virginia, i. 88, 600. It since appears, that the county and corporation courts, and the circuit superior courts, have chancery as well as law powers, and when sitting in chancery, they administer equity *according to the course of procedure in the English chancery.* 1 Robinson's Practice, 86. In the states of Vermont, Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, Ohio, Indiana, Illinois, Missouri, Kentucky, North Carolina, Georgia, and Arkansas, the jurisdiction of law and equity is vested in the same tribunal; but the chancery proceedings are distinct, and carried on by bill and answer, in the circuit court, with appeal to the supreme court. In Michigan, under the constitution of 1835, a separate court of equity was established, with plenary powers and jurisdiction; and the chancellor holds his court of chancery in the general circuits in which the state is divided, subject to equity appellate jurisdiction in the supreme court. The administration of justices in equity, in that state, under Chancellor Farnsworth and Chancellor Manning, as reported in Harrington's & Walker's Reports, appears to be enlightened and correct, and does distinguished honor to their state. In Vermont, each judge of the supreme court is a chancellor, with the usual chancery powers, within his judicial district; and in Georgia, and perhaps in some other states, cases in equity are generally decided by special juries (Dudley (Ga.), 8; R. M. Charlton, 134, 135, 138), though the association of a special jury with the judge in equity is held to be a matter of practice, and not of legal obligation. Ib. 184. In some of those states, as in Maine, Massachusetts, New Hampshire, and Rhode Island, chancery powers are confined to a few specified objects, or assumed in hard cases from necessity. In Maine, by their revised statutes, the supreme court

the burden according to the equity of the different claimants, in order to preserve a just proportion, among those who are

may, by a bill in equity, compel the specific performance of a contract in writing, when the party has not a plain and adequate remedy at law. But, with few exceptions, the contract must have reference to the realty and not the personalty. Bubier *v.* Bubier, 24 Maine, 42. In other cases, as in Georgia, for instance, equity powers are granted in all cases where a common-law remedy is not adequate; and in Indiana, chancery powers are given not only to the supreme court and to the circuit courts, but certain chancery powers are also conferred on the judges, individually, in vacation time. In Louisiana, the distinction between law and equity, according to the theory of the English law, seems to be entirely unknown. There is no distinction, in that state, in the proceedings, or between the law and equity powers and jurisdiction of the court. 16 La. 196; 4 Rob. (La.), 82. But in the federal courts in Louisiana, and in some of the other states already mentioned, the jurisdiction of law and equity are distinctly maintained. In the province of Upper Canada, they have a vice-chancellor exercising the equity powers of the court of chancery in England; and in the provinces of Nova Scotia and New Brunswick, the masters of the rolls are, by provincial statute, constituted judges of the court of chancery, and the responsible advisers of the chancellor (and the lieutenant governor is *ex officio chancellor*), except on appeals from their own decisions. In the Revised Statute Code of Connecticut, published in 1784, p. 48, and again in 1821, p. 195, the courts having jurisdiction of suits in equity are directed to proceed according to the rules in equity, and to take cognizance of such matters only wherein adequate remedy cannot be had in the ordinary course of law. But, under this general grant, the equity system in Connecticut appears, in practice, to be broad and liberal. See Swift's Digest and Connecticut Reports, *passim*. In Ohio, the chancery powers conferred upon the supreme court, and the courts of common pleas sitting as courts of chancery, by the statutes of 1831, entitled "An act directing the mode of proceeding in chancery," are large and liberal, and would appear to constitute a very adequate jurisdiction. The digest in that statute of chancery powers and proceedings is executed with much skill and ability. The same thing may be said of the chancery jurisdiction under the territorial act of Michigan, of April 23, 1833. In Massachusetts, the equity powers of the supreme judicial court are quite limited. The power to enforce redemption is confined to a statute provision, and the mortgagor must redeem in three years after entry by the mortgagee. See Erskine *v.* Townsend, 2 Mass. 493; Kelleran *v.* Brown, 4 id. 443; Skinner *v.* Brewer, 4 Pick. 468; Jackson on Real Actions, 49. But in relation to trusts created by will, the courts of probate and the supreme judicial court have concurrent and general chancery powers, subject to appeal from the first to the last of those tribunals. So, the supreme judicial court has ample equity powers to enforce by bill, and a course of proceeding in chancery, the specific performance of contracts concerning land, as against heirs, &c. Mass. Revised Statutes, 1836. Under the Plymouth Colony Laws, the court of assistants had not only supreme criminal and civil jurisdiction at law, but *such matters of equity as could not be relieved at law*, such as the forfeiture of an obligation, breach of covenants, and other like matters of apparent equity. Brigham's ed. 1836, p. 260. In Pennsylvania, equity powers have been gradually assumed by their supreme court, from the necessity of the case, and for the advancement of justice, with the aid of a few legislative provisions. The provincial legislature of Pennsylvania, from its earliest existence, made repeated efforts to unite chancery powers with those of the courts of law, by the acts of 1701, 1710, and 1715, but those acts were successively disallowed by the royal council in England. The constitution of 1776,

bound in good conscience to a just contribution, and in order to prevent one creditor from exercising his election between different funds unreasonably, and to the prejudice of another. The principle of equity in these cases is clear and luminous, and it is deeply ingrafted in general jurisprudence. (*a*)

and the acts under it, gave to the courts of law a few specific equity powers, and the constitution of 1790 continued the same grant; and, under the latter instrument, various equity powers have been gradually granted, assumed, and amalgamated with the common-law powers of the courts. Those principles of equity have been digested from the acts of the legislature, and the decisions of the supreme court, with diligence, ability, and judgment, in a clear and neat little code of equity law, under the unpretending title of "An Essay on Equity in Pennsylvania, by Anthony Lausset, Jr., Student at Law, 1826."

In January, 1835, the commissioners appointed to revise the civil code of Pennsylvania, made an elaborate report to the legislature, upon the administration of justice, in which they propose to invest the supreme court and the several courts of common pleas with specific but more enlarged equity powers than had heretofore been exercised. They recommended, and in reference to the established jurisprudence, usages, and practice in Pennsylvania, perhaps wisely recommended, not the establishment of a separate court of chancery, nor the union of a court of chancery with the existing courts of law, but the incorporation or amalgamation, as heretofore, of the peculiar powers and practice of chancery with those of the common-law courts in the requisite cases, and with the adaptation of the old common-law forms of proceeding and existing remedies to new equity cases and purposes. Under this recommendation, the legislature of Pennsylvania, in June, 1836, gave enlarged equity powers to the supreme court and the several courts of common pleas, and to be exercised according to the practice in equity, prescribed or adopted by the Supreme Court of the United States. Again, in June, 1840, the equity power of the courts was still further extended. But the equity jurisdiction of the courts is still only a limited and selected portion of equity power. There is not an universal or even a general equity jurisdiction conferred on the Pennsylvania courts. The organization of their courts is ill suited for such a purpose. Gilder *v.* Merwin, 6 Wharton, 540, 541. In New York, in 1846, the state convention which revised the constitution effected an entire revolution in the judicial system of the state. They abolished the existing courts of chancery, the supreme court, the office of vice-chancellor, assistant vice-chancellor, judge of the county courts, supreme court commissioner, master in chancery, and examiner in chancery (Constitution of 1846, art. 13, sec. 8), and as a substitute they ordained that there should be a supreme court, having general jurisdiction in law and equity, and with power in the legislature to confer equity jurisdiction in special cases upon the county judges. (Id. sec. 14.) This was leaving the organization, powers, proceedings, and practice of the supreme court in painful difficulty and uncertainty, while they annihilated, at the same time, the well defined and well settled jurisdiction and practice of the courts of law and equity which had previously existed. This would seem to be, on the first impression, a rash and unwise innovation, and especially when we consider that a separate equity jurisdiction had been exercised upon the English model, and with the English spirit and instruction, from the first settlement of the country, and had formed our habits and shaped our learning, and proved to be eminently propitious to the growth and character of the New York jurisprudence.

(*a*) Sir William Harbert's Case, 3 Co. 14; 1 Powell on Mortgages, 342, b; Stevens *v.* Cooper, 1 Johns. Ch. 425; Scribner *v.* Hickok, 4 id. 530.

3. Rights of the Mortgagee. — (1.) *His Right to the Possession.* — We have seen that the mortgagee may, at any time, enter and take possession of the land, by ejectment or writ of entry, though he cannot make the mortgagor account for the past, or bygone rents, for he possessed in his own right, and not in the character of receiver. (*b*) He may, without suit, obtain possession of the rents and profits from a lessee existing prior to the mortgage, on giving him notice of his mortgage, and requiring the rent
* 165 to be * paid him, and in default he may distrain. (*a*) The case of *Moss* v. *Gallimore* applies the right and the remedy of the mortgagee to the rent in arrear at the time of the notice, as well as to the rent accruing subsequently; and that case was cited, and the principle of it not questioned, in *Alchorne* v. *Gomme;* (*b*) though it would seem to be now understood in chancery, that the mortgagor is not accountable as receiver for the rents, and that the rent due prior to the notice belongs to the mortgagor. (*c*) But the case of *Moss* v. *Gallimore* has been considered as good law, to the whole extent of it, by the courts of law in this country, (*d*) and the distinction taken is between a lease made by the mortgagor prior, and one made subsequent, to the mortgage. In the latter case, it is admitted that the mortgagee cannot distrain, or sue for the rent, because there is no privity of contract, or of estate, between the mortgagee and tenant. But if the subsequent tenant attorns to the mortgagee after the mortgage has become forfeited, he then becomes his tenant, and is answerable to him for the rent. (*e*)

The statute of 14 Geo. II. c. 19, expressly admitted of the

(*b*) Lord Hardwicke, in Mead *v.* Lord Orrery, 3 Atk. 244, and Higgins *v.* York Buildings Company, 2 Atk. 107; Parker, Ch. J., in Wilder *v.* Houghton, 1 Pick. 90; Howell *v.* Ripley, 10 Paige, 43.

(*a*) Moss *v.* Gallimore, Doug. 279; Buller, J., in Birch *v.* Wright, 1 T. R. 378.

(*b*) 2 Bing. 54.

(*c*) *Ex parte* Wilson, 2 Ves. & B. 252. The mortgagee not in possession is not entitled to the emblements. Toby *v.* Reed, 9 Conn. 216. As between mortgagor and mortgagee, the property in timber cut and being on the premises is in the mortgagee, subject to an account. This is the rule in Massachusetts and Maine. Gore *v.* Jenness, 19 Me. 53. The purchaser of mortgaged premises sold on foreclosure is entitled to the growing crops. Shepard *v.* Philbrick, 2 Den. 174.

(*d*) Souders *v.* Van Sickle, 3 Halst. 313; M'Kircher *v.* Hawley, 16 Johns. 289.

(*e*) Jones *v.* Clark, 20 Johns. 51; Magill *v.* Hinsdale, 6 Conn. 464. It was held, in Pope *v.* Biggs, 9 B. & C. 245, that a mortgagee may entitle himself to the rents due at the time of notice, as well as to those accruing afterwards, from a tenant holding under a lease from the mortgagor, subsequent to the mortgage.

attornment of the tenant (and whether the tenancy existed before or after the date of the mortgage has been held to make no difference) to the mortgagee after forfeiture; and this provision has been incorporated into the statute law of this country. (*f*) It will depend, therefore, upon the act of the tenant, under a * lease from the mortgagor subsequent to the mortgage, *166 whether the mortgagee can sustain a suit or distress for the rent prior to his recovery in ejectment.

In New York, I apprehend, the mortgagee can in no case, without such attornment, have any remedy at law for the rent, for he is deprived of any action to recover the possession; and if he gains the possession, it must be by contract with the mortgagor, or by one with the tenant, subsequent to the forfeiture, or by the aid of a court of equity, and which aid would be afforded when the pernancy of the rents and profits becomes indispensable to the mortgagee's indemnity. (*a*)

(2.) *Accountable for the Profits.* — If the mortgagee obtains possession of the mortgaged premises before foreclosure, he will be accountable for the actual receipts of the net rents and profits, and nothing more, unless they were reduced, or lost by his wilful default, or gross negligence. (*b*) [1] By taking possession, he im-

(*f*) New York Revised Statutes, i. 744, sec. 3; New Jersey Revised Laws, 192, 17; 3 Halst. 317.

(*a*) [See Syracuse City Bank *v.* Tallman, 31 Barb. 201.] The interest of the mortgagee before foreclosure is not the subject of sale on execution at law, notwithstanding the debt is due and the estate has become absolute at law. Jackson *v.* Willard, 4 Johns. 41. And see 4 Day, 235; 16 Mass. 345; 3 Pick. 489; 1 Walker (Miss.), 194, s. p.; [*ante*, 160, 161.]

(*b*) Anon., 1 Vern. 44; 1 Eq. Cas. Abr. 328, pl. 1; Robertson *v.* Campbell, 2 Call, 354; Ballinger *v.* Worsley, 1 Bibb, 195; Van Buren *v.* Olmstead, 5 Paige, 1; Felch *v.* Felch, in Vermont, cited in the Law Reporter for September, 1846.

[1] *Mortgagee in Possession.* — (*a*) *Liability.* — The rule of the text is well settled, Miller *v.* Lincoln, 6 Gray, 556; Richardson *v.* Wallis, 5 Allen, 78; Hubbard *v.* Shaw, 12 Allen, 120; Shaeffer *v.* Chambers, 2 Halst. Ch. 548; Moore *v.* Degraw, 1 Halst. Ch. 846; [Murdock *v.* Clarke, 59 Cal. 683, and cases cited; Mayer *v.* Murray, 8 Ch. D. 424. But see Barnett *v.* Nelson, 54 Iowa, 41. See also Phillips *v.* Sylvester, 8 L. R. Ch. 173; Earl of Egmont *v.* Smith, 6 Ch. D. 469; Metropolitan Ry. Co. *v.* Defries, 2 Q. B. D. 189, cases of vendor in possession to secure the purchase-money;] but it is necessary, in order to lay a foundation for the rule, that the party should be in possession in the character of mortgagee, and not, for instance, as purchaser, under the reasonable belief that he has a good title, Parkinson *v.* Hanbury, L. R. 2 H. L. 1. [See *In re* McKinley's Est., 7 Ir. R. Eq. 467.] Perhaps, however, a first mortgagee in possession would not be allowed

poses upon himself the duty of a provident owner, and he is bound to recover what such an owner would, with reasonable diligence, have received. (*c*) The net rents and profits are to be ascertained after payment of taxes and ordinary repairs, and other expenses of that character, and the mortgagee is not to be charged with the increased rents and profits arising from the use

(*c*) Williams *v.* Price, 1 Sim. & Stu. 581; 3 Powell on Mortgages, 949, a, note; Hughes *v.* Williams, 12 Ves. 498.

to get rid of that character as against a second mortgagee by purchasing the equity. Harrison *v.* Wyse, 24 Conn. 1. A mortgagee in possession has been held liable for waste, Guthrie *v.* Kahle, 46 Penn. St. 331; and, even without taking possession, for damage done by a stranger dealing with the property by his permission. Hood *v.* Easton, 2 Giff. 692. If the estate is sufficient to pay the mortgage, and the mortgagee notwithstanding opens and works mines, he will be charged with the gross receipts instead of the net profits, and disallowed the expenses of working. Millett *v.* Davey, 31 Beav. 470. *x*[1]

(*b*) *Allowances.* — In Massachusetts the mortgagee is still sometimes allowed compensation for managing the estate. Adams *v.* Brown, 7 Cush. 220. Improvements have been allowed for when made by the mortgagee in possession under the defective foreclosure of another mortgage, and in the belief, favored by the conduct of the mortgagor, that he was absolute owner. Mickles *v.* Dillaye, 17 N. Y. 80; McConnel *v.* Holobush, 11 Ill. 61, 70; McSorley *v.* Larissa, 100 Mass. 270. See Montgomery *v.* Chadwick, 7 Iowa, 114. But improvements not necessary to the use of the premises are not in general allowed. McCarron *v.* Cassidy, 18 Ark. 34. *x*[2] As to insurance, see iii. 376, n. 1, (c).

x[1] A mortgagee taking possession is entitled to back rents, but not to sums due the mortgagor in his business carried on upon the premises, as these do not arise out of the estate. Anderson *v.* Butler's Wharf Co., 48 L. J Ch. 824. Such a mortgagee is also entitled to the crops then growing. Bagnall *v.* Villar, 12 Ch. D. 812. So, also, to carry on business so as to sell as a going concern. Cook *v.* Thomas, 24 W. R. 427. He is bound to account within a reasonable time when called on. Cassidy *v.* Sullivan, 1 L. R. Ir. 313. So, also, in case of a bill to redeem. Elmer *v.* Creasy, 29 L. T. 129, West of England, &c. Bank *v* Nickolls, 6 Ch. D. 613. As to his liability to account with annual rests, see Nelson *v.* Booth, 3 De G. & J. 119; Shephard *v.* Elliot, 4 Madd. 254; Carter *v.* James, 29 W. R. 437.

x[2] In Shepard *v.* Jones, 21 Ch. D. 469, it was held that a mortgagee, by showing that he had laid out money in permanent improvements, entitled himself to an inquiry as to whether the mortgagor's estate was permanently benefited. Notice to the mortgagor of intended improvements was considered material only when the mortgagee claimed by way of contract. The mortgagee is clearly entitled to be reimbursed expenses reasonably necessary to the preservation and enforcement of the security, Wilkes *v.* Saunion, 7 Ch. D. 188; Tipton Green Coll. Co. *v.* Tipton Moat Coll. Co., ib. 192; Hughes *v.* Johnson, 88 Ark. 285 · Sidenberg *v.* Ely, 90 N. Y. 257; Dewey *v.* Brownell, 54 Vt. 441; but not to compensation for managing the estate, Comyns *v.* Comyns, 5 Ir. R. Eq. 583.

of any permanent improvements made by himself. (*d*) He may charge for the expenses of a bailiff or receiver, when it becomes proper to employ one; but he is not entitled to make any charge, by way of commission, for his own trouble in managing the property and collecting and receiving the rents. (*e*) This is the English rule, and the evident policy of it is to guard against abuse, in cases where there might be a strong temptation to it; and the rule has been followed in New York and Kentucky, while in Massachusetts a commission of five per cent has been allowed to the assignee of a mortgagee for managing the estate. (*f*)
The mortgagee in possession is *likewise allowed for *167
necessary expenditures, in keeping the estate in repair,
and in defending the title; (*a*) but there has been considerable diversity of opinion on the question, whether he was entitled to a charge for beneficial and permanent improvements. The clearing of uncultivated land, though an improvement, was not allowed in *Moore* v. *Cable*, on account of the increasing difficulties it would throw in the way of the ability of the debtor to redeem. But lasting improvements in building have been allowed, in England, under peculiar circumstances; (*b*) and they have been

(*d*) Bell *v.* Mayor of New York, 10 Paige, 49.

(*e*) Bonithon *v.* Hockmore, 1 Vern. 316; French *v.* Baron, 2 Atk. 120; Godfrey *v.* Watson, 3 id. 517; Langstaffe *v.* Fenwick, 10 Ves. 405; Davis *v.* Dendey, 3 Mad. 170; Clark *v.* Robbins, 6 Dana (Ky.), 350.

(*f*) Moore *v.* Cable, 1 Johns. Ch. 385; Breckenridge *v.* Brooks, 2 Marsh. 339; Gibson *v.* Crehore, 5 Pick. 146. The Massachusetts Revised Statutes, in 1836, pt. 3, tit. 3, c. 107, provide, that after the breach of the condition of the mortgage of real estate, the mortgagee or his assignee may take possession peaceably, or he may recover it by suit; and that, in either case, possession for three years forecloses the right of redemption. He may also enter or recover possession by suit *before* a breach of the condition, and the three years will not run except from the time of the breach. Upon redemption within the three years, the mortgagee must account for the rents and profits, and will be allowed for the expense of reasonable repairs and improvements, and *all other necessary expenses in the care and management of the estate.* This would seem to put an end to the allowance of any commission.

(*a*) Godfrey *v.* Watson, 3 Atk. 517; Lord Alvanley, in Hardy *v.* Rees, 4 Ves. 480; Moore *v.* Cable, 1 Johns. Ch. 385; Saunders *v.* Frost, 5 Pick. 259. The mortgagee is bound to keep the estate in necessary repair, and if he be guilty of wilful default or gross neglect as to repairs, he is responsible for loss and damages occasioned thereby. But he is not bound to repair against the natural effects of waste and decay from time. Russell *v.* Smith, 1 Anst. 96; Hughes *v.* Williams, 12 Ves. 495; Wragg *v.* Denham, 2 Y. & Coll. 117, 121; Dexter *v.* Arnold, 2 Sumner, 108. He may maintain trespass or trover for cutting and carrying away the timber. Frothingham *v.* M'Kusick, 24 Maine, 403.

(*b*) Exton *v.* Greaves, 1 Vern. 138; Talbot *v.* Braddill, ib. 183, note; Quarrell *v*

sometimes allowed and sometimes disallowed in this country. (*c*) The mortgagee in possession holds the estate with duties and obligations analogous in some respects to those of a trustee; and if he takes the renewal of a lease, it is for the benefit of the estate, and not for his own benefit. He can make no gain or profit out of the estate, which he holds merely for his indemnity. (*d*)

*168 *(3.) *Of Registry of the Mortgage.* — The mortgagee's right depends very essentially upon the registry of his mortgage, and upon the priority of that registry. The policy of this country has been in favor of the certainty and security, as well as convenience, of a registry, both as to deeds and mortgages; and by the statute law of New York, every conveyance of real estate, whether absolutely or by way of mortgage, must be recorded in the clerk's office of the county in which the real estate is situated, after being duly proved or acknowledged, and certified, as the law prescribes. If not recorded, it is void as

Beckford, 1 Mad. 153, Phil. ed. A tenant for life cannot make beneficial improvements and charge them on the inheritance. Caldecott *v.* Brown, 2 Hare, 144.

(*c*) In Conway *v.* Alexander, 7 Cranch, 218, the Circuit Court for the District of Columbia directed an allowance for permanent improvements; and, though the decree was reversed on appeal, that point was not questioned. So, in Ford *v.* Philpot, 5 Harr. & J. 312, a similar allowance was made in chancery, and that point was untouched in the court of appeals. In Russell *v.* Blake, 2 Pick. 505, it was said, that the mortgagee could not be allowed for making anything new, but only for keeping the premises in repair. So, in Quin *v.* Brittain, 1 Hoff. Ch. 353; Clark *v.* Smith, Saxton, Ch. (N. J.) 121; Dougherty *v.* M'Colgan, 6 Gill & J. 275, s. c.; Raymond's Digested Chancery Cases, 342, and in Bell *v.* Mayor of New York, 10 Paige, 49, it was held to be a general principle in chancery, though not without exceptions, that a mortgagee in possession is not to be allowed for new improvements. All the cases agree, that the mortgagee is to be allowed the expense of necessary repairs, and beyond that the rule is not inflexible, but it is subject to the discretion of the court, regulated by the justice and equity arising out of the circumstances of each particular case. See, on this subject, Burge's Comm. on Colonial and Foreign Laws, ii. 205.

(*d*) Holdridge *v.* Gillespie, 2 Johns. Ch. 30. In England, it is held that the mortgagee of a term is liable on the covenants in the lease assigned to him, by way of mortgage, though he has never been in possession of the term, or taken the issues and profits thereof. Williams *v.* Bosanquet, 1 Brod. & Bing. 288. But in New York it is held that such a mortgagee is not liable as assignee upon the covenants. Walton *v.* Cronly, 14 Wendell, 63; Astor *v.* Miller, 2 Paige, 68. This last decision is conformable to that of Eaton *v.* Jacques, Doug. 455. By the Massachusetts Revised Statutes of 1836, pt. 2, tit. 4, c. 65, sec. 10, 15, the interest of the mortgagee before foreclosure is deemed personal assets in the hands of executors and administrators. He is chargeable with waste, but what is waste in respect to clearing the land for timber must depend on circumstances. Givens *v.* M'Calmont, 4 Watts, 460.

against any subsequent purchaser or mortgagee, in good faith, and for a valuable consideration, of the same estate, or any portion thereof, whose conveyance shall be first duly recorded. (*a*) It may be said, generally, that this is the substance of the statute law on the subject in every state of the Union; but in some of them the recording is still more severely enforced, and deeds are declared void, at least as to all third persons, unless recorded. (*b*) If the question of right between a mortgagee, and a subsequent mortgagee or purchaser of the same estate, depended entirely upon the existence and priority of the registry, it would turn upon a simple matter of fact of the easiest solution, and it would undoubtedly remove much opportunity for litigation. The French ordinance of 1747 allowed to creditors and purchasers, having notice of a deed containing a substitution of an estate prior to their contract or *purchase of the same, to object *169 to the want of registry of the deed according to the requisition of the ordinance. The ordinance was framed by an illustrious magistrate, the Chancellor d'Aguesseau, and the commentators upon it laid it down as a fixed principle, that not even the most actual and direct notice would countervail the want of registration; so that if a person was a witness, or even a party to the deed of substitution, still, if it was not registered, he might safely purchase the property substituted, or lend money upon a

(*a*) New York Revised Statutes, i. 756, sec. 1; ib. 762, sec. 37. The term "purchaser," in the statute, is declared to embrace every mortgagee and his assignee. A purchaser for a valuable consideration, within the meaning of the registry act, is one who has advanced a new consideration for the estate conveyed, or who has relinquished some security for a prëexisting debt due him. The mere receiving of a conveyance in payment of a prëexisting debt is not sufficient to give him a preference over a prior unregistered mortgage. Dickerson *v.* Tillinghast, 4 Paige, 215.

(*b*) In Pennsylvania, no deed or mortgage is good unless recorded in six, and in Delaware, no mortgage is good unless recorded in twelve months; and in Massachusetts, Rhode Island, Connecticut, and some other states, the deed does not operate until recorded, except as between the parties and their heirs. In Ohio, deeds must be recorded in six months; and an unrecorded deed is void against a subsequent purchaser for valuable consideration, without notice of the deed, whether the subsequent deed be or be not recorded. In Georgia, mortgages of real and personal property are to be recorded within three months from their date, or they lose their preference. Prince's Dig. ed. 1836, p. 165. In Indiana, mortgages must be recorded or deposited for record, in ninety days, and in Kentucky, in sixty days, to be valid against creditors. The Louisiana Code, art. 3317, 3333, requires all mortgages, whether conventional, legal, or judicial, to be recorded, and their effect ceases unless renewed within ten years. But the rule does not apply to mortgages to which husbands, tutors, and curators are subjected by operation of law.

mortgage of it. (a) The policy of so rigorous a rule was to establish a clear and certain standard of decision for the case, which would be incapable of vibration, and prevent the evils of litigation, uncertainty, and fraud. But Pothier questions the wisdom of the rule, inasmuch as actual notice supplies the want, and the object of the registry. The principle of the ordinance has, however, been continued, and applied to some special cases in the Napoleon code. (b)

A more reasonable doctrine prevails in the English and American law; and it is a settled rule, that if a subsequent purchaser or mortgagee, whose deed is registered, had notice, at the time of making his contract, of the prior unregistered deed, he shall not avail himself of the priority of his registry to defeat it; and the prior unregistered deed is the same to him as if it had been registered. His purchase is justly considered, in cases where the conduct of the first mortgagee has been fair, as made in bad faith; and it would ill comport with the honor of the law, *170 and the wisdom of *the administration of justice, that courts should blind their eyes to such fraudulent dealing, and suffer it to remain triumphant. If the second purchaser has, in fact, notice, the intent of the registry is answered; and to permit him to hold against the first purchaser would be to convert the statute into an engine of fraud. And, by analogy to the case of the registry acts, it is settled in England, upon great consideration, that a purchaser is also bound by notice of a judgment, though it be not docketed. The effect of notice equally supplies the want of the register in the one instance, and of the docket in the other; though Lord Eldon seems to doubt whether the rule be perfectly reconcilable to principle. (a) Lord Hardwicke, in

(a) Com. de l'Ord. de Louis XV., sur les Substitutions, par M. Furgole, cited by Mr. Butler, n. 249, sec. 11 to Co. Litt. lib. 3; Pothier, Traité des Substitutions, art. 4, sec. 6.

(b) Code Civil, No. 1071. Le défaut de transcription ne pourra être supplée ni regardé comme couvert par la connaissance que les créanciers ou les tiers acquéreurs pourraient avoir eue de la disposition par d'autres voies que celle de la transcription. This regulation is almost in the very words of the ordinance respecting French entails, promulgated under the auspices of Chancellor d'Aguesseau. Œuvres d'Agueseau, xii. 476, octavo ed.

(a) Tunstall v. Trappes, 3 Sim. 286; Davis v. The Earl of Strathmore, 16 Ves. 419. x[1]

x[1] Morris v. White, 36 N. J. Eq. 324. Roberts v. Crawford, 58 N. H. 499. But see McKennon v. May, 89 Ark. 442. So one having actual notice of an unrecorded chattel mortgage is bound by it.

the great case of *Le Neve* v. *Le Neve*, (*b*) in which the existence and solidity of the English rule are shown and vindicated in a masterly manner, states the case of a purchaser of land in a register county, employing an attorney to register his conveyance, who neglects to do it, and buys the estate himself, and registers his own conveyance, and he then significantly asks, Shall this be allowed to prevail? A court of equity must have its moral sense "wrapped up in triple brass," to be able to withstand such an appeal to its justice. The French code does not carry throughout the principle which it has adopted; for it declares, that the want of a registry may be set up by all persons interested therein, *excepting, however, those who are charged with the causing of the registry to be made.* (*c*)

*The statute of New York (*a*) postpones an unregis- *171 tered deed or mortgage, only as against a subsequent purchaser or mortgagee, *in good faith and for a valuable consideration;* and this lets in the whole of the English equity doctrine of notice. The statute law of many of the other states is not so latitudinary in terms; and deeds not recorded are declared void as to creditors and subsequent purchasers; and, in some cases, they are declared to convey no title, or to be void as against all other persons but the grantor and his heirs. (*b*) The doctrine of notice,

(*b*) 3 Atk. 646; 1 Ves. 64; Amb. 436, s. c.; [Agra Bank *v.* Barry, 7 L. R. H. L. 135; Credland *v.* Potter, 10 L. R. Ch. 8. See also Bradley *v.* Riches, 9 Ch. D. 189.]

(*c*) Code Civil, n. 941. Mr. Butler and Mr. Miller discover a strong partiality for the French rule, and they consider the English doctrine to be another sample of judicial legislation, such as the introduction of common recoveries to bar entails, and the revival of uses under the name of trusts; and they insist that it is now so inconvenient as to be generally lamented. Butler's Reminiscences, i. 88; Miller's Inquiry into the Civil Law of England, 304. Mr. Humphrey, in his Outlines of a Code, 824, will not allow notice of any kind to disturb the order and priority of registration, and he is very hostile to the equity doctrine of notice. There is no doubt that the doctrine of notice, replete as it is with nice distinctions, is troublesome. But the law would not be a science luminous with intelligence, humanity, and justice, if it did not abound in refinements. General and inflexible rules, without modification or exceptions, would be tyrannical and cruel, like the bed of Procrustes, or the laws of Draco. It is in vain to think of governing a free and commercial people, abounding in knowledge and wealth, by a code of simple and brief rules. Subtlety will be exerted to evade them, and use them as instruments to circumvent. The tide of improvement necessarily carries with it complicated regulations; and the wants and vices of civilized life, and the activity and resources of a cultivated intellect, inevitably introduce innumerable refinements in the civil law.

(*a*) Revised Statutes, i. 756, sec. 1; ib. 762, sec. 38; [Fort *v.* Burch, 5 Den. 187.]

(*b*) The statute in New Jersey, declaring conveyances and mortgages not recorded

and its operation in favor of the prior unregistered deed or mortgage, equally applies, however, as I apprehend, throughout the United States; and it everywhere turns on a question of fraud, and on the evidence requisite to infer it. (c) In pursuance of that principle, and in order to support, at the same time, the policy and the injunctions of the registry acts, in all their *172 vigor and genuine meaning, implied notice *may be equally effectual with direct and positive notice; but then it must not be that notice which is barely sufficient to put a party upon inquiry. Suspicion of notice is not sufficient. The inference of a fraudulent intent affecting the conscience must be founded on clear and strong circumstances, in the absence of actual notice. The inference must be necessary and unquestionable. (a) Though the cases use very strong language in favor of

void, as against subsequent judgment creditors, purchasers, and mortgagees, limits this effect by adding *not having notice thereof*. Elmer's Dig. 86, 87. This was recognizing expressly the efficacy of notice. The Revised Statutes of Massachusetts, c. 59, sec. 28, declare that no conveyance in fee or for life, and no lease for more than seven years, shall be valid against persons other than the grantor, his heirs, and devisees, and *persons having actual notice thereof*, unless recorded. Notice such as men usually act upon in the ordinary affairs of life is sufficient. Curtis *v.* Mundy, 8 Met. 405.

(c) Farnsworth *v.* Childs, 4 Mass. 637; M'Mechan *v.* Griffing, 3 Pick. 149; Hewes *v.* Wiswell, 8 Greenl. 94; Chiles *v.* Conley, 2 Dana (Ky.), 23; Pike *v.* Armistead, 2 Dev. Eq. 24; Brackett *v.* Wait, 6 Vt. 411; Taylor *v.* M'Donald, 2 Bibb, 420; Newman *v.* Chapman, 2 Rand. 93; Guerrant *v.* Anderson, 4 id. 208; Jackson *v.* Sharp, 9 Johns. 164; Jackson *v.* Burgott, 10 id. 457: Roads *v.* Symmes, 1 Ohio, 281; Muse *v.* Letterman, 13 Serg. & R. 167; Jaques *v.* Weeks, 7 Watts, 261; Hudson *v.* Warner, 2 Harr. & Gill, 415; Story, J., 5 Mason, 159; Planters' Bank *v.* Allard, 20 Mart. (La.) 186; Rogers *v.* Jones, 8 N. H. 264; Martin *v.* Sale, 1 Bailey, Eq. 1; Bush *v.* Golden, 17 Conn. 594, 603; [Spofford *v.* Weston, 29 Me. 140; Clabaugh *v.* Byerly, 7 Gill, 354.] In the case of Righton *v.* Righton, 1 [Mill] Const. (S. C.) 130, it was said to be doubtful whether a purchaser with notice was bound by a deed unrecorded; but other cases in that state put this point out of doubt, and hold him bound. Forrest *v.* Warrington, 2 Desaus. 254; Tait *v.* Crawford, 1 M'Cord, 265; Givens *v.* Branford, 2 id. 152. In Dixon *v.* Doe, 1 Smedes & M. 70, it was held, after an elaborate discussion, that under the Mississippi statute, creditors and mortgagees, as well as subsequent purchasers, were affected by notice of a prior unregistered deed, and that it was not to be avoided by them from the want of a registry, if they had due notice of the deed. On the other hand, under the registering act in Ohio, notice of a prior unrecorded mortgage will not postpone the second mortgagee, nor can a third person, advancing money to enable a purchaser to buy, sustain a claim of a vend[or]'s lien. Stansett *v.* Roberts, 13 Ohio, 148.

(a) Lord Hardwicke, in Hine *v.* Dodd, 2 Atk. 275; Lord Alvanley, in Jolland *v.* Stainbridge, 3 Ves. 478; Eyre *v.* Dolphin, 2 Ball & B. 301; Jackson *v.* Elston, 12 Johns. 452; Dey *v.* Dunham, 2 Johns. Ch. 182; M'Mechan *v.* Griffing, 3 Pick

explicit, certain notice, yet it is to be understood as the true construction of the rule on the subject, that implied or presumptive notice may be equivalent to actual notice. (*b*) [1] The notice must also have been received, or chargeable, when the mortgage was executed; for if a right had vested, when the notice of the prior unregistered incumbrance was received, the mortgagee has then a right to try his speed in attaining a priority of registry. (*c*) As courts of law have concurrent jurisdiction with courts of equity, in cases of frauds, it was adjudged, in *Jackson* v. *Burgott*, (*d*) that the question of notice, and of preference due to the prior unregistered deed, by reason of notice, was cognizable in a court of law. But in *Doe* v. *Allsop*, (*e*) it was decided, that the deed first registered must prevail at law, under the registry act of 7 Anne, c. 20, whether there be notice or not notice, and that the grantee in the prior deed must seek his relief in equity. One of the judges, however, laid stress on the fact, that the registry act declared the unregistered conveyance void against every subsequent purchaser for a * valuable consideration, without adding *173 *bona fide purchaser;* and as the statute of New York uses the words, *purchaser in good faith*, the jurisdiction of the courts of law over the case would seem to remain unaffected. It is a question on the sound interpretation of the registry acts, and in a matter of fraud, and the better opinion is in favor of the jurisdiction of the courts of law.

A mortgage, not registered, has preference over a subsequently docketed judgment; and the statutory regulations concerning the registry of mortgages, and the docketing of judgments, do not

149; Jackson *v.* Given, 8 Johns. 137, 140; [Center *v.* P. & M. Bank, 22 Ala. 743; Fort *v.* Burch, 6 Barb. 60; Stowe *v.* Meserve, 13 N. H. 46;] [Condit *v.* Wilson, 36 N. J. Eq. 370.] It is stated by the A. V. Chancellor, in 1 Hoff. Ch. 372, that the remark in the text as to the clear and strong evidence of notice to do away the effect of a registered deed, is not accurate. But I beg leave to say that the text is accurate, both on grounds of policy and authority.

(*b*) 8 Johns. 137; 1 Ohio, 281; Grimstone *v.* Carter, 3 Paige, 421. But a *lis pendens*, to foreclose a mortgage not registered, is not sufficient to affect a subsequent purchaser for valuable consideration, who has no actual notice. Newman *v.* Chapman, 2 Rand. 93.

(*c*) Cushing *v.* Hurd, 4 Pick. 253.

(*d*) 10 Johns. 457.

(*e*) 5 B. & Ald. 142.

[1] See Rolland *v.* Hart, L. R. 6 Ch. 678; *ante*, 152, n. 1, (*f*); *post*, 179, n. 1, (*c*).

reach the case. (*a*) A mortgage unregistered is still a valid conveyance, and binds the estate, except as against subsequent *bona fide* purchasers and mortgagees, whose conveyances are recorded. If, therefore, the purchaser at the sale on execution, under the judgment, has his deed first recorded, he will then gain a preference by means of the record over the mortgage, and the question of right turns upon the fact of priority of the record in cases free from fraud.[1] This is also the case as to purchasers deriving title respectively under a fraudulent grantor and a fraudulent grantee. (*b*) The rule in Pennsylvania is different, (*c*) and the docketed judgment is preferred, and not unreasonably; for there is much good sense, as well as simplicity and certainty, in the proposition, that every incumbrance, whether it be a registered deed or docketed judgment, should, in cases free from fraud, be satisfied according to the priority of the lien upon the record, which is open for public inspection. In one instance, a mortgage will have preference over a prior docketed judgment, and that is the case of a sale and conveyance of land, and a mortgage taken at the same time, in return, to secure the payment of the purchase-money. The deed and the mortgage are considered *174 as parts of the same contract, and constituting * one act; and justice and policy equally require that no prior judgment against the mortgagor should intervene, and attach upon the land, during the transitory seisin, to the prejudice of the

(*a*) M. Valette, Professor of the Civil Code to the faculty of law of Paris, discussed elaborately the question whether a subsequent judgment against the debtor will injuriously affect a prior mortgage; and he concludes, very clearly, that it will not, either by the Roman or French law, for the judgment is *res inter alios acta*. See a translation of that discussion taken from the Revue de Droit François et Étranger, of Jan. 7, 1844, in the American Law Magazine for July, 1844.

(*b*) Jackson *v.* Dubois, 4 Johns. 216; Jackson *v.* Terry, 13 id. 471; Jackson *v.* Town, 4 Cow. 599; Ash *v.* Ash, 1 Bay, 304; Ash *v.* Livingston, 2 id. 80; Penman *v.* Hart, ib. 251; Hampton *v.* Levy, 1 M'Cord, Ch. 107. The rule remains the same since the New York Revised Statutes. Schmidt *v.* Hoyt, 1 Edw. Ch. 652; Ledyard *v.* Butler, 9 Paige, 132.

(*c*) Semple *v.* Burd, 7 Serg. & R. 286; Friedley *v.* Hamilton, 17 id. 70; Jaques *v.* Weeks, 7 Watts, 261; [Uhler *v.* Hutchinson, 23 Penn. St. 110.] So in North Carolina, a judgment creditor is preferred to a prior unregistered mortgage, and is not affected by notice of it. Davidson *v.* Cowan, 1 Dev. Eq. 470. Same law in Ohio, Bank of Cleveland *v.* Sturges, 2 McL. 341.

[1] See Fort *v.* Burch, 5 Denio, 187; Wilson *v.* Kimball, 7 Fost. (27 N. H.) 300; Ely *v.* Wilcox, 20 Wis. 523; Rolland *v.* Hart, L. R. 6 Ch. 678.

mortgage. This sound doctrine is, for greater certainty, made a statute provision in New York. (*a*)

There has been much discussion on the question whether the registry be, of itself, in equity, constructive notice to subsequent purchasers and mortgagees. The weight of authority in the English books, and Mr. Coote says the weight of principle also, are against notice founded on the mere registration of a deed; and Lord Redesdale thought, that if the record was held to be notice, it would be very inconvenient, for the principle would have to be carried to the extent of holding it notice of the entire contents of the deed, and to be notice whether the deed was duly or authorizedly recorded or not. (*b*) But Lord Camden was evidently of a different opinion, though he held himself bound by precedents to consider the registry not notice. (*c*) In this country the registry of the deed is held to be constructive notice of it to subsequent purchasers and mortgagees; (*d*) but we do not carry the rule to the extent apprehended by Lord Redesdale; and a deed unduly registered, either from want of a valid acknowledgment or otherwise, is not notice according to the prevailing opinion in this country. (*e*)

(*a*) New York Revised Statutes, i. 749, sec. 5.

(*b*) Latouche *v.* Dunsany, 1 Sch. & Lef. 157; Bushnell *v.* Bushnell, ib. 90. See also the opinion of Sergeant Hill, in 4 Mad. 286, note.

(*c*) Morecock *v.* Dickins, Amb. 678.

(*d*) Johnson *v.* Stagg, 2 Johns. 510; Frost *v.* Beekman, 1 Johns. Ch. 298; 18 Johns. 544, s. c.; Peters *v.* Goodrich, 3 Conn. 146; Hughes *v.* Edwards, 9 Wheat. 489; Thayer *v.* Cramer, 1 M'Cord, Ch. 395; Evans *v.* Jones, 1 Yeates, 174; Shaw *v.* Poor, 6 Pick. 86; Lasselle *v.* Barnett, 1 Blackf. (Ind.) 150; Plume *v.* Bone, 1 Green (N. J.), 63; N. Y. Revised Statutes, i. 761, sec. 33. But the recording of the assignment of a mortgage is not of itself notice of such assignment to the mortgagor, his heirs, or personal representatives, so as to invalidate payments to the mortgagee; ib. 763, sec. 41. And in Napier *v.* Elam, 6 Yerg. 108, it was held that if the vendor did not disclose the fact, that a previous incumbrance existed upon the property, it was a fraud that equity would relieve against, although the previous incumbrance was registered. In the case of Talmage *v.* Wilgers, before the Ass. V. Ch. in New York, it was adjudged that a mortgagee who releases a portion of the mortgaged premises is not bound, prior to such release, to search the records as to conveyances by the mortgagor subsequent to his own mortgage. The record is not constructive notice, and binding the mortgagee in that case, and the mortgagee is not bound to allow upon the mortgage the value of the lot released. New York Legal Observer, i. 42. [Other cases as to the parties to whom the record is notice are Stuyvesant *v.* Hall, 2 Barb. Ch. 151; Holley *v.* Hawley, 39 Vt. 525; Howard Ins. Co. *v.* Halsey, 4 Sandf. 565; Ely *v.* Wilcox, 20 Wis. 523, 530; Bank of Montgomery County's Appeal, 36 Penn. St. 170, and cases *post*, 176, n. 1.]

(*e*) [Graves *v.* Graves, 6 Gray, 391; Bossard *v.* White, 9 Rich. Eq. 483, 496; Har

*175 *(4.) *Future Advances.* — The ancient rule was, that if the mortgagor contracted further debts with the mortgagee, he could not redeem without paying those debts also. (*a*) The principle was to prevent circuity of action; but it was not founded upon contract, and Lord Thurlow said it had no foundation in natural justice; though I think the rule evidently had a foundation in the civil law. (*b*) The rule is now limited to the right to tack the subsequent debt to the mortgage, as against the heir of the mortgagor, and a beneficial devisee; but it cannot be permitted as against creditors, or against the mortgagor's assignee for valuable consideration, or devisee for the payment of debts. (*c*) So, a mortgage or judgment may be taken, and held as a security for future advances and responsibilities to the extent of it, when this is a constituent part of the original agreement; and the future advances will be covered by the lien, in preference to the claim under a junior intervening incumbrance, with notice of the agreement. (*d*) The principle is, that subsequent advances

per *v.* Barsh, 10 Rich. Eq. 149; Galpin *v.* Abbott, 6 Mich. 17; McKean *v.* Mitchell, 35 Penn. St. 269; Peck *v.* Mallams, 10 N. Y. (1 Kern.) 509, 518; Ely *v.* Wilcox, 20 Wis. 523, 529; Burnham *v.* Chandler, 15 Tex. 441; Harper *v.* Tapley, 35 Miss. 510;] Heister *v.* Fortner, 2 Binney, 40: Hodgson *v.* Butts, 3 Cranch, 140; Frost *v.* Beekman, 1 Johns. Ch. 298; Sutherland, J., James *v.* Morey, 2 Cow. 246, 296; Kerns *v.* Swope, 2 Watts, 75; Shults *v.* Moore, 1 McL. 520. It would not be notice to affect a purchaser. But see Morrison *v.* Trudeau, 13 Mart. (La.) 384, where such a deed is said to operate as a notice to third persons. By the Massachusetts Revised Statutes of 1836, pt. 2, tit. 1, c. 59, sec. 32, the recording the deed, or writing, creating or declaring a trust, is made equivalent to actual notice of the same to purchasers and creditors.

(*a*) Shuttleworth *v.* Laycock, 1 Vern. 245; Baxter *v.* Manning, ib. 244; Anon., 3 Salk. 84; Francis's Maxims of Equity, 1.

(*b*) This was clearly and learnedly shown by Mr. Justice Jackson, in 15 Mass. 407. See also Story's Eq. Jur. ii. 276, and Institutes of the Civil Law of Spain, by Asso & Manuel, b. 2, tit. 11, c. 3, sec. 2, n. 71. In Lee *v.* Stone, 5 Gill & J. 1, it was held that a mortgagor seeking to redeem must pay not only the mortgage debt, but all other debts due from him to his mortgagee; but if the mortgagee seeks a foreclosure, the mortgagor can redeem on paying the mortgage debt only. So he can, if a subsequent mortgagee or a judgment creditor files a bill to redeem. [176, n. 1; 179, n. 1, (*d*).]

(*c*) Troughton *v.* Troughton, 1 Ves. Sen. 86; Anon., 2 id. 662; Heams *v.* Bance, 3 Atk. 630; Powis *v.* Corbat, ib. 556; Lowthian *v.* Hasel, 3 Bro. C. C. 162; Hamerton *v.* Rogers, 1 Ves. Jr. 513; Lord Alvanley, in Jones *v.* Smith, 2 id. 376.

(*d*) Marshall, Ch. J., in Shirras *v.* Craig, 7 Cranch. 34. It was adjudged by the Vice-Chancellor, after a full consideration of the cases, that a mortgage to secure future advances was valid, without showing on its face the object of it. It is sufficient if the extent of the lien be clearly defined. The policy of the registry laws does not affect the question of the validity of it in this respect. But a subsequent mort-

cannot be tacked to a prior mortgage, to the prejudice of a *bona fide* junior incumbrancer; but a mortgage is always good, to secure future loans, when there is no intervening equity. (*e*)

It is necessary * that the agreement, as contained in the *176 record of the lien, should, however, give all the requisite information as to the extent and certainty of the contract, so that a junior creditor may, by inspection of the record, and by common prudence and ordinary diligence, ascertain the extent of the incumbrance. This is requisite to secure good faith, and prevent error and imposition in dealing. (*a*) [1] It is the settled rule in

gage on the same premises, for an existing debt, takes precedence of all advances made after such second mortgage is executed. Craig *v.* Tappin, 2 Sandf. Ch. 78.

(*e*) Gardner *v.* Graham, 7 Vin. Abr. 52, E. pl 3; Lyle *v.* Ducomb, 5 Binney, 585; Hughes *v.* Worley, 1 Bibb, 200; Livingston *v.* M'Inlay, 16 Johns. 165; Hendricks *v.* Robinson, 2 Johns. Ch. 309; Brinckerhoff *v.* Marvin, 5 id. 326; James *v.* Johnson, 6 id. 420; Shirras *v.* Craig, 7 Cranch, 34; Story, J., in Conrad *v.* Atlantic Insurance Company, 1 Peters, 448; Hubbard *v.* Savage, 8 Conn. 215; Averill *v.* Guthrie, 8 Dana, 83; Leeds *v.* Cameron, 3 Sumner, 492; Brown *v.* Frost, 1 Hoff. Ch. 41; Walling *v.* Aiken, 1 McMul. (S. C.) 1.

(*a*) Pettibone *v.* Griswold, 4 Conn. 158; Stoughton *v.* Pasco, 5 id. 442; St. Andrew's Church *v.* Tompkins, 7 Johns. Ch. 14; Garber *v.* Henry, 6 Watts, 57. But if a mortgage or judgment be taken as a security for future advances, and subsequent judgment or mortgage duly registered intervenes, it is suggested that further advances, *after that period*, would not be covered. Brinckerhoff *v.* Marvin, 5 Johns. Ch. 326; Terhoven *v.* Kerns, 2 Barr, 96.

[1] *Future Advances.* — There is no doubt that a mortgage to secure future advances is valid as between the parties, Lawrence *v.* Tucker 23 How. 14; although no certain sum is named therein, Robinson *v.* Williams, 22 N. Y. 380; Kramer *v.* Farmers' & Mechanics' Bank of Steubenville, 15 Ohio, 253; Seymour *v.* Darrow, 31 Vt. 122. See Youngs *v.* Wilson, 27 N. Y. 351; Collins *v.* Carlile, 13 Ill. 254; [Collier *v.* Faulk, 69 Ala. 58.]

The law now is that if a mortgage is given to secure future advances, and then a second mortgage is executed, each mortgagee having notice of the other's deed, and afterwards advances are made by the prior mortgagee with full knowledge of the subsequent mortgage, he will not be entitled to priority for these advances over the antecedent advance made by the subsequent mortgagee. Gordon *v.* Graham, *infra*, n. (*e*), was thought by Lord Campbell to be misreported, and not to sanction the proposition for which it is usually cited, and the case is stated by him at some length from the Registrar's Book. Lord Cranworth was of a different opinion. Hopkinson *v.* Rolt, 9 H. L. C. 514; 3 De G. & J. 177; 25 Beav. 461; Menzies *v.* Lightfoot, L. R. 11 Eq. 459; Dann *v.* City of London Brewery Co., L. R. 8 Eq. 155; Spader *v.* Lawler, 17 Ohio, 371; Frye *v.* Bank of Ill., 11 Ill. 367; Bank of Montgomery County's Appeal, 36 Penn. St. 170; Boswell *v.* Goodwin, 31 Conn. 74, 87; [London, &c. Banking Co. *v.* Ratcliffe, 6 App. Cas. 722; National Bank *v.* Gunhouse, 17 S. C. 489.] The opposite doctrine is laid down on the supposed authority of Gordon *v.* Graham, in McDaniels *v.* Colvin, 16 Vt. 300. If, however, the first mortgagee is bound by contract to make the future

England, and in this country, that a regularly executed mortgage cannot be enlarged, by tacking subsequent advances to it in consequence of any agreement by parol; (*b*) and an agreement to that effect, in writing, could not, as I apprehend, affect a subsequent incumbrancer, unless he had dealt with the mortgagor with full knowledge of the agreement. (*c*)

(5.) *Doctrine of Tacking.* — It is the established doctrine in the English law, that if there be three mortgages in succession, and all duly registered, or a mortgage, and then a judgment, and then a second mortgage upon the estate, the junior mortgagee may purchase in the first mortgage, and tack it to his mortgage, and by that contrivance "squeeze out" the middle mortgage, and gain preference over it. The same rule would apply if the first as well as the second incumbrance was a judgment; but the in-

(*b*) *Ex parte* Hooper, 19 Ves. 477; Walker *v.* Snediker, 1 Hoff. Ch. 146.

(*c*) In New Hampshire, by statute of 3d July, 1829, mortgages to secure future liabilities are invalid. So by the Revised Statutes of Massachusetts, c. 74, sec. 5, a delivery of subsequently acquired personal property by the mortgagor to the mortgagee does not render the mortgage, as to such subsequent property, valid as against subsequently attaching creditors, unless delivered with the intention to ratify the mortgage, and unless the mortgagee retained open possession of the same, until the time of such attachment. In Jones *v.* Richardson, [10 Met. 481,] it would appear that the delivery and possession of subsequently acquired goods, except under the special provision in the statute, would not be valid under the mortgage as against attaching creditors. [Cf. *ante*, ii. 492, n. 1, (*c*).]

advances, he is to be preferred to the second incumbrancer, although the advances are not made until after the execution of the second mortgage. Crane *v.* Deming, 7 Conn. 387; Boswell *v.* Goodwin, 31 Conn. 74, 87; Ladue *v.* Detroit & Milwaukee R. R., 13 Mich. 380, 407. So it has been laid down that advances made without notice of the second mortgage are entitled to priority. Boswell *v.* Goodwin, 31 Conn. 74, 81. But the record of the second mortgage is notice to the prior mortgagee. Bank of Montgomery County's Appeal; Spader *v.* Lawler, *supra*; Ladue *v.* Detroit & Milwaukee R. R., 13 Mich. 380. But see McDaniels *v.* Colvin, 16 Vt. 300; Truscott *v.* King, 6 N. Y. (2 Seld.) 147, 166. [The docketing of a judgment is not such notice. Ackerman *v.* Hunsicker, 85 N. Y. 43.]

Although, as stated in the text, a mortgage cannot be continued in force as security for a new indebtedness by an oral agreement (see Thomas's Appeal, 30 Penn. St. 378, 384; Tompkins *v.* Tompkins, 6 C. E. Green (21 N. J. Eq.), 338; [Edwards *v.* Dwight, 68 Ala. 389; Sims *v.* Mead, 29 Kans. 124. But see Walker *v.* Walker, 17 S. C. 329]), still, if the mortgagee advances money on the faith of such an understanding, a court of equity will not aid the mortgagor, or one who has taken a conveyance from him with knowledge of the facts, to obtain a discharge or to redeem, before the advances are repaid. Joslyn *v.* Wyman, 5 Allen, 62; Stone *v.* Lane, 10 Allen, 74. See Wilson's Case, L. R. 12 Eq. 516.

cumbrancer who tacks must always be a mortgagee, for he stands in the light of a *bona fide* purchaser, parting with his money upon the security of the mortgage. This doctrine, harsh and unreasonable as it strikes us, was not authorized in the Roman law to the extent to which it is carried in the English law. The general maxim in that system, on the subject of pledges and hypothecations, was *qui prior est tempore potior est jure*; (*d*) and it yielded only in a qualified degree to this doctrine of substitution, when the subsequent incumbrancer took the place of a * prior one by purchasing in the first mortgage and tacking * 177 it to his own. (*a*) The substitution in the Roman law was not carried so far as to disturb the vested rights of intermediate incumbrancers, and only went to the extent of the first mortgage so purchased. (*b*) In the English law, the rule is under some reasonable qualification. The last mortgagee cannot tack, if, when he took his mortgage, he had notice in fact (for the registry or docket of the second incumbrance is not constructive notice, as we have already seen) of the intervening incumbrance. But if he acquired that knowledge subsequent to the time of taking his mortgage, he may then purchase and tack, though he had notice at the time of his purchase, and though there was even a bill then pending by the second mortgagee to redeem. The courts say, that up to the time of the decree settling priorities, the party may tack, or struggle for the *tabula in naufragio*. (*c*) The English doctrine of tacking was first solemnly established in *Marsh* v. *Lee*, (*d*) under the assistance of Sir Matthew Hale, who compared the operation to a plank in a shipwreck gained by the last mortgagee; and the subject was afterwards very fully and accurately expounded by the Master of the Rolls, in *Brace* v. *Duchess of Marlborough*. (*e*) It was admitted, in this last case, that the rule carried with it a great appearance of hardship, inasmuch as it

(*d*) Dig. 20. 4. 12. 3.

(*a*) Heinec. Elem. Jur. Civ sec. ord. Pand. pt. 4, lib. 20, tit. 3, sec. 85; Opera, v. pt. 2, p. 350; Dig. 20. 4. 3, 5; Pothier, ad Pand. ib.

(*b*) Dig. 20. 4. 16; Story on Eq. ii. 276, note; *vide supra*, 136, note. So, by the Spanish law, the third mortgagee, by purchasing in the first mortgage, acquires no other right than what strictly belonged to the mortgage, and the intermediate mortgagees are not prejudiced by any act to which they were not parties, or did not consent. Institutes of the Civil Law of Spain, by Asso & Manuel, b. 2, tit. 11, c. 3, 2, n. 71; and this they consider to be the extent to which the civil law went.

(*c*) Lord Eldon, 11 Ves. 619. (*d*) 2 Vent. 337.

(*e*) 2 P. Wms. 491.

defeated an innocent second incumbrancer of his security. The assumed equity of the principle is, that the last mortgagee, when he lent his money, had no notice of the second incumbrance; and the equities between the second and third incumbrancers being equal, the latter, in addition thereto, has the prior legal estate or title, and he shall be preferred. In the language of one of the cases, he hath "both law and equity for him." The legal title and equal equity prevail over the equity. (*f*)

* 178 * The Irish registry act of 6 Anne has been considered as taking away the doctrine of tacking, for it makes registered deeds effectual according to the priority of registry. The priority of registry is made the criterion of title to all intents and purposes whatsoever; and this Lord Redesdale considered to be the evident intention of the statute, but that it did not exclude anything which affects the conscience of the party who claims under the registered deed, nor give a priority of right to commit a fraud. (*a*) This leaves the doctrine of a notice of a prior unregistered deed in full force; and this is the true and sound distinction which prevails in the United States, and I presume that the English law of tacking is with us very generally exploded. (*b*) Liens are to be paid according to the order of time in which they respectively attached. This is the policy and meaning of our registry acts, and, consequently, all incumbrancers are to be made parties to a bill to foreclose, that their claims may be chargeable in due order. (*c*) There is no natural equity in tacking, and when it supersedes a prior incumbrance, it works manifest injustice. By acquiring a still more antecedent incumbrance, the junior party acquires, by substitution, the rights of the first incum-

(*f*) The law established by these decisions has been regularly transmitted down in Westminster Hall to this day. Belchier *v.* Butler, 1 Eden, 523; Frere *v.* Moore, 8 Price, 475.

(*a*) 1 Sch. & Lef. 157, 430. In M'Neil *v.* Cahill, 2 Bligh, 228, on appeal to the House of Lords, in an Irish case, it was declared that if the deed posterior in date and execution be first registered, even with notice of the other deed, it has priority both in law and equity; but this does not apply to the case of a fraudulent priority of registry.

(*b*) Grant *v.* U. S. Bank, 1 Caines's Cas. 112, Feb. 1804. This was the earliest case that I am aware of in this country, destroying the system of tacking. In that case I had the satisfaction of hearing that profound civilian, as well as illustrious statesman, General Hamilton, make a masterly attack upon the doctrine, which he insisted was founded upon a system of artificial reasoning, and encouraged fraud. See also 11 Serg. & R. 223; 3 Pick. 50; 6 Munf. 560.

(*c*) Haines *v.* Beach, 3 Johns. Ch. 459.

brancer over the purchased security, and he justly acquires nothing more. The doctrine of tacking is founded on the assumption of a principle which is not true in point of fact; for, as between *A., whose deed is honestly acquired, and re- *179 corded to-day, and B., whose deed is with equal honesty acquired, and recorded to-morrow, the equities upon the estate are not equal. He who has been fairly prior in point of time has the better equity, for he is prior in point of right. (a)[1]

(a) In case of conflicting equities, precedency of time gives the advantage in right. 1 Bibb, 523; 1 Blackf. (Ind.) 91. With respect to priorities in the case of contribution and liens, it may be here observed that a judgment creditor is not entitled to go

[1] *Tacking, &c.* — (a) *Tacking.* — As the doctrine of tacking depends on the mortgagee's having the legal estate, *ante*, 177; Bates *v.* Johnson, H. R. V. Johnson, 304, it can hardly exist where the mortgagor remains the legal as well as equitable owner, as in New York and some other states. 194, n. 1; cf. 176, n. 1 *ad f.*, 178. It is said that neither the purchaser of the legal estate nor the party conveying it must have notice of the intervening incumbrance. Carter *v.* Carter, 3 Kay & J. 617, 639. *x*[1]

(b) *Priority.* — It has been said that the priority of equitable incumbrances is in general determined by priority in time. Cory *v.* Eyre, 1 De G., J. & S. 149, 167; [Dixon *v.* Muccleston, 8 L. R. Ch. 155.] But in an earlier case priority of time was said to be the ground of preference last resorted to, and a mortgage given to secure an antecedent debt by deposit of title deeds, was preferred to the lien of a previous vendor who had delivered the same deeds with a receipt of purchase-money indorsed upon them. Rice *v.* Rice, 2 Drewry, 73, 78. This was followed by Layard *v.* Maud, L. R. 4 Eq. 397, which was decided on the general principle that one equitable mortgagee without possession of the deeds must be postponed to another who has that possession. It was admitted in Layard *v.* Maud that a first mortgagee having the legal title is not postponed to a subsequent mortgagee or purchaser because he allows the mortgagor to retain the title deeds, unless he has been guilty of fraud or gross negli-

x[1] The case of Carter *v.* Carter is limited in terms to a purchase from a mortgagee whose mortgage has been satisfied, and who has thus become a constructive trustee. It seems to be settled that a second equitable mortgagee cannot gain priority by getting in a legal title from a trustee, he having notice of the trust; and perhaps knowledge by the trustee would also prevent such priority. Mumford *v.* Stohwasser, 18 L. R. Eq. 556. See also Heath *v.* Crealock, 10 L. R. Ch. 22. And in the case of successive equitable incumbrancers, one subsequent in time cannot gain priority by getting in a dry legal title. Langdell's Summary of Equity Pleading, ¶ 148. But the doctrine of tacking is, that where the first mortgagee has the legal title, and his debt has not been paid, the third mortgagee may buy the mortgage, though both he and the first mortgagee have full knowledge of the second mortgage, and that the third mortgagee may then not only defend himself, on the ground of his legal title, from a suit by the second mortgagee, but may also tack the third mortgage to the first, and compel the second mortgagee to redeem both or be foreclosed. Langdell's Sum. Eq. Pl. ¶ 148 and n. 6. See further, Robinson *v.* Trevor, 12 Q. B. D. 423.

With the abolition of the English system of tacking, we are relieved from a multitude of refined distinctions, which have given

against the land of a subsequent purchaser, so long as there is land of the debtor remaining unsold, and he is entitled to resort to the land of the purchaser, to the extent only of that part of his debt which remains unsatisfied after the debtor's estate has been exhausted. So, if a debtor sells part of his land charged with a judgment, and dies seised of the residue, his heirs are bound to satisfy the judgment, so far as the assets go, and they are not entitled to any contribution from the purchaser, for "the heir sits in the seat of his ancestor," and the assets that descend to him are first to be

gence. Colyer *v.* Finch, 5 H. L. C. 905. And the same qualification seems to have been thought applicable to equitable mortgagees in Dowle *v.* Saunders, 2 Hem. & Mil. 242; Espin *v.* Pemberton, 4 Drewry, 333. As the doctrine of equity is that the estate itself passes by an equitable mortgage of land, such a mortgage will not be postponed by a subsequent incumbrancer giving first notice to the trustee. Rooper *v.* Harrison, 2 Kay & J. 86. But it would be otherwise if the land were equitably converted by being held in trust for sale. Lee *v.* Howlett, 2 Kay & J. 531. Cf. ii. 438, n. 1.

(*c*) *Notice.* — As to constructive notice in general, see Rolland *v.* Hart, L. R. 6 Ch. 678; *ante*, 152, n. 1; as between first and second mortgagees, 176, n. 1. Open possession inconsistent with the record title has been treated as notice of the unrecorded deed under which the possession is held. Lea *v.* Polk County Copper Co., 21 How. 493; Morrison *v.* Kelly, 22 Ill. 610; Martin *v.* Jackson, 27 Penn. St. 504; Coleman *v.* Barkley, 3 Dutch. 857; McKinzie *v.* Perrill, 15 Ohio St. 162; Watkins *v.* Edwards, 23 Tex. 443; Helms *v.* May, 29 Ga. 121; Patten *v.* Moore, 32 N. H. 382; Bailey *v.* Richardson, 9 Hare, 734. In other cases it is thought at least not to be conclusive evidence of such notice. Moore *v.* Jourdan, 14 La. An. 414; Vaughan *v.* Tracy, 22 Mo. 415; Nutting *v.* Herbert, 37 N. H. 346; Mara *v.* Pierce, 9 Gray, 306; Dooley *v.* Wolcott, 4 Allen, 406; Bird *v.* Dennison, 7 Cai. 297; Porter *v.* Sevey, 43 Me. 519. [See further, *infra*, n. (*d*), and Pope *v.* Allen, 90 N. Y. 298; Lincoln *v.* Thompson, 75 Mo. 613; Jefferson, &c. R. R. Co. *v.* Oyler, 82 Ind. 394; White, Jr. *v.* White, 105 Ill. 313; Brunson *v.* Brooks, 68 Ala. 248; Stafford Nat. Bank *v.* Sprague, 17 Fed. Rep. 784. As to when notice to a solicitor is considered as notice to his client, see Agra Bank *v.* Barry, 7 L. R. H. L. 135; Bradley *v.* Riches, 9 Ch. D. 189, 195; Waldy *v.* Gray, 20 L. R. Eq. 238; Kettlewell *v.* Watson, 21 Ch. D. 685.]

(*d*) *Consolidation.* — Another doctrine well settled in England is that of the consolidation of securities. If mortgages of different lands to secure distinct debts are either originally made, or come by assignment to the same person, "the mortgagor cannot redeem either mortgage without also redeeming the other; and the mortgagee may enforce the payment of the whole of the principal and interest due to him on both mortgages out of the lands comprised in either." Wms. R. P. pt. iv. end. And it does not matter that the purchaser of the two mortgages buys them with notice of an outstanding second mortgage. Vint *v.* Padget, 2 De G. & J. 611. See Tassell *v.* Smith, ib. 718.[x2]

[x2] Where a mortgagor assigned the equity of redemption and afterwards mortgaged other property to the mortgagee, it was held the latter could not consolidate so as to prevent the assignee from redeeming by payment of the first mortgage alone. Jennings *v.* Jordan, 6 App. Cas. 698, overruling Tassell *v.* Smith. See also Baker *v.* Gray, 1 Ch. D. 491; *In re* Raggett, 16 Ch. D. 117.

intricacy to this peculiar branch of equity jurisprudence. The doctrine of notice is also of very extensive application throughout the law of mortgage, and is very greatly surcharged with cases abounding in refinements. It is, indeed, difficult to define, with precision, the rules which regulate implied or constructive notice, for they depend upon the infinitely varied circumstances of each case. The general doctrine is, that whatever puts a party upon an inquiry, amounts, in judgment of law, to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact, by the exercise of ordinary diligence and understanding. (*b*) So, notice of a deed is notice of its contents, and notice to an agent is notice to his principal. A purchaser with notice, from a purchaser without notice, even in the case of an indorsement of a note, can protect himself under the first purchaser, who was duly authorized to sell; and a purchaser without notice, from a purchaser with notice, is equally protected, for he stands perfectly innocent. (*c*)

charged. But if there be several coheirs, and the judgment creditor collects the debt from a part of the inheritance altotted to one of them, such heir is entitled to contribution from his coheirs. On the other hand, where there is no equality, there is no contribution, as if a person seised of three acres of land, charged with a judgment, sells one acre to A., the two remaining acres are first chargeable in equity with the payment of the debt; and if he should sell another acre to B., the remaining acre in his hands, or in those of his heir, is chargeable in the first instance with the judgment debt as against B., as well as against A., and if that prove insufficient, then the acre sold to B. ought to supply the deficiency in preference to the acre sold to A., for when B. purchased, he took the land chargeable with the debt in the hands of A., in preference to the land already sold to A. Between purchasers in succession at different times, of different parts of the estate of the judgment debtor, there is no contribution, for there is no equality of right between them. Sir William Herbert's Case, 3 Co. 11, b; Clowes *v.* Dickenson, 5 Johns. Ch. 235; Conrad *v.* Harrison, 3 Leigh, 532. See also 6 Ohio, 227; 6 Paige, 35, 525; 10 Serg. & R. 455, s. p.; Shannon *v.* Marselis, Saxton, Ch. (N. J.) 413, 421, and Cowden's Estate, 1 Barr, 274–277, s. p. [See further, Stuyvesant *v.* Hall, 2 Barb. Ch. 151; Jones *v.* Myrick, 8 Gratt. 179; King *v.* McVickar, 3 Sandf. Ch. 192; Skeel *v.* Spraker, 8 Paige, 182; Blair *v.* Ward, 2 Stockt. 119; Lock *v.* Fulford, 52 Ill. 166; Lyman *v.* Lyman, 32 Vt. 79. But see Dickey *v.* Thompson, 8 B. Mon. 312.]

(*b*) A purchaser of lands from an incorporated company is chargeable with notice of all the restrictions upon its power to hold and convey lands contained in its charter. Merritt *v.* Lambert, 1 Hoff. Ch. 166.

(*c*) Hascall *v.* Whitmore, 19 Me. 102; Smith *v.* Hiscock, 14 id. 449; Griffith *v.* Griffith, 9 Paige, 315; Bracken *v.* Miller, 4 Watts & S. 102; Sweet *v.* Southcote, 2 Bro. C. C. 66; Bumpus *v.* Platner, 1 Johns. Ch. 219; Godfroy *r.* Disbrow, 1 Walker Ch. (Mich.) 260. To constitute a purchaser without notice, it is not sufficient that the contract should be made without notice, but that the purchase-money should be paid before notice. And though a purchaser may be held as a trustee for the *cestui*

There is, also, this further rule on the subject, that the purchaser of an estate in the possession of tenants is chargeable with notice of the extent of their interests as tenants; for, having knowledge of the tenancy, he is bound to inform himself of the condition of the lease. The general rule is, that possession of land is notice to a purchaser of the possessor's title. (*d*) The effect of notice on the equity and validity of claims is very strong. A purchaser of an equitable interest, standing out in a trustee, and who neglects to inform the trustee of it, will be postponed to a subsequent purchaser of the same interest, who makes
* 180 inquiries of the trustee, and has no * knowledge of the prior assignment, and gives due notice of his purchase. So, a purchaser of real estate cannot hold against a prior equitable title, if he have notice of the equity before the payment of the purchase-money, or the execution of the deed. (*a*)

que trust, yet if he believed the title to be good, he is entitled to the incumbrances from which he relieved the land, and to the permanent improvements which he has made, and to his advances for the support of the wife and children, and which are to be set off against the profits for which he is chargeable; and the incumbrances and improvements are a charge on the land, unless absorbed by the residue of the profits. Wormley *v.* Wormley, 1 Brock. 330; s. c. 8 Wheaton, 421. The doctrine of constructive notice was fully examined in the case of Griffith *v.* Griffith, 1 Hoff. Ch. 153, and in the case of Brush *v.* Ware, 15 Peters, 93; and it is of two kinds, that which arises from testimony, and that which results from a record.

(*d*) Daniels *v.* Davison, 16 Ves. 249; Chesterman *v.* Gardner, 5 Johns. Ch. 29; Dyer *v.* Martin, 4 Scamm. 147; [Brainard *v.* Hudson, 108 Ill. 218.] But the constructive notice, arising from tenancy, does not extend beyond the tenant's title, or apply to the title of the lessor under whom the tenant holds. Lord Eldon, in Attorney General *v.* Backhouse, 17 Ves. 293; Sugden on Vendors and Purchasers, c. 17, p. 745, 746, 7th ed. Our registry acts are designed to protect purchasers against latent equities; the doctrine in the English law of constructive notice of the title of the lessee, or party in the possession, is not favored in the American courts. Scott *v.* Gallagher, 14 Serg. & R. 333; M'Mechan *v.* Griffing, 3 Pick. 149; Hewes *v.* Wiswell, 8 Greenl. 94; Flagg *v.* Mann, 2 Sumner, 556, 557. Where the possessor of land has caused a registry of a particular title, the purchaser need not look beyond it. But apart from any registry, possession ought to be sufficient to put purchaser on inquiry; and Ch. J. Gibson, in Woods *v.* Farmere, 7 Watts, 382, with his usually strong and stringent logic, justifies the doctrine of implied notice in such cases. [But see Caballero *v.* Henty, 9 L. R. Ch. 447; Phillips *v.* Miller, 9 L. R. C. P. 196; s. c. 10 L. R. C. P. 420.]

(*a*) Dearle *v.* Hall, 3 Russ. 1; Jewett *v.* Palmer, 7 Johns. Ch. 65; Frost *v.* Beekman, 1 id. 288; Gallion *v.* M'Caslin, 1 Blackf. (Ind.) 91; Gouverneur *v.* Lynch, 2 Paige, 300; Grimstone *v.* Carter, 3 id. 421; Boone *v.* Chiles, 10 Peters, 177; Meux *v.* Maltby, 2 Swanst. 281; Allen *v.* Anthony, 1 Meriv. 282; Merritt *v.* Lambert, 1 Hoff. Ch. 166. With respect to the liability of purchasers, for the right application of the purchase-money, it was declared as a general rule, by the Supreme Court of the United States, in Potter *v.* Gardner, 12 Wheaton, 498, that the person who pays the purchase-money

4. **Of Foreclosure.** — (1.) *Of Strict Foreclosure.* — The equity of redemption which exists in the mortgagor, after default in payment, may be barred or *foreclosed*, if the *mortgagor *181 continues in default after due notice to redeem. The ancient practice was, by bill in chancery, to procure a decree for a strict foreclosure of the right to redeem, by which means the lands became the absolute property of the mortgagee. This is the English practice to this day, though sometimes the mortgagee will pray for, and obtain, a decree for a sale of the mortgaged premises, under the direction of an officer of the court, and the proceeds of the sale will, in that case, be applied towards the discharge of incumbrances according to priority. (*a*) The latter practice is evidently the most beneficial to the mortgagor, as well as the most reasonable and accurate disposition of the pledge. It prevails in New York, Maryland, Virginia, South Carolina,

to the person authorized to sell, was not bound to look to its application, whether the lands sold be charged in the hands of an heir or devisee with the payment of debts, or the lands be devised to a trustee for the payment of debts, unless the money be misapplied with his coöperation. The principle of this decision appears to be most consistent with the common sense and practice of mankind, and to be reasonable and just; and a contrary doctrine would lead to abuse and imposition upon purchasers. The law concerning notice, express and implied, is very amply discussed by Mr. Coventry, in his notes to Powell on Mortgages, ii. c. 14, 561–662; and the American editor, Mr. Rand, has, with a thorough accuracy, collected all the cases and decisions in this country appertaining to the subject. The immense body of English learning with which Mr. Coventry has enriched every part of the original work of Powell is not only uncommon, but very extraordinary. There never were two editors who have been more searching, and complete, and gigantic in their labors. The work has become a mere appendage to the notes, and the large collections of the American editor, piled upon the vastly more voluminous commentaries of the English editor, have unitedly overwhelmed the text, and rendered it somewhat difficult for the reader to know, without considerable attention, upon what ground he stands

Conati imponere Pelio Ossam —
—— atque Ossæ frondosum involvere Olympum.

I acknowledge my very great obligations to those editors for the assistance I have received from their valuable labors; but I cannot help thinking that Mr. Coventry would have better accommodated the profession, if he had written an original treatise on the subject, and we should then, probably, have had, what is now wanting in the present work, unity of plan, adaptation of parts, and harmonious proportion. Several of his essays in the notes, as, for instance, those relating to receivers; equitable assets; voluntary settlements; the wife's equity; when debts, as between the representatives of the deceased, are to be charged upon the real, and when on the personal estate; interest and usury, &c., have no very close application to mortgages. Mr. Coote's "Treatise on the Law of Mortgage" is neat, succinct, and accurate, and free from several of the objections which have been suggested.

(*a*) Mondey *v.* Mondey, 1 Ves. & B. 223.

Tennessee, Kentucky, Indiana, and probably in several other states. (*b*) But in the New England states, the practice of a strict foreclosure would seem to prevail, and the creditor takes the estate to himself, instead of having it sold, and the proceeds applied. But a subsequent incumbrancer, by paying the original debt, becomes entitled to all the rights of the first mortgagee. (*c*) In Vermont, the mortgagor is allowed, by the decree, a definite time (which is sometimes one and two years) to redeem, and in default, the equity of redemption is foreclosed. (*d*) In Massachusetts, Rhode Island, and Maine, the mortgagor has three years, after the mortgage is foreclosed, to redeem, and in Connecticut fifteen years, and in New Hampshire one year to redeem, after entry and seisin by the mortgagee upon breach of the condition, and without foreclosure. (*e*) The severity of the
* 182 foreclosure without a sale is * mitigated by the practice of enlarging the time to redeem from six months to six months, or for shorter periods, according to the equity arising from circumstances. (*a*)

(*b*) Johns. Ch. *passim*; N. Y. R. S. ii. 191, sec. 151. In Lansing *v.* Goelet, 9 Cowen, 346, it was decided that a decree of foreclosure and sale, and a decree of sale without any express decree of foreclosure, were equally a complete bar of the equity of redemption. Nelson *v.* Carrington, 4 Munf. 332; Downing *v.* Palmateer, 1 Monroe, 66; Humes *v.* Shelby, 1 Tenn. 79; Hurd *v.* James, ib. 201; Rodgers *v.* Jones, 1 M'Cord, Ch. 221; Pannell *v.* Farmers' Bank, 7 Harr. & J. 202; David *v.* Grahame, 2 Harr. & G. 94; Act of Indiana, 1830. In Ohio, the mortgagee is entitled to a decree of foreclosure, where two thirds of the value of the mortgaged lands do not exceed the amount of the debt, and he may insist on a sale. 5 Ohio, 554. In Tennessee, the mortgagor has two years, under an act of 1820, to reedeem after confirmation of the master's sale, under a decree of foreclosure. Henderson *v.* Lowry, 5 Yerg. 240.

(*c*) Mix *v.* Hotchkiss, 14 Conn. 45.

(*d*) Smith *v.* Bailey, 1 Shaw (Vt.), 163, N. S. ib. 267.

(*e*) Lockwood *v.* Lockwood, 1 Day, 295; Swift's Dig. ii. 656, 683; Erskine *v.* Townsend, 2 Mass. 493 · 1 Pick. 356, Wilde, J.; Newall *v.* Wright, 3 Mass. 155; Statute of Massachusetts, 1st March, 1799, c. 77; Mass. R. S. 1836, pt. 3, tit. 3, c. 107; [Wyman *v.* Babcock, 2 Curtis, 386;] Baylies *v.* Bussey, 5 Greenl. 153; Sweet *v.* Horn, 1 N. H. 332; Gilman *v.* Heddin, 5 N. H. 31. The practice of a strict foreclosure has also been allowed in North Carolina. Spiller *v.* Spiller, 1 Hayw. 482; [Johnson *v.* Donnell, 15 Ill. 97.] In Connecticut, the taking possession of mortgaged premises by the mortgagee, under a decree of foreclosure, was held to be an extinguishment of the debt by the appropriation of the pledge in satisfaction of it. The Derby Bank *v.* Landon, 3 Conn. 62. But by statute in 1838, the foreclosure of a mortgage does not preclude the creditor from recovering, by action, so much of his debt as the mortgage proper shall be insufficient to satisfy, estimated in value at the expiration of the time limited for redemption, and such action, after foreclosure, shall not open it.

(*a*) Edwards *v.* Cunliffe, 1 Mad. 287; Perine *v.* Dunn, 4 Johns. Ch. 140. In Mis-

(2.) *Of Selling on Foreclosure.* — In England, and with us, the practice of selling the land by the party himself, or by an authorized trustee, under a power inserted in the mortgage, has extensively prevailed. The course in Ireland, as well as here, is to decree a sale instead of a foreclosure; and if the sale produces more than the debt, the surplus goes to the mortgagor, and if less, the mortgagee has his remedy for the difference. This course was recommended by Lord Erskine, as more analogous to the relative situation of lender and borrower, and it was the English practice a century ago, in cases where the security was defective. If the mortgagee proceeds by bill for the technical foreclosure, the estate becomes his property, in the character of a purchaser; and the general understanding formerly was, that by taking the pledge to himself, he took it in satisfaction of the debt. (*b*) But according to the case of *Took* v. *Hartley*, (*c*) if the mortgagee sells the estate, after the foreclosure, fairly, and for the best price, he may proceed at law against the mortgagor, upon his bond, for the difference; though he cannot have recourse at law for deficiency, so long as he keeps the estate, because the value of it is not ascertained, and the mortgagee cannot say what proportion of the debt remains due. It has likewise been repeatedly held, that an action at law by the mortgagee, after foreclosure, for the balance of the debt due him, opens it, and lets in the mortgagor to redeem. (*d*) There has been some embarrassment and conflict of opinion *manifested *183

souri, a short and easy mode of foreclosing mortgages is provided, and to be commenced by petition to the circuit court, and by process of summons. Revised Statutes of Missouri, 1835, p. 409; [Riley *v.* McCord, 24 Mo. 265.] And in New Hampshire, the mortgagee, or the administrator, may foreclose a mortgage by peaceable entry, and a possession of one year, without process. Gibson *v.* Bailey, 9 N. H. 168. This is under the statute of 1829; and after a possession of one year, according to the terms of the act, without tender of payment or demand of an account on the part of the mortgagor, the mortgage is foreclosed. This statute remains good, notwithstanding chancery powers respecting the redemption and foreclosure of mortgages, according to established principles of chancery, were conferred on their superior court by the act of July 4, 1834. Wendell *v.* N. H. Bank, 9 N. H. 404.

(*b*) In Schnell *v.* Schroder, 1 Bailey, Eq. 334, it was considered that the purchase of the equity of redemption, by the mortgagee, either directly from the mortgagor, or on execution under a junior judgment, extinguished the mortgage debt.

(*c*) 2 Bro. C. C. 125; Dickens, 785, s. c.

(*d*) Dashwood *v.* Blythway, 1 Eq. Cas. Abr. 317, pl. 3; Mosely, 196, s. c.; Perry *v.* Barker, 13 Ves. 198.

in the cases, on the point whether the mortgagee had his remedy at law after a foreclosure, and without a sale of the estate. The better opinion is, that after a foreclosure, with or without a subsequent sale, the mortgagee may sue at law for the deficiency, to be ascertained in the one case by the proceeds of the sale, and in the other by an estimate and proof of the real value of the pledge at the time of the foreclosure. (*a*) [1] Whether the action at law will open the foreclosure in equity, and let in the equity of redemption, is an unsettled question. The weight of English authority would seem to be, that it opens the foreclosure, unless the estate has, in the mean time, been sold by the mortgagee; and then it is admitted that the power of conveyance is gone, for it would be inequitable to open the foreclosure against the purchaser. But in *Hatch* v. *White*, (*b*) the reasoning of the court was against the conclusion that the suit at law opened the foreclosure in any case; and this was also the decision in *Lansing* v. *Goelet*. (*c*)

(*a*) Lord Thurlow's opinion, as represented by Sir Samuel Romilly, and by Lord Eldon, in Perry *v.* Barker, 8 Ves. 527; Hatch *v.* White, 2 Gall. 152; Amory *v.* Fairbanks, 3 Mass. 562; Globe Ins. Co. *v.* Lansing, 5 Cowen, 380; Omaly *v.* Swan, 3 Mason, 474; Lansing *v.* Goelet, 9 Cowen, 346; Lovell *v.* Leland, 3 Vt. 581; Cullum *v.* Emanuel, 1 Ala. 23. In Davis *v.* Battine, 2 Russ. & My. 76, it was declared, that though the mortgagee takes the debtor on *ca. sa.*, it does not extinguish his lien on the land.

(*b*) 2 Gall. 152.

(*c*) 9 Cowen, 346. In Lovell *v.* Leland, 3 Vt. 581, it was deemed to be reasonable, though not absolutely decided, that if the mortgagee, after foreclosure, sues at law to recover the difference between the value of the estate and the sum due, the foreclosure should be opened, and that the mortgagor, on being sued, might file his bill to redeem, on paying the full amount of debt and costs, and that the mortgagee, when he brings the suit, should have it in his power to reconvey the estate. By the Massachusetts Revised Statutes of 1836, part 3, tit. 3, c. 107, if the mortgagee, after foreclosure, sues for the balance of his debt, after deducting the ascertained value of

[1] Stark *v.* Mercer, 3 How. (Miss.) 377; Porter *v.* Pillsbury, 36 Me. 278, 283; Marston *v.* Marston, 45 Me. 412; Leland *v.* Loring, 10 Met. 122; Paris *v.* Hulett, 26 Vt. 308; [Rudge *v.* Richens, 8 L. R. C. P. 358.] By statute in many of the states the decree of foreclosure provides for any deficiency which may exist after a sale of the premises. A receipt of rents by the mortgagee since the account was taken will prevent his obtaining the final order. Prees *v.* Coke, L. R. 6 Ch. 645. *x*[1]

x[1] A decree of foreclosure is a decree *in personam*, and hence may be made where the parties are within the jurisdiction though the estate be out of the jurisdiction of the court. Paget *v.* Ede, 18 L. R. Eq. 118; *In re* Longdendale, &c. Co., 8 Ch. D. 150. Want of consideration is a good defence to a foreclosure suit as showing that nothing is due. Hannan *v.* Hannan, 123 Mass. 441.

The general rule is, that the mortgagee may exercise all his rights at the same time, and pursue his remedy in equity upon the mortgage, and his remedy at law upon the bond or covenant accompanying it, concurrently. (*d*) There are *difficulties attending the sale of the equity of redemption by the mortgagee, by execution at law, and it is accompanied with danger to the rights of the mortgagor; and these difficulties were suggested in the case of *Tice* v. *Annin*, (*a*) and that the proper remedy was to prohibit the mortgagee from selling at law the equity of redemption. (*b*) *184

the land, a recovery in such suit will open the foreclosure, and allow the mortgagor to file his bill within a year thereafter to redeem.

(*d*) Booth *v.* Booth, 2 Atk. 343; Burnell *v.* Martin, Doug. 417; Schoole *v.* Sall, 1 Sch. & Lef. 176; Dunkley *v.* Van Buren, 3 Johns. Ch. 330; Hatfield *v.* Kennedy, 1 Bay, 501; Hughes *v.* Edwards, 9 Wheat. 489; Collum *v.* Emanuel, 1 Ala. 23; [Very *v.* Watkins, 18 Ark. 546.] If the mortgagee proceeds to judgment and execution at law upon his bond, and sells the land mortgaged to secure the bond debt, he sells only the equity of redemption, and he may afterwards maintain ejectment against the purchaser of the premises, in order to enforce payment of the balance. Jackson *v.* Hull, 10 Johns. 481; M'Call *v.* Lenox, 9 Serg. & R. 307, 308, 314. This supposes the case, that the purchaser, at the sheriff's sale, knew of the existing mortgage, and purchased subject to it. But the rule is not uniform on the subject. In Pennsylvania it has been frequently held that the purchaser will hold the land discharged of the lien of the mortgage. M'Grew *v.* M'Lanahan, 1 Penn. 44; Pierce *v.* Potter, 7 Watts, 475; Berger *v.* Hiester, 6 Wharton, 210.

(*a*) 2 Johns. Ch. 125. In this case it was suggested, that if the mortgagee should elect to proceed against his debtor at law, after the equity of redemption had been sold under a *fi. fa.*, and attempt to recover his debt out of other property of the mortgagor, equity would either stay such proceeding, or compel him, upon payment of his debt, to assign over his debt and security to his debtor, to enable the latter to indemnify himself out of the mortgaged premises in the possession of the purchaser. In Collum *v.* Emanuel, 1 Ala. 23, it was held that *ordinarily* the sale of the equity of redemption by the mortgagee does not extinguish the mortgage, and the purchaser acquires only the right to complete his purchase by the payment of the mortgage debt. In Cassilly *v.* Rhodes, 12 Ohio, 88, it was held that when mortgaged premises are sold under a decree of foreclosure, the emblements of *a lessee under the mortgagor* did not pass to the purchaser. This decision proceeded on the system of appraisements founded on judicial sale in Ohio. Under the general law, both in England and in this country, the mortgagor is not entitled to emblements as against the mortgagee or purchaser on foreclosure.

(*b*) The New York Revised Statutes, ii. 368, sec. 31, 32, have carried the suggestion into effect, and prohibited the sale at law of the mortgagor's equity by the mortgagee, on a judgment for the debt secured by the mortgage. See also Delaplaine *v.* Hitchcock, 6 Hill (N. Y.), 14, s. p. In Massachusetts, North Carolina, and Kentucky, likewise, similar embarrassments have been felt, and the mortgagee cannot, by execution at law, sell the equity of redemption in discharge of a debt secured by the mortgage. Atkins *v.* Sawyer, 1 Pick. 351; Camp *v.* Coxe, 1 Dev. & Bat. 52; Goring *v.* Shreve. 7 Dana, 64. The New York Revised Statutes have, in other

(3.) *Parties to a Bill of Foreclosure.* — When the mortgagee proceeds by bill to foreclose, he must make all incumbrancers, existing at the filing of the bill (and which of course includes the junior, as well as the prior incumbrancers), parties, in order to prevent a multiplicity of suits, and that the proceeds of the mortgaged estate may be duly distributed;[1] and the incum-

respects, materially changed the established practice on this subject. It is now declared, that while a bill of foreclosure is pending in chancery, no proceedings shall be had at law for the recovery of the debt, without the authority of the court of chancery; and, on the other hand, if a judgment has been obtained at law for the mortgaged debt, or any part of it, no proceedings are to be had in chancery, unless an execution has been returned unsatisfied, in whole or in part, and it be stated in the return that the defendant had no property to satisfy it, except the mortgaged premises. New York Revised Statutes, ii. 191, sec. 153, 156; Williamson *v.* Champlin, 8 Paige, 70; Shufelt *v.* Shufelt, 9 id. 137. The statute goes on and declares, that if the mortgaged premises should prove insufficient to satisfy the debt, the court of chancery has power to direct the payment, by the mortgagor, of the unsatisfied balance, and to enforce it by execution against the other property or the person of the debtor. Ib. sec. 152. As the action of ejectment upon a mortgage is abolished (ib. 312, sec. 57), the jurisdiction at law over the debt, as well as over the pledge, would appear, by these provisions, to be essentially taken away and transferred to chancery. In Mississippi, where there is no such statute, the remedy of the mortgagee for his unsatisfied balance of the debt, after a foreclosure and sale under his mortgage, is at law. Stark *v.* Mercer, 8 How. (Miss.) 877; [*ante*, 160, n. 1.]

[1] [There are, however, numerous authorities, holding that a prior incumbrancer is not a necessary party to a foreclosure by a junior mortgagee. In Rose *v.* Page, 2 Sim. 471, it was expressly adjudged by the English Vice-Chancellor, that a mortgagee might file his bill against the mortgagor and a junior mortgagee, without making a prior one a party. The same point was decided as to prior annuitants, in Delabere *v.* Norwood, 3 Swanst. 144. In Richards *v.* Cooper, 5 Beav. 304, it was decided again as to a prior mortgagee. See also Parker *v.* Fuller, 1 Russ. & My. 656; Story's Eq. Pl. sec. 193, and note; Calvert on Parties, 128, 138. There is an evident distinction between prior and subsequent incumbrancers. If the junior mortgagee is not made a party, the purchaser will take the estate, subject to right of redemption; and the inconvenience of this is manifest. If a prior mortgagee is omitted, the only consequence is, that the purchaser will get the estate, subject to that paramount lien, and necessarily the terms of the purchase will be adjusted accordingly. As owner of the estate, he can pay off the lien, and clearly it must be indifferent to him whether he bids and pays the full value, taking a clear title, or whether he pays the value less the prior incumbrance, and then pays off such incumbrance. If, however, the prior lien is disputed, or the amount of it is in controversy, the propriety of making the holder of it a party is unquestionable; and the purpose of so doing is to obtain an adjudication as to the validity or amount of such lien. There would seem to be no dictate of necessity or convenience which requires or even justifies the making a prior incumbrancer a party at the suit of a junior one for any other purpose. — C.]

brancers who are not parties will * not be bound by the *185
decree. (a) The reason of the rule requiring all incumbrancers, subsequent as well as prior to the plaintiff, to be made parties, is to give security and stability to the purchaser's title; for he takes a title only as against the parties to the suit; and it cannot and ought not to be set up against the subsisting equity of those incumbrancers who are not parties. (b) If a surplus remains after satisfying the incumbrancers who are brought into court, it will be paid over to the mortgagor, as the proceeds of his equity of redemption; though subsequent incumbrancers, who are not parties, would probably be permitted, on application to the court, and due proof of their title, to intercept its transit. (c) The general rule is, that all persons materially interested in the mortgage, or mortgaged estate, ought to be made parties to a bill of foreclosure. This will ordinarily include the heir, or devisee, or assignee, and personal representatives of the mortgagor, and also the tenants for life, and the remainderman; for they all may be interested in the right of redemption, or in taking the accounts. * If the mortgage consists of a reversion or *186
remainder, subject to an estate for life, it may be foreclosed; but the estate of the tenant for life would not be affected;

(a) Godfrey v. Chadwell, 2 Vern. 601; Morret v. Westerne, ib. 663; Hobart v. Abbott, 2 P. Wms. 643; Fell v. Brown, 2 Bro. C. C. 276; Bishop of Winchester v. Beaver, 3 Ves. 314; Sherman v. Cox, 3 Rep. in Ch. 46 [*84;] Haines v. Beach, 3 Johns. Ch. 459; Lyon v. Sandford, 5 Conn. 544; Renwick v. Macomb, 1 Hopkins, 277; [McCall v. Yard, 1 Stockt. 358; Williamson v. Probasco, 4 Halst. Ch. 571; Webb v. Maxan, 11 Texas, 678; Davis v. Hemingway, 29 Vt. 438.] The English practice is to settle by decree the order of payment, according to priorities; and the decree is, in detail, that the second incumbrancer shall redeem the first, the third the second, and so on. See Mondey v. Mondey, 1 Ves. & B. 223, and 3 Meriv. 216, note.

(b) The New York Revised Statutes, ii. 192, sec. 158, declare, that the deed to the purchaser at a sale, under the decree of foreclosure, shall be an entire bar against all the parties to the suit, and their heirs respectively; but the statute goes no further, and the rights of other mortgagees and of judgment creditors, not being parties, are not affected by the sale. N. Y. R. S. ii. 546, sec. 8; and in Louisiana, if there be an agreement in a mortgage by the clause *de non alienando*, it renders void, as regards the mortgage creditor, any alienation made in violation of it, and the mortgagee may carry on his executory proceedings of seizure and sale without making the vendee a party, or taking any notice of a change of owner. Haley v. Dubois, 10 Rob. (La.) 54.

(c) [McCall v. Yard, 1 Stockt. 358. See Mills v. Van Voorhis, 23 Barb. 125.] The New York Revised Statutes, ii. 192, sec. 159, 160, direct the surplus arising upon the sale to be brought into court, for the use of the defendant, *or of the person who may be entitled thereto, subject to the order of the court;* and if not called for in three months, it is to be put out at interest, for the benefit of the defendant, his representatives or assigns.

and he would have no interest in the foreclosure. (*a*) The bill to foreclose is filed in the name of the mortgagee or his assignee, or, if dead, in the name of his personal representatives; for the mortgage debt is part of the personal estate of the mortgagee, and though, on his death, the estate technically descends to the heir, he will, without a manifest intent to the contrary, take it in trust for the personal representatives. (*b*) But the question of parties is usually more or less fluctuating, and open for discussion. It is governed, in some degree, by circumstances; whereas, the principle that those persons who are interested in the subject, and are not made parties to the suit, are not bound by the decree, is more steady in its operation, for it is founded on natural right.

The equity of redemption may be foreclosed by the act of the mortgagor himself; for, upon a bill to redeem, the plaintiff is required to pay the debt by a given time, which is usually six months after the liquidation of the debt; and upon his default, the bill is dismissed for non-payment, which is a bar to a new bill, and equivalent to a decree of absolute foreclosure. (*c*) *y*[1]

(4.) *Equity of Redemption barred by Time.* — The right * 187 of redemption may be barred by the length of * time. The analogy between the right in equity to redeem and the right of entry at law is generally preserved; so that the mortgagor, who comes to redeem against a mortgagee in possession, after the period of limitation of a writ of entry, must bring himself within one of the exceptions, which would save the right of entry at law, or the time will be a bar to the redemption, and a

(*a*) Penniman *v.* Hollis, 13 Mass. 429. On a sale by the mortgagee in the lifetime of the mortgagor, the surplus is personal estate; but if the sale be after the mortgagor's death, the surplus, as well as the equity of redemption, belongs to his heir. Wright *v.* Rose, 2 Sim. & Stu. 323; Moses *v.* Murgatroyd, 1 Johns. Ch. 130.

(*b*) Com. Dig. tit. Chancery, 4, A. 9; Demarest *v.* Wynkoop, 3 Johns. Ch. 145; Scott *v.* Macfarland, 13 Mass. 309; Grace *v.* Hunt, Cooke (Tenn.), 344; Denn *v.* Spinning, 1 Halst. 471. [See 194, n. 1, (*c*) *ad f.*] The cases, as to parties, are collected in 3 Powell on Mortgages, 968–977, 989–992.

(*c*) Cholmley *v.* Oxford, 2 Atk. 267; Sir William Grant, in the Bishop of Winchester *v.* Paine, 11 Ves. 199; Perine *v.* Dunn, 4 Johns. Ch. 140.

y[1] But this rule does not apply to an equitable mortgage by deposit of title deeds. Marshall *v.* Shrewsbury, 10 L. R. Ch. 250. As to the right to a sale in case of foreclosure of an equitable mortgage, see Backhouse *v.* Charlton, 8 Ch. D. 444; York Union Banking Co. *v.* Artley, 11 Ch. D. 205.

release of it to the mortgagee may be presumed. The limitation at law and in equity is usually the same, with the allowance of the same time for disabilities. (a) The statute of limitations is assumed as the fit and proper ground for taking the length of possession therein mentioned as the presumption of right; and the courts of equity have been considered by the judges, in some cases, as virtually, though not in terms, included in its provisions. This is the general doctrine, in England, and in this country, in respect to remedies in equity; but the late Revised Statutes of New York have wisely removed all doubt and difficulty on this subject, and regulated limitations in equity by express provisions. In all cases of concurrent jurisdiction, in the courts of law and of equity, the statute of limitations applies equally to both courts; but it does not apply to cases in which a court of equity has peculiar and exclusive jurisdiction; and in all such cases, the limitation of bills for relief, on the ground of fraud, is six years after the discovery of it by the aggrieved party; and in all the other cases not provided for, the limitation is ten years after the cause accrued; and *this, consequently, reduces *188 the right to redeem for twenty years, as it before stood, to ten years. (a) [1]

(a) Jenner v. Tracy, cited in Cox's note to 3 P. Wms. 287; Belch v. Harvey, ib.; Anon., 3 Atk. 313, Aggas v. Pickerell, ib. 225; Smith v. Clay, 3 Bro. C. C. 639, note; Lord Kenyon, in Bonny v. Ridgard, cited in 17 Ves. 97; Hodle v. Healy, 1 Ves. & B. 536; Demarest v. Wynkoop, 3 Johns. Ch. 129; Kane v. Bloodgood, 7 id. 90; Slee v. Manhattan Company, 1 Paige, 48; Lamar v. Jones, 3 Harr. & M'Hen. 328; Sir Thomas Plumer, in Chalmer v. Bradley, 1 Jac. & Walk. 59; Lyttle v. Rowton, 1 Marshall, 519; Elmendorf v. Taylor, 10 Wheaton, 168; Lord Redesdale in Cholmondeley v. Clinton, 2 Jac. & Walk. 191; Dexter v. Arnold, 3 Sumner, 152.

(a) New York Revised Statutes, ii. 301, sec. 49, 50, 51, 52. The period of limitation of a right of entry upon land varies very materially in the different states. It is 30 years in Mississippi; 21 years in Pennsylvania and Ohio; 20 years in Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, Alabama, Kentucky, Indiana, and Missouri; 15 years in Vermont and Connecticut; 10 years in Louisiana; 7 years in North Carolina, Tennessee, and Georgia; and 5 years in South Carolina. But in North Carolina the limitation in certain cases is 21 years, by the act of 1791, to constitute a bar to the right of entry. See the appendix to Mr. Angell's learned and accurate Treatise on the Limitation of Actions at Law and Suits in Equity. After entry by the mortgagee, upon default, or by writ of entry, the limitation of the right of redemption, in the New England states, is not regulated by the general limitation to a right of entry, but is, as we have already seen, very much reduced.

[1] [The effect of this statute upon the rights of mortgagor, as affected by the lapse of time, is both interesting in theory and important in practice. The terms

It is the better and prevailing opinion in the English courts, that if a mortgagee enters in the lifetime of the tenant for life,

"forfeiture" and "redemption," in their origin, were descriptive of the relations of mortgagor and mortgagee, when a mortgage was regarded as a grant of an estate defeasible only by payment at the specified day. By failure to pay at the day, the mortgagor's estate was wholly gone. This was "forfeiture." But equity relieved, and this was "redemption." The period of limitation within which this relief would be granted, was twenty years after forfeiture, or after acknowledgment by the mortgagee of the mortgagor's right. As the law is now settled, in New York and other states, there is never a *forfeiture* of the mortgagor's estate, and the estate is therefore never redeemed, in the ancient sense of the term. It is simply relieved from the incumbrance by payment at any time, and a tender of such payment is effectual for that purpose. Kortright *v.* Cady, 21 N. Y. 343. In England, a reconveyance of the estate is held to be necessary when payment is made *after* the "law day," in order to reinvest the mortgagor with the title, and as the power of equity must be invoked to compel such reconveyance, a bill for that purpose may well be termed a bill of redemption. But in New York no such reconveyance is required, because nothing is forfeited or lost by the failure to pay at the day. Jackson *v.* Crafts, 18 Johns. 110; Kortright *v.* Cady, *supra*. The mortgage stands as before, as a simple security. With us, therefore, the inquiry within what period of limitation may a mortgagor ask to redeem, and file his bill for that purpose, apparently amounts to no more than this: within what time may he rightfully pay, or offer to pay, the debt, so as to remove the cloud from his estate? Or, if the mortgagee has gone into possession, and remains after the debt is paid, within what time may the true owner recover the possession, which is wrongfully withheld?

The impression of the annotator decidedly is, that a mortgagor cannot be adjudged to have lost his estate, by lapse of time, short of twenty years' adverse possession by the mortgagee, and that the rule on this subject is essentially unchanged. Suppose the mortgagee has been in possession a little more than ten years, confessedly as mortgagee, and receiving and applying the rents and profits in the gradual extinction of the debt. But (the debt being always due) the mortgagor had a right to redeem at the very commencement of that period. Yet it is inconceivable that his estate is forever gone at the end of the ten years, while the process of payment has been constantly going on with the concurrence of both parties. Suppose the mortgagor is always in possession, as the fact usually is in this country. Is a title ever lost, by limitation or lapse of time, while the owner is in the peaceable possession and enjoyment? Plainly, it is not. But, with us, the redemption of an estate from a mortgage is simply the payment of the mortgage at any time. Does, then, a mortgagor in possession lose his right to pay the debt in ten years after it has fallen due? If he does, is it a consequence that he must give up his estate, and that the mortgagor may recover and hold it forever against him? Again: the mortgagee may sue on the bond or other personal obligation for the debt, or proceed in equity to foreclose the mortgage at any time, until a presumption of payment arises; in other words, for twenty years after the debt is due, and after any acknowledgment of its existence. Now the *right* to pay the debt during that period of time would seem to be a necessary result of the obligation and duty to pay. Payment is the act of the party, and by extinguishing the mortgage, it redeems the estate without any judicial sentence. But after payment, or tender,

the remainderman will be barred of his right to redeem, after twenty years, from such entry. The principle is, that the remainderman might have redeemed, notwithstanding the life estate, and that it is of no consequence to the mortgagee who has the equity, for he ought to be quieted after twenty years' possession. This was the opinion of Ch. B. Eyre, (*b*) and of Sir William Grant, and it was so decided in *Harrison* v. *Hollins*. (*c*) Lord Manners was of a different opinion, and he concluded, from analogy to the statute of limitations at law, that the remainderman had twenty years to redeem, after the termination of the life estate. Until his title vests in possession, he was quite unconnected with the tenant for life; and there was as much reason in this as in other cases, that lapse of time should not bar, until his right of entry had accrued. (*d*) As the right of redemption belongs exclusively to a court of equity, the remainderman's bill to redeem must, in New York, be filed within ten years "after the cause thereof *shall accrue;" (*a*) and *189 whether the cause for redemption, as respects the remainderman, may be said to accrue when the mortgagee enters and takes possession under the mortgage, remains yet to be settled. This case does not fall precisely within the principle which gives to a remainderman twenty years after the death of the tenant for life to assert a title, and make his claim and entry by action; for until then he had no right of entry; whereas, the remainderman, in the other case, may redeem the mortgage in the lifetime of the tenant for life; and to permit a mortgagee to be called to a severe account for the proceeds of the estate, after a long, unmolested reception of the rents and profits, and when he is not allowed any adequate compensation for his care and trouble, is not,

(*b*) Corbett *v.* Baker, 1 Anst. 138.
(*c*) 1 Sim. & Stu. 471.
(*d*) Blake *v.* Foster, 2 Ball & Bea. 387, 575.
(*a*) New York Revised Statutes, ii. 301, sec. 52.

the mortgagor may have a cause of suit to recover possession from the mortgagee. But this is a *legal* cause of suit, the possession of the mortgagee, after the extinction of his lien, being simply tortious. Incidentally, an accounting may be necessary, and the jurisdiction of equity may be conveniently invoked on that ground. But this cannot be a circumstance which abridges the limitation. Either legal or equitable jurisdiction may be resorted to, as convenience may dictate. The relief which is sought for, in either forum, is not against a forfeiture, because there is none, but it is the possession of an estate according to the legal title. If this be so, the limitation is twenty years. C.]

in those instances where the remainderman might have called on him sooner, very consistent with true policy and substantial justice. (*b*)

The mortgagee may equally, on his part, be barred by lapse of time; and if the mortgagor has been permitted to possess and enjoy the estate without account, and without any payment of principal or interest, or claim for a given period, and which is generally fixed at twenty years, the mortgage debt is presumed to be extinguished, and a reconveyance of the legal estate from the mortgagee may be presumed. The period of twenty years is taken, by analogy to the period of limitation at law, for tolling the entry of the true owner. (*c*) The rule of barring the equity of redemption, or the claim of the mortgagee, by lapse of time, is founded on a presumption of title which may be rebutted
* 190 by parol proof, or circumstances * sufficient to put down or destroy the contrary presumption. (*a*)

When a foreclosure takes place by a sale of the mortgaged premises under a power, it is usual, in England, to provide in the mortgage itself for due notice of the sale, so as to afford a fair opportunity of an advantageous sale. If the mortgagee omits to give proper notice, whether directed by the power or not, the sale may be impeached in chancery. (*b*) In New York, (*c*) and proba-

(*b*) According to the principle of the decision in Wells *v.* Prince, 9 Mass. 508, though a remainderman should have acquired a right of entry in the lifetime of a devisee for life, yet he was not bound to avail himself of it, and might enter after his second right accrued by the death of a tenant for life.

(*c*) Hillary *v.* Waller, 12 Ves. 239; Cook *v.* Soltan, 2 Sim. & Stu. 154; Moore *v.* Cable, 1 Johns. Ch. 385; Giles *v.* Baremore, 5 id. 545; Jackson *v.* Wood, 12 Johns. 242; Ross *v.* Norvell, 1 Wash. 14; Howland *v.* Shurtleff, 2 Met. 26. By the statute of 3 and 4 Wm. IV. c. 27, explained by statute 1 Vict. c. 28, mortgagees must bring their suit to recover the land mortgaged within twenty years next after the last payment of any part of the principal money, or interest secured by the mortgage.

(*a*) Whiting *v.* White, Cooper, Eq. 1; Reeks *v.* Postlethwaite, ib. 161; Barron *v.* Martin, ib. 189; Hughes *v.* Edwards, 9 Wheat. 489. The English rule as to the allowance of parol proof to destroy the effect of the mortgagee's possession for twenty years, was proposed in England to be abolished, by the proposition of the real property commissioners, that the mortgagee's right, founded on twenty years' possession, should not be taken away by any unwritten promise, statement, or acknowledgment.

(*b*) Anon., 6 Mad. 15. The notice of sale under the foreclosure of mortgages is the subject of special regulation by the New York statute of May 7, 1844, c. 346.

(*c*) It is requisite, in New York, to a valid execution of the power, that it be previously registered, or the mortgage containing it recorded; and that there be no pending suit at law, nor any judgment for the debt on which an execution has not been returned unsatisfied; and that notice sufficiently descriptive of the mortgage, and

bly in other states, a sale under a power is made the subject of a statute provision; but as the title under such a sale does not affect any mortgagee or judgment creditor whose lien accrued *prior* * *to the sale*, it must be rather a hazardous and unsat- *191 isfactory title, and far inferior to one under a decree in chancery, founded on a view of the rights (and which bars the rights) of all incumbrancers who are brought before the court. The sale under a power, if regularly and fairly made, according to the directions of the statute, is a final and conclusive bar to the equity of redemption. This has been the policy and language of the law of New York, from the time of the first introduction of the statute regulations on the subject, in March, 1774. (*a*) As proceedings under a power are *in pais*, and no day in court is given to the mortgagor to set up any equitable defence, a court of equity will interfere, where payments have been made and not credited, and stay the proceedings, and regulate the sale as to the extension of notice, or otherwise, as justice may require, and particularly when the rights of the infant heirs of the mortgagor are concerned. (*b*) A sale under a power, as well as under a decree, will bind the infant heirs; for the infant has no day, after

the debt, and the land, be published for twenty-four weeks successively, once a week, in a newspaper printed in the county where the lands, or a part of the lands, are situated, and the same also affixed, twelve weeks prior to the time of the sale, on the outward door of the nearest courthouse of the county. Every such sale must be in the county where the mortgaged premises, or some part of them, are situated, and at public auction; and distinct farms, tracts, or lots, are sold separately. The statute further provides, that the mortgagee, and his representatives, may purchase; and every such sale is declared to be equivalent to a foreclosure and sale in equity, so far as to bar the equity of redemption of the mortgagor, and of all persons claiming under him by title subsequent to the mortgage; but it is not to affect a mortgagee, or judgment creditor, whose title or lien accrued prior to the sale. The affidavit of the publication and notice of sale, and circumstances of the sale, are evidence of the sale and foreclosure without any conveyance. The statute contains some further directions necessary to be attended to, concerning the contents and disposition of the affidavit of the sale. New York Revised Statutes, ii. 545, tit. 15, and Acts of New York, April 18, 1838, and of May 7, 1844, c. 346.

(*a*) Doolittle *v.* Lewis, 7 Johns. Ch. 50. It was formerly held, that though the mortgagee omitted to record the power, yet that the sale would be binding upon the mortgagor, and bar his equity of redemption. Wilson *v.* Troup, 2 Cowen, 229, 242. But the new revised statute would seem to be too precise in its injunctions, to admit of such a latitudinary construction. It declares, that *to entitle the party to give notice, and to make the foreclosure, it shall be requisite* that the power *has been duly registered*, and that every sale pursuant to a power as aforesaid, and *conducted as therein prescribed*, shall be a bar, &c.

(*b*) Van Bergen *v.* Demarest, 4 Johns. Ch. 37; Nichols *v.* Wilson, ib. 115.

he comes of age, to show cause, as he has where there is the strict technical foreclosure, and as he generally has in the case of decrees. (c)

(5.) *Of Opening Biddings.* — Upon a decree for a sale, it is usual to insert a direction that the mortgagor deliver up possession to the purchaser; but whether it be or not part of the decree, *192 a court of *equity has competent power to require, by injunction, and enforce, by process of execution, delivery of possession; and the power is founded upon the simple elementary principle, that the power of the court to apply the remedy is coextensive with its jurisdiction over the subject-matter. (a) The English practice of opening biddings on a sale of mortgaged premises, under a decree, does not prevail to any great extent in this country. (b) The object is to aid creditors by an increase of the bid; but Lord Eldon condemned the practice as injurious to the sale; and he observed, that a great many estates were thrown away upon the speculation that there would be an opportunity of purchasing afterwards by opening biddings. (c) The English method of selling under a decree varies greatly from ours, and is favorable to openings of the sale; whereas the sale at public auction, with us, is ordinarily a valid and binding contract, as soon as the hammer is down. The master sells at public auction on due notice, and the purchaser becomes entitled to a deed, unless there be fraud, mistake, or some occurrence, or some special circumstances, affording, as in other cases, a proper ground for equitable relief. (d) In England, the sale has the attributes of

(c) Booth *v.* Rich, 1 Vern. 295; Mallack *v.* Galton, 3 P. Wms. 352; Mills *v.* Dennis, 3 Johns. Ch. 367.

(a) Dove *v.* Dove, Dickens, 617; 1 Bro. C. C. 375; 1 Cox Cases, 101, s. c.; Kershaw *v.* Thompson, 4 Johns. Ch. 609; Ludlow *v.* Lansing, 1 Hopkins, 231; Garretson *v.* Cole, 1 Harr. & J. 370. This power is confirmed by the New York Revised Statutes, ii. 191, sec. 152. In Wood *v.* Mann, 3 Sumner, 318, it was held that a court of equity may, by attachment, compel a purchaser at a sale by the master, and even his surety for the payment of the purchase-money, to complete the purchase by paying in the purchase-money.

(b) Woodhull *v.* Osborne, 2 Edw. Ch. 614. (c) 2 Jacob & W. 348.

(d) The mortgagor has no right to redeem *after the premises have been sold* under a decree, though the purchase by the mortgagee be not consummated by confirmation of the report and the deed delivered. Brown *v.* Frost, 10 Paige, 246, 1. And in the Bank of the U. S. *v.* Carroll, 4 B. Mon. 49, the Court of Appeals in Kentucky were so struck with the policy of affording the highest sanction to judicial sales, as to question whether the purchaser's title, he being a purchaser without notice, ought not to prevail even against the right to redeem of a junior mortgagee, who was no

a private sale. The master gives notice, and receives bids, and reports the highest bidder; and if his report be confirmed, the title is examined, and the conveyance prepared; and the whole proceeding is *in fieri*, until the final settlement of the title. (*e*)

*(6.) *Of the Reconveyance.* — If a mortgage be satisfied *193 without a sale, and the estate is to be restored to the mortgagor, it will depend upon circumstances whether a reconveyance be necessary. When the mortgage is made with a condition that the conveyance shall be void on payment at a given day, and the condition be fulfilled, the land returns to the mortgagor, without any reconveyance, and by the simple operation of the condition. (*a*) But if there had been a default, then, as the estate had become absolute at law, according to the old doctrine, the language of the books has been, that a reconveyance was necessary on discharging the debt. (*b*) The general understanding, and the practice on this subject, in this country, have been different,

party to the suit of foreclosure. On the other hand, in Michigan, under a mortgage sale, the mortgagor, or his assigns, may redeem within two years, on paying the purchase-money and ten per cent interest. So, a subsequent mortgagee may redeem and succeed to the right of the prior mortgage. Johnson *v.* Johnson, Walker, Ch. (Mich.) 332.

(*e*) White *v.* Wilson, 14 Ves. 151; Cunningham *v.* Williams, 2 Anst. 344; Williamson *v.* Dale, 3 Johns. Ch. 290; Lansing *v.* M'Pherson, ib. 424; Bland, Chancellor, in Anderson *v.* Foulke, 2 Harr. & G. 355, 366. In that case the Chancellor observed, that biddings were never opened, in Maryland, or the sale suspended, merely to let in another and a higher bid. But if, either before or after ratification of the sale, there be any injurious mistake, misrepresentation, or fraud, the biddings will be opened, and the property again sent into the market. Gordon *v.* Sims, 2 M'Cord, Ch. 158, 165; and see the note of the learned reporter in the latter case, page 159, in which the English and American practice on this point is clearly stated, and the inferences justly drawn. The practice in England is not to open biddings after the confirmation of the master's report of a purchaser, except under special circumstances; but it is almost a matter of course when the report has not been absolutely confirmed. The terms vary according to circumstances. The biddings *may* be opened even in favor of a person present at the sale; but the general rule is against it, and the fact furnishes a very strong objection to the interference of the court. [Even what is in form an order of absolute foreclosure may be set aside at the discretion of the court in England. Campbell *v.* Holyland, 7 Ch. D. 166.]

In Tennessee, the courts of chancery do not open biddings in a sale, under a decree of foreclosure, after confirmation of the master's report, except in cases which would justify setting the sale aside altogether. Henderson *v.* Lowry, 5 Yerg. 240.

(*a*) Preston on Convey. ii. 200, 201.

(*b*) Lord Hardwicke, in Harrison *v.* Owen, 1 Atk. 520; 1 Sch. & Lef. 176, 177; Judge Trowbridge's Essay on Mortgages, 8 Mass. 557, 561, 563, appendix.

though the cases are not uniform. This contrariety of opinion, which shows itself here and in England, proceeds from the vibration between law and equity views of the subject. A judge at law, as was observed in *Gray* v. *Jenks*, (*c*) sometimes deals with the mortgage in its most enlarged and liberal character, stripped of its technical habiliments; and a judge in equity sometimes follows out the doctrine of law, and contemplates it with much of its original and ancient strictness. The debt, generally speaking, is considered to be the principal, and the land only the incident; and discharging or forgiving the debt, with the delivery of the security, any time before foreclosure, extinguishes the mortgage and no reconveyance is necessary to restore the title
*194 to the mortgagor. (*d*) *So, an assignment of the debt by deed, by writing simply, or by parol, is said to draw the land after it as a consequence, and as being appurtenant to the debt. The one is regarded as the principal, and the other the accessory, and *omne principale trahit ad se accessorium*. The assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered to be without meaning or use. This is the general language of the courts of law, as well as of the courts of equity; and the common sense of parties, the spirit of the mortgage contract, and the reason and policy of the thing, would seem to be with doctrine. (*a*) In Massachusetts and Maine, the technical rules of the common law are more

(*c*) 3 Mason, 521.

(*d*) In the case of The Farmers' Fire Ins. and Loan Co. *v.* Edwards, 26 Wend. 541, it was decided, in the N. Y. Court of Errors, that a tender of a debt secured by mortgage *after* the day stipulated for payment, removed the lien of the mortgage, as a tender *at the day*, provided it be made *before foreclosure*. The mortgagee, if in possession, may, after the tender, be ousted by the mortgagor.

(*a*) Lord Hardwicke, in Richards *v.* Syms, 3 Eq. Cas. Abr. 617; Barn. Ch. 90, s. c.; Lord Mansfield, in Martin *v.* Mowlin, 2 Burr. 978, 979; Johnson *v.* Hart, 3 Johns. Cas. 322; 1 Johns. 580, s. c.; Jackson *v.* Willard, 4 id. 41; Renyan *v.* Mersereau, 11 id. 534; Jackson *v.* Davis, 18 id. 7; Jackson *v.* Bronson, 19 id. 325; Wilson *v.* Troup, 2 Cow. 195; Jackson *v.* Blodget, 5 id. 202; Wentz *v.* Dehaven, 1 Serg. & R. 312; Kinsey, Ch. J., in Den *v.* Spinning, 1 Halst. 471; Morgan *v.* Davis, 2 Harr. & M'Hen. 17; Paxon *v.* Paul, 3 id. 399. Story, J., in Hatch *v.* White, 2 Gall. 155; Pattison *v.* Hull, 9 Cow. 747; Paine *v.* French, 4 Ohio, 320; Perkins *v.* Dibble, 10 Ohio, 433; Ellison *v.* Daniels, 11 N. H. 274. Entry of satisfaction on the back of a mortgage discharges it. Allard *v.* Laine, 18 Me. 9. In Pennsylvania, it is held that the assignment of a debt secured by mortgage is not an instrument within the recording act of 1775, and will, without it, be good against a subsequent assignment; nor is the assignment of a mortgage within the act, and it may be without writing. Craft *v.* Webster, 4 Rawle, 242.

strictly maintained. The doctrine of Lord Mansfield, in *Martin* v. *Mowlin*, is not regarded as correct; and, upon the construction of their statute law, the estate of the mortgagee cannot be assigned except by deed; though a bond may be assigned, and pass without deed, and even by delivery. Upon the discharge of the mortgage debt, after a default, a reconveyance is deemed requisite to restore the fee to the mortgagor. This is the doctrine, also, in Connecticut, Virginia, and Kentucky. (*b*) [1]

(*b*) Judge Trowbridge's Reading on the Law of Mortgage, 8 Mass. 554, appendix; Warden *v.* Adams, 15 id. 233; Parsons *v.* Welles, 17 id. 419; Prescott *v.* Ellingwood, 23 Me. 345; Phelps *v.* Sage, 2 Day, 151; Faulkner *v.* Brockenborough, 4 Rand.

[1] *Mortgagor and Mortgagee.* — (*a*) The mortgagee of the fee still has the legal estate in many jurisdictions before default and a fee simple absolute afterwards. Norwich *v.* Hubbard, 22 Conn. 587, 594; Stewart *v.* Crosby, 50 Me. 130, 133; Smith *v.* Johns, 3 Gray, 517; Russell *v.* Allen, 2 Allen, 42; Steel *v.* Steel, 4 Allen, 417; Simmons *v.* Brown, 7 R. I. 427; Waterman *v.* Matteson, 4 R. I. 539; Swartz *v.* Leist, 13 Ohio St. 419; [Welsh *v.* Phillips, 54 Ala. 309; Fletcher *v.* Neudeck, 30 Minn. 125 (chattel).] See the New Hampshire cases cited below. But in view of the restrictions usually imposed by deed or statute against entering before default, the doctrine is not of much importance except as affecting the record title and the formalities of assignment. It might be of importance as affecting these. Thus, on principle, a conveyance by a mortgagor before default is not sufficient to pass a legal title to the purchaser even after the mortgage is extinguished, except by estoppel, and so it is supposed it would be held in England. See Cuthbertson *v.* Irving, 6 Hurlst. & N. 135; Downe *v.* Thompson, 9 Q. B. 1037; Williams, R. P. 9th ed. 406. In the United States, however, it is laid down very generally, even in those states where as between the parties the mortgage is a conveyance of the fee, that before entry by the mortgagee the mortgagor is the legal owner as towards third persons, and it is supposed that his conveyance, while the mortgage is outstanding, has come by inveterate usage to be regarded as a sufficient transfer of the fee, if the mortgage is afterwards paid at the proper time. See Eastman *v.* Batchelder, 36 N. H. 141, 153; M'Cormick *v.* Digby, 8 Blackf. 99; Freeman *v.* McGaw, 15 Pick. 82; *ante*, 157.

(*b*) At the same time the common-law theory has been applied in the case of a mortgagee. Of course only a formal conveyance will pass the legal title, and on this principle it has been held that an assignment must be under seal to be valid at law, for instance, to enable an assignee to maintain a real action to foreclose in his own name. Young *v.* Miller, 6 Gray, 152; Adams *v.* Parker, 12 Gray, 53. See also Smith *v.* Kelley, 27 Me. 237. When the mortgage and the debt go different ways, the holder of the legal title may be a trustee for the party to whom the mortgage debt is due. Swartz *v.* Leist, 13 Ohio St. 419; Johnson *v.* Carpenter, 7 Minn. 176. See Young *v.* Miller, 6 Gray, 152, 154. And before entry to foreclose the *equitable* remedies on the mortgage may well enough be treated as a mere incident of the debt, and held to pass when the debt is assigned. Swartz *v.* Leist, *supra*; Wright *v.* Eaves, 10 Rich. Eq. 582; Vansant *v.* Allmon, 23 Ill. 30; Dick *v.* Mawry, 9 Sm. & M. 448; Burdett *v.* Clay, 8 B. Mon. 287, 295. So the assignee of a coupon of a bond secured by

245; Breckenridge v. Brooks, 2 Marsh. 337. In Gray v. Jenks, 3 Mason, 520, *195 a satisfied mortgage *under the law of the State of Maine, was so far deemed an extinguished title, as that no action would lie upon it by the mortgagee. The irresistible good sense and equity of such a conclusion were felt and forcibly

mortgage has an equitable lien on the security. Miller v. Rutland & W. R. R., 40 Vt. 399; Sewall v. Brainerd, 38 Vt. 364. See also, generally, Hyman v. Devereux, 63 N. C. 624; Willis v. Vallette, 4 Met. (Ky.) 186, 195. But the language of many of the cases which go no further than to allow equitable remedies is very broad, and in one court the assignees of the mortgage note, only, are allowed a common-law remedy upon the mortgage by writ of entry. Southerin v. Mendum, 5 N. H. 420; Furbush v. Goodwin, 9 Fost. (29 N. H.) 321, 327, 332; Northy v. Northy, 45 N. H. 141, 144. But see Dwinel v. Perley, 32 Me. 197. [The mortgage passes free from equities if the debt does. Carpenter v. Longan, 16 Wall. 271; Burhans v. Hutcheson, 25 Kan. 625.]

It has been held that the mortgage is so far incident to the debt that the remedy by foreclosure is put an end to when the note is barred. Pollock v. Maison, 41 Ill. 516; Perkins v. Sterne, 23 Tex. 561. *Contra*, Miller v. Helm, 2 Sm. & M. 687, 697; Bush v. Cooper, 26 Miss. 599, 611; Michigan Ins. Co. v. Brown, 13 Mich. 265; Fisher v. Mossman, 11 Ohio St. 42; Pratt v. Huggins, 29 Barb. 277; Elkins v. Edwards, 8 Ga. 325; Ball v. Wyeth, 8 Allen, 275, 278; Richmond v. Aiken, 25 Vt. 324; Mitchell v. Clark, 35 Vt. 104, 107. [See also Taylor v. McClain, 60 Cal. 651.] As to vendor's lien, see 152, n. 1, (*d*). So a conveyance in fee by a mortgagee before entry which did not appear to be intended as an assignment of the mortgage and debt has been treated as wholly inoperative. Johnson v. Cornett, 29 Ind. 59; Hill v. Edwards, 11 Minn. 22, 29; Johnson v. Lewis, 13 Minn. 364; Furbush v. Goodwin, 5 Fost. (25 N. H.) 425, 450; Merritt v. Bartholick, 36 N. Y. 44; Dutton v. Warschauer, 21 Cal. 609, 625. See Lucas v. Harris, 20 Ill. 165; Southerin v. Mendum, 5 N. H. 420, 430; Rigney v. Lovejoy, 13 N. H. 247. But compare Ruggles v. Barton, 13 Gray, 506; McSorley v. Larissa, 100 Mass. 270; Webb v. Flanders, 32 Me. 175; Cole v. Edgerly, 48 Me. 108, 112.

(*c*) Some of the preceding decisions are more intelligible, when it is known that in many states it has been enacted or decided that the mortgagee has only a lien and no title. And this is not a great innovation, when, as has been seen, the chief effect of the mortgagee's legal title in this country is to increase the formalities necessary to a transfer valid in a common-law court. Dutton v. Warschauer, 21 Cal. 609, 621; Stoddard v. Hart, 23 N. Y. 556; Levy v. New York, 3 Rob. 194; Kortright v. Cady, 21 N. Y. 343; Syracuse City Bank v. Tallman, 31 Barb. 201; *ante*, 188, n. 1; Ladue v. Detroit & Milwaukee R. R., 13 Mich. 380; Dougherty v. Randall, 3 Mich. 581; Fletcher v. Holmes, 32 Ind. 497, 513; Adams v. Corriston, 7 Minn. 456, 463; Burton v. Hintrager, 18 Iowa, 348, 350; Freeman v. Bass, 34 Ga. 355, 369; [Trimm v. Marsh, 54 N. Y. 599; Ten Eyck v. Craig, 62 N. Y. 406, 421. See Rector, &c. v. Mack, 93 N. Y. 488.] See Mitchell v. Bogan, 11 Rich. (S. C.) 686. In many states, also, it is provided by statute that the mortgagee's interest shall go to his executor or administrator upon his death.

(*d*) When the mortgage passes the fee, a reconveyance upon discharge after default is necessary on principle, in order to restore the legal title to the mortgagor, unless other statutory methods of discharge are resorted to, such as entry of satisfaction on the margin of the record. See Pearce v. Morris, L. R. 5 Ch. 227; Colyer v. Colyer, 3 De G., J. & S. 676, 693; Brobst v. Brock, 10 Wall. 519, 536; [Sands to Thompson, 22 Ch. D. 614.]

expressed by the learned judge who decided that case; and an intimation to the same effect had been previously given by the Chief Justice of Maine, in the case of Vose *v.* Handy, 2 Greenl. 322. It may, therefore, be presumed, notwithstanding the language of other parts of that case, that the doctrine stated in the text will yield to the more liberal views of the subject implied in the emphatical suggestion of the chief justice. The opinions of Judge Trowbridge are cited with the greatest respect in Massachusetts; and he is considered, and I presume very justly, as the oracle of the old real property law. He criticises, very ably, the opinion of Lord Mansfield; and some of the observations attributed to his lordship, in Martin *v.* Mowlin, were no doubt very loosely made. Judge Trowbridge insists, that Lord Mansfield confounds the distinction between mortgages of land for a term only, and a mortgage in fee. The former, he says, is but a chattel interest, and the latter an estate of inheritance, descendible as such, and the money due thereon is equitable assets. The supreme court of Massachusetts, in Parsons *v.* Welles, adhered to these views of the subject. But I would observe, with great submission and respect, that the doctrines of Judge Trowbridge, on mortgages, are far in the rear of the improvements of the age, in this branch of the science; and it will not do to take our doctrines of mortgages from Littleton and Coke. The language of the courts of law is now essentially the same as that in equity; and it is said, again and again, to be an affront to common sense, to hold that the mortgagor, even of a freehold interest, is not the real owner. To show that many of the positions of Judge Trowbridge are not law at this day, it is sufficient to state, that he maintains that the equity of redemption is not liable to be taken in execution; that the mortgage money, on redemption, goes to the heir, and

But a mortgagee out of possession will not be able to disturb the mortgagor, even at law, in those jurisdictions where a conditional judgment only is given upon a writ of entry to foreclose. Stewart *v.* Crosby, 50 Me. 130, 134; Slayton *v.* McIntyre, 11 Gray, 271; Doton *v.* Russell, 17 Conn. 146. In other states no reconveyance is required, although payment is delayed until after default. 193, 195; Armitage *v.* Wickliffe, 12 B. Mon. 488, 497. And it is even held that a tender after default is sufficient to discharge the mortgage lien, Kortright *v.* Cady, 21 N. Y. 343; [Trimm *v.* Marsh, 54 N. Y. 599;] Carruthers *v.* Humphrey, 12 Mich. 270; Van Husen *v.* Kanouse, 13 Mich. 303, 306; although the contrary and more conservative doctrine is very strongly upheld in Shields *v.* Lozear, 5 Vroom (34 N. J.), 496, 505; Stockton *v.* Dundee Manuf. Co., 7 C. E. Green (22 N. J. Eq.), 56; Currier *v.* Gale, 9 Allen, 522. [The tender in such case must be kept good. Frank *v.* Pickens, 69 Ala. 369; Tompkins *v.* Batie, 11 Neb. 147; Crain *v.* McGoon, 86 Ill. 431; s. c. 29 Am. R. 37 and note. A receipt of rents and profits by a mortgagee in possession to the amount of the debt does not in itself discharge the mortgage. Hubbell *v.* Moulson, 53 N. Y. 225.] So a tender after default has been held not to put an end to a power of sale at law. Cranston *v.* Crane, 97 Mass. 459, 465. But as to equity, see Jenkins *v.* Jones, 2 Giff. 99.

(*e*) Whether the release of a mortgage will constitute a discharge or an assignment, depends not so much upon the form of the instrument, as upon the relations of the parties to the estate, and their presumed intent derived from the circumstances under which the conveyance is made. If the release is to a party whose duty it is to extinguish the mortgage for the benefit of another, it will be held to operate as a discharge. *Ante*, 46, n. 1; Brown *v.* Lapham, 8 Cush. 551, 554; Kilborn *v.* Robbins, 8 Allen, 466; Wadsworth *v.* Williams, 100 Mass. 126; Robinson *v.* Urquhart, 1 Beasl. 515; Kensington *v.* Bouverie, 7 De G., M. & G. 134, 144. [See further, Cox *v.* Garst, 105 Ill. 342; Dodge *v.* Fuller, 2 Flip. 603.]

not to the executor of the mortgagee; that a third mortgagee, without notice, may buy in the first mortgage, and secure himself against the second; that the mortgagee in fee has an interest which the creditor may take on execution. The cases of Morgan *v.* Davis, Paxon *v.* Paul, Jackson *v.* Davis, and Jackson *v.* Blodget, may be selected as cases in which it has been adjudged in the courts of law, that on discharge of the mortgage, after a default, the fee reverts to, and vests in the mortgagor, without any conveyance; and I am persuaded that most of the courts of law in this country would not now tolerate a claim of title under a mortgage, admitted or shown to have been fully and fairly satisfied by payment of the debt. In New Hampshire *196 there is a statute provision which restores the *land to the mortgagor, by simple payment, or tender after the condition is broken. Sweet *v.* Horn, 1 Adams, 332. Though the cancelling of a deed does not revest an estate, which has once passed under it by a transmutation of possession (Hudson's Case, Prec. in Ch. 235), yet, if the grantee has voluntarily, and without mistake, destroyed the deed, with a view to revest the title, he cannot be permitted to show its contents by parol proof. In that way, by a species of esteppel, the destruction of a deed may have the effect of a reconveyance. Farrar *v.* Farrar, 4 N. H. 191.

In Cameron *v.* Irwin, 5 Hill, 272, it was adjudged that payment of a mortgage extinguishes the power of sale contained in it. So in the case of the payment of a judgment. Payment extinguishes a mortgage as much as if it was released or cancelled, and the whole title revests in the mortgagor. The assignee of a mortgage holds by no title or right paramount to that of his assignor. But in Connecticut, in the case of Smith *v.* Vincent, 15 Conn. 1, it was adjudged, as late as 1842, that the title of a mortgagee, under a satisfied mortgage after foreclosure, might be set up as a defence at law, by a person not a stranger, to an action of ejectment, as the title is to be governed by what appears upon the records. And in Raynor *v.* Wilson, 6 Hill (N. Y.), 469, it was adjudged that a destruction or surrender of a deed of lands would not operate to revest the grantor with the title. Duncan *v.* Wickliffe, 4 Scamm. 452, S. P. But though where title has passed by transmutation of possession, it does not revest by the cancelling of the deed, yet the party who voluntarily cancels his deed, is precluded from taking it up.

LECTURE LIX.

OF ESTATES IN REMAINDER.

ESTATES in expectancy are of two kinds: one created by the act of the parties, and called a *remainder;* the other by the act of law, and called a *reversion.* I shall confine myself in this Lecture to estates in remainder.

To give as much perspicuity as possible to the arrangement and discussion of so intricate a subject, I shall treat of remainders in the following order: —

1. Of the general nature of remainders.
2. Of vested remainders.
3. Of contingent remainders.
4. Of the rule in Shelley's case.
5. Of the particular estate.
6. Of remainders limited by way of use.
7. Of the time within which a contingent remainder must vest.
8. Of the destruction of contingent remainders.
9. Of some remaining properties of contingent remainders.

1. Of the General Nature of Remainders. — A remainder is a remnant of an estate in land, depending upon a particular prior estate, created at the same time, and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgment of it. (*a*) In the New York Revised Statutes, (*b*) * it is defined to be *an estate limited to* *198 *commence in possession at a future day, on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time.* (*a*) Mr. Cornish, after a careful analysis of Lord

(*a*) Co. Litt. 49 a, 143 a; 2 Bl. Comm. 163; Preston on Estates, i. 90, 91.

(*b*) Vol. i. 723, sec. 10, 11.

(*a*) The New York statutes give a broad construction to the term "remainder," for they declare that *where a future estate is dependent on a precedent estate*, it is a remainder, and may be created and transferred as such. 1 New York Revised Statutes, 723, sec. 11.

Coke's definition, substitutes his own. A remainder, he says, is "an estate in lands, hereditaments, or chattels real, limited to one who may take a new estate therein, on the natural determination of a particular estate in the same subject-matter, created either in fact or in contemplation of law, together with such particular estate, and forming, to certain purposes, but one estate therewith." (*b*) A remainder may consist of the whole remnant of the estate; as in the case of a lease to A. for years, remainder to B. in fee; or it may consist of a part only of the residuary estate, and there may be a reversion beyond it left vested in the grantor, as in the case of a grant to A. for years, remainder to B. for life; or there may be divers remainders over, exhausting the whole *residuum* of the estate, as in the case of a grant to A. for years, remainder to B. for life, remainder to C. in tail, remainder to D. in fee. The various interests into which an estate may be thus subdivided make, for many purposes, but one estate, being different parts or portions of the same entire inheritance. (*c*) Though a remainder, in its original simplicity, would appear to be very easy, safe, and practical, yet the doctrine of remainders, when the collateral refinements and complex settlements *199 which have, in the *course of time, grown out of it, are considered, will be found to surpass all the modifications of property in the difficulties which attend the study and the practice of it. The subdivision of the interest of an estate, to be enjoyed partitively, and in succession, is a very natural and obvious contrivance, and must have had a place in early civilization. (*a*)

If the whole fee be granted, there cannot, as a matter of course, be any remainder. (*b*) So, if an estate be granted to A. and his

(*b*) Cornish's Essay on the Doctrine of Remainders, 1827, p. 96. Mr. Cornish pronounces his own definition to be accurate; but he is not remarkably happy, either in brevity, or neatness, or clearness of expression. He ought to be accurate *ad unguem*, for he has occupied upwards of seventy pages in a labored analysis to produce his definition: and some parts of his inquiry involve critical discussions upon the most abstruse, subtle, and artificial distinctions in the law. They could not be made intelligible without giving more space to them than these Lectures will allow.

(*c*) 2 Bl. Comm. 164.

(*a*) Mr. Cornish has detected, in some ancient authorities, the evidence that partial interests, carved out of the inheritance, with a limitation of remainders over, existed among the anglo-Saxons. Essay on Remainders, 3.

(*b*) This is a clear principle of the common law; but the New York Revised Statutes, i. 728, sec. 16, have changed the whole doctrine on this point, and allowed a contingent remainder in fee to be created on a prior remainder in fee, and to take effect

heirs, till C. returns from Rome, and then to the use of B. in fee, the limitation to B. cannot be good as a remainder, though it may enure as a shifting use or executory limitation; for the entire fee passed to A. as a base or qualified fee, in which the grantor retained only a possibility of reverter. (*c*) But if the estate had been granted to A. without words of inheritance, until C. returned from Rome, he would have taken only a freehold estate, and the residue of the estate upon the return of C., if limited to the use of B., would be a remainder. It would equally have been a remainder if the estate had been limited to A., and the
* heirs of his body, until the return of C. from Rome, and * 200
then to the use of B. in fee; for an estate tail, not being the whole inheritance like a qualified fee, but only a portion of the entire estate, the remnant to B. would be a remainder. There can be no remainder limited after an estate of inheritance, except it be after an estate tail. There may be a future use, or executory devise, but it will not be a remainder. (*a*) In a devise, a subsequent interest may frequently be supported as a remainder, notwithstanding a limitation to the heirs of the prior devisee, provided the generality of the word "heirs" be restrained to issue, as a devise to A. and his heirs, and if he dies without issue, remainder over. (*b*) If the prior fee be contingent, a remainder may be created, to vest in the event of the first estate never taking effect, though it would not be good as a remainder, if it was to *succeed*, instead of being collateral to the contingent fee. Thus, a limitation to A. for life, remainder to his issue in fee, and

in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency, by which the estate of such persons may be determined before they attain their full age. So, a fee may be limited upon a fee, upon a contingency which, if it should occur, must happen within the period prescribed by the article, that is, two lives in being at the creation of the estate. Ib. sec. 24.

(*c*) 10 Co. 97; 1 Eq. Cas. Abr. 186, E. 1; *vide supra*, 10, note b; [Brattle Square Church *v.* Grant, 3 Gray, 142.]

(*a*) 2 Inst. 336; Fearne on Remainders, 7, 8.

(*b*) Doe *v.* Ellis, 9 East, 382; Tenny *v.* Alger, 12 id. 253; Dansey *v.* Griffiths, 4 Maule & S. 61. The series of cases on this subject, as Mr. Humphrey expresses it, in his Observations on Real Property, has been "obscurely shading down from a fee simple to a fee tail." The New York Revised Statutes (i. 722, sec. 3, 4) have provided for the preservation of valid remainders, limited upon every estate, which, under the English law, would be adjudged an estate tail. They are declared valid as conditional limitations upon a fee, and vest in possession on the death of the first taker, without issue living at the time of his death.

in default of such issue remainder to B., the remainder to B. is good as being *collateral* to the contingent fee in the issue. It is not a fee mounted upon a fee, but it is a contingent remainder with a double aspect, or, as Mr. Douglas says, with less quaintness, on a double contingency. (*c*) But if the remainder *201 over to B. * had been merely in the event of such dying before twenty-one, it would have been good only as a shifting use or executory devise, for it would have rested on an event which rescinds a prior vested fee. (*a*) There is likewise a double contingency when estates are limited over in the alternative, or in succession. If the previous estate takes effect, the subsequent limitation awaits its determination, and then vests. But if the first estate never vests by the happening of the contingency, then the subsequent limitation vests at the time when the first ought to have vested. (*b*) The New York Revised Statutes (*c*) have provided for this case of limitations in the alternative, by declaring, that two or more future estates may be created to take effect in the alternative, so that if the first in order shall fail to vest, the next in succession shall be substituted for it, and take effect accordingly.

Cross remainders are another qualification of these expectant estates, and they may be raised expressly by deed, and by implication in a devise. If a devise be of one lot of land to A., and of another lot to B., in fee, and if either dies without issue, the survivor to take, and if both die without issue, then to C. in fee, A. and B. have cross remainders over by express terms; and on the failure of either, the other or his issue takes, and the remainder to C. is postponed; but if the devise had been to A. and B. of lots to each, and remainder over on the death of both of them, the cross remainders to them would be implied. (*d*) y^1 So, if dif-

(*c*) Luddington *v.* Kine, 1 Lord Raym. 203; Doug. 505, n.

(*a*) Cornish on Remainders, 27-29. (*b*) Doug. *supra*.

(*c*) Vol. i. 274, sec. 25.

(*d*) Chadock *v.* Cowley, Cro. Jac. 695; 2 Bl. Comm. 381; Baldrick *v.* White, 2 Bailey (S. C.), 442; [Wall *v.* Maguire, 24 Penn. St. 248; Bamford *v.* Chadwick, 23 L. J. N. S. C. P. 172; 26 Eng. L. & Eq. 302.]

y^1 The question is one of intention upon a construction of the whole will. Taafe *v.* Coumee, 10 H. L. C. 64; Hannaford *v.* Hannaford, 7 L. R. Q. B. 116; *In re* Ridge's Trusts, 7 L. R. Ch. 665; Maden *v.* Taylor, 45 L. J. Ch. 569. See, as to personalty, Hudson *v.* Hudson, 20 Ch. D. 406.

ferent parcels of land are conveyed to different persons by deed, and by the limitation they are to have the parcel of each other when their respective interests shall determine, they take by cross remainders; and this complex doctrine of cross remainders, in the mode in which the parties become entitled, and in their proportions, though not in their interests, has a great analogy, as Mr. * Preston observes, to the order of suc- * 202 cession between coparceners. (*a*) The courts lean in favor of cross remainders, in order to effectuate the intention. It is a method to bring the estate together.

2. **Of Vested Remainders.** — Remainders are of two sorts, vested and contingent. An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. It gives a legal or equitable seisin. (*b*) The definition of a vested remainder in the New York Revised Statutes (*c*) appears to be accurately and fully expressed. It is "when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate." A grant of an estate to A. for life, with the remainder in fee to B., or to A. for life, and after his death to B. in fee, is a grant of a fixed right of immediate enjoyment in A., and a fixed right of future enjoyment in B. So, if the grant was only to A. for life, or years, the right under it would be vested in A. for the term, with a vested reversion in the grantor. Reversions, and all such future uses and executory devises as do not depend upon any uncertain event or period, are vested interests. (*d*) A vested remainder is a fixed interest, to take effect in possession after a particular estate is spent. If it be uncertain whether a use or estate limited *in futuro* shall ever vest, that use or estate is said to be in contingency. (*e*) But though it may be uncertain whether a remainder will ever take effect *in possession*, it will nevertheless * be a vested remainder * 203

(*a*) Preston on Estates, i. 94, 98.

(*b*) Ib. i. 64; [Smith *v.* West, 103 Ill. 332.] Mr. Preston says, there may be an executory interest, which is neither vested nor contingent, and yet carries with it a certain and fixed right of future enjoyment; and he instances the case of a devise of a freehold, to commence on the death of B. This, he says, is a certain interest, which is not executed immediately, so as to be vested; but this is excessive refinement. Is it not a vested right of future enjoyment?

(*c*) Vol. i. 723, sec. 13. (*d*) Fearne's Int. to his Treatise on Remainders.

(*e*) 10 Co. 85, a.

if the interest be fixed. The law favors vested estates, and no remainder will be construed to be contingent, which may, consistently with the intention, be deemed vested. (*a*) A grant to A. for life, remainder to B. and the heirs of his body, is a vested remainder; and yet it is uncertain whether B. may not die without heirs of his body, before the death of A., and so the remainder never take effect in possession. Every remainderman may die, and without issue, before the death of the tenant for life. It is the present *capacity* of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder. (*b*) [1] *y*[1] When the event on which the preceding estate

(*a*) In Moore *v.* Lyons, 25 Wend. 119, it was held, in the court of errors of New York, after a very able and learned discussion, that in a devise of real estate to A. *for life, and after his death to three others, or to the survivors or survivor of them, their heirs and assigns forever*, the remaindermen took a *vested interest at the death of the testator.* Survivorship is referred to the period of the death of the testator, if there be no special intent manifest to the contrary, so as not to cut off the heirs of the remainderman who should happen to die before the tenant for life. They are vested, and not contingent remainders. This is now become the settled technical construction of the language and the established English rule of construction. Doe *ex dem.* Waring *v.* Prigg, 8 B. & C. 231, and the decision of Sir John Leach, in Cripps *v.* Wolcott, 4 Mad. 11, is overruled. [See Bowers *v.* Bowers, L. R. 5 Ch. 244;] King *v.* King, 1 Watts & S. 205, S. P. It is the uncertainty of the *right* of enjoyment, and not the uncertainty of its actual enjoyment, which renders a remainder contingent. The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues. Vice-Chancellor, 2 Sandf. Ch. 533, Williamson *v.* Field.

(*b*) Parkhurst *v.* Smith, Willes, 337; Fearne on Rem. 277, 278; Vanderheyden *v.* Crandall, 2 Denio, 18; [Wendell *v.* Crandall, 1 Comst. 491.] Mr. Cornish, however, observes very justly, that there are cases in which a remainder is vested, without a present capacity for taking effect in possession, if the particular estate were to determine immediately. Essay on Rem. 102.

[1] *Vested and Contingent Remainders.* — Mr. Williams, in his work on Real Property, considers that if an estate is always ready, from its commencement to its end, to come into possession the moment the prior estates determine, it is a vested remainder; which seems also to be the meaning of the New York Revised Statutes. A comparison of two cases will disclose a defect in these definitions. If

y[1] A vested remainder imports *ex vi termini* a present title in the remainderman. The whole will must be looked at to see (1) whether the intent is to have the title vest, and (2) whether an estate is created capable of vesting. Postponing the time of taking possession is not inconsistent with an intent to have the *title* vest. *In re* Neary's Estate, 7 L. R. Ir. 311; Creeth *v.* Wilson, 9 L. R. Ir. 216; Rogers *v.* Rogers,

is limited must happen, and when it also may happen before the expiration of the estate limited in remainder, that remainder is

land is devised to testator's wife for life, and at her death to such of the testator's children as shall then be living, and the testator dies leaving children in his wife's lifetime, the persons who would take at any given instant, if the wife's estate should determine then, are ascertained, and the remainder is always ready to come into possession at any moment. Yet this is unquestionably a contingent remainder, as is held in Olney *v.* Hull, 21 Pick. 311; Thomson *v.* Ludington, 104 Mass. 193. See 248, n. (*c*); Price *v.* Hall, L. R. 5 Eq. 399, 402; Rhodes *v.* Whitehead, 2 Drew. & Sm. 532. But compare Moore *v.* Littel, 41 N. Y. 66; Browne *v.* Browne, 3 Sm. & Giff. 568, a case much doubted, especially in Holmes *v.* Prescott, 10 Jur. N. S. 507. On the other hand, a devise to testator's wife for life, remainder to B., C., D., E., and F., "provided that if any of the last five named children die before my wife, then the property to be equally divided between the survivors," gives a vested remainder, defeasible on condition subsequent. Blanchard *v.* Blanchard, 1 Allen, 223; Price *v.* Hall, L. R. 5 Eq. 399, 402; Doe *d.* Poor *v.* Considine, 6 Wall. 458, 476; Hervey *v.* M'Laughlin, 1 Price, 264. See Riley *v.* Garnett, 3 De G. & Sm. 629; Kersh *v.* Yongue, 7 Rich. Eq. 100. But see Hall *v.* Nute, 38 N. H. 422. In the case last put, the remaindermen already answer to the description by which they are to take, viz., B., C., &c. In the former case, on the other hand, they do not, for they do not take as B., C., &c., but as *survivors of A.*, and there are no devisees to answer the whole of the requisite description. L. R. 5 Eq. 402.

It is obvious that the enjoyment of the remainder by B. or C. depends upon the same contingencies in the one case as in the other, and it might be thought that when this is so, the descriptions by which the remaindermen are to take, must be the same in both cases, if the substance be regarded more than verbal distinctions. But it will be remembered that whether a certain limitation creates a vested or a

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11 R. I. 38; Bailey *v.* Hoppin, 12 R. I. 560; Faber *v.* Police, 10 S. C. 376; De Lassus *v.* Gatewood, 71 Mo. 371. Thus, a remainder to children as or when they shall attain a certain age, is contingent; but if accompanied with a gift of the whole interest in the mean time, is vested, the intent being shown to postpone the possession only Fox *v.* Fox, 19 L. R. Eq. 286; Isaacson *v.* Webster, 16 Ch. D. 47; *In re* Holt's Est., 45 L. J. Ch. 208; Peterson's App., 88 Penn. St. 397. See also Patching *v.* Barnett, 51 L. J. Ch. 74. So, also, a power of maintenance tends to show an intent to have the title vest. Partridge *v.* Baylis, 17 Ch. D. 835; Barker *v.* Barker, 16 Ch. D. 44. See also Leadbeater *v.* Cross, 2 Q. B. D. 18; Muskett *v.* Eaton, 1 Ch. D. 435; Verrill *v.* Weymouth, 68 Me. 318; Higgins *v.* Waller, 57 Ala. 396; Linton *v.* Laycock, 33 Ohio St. 128; Warren *v.* Hembree, 8 Oreg. 118. The remaindermen must be in existence at the time of vesting. Stonebraker *v.* Zollickoffer, 52 Md. 154. But in the case of a gift to a class, all of the class need not be in existence in order that the remainder may vest in any. The remainder may vest in those who are in existence, subject to open and let in those who afterwards come within the class. *In re* Lechmere & Lloyd, 18 Ch. D. 524; Farrow *v.* Farrow, 12 S. C. 168; Stonebraker *v.* Zollickoffer, *supra*; *post*, 205, 206. The courts lean toward construing limitations as remainders, rather than executory devises, and as vested rather than contingent remainders. Brackenberry *v.* Gibbons, 2 Ch. D. 417; *In re* Lechmere & Lloyd, 18 Ch. D. 524; Radford *v.* Willis, 7 L. R. Ch. 7; Linton *v.* Laycock, 33 Ohio St. 128; Toms *v.* Williams, 41 Mich. 552.

vested; as in the case of a lease to A. for life, remainder to B. during the life of A., the preceding estate determines on an event which must happen; and it may determine by forfeiture or surrender before the expiration of A.'s life, and the remainder is, therefore, vested. (*c*) A remainder, limited upon an estate tail, is held to be vested; though it must be uncertain whether
* 204 it will ever take place. (*d*) The lines of * distinction between vested and contingent remainders are so nicely drawn, that they are sometimes difficult to be traced; and, in some instances, a vested remainder would seem to possess the essential qualities of a contingent estate. The struggle with the courts has been for that construction which tends to support the remainder by giving it a vested character; for if the remainder be contingent, it is in the power of the particular tenant to defeat it by a fine or feoffment. (*a*) The courts have been subtle and scrutinizing in their discriminations between vested and contingent remainders. The stability of title has depended very much on the distinction; and the judges observed, in the case of *Parkhurst* v. *Smith*, (*b*) that if they were to adopt the definition of a contingent remainder contended for upon the argument, they would overturn all the settlements that ever were made.

(*c*) Fearne, 279–286.

(*d*) Badger *v.* Lloyd, 1 Salk. 232; 1 Ld. Raym. 523, s. c.; Ives *v.* Legge, 3 T. R. 488, note. Thus, in a case of a devise to A. and the heirs of his body, and in default thereof to B.; or in the case of a devise to B., and after his death, without male issue, to C.; and after his death, without male issue, to D.; and if D. die without male issue, none of these prior devisees being living, to E. in fee; here the remainder to B., in the one case, and to E. in the other, is vested. There was a like decision in Luddington *v.* Kime, 1 Ld. Raym. 203, though the judges were not unanimous on the question, whether the remainder was vested or contingent. A vested remainder is an interest, said Chancellor Walworth, in Hawley *v.* James (*infra*, 230), which cannot be defeated by third persons, or contingent events, or by failure of a condition precedent, *if the remainderman lives, and the estate limited to him by way of remainder continues until all the precedent estates are determined.*

(*a*) Dampier, J., 3 Maule & S. 32.

(*b*) Willes, 837.

contingent remainder, may depend upon the intent of the party creating it as well as upon the conditions of its taking effect. The different words used in expressing the same contingencies sufficiently show a different intent in the two cases. In the first case, the benefit does not purport to be conferred on the children as children, or as individuals named, but as survivors, which indicates that an immediate vesting is not intended; in the second case, the devise is to them as B., C., &c., and there is no obstacle to supposing an immediate vesting to have been intended.

A limitation, after a power of appointment, as, to the use of A. for life, remainder to such use as A. shall appoint, and in default of appointment, remainder to B., is a vested remainder, though liable to be devested by the execution of the power. (*c*) The better opinion also, is, that if there be a devise to trustees and their heirs, during the minority of a beneficial devisee, and then to him, or upon trust to convey to him, it conveys a vested remainder in fee, and takes effect in possession when the devisee attains twenty-one. The general rule is, that a trust estate is not to continue beyond the period required by the purposes of the trust; and notwithstanding the devise is to trustees and their heirs, they take only a chattel interest, for the trust, in such a case, does not require an estate of a higher quality. If the devisee dies before the age of twenty-one, the estate descends to his heirs as a vested inheritance. The Master of the Rolls said, that the trustees in such a case had an * estate for so * 205 many years as the minority of the devisee might last. (*a*)

Vested remainders are actual estates, and may be conveyed by any of the conveyances operating by force of the statute of uses. Where estates tail exist, they may be destroyed by a common recovery suffered by the tenant in tail; for that destroys everything as well remainders and reversions, and all ulterior limitations, whether by shifting use or executory devise. But if a particular tenant for life or years, on whose estate a vested remainder depends, makes a tortious conveyance, which merely works a forfeiture of his particular estate, and does not ransack the whole estate, the next remainderman, whose estate was disturbed and displaced, may take advantage of the forfeiture, and enter. (*b*) *y*[1]

(*c*) Cunningham *v.* Moody, 1 Ves. 174; Doe *v.* Martin, 4 T. R. 39. If a *mere power* be given to appoint a remainder among a number of ascertained persons, with a limitation over to the whole number of persons in default of appointment, the remainder is vested, subject to be devested by the execution of the power. Sugden on Powers, 151, 5th London ed.

(*a*) Doe *v.* Lea, 3 T. R. 41; Stanley *v.* Stanley, 16 Ves. 491; Doe *v.* Nicholls, 1 B. & C. 336. Mr. Cornish, in his Essay on Remainders, 105, 107, considers this principle as a glaring anomaly in the law, holding an estate with words of inheritance a mere chattel devolvable upon executors; and that if it was to be applied to conveyances instead of wills, it would extirpate the most rooted principles of the system of property.

(*b*) Litt. sec. 416; Co. Litt. 252, a.

y[1] So, also, if for any reason the life tenant cannot take, the remaindermen take at once. Jull *v.* Jacobs, 8 Ch. D. 703; Fox *v.* Rumery, 68 Me. 121. But

Where a remainder is limited to the use of several persons, who do not all become capable at the same time, as a devise to A. for life, remainder to his children; the children living at the death of the testator take vested remainders, subject to be disturbed by afterborn children. The remainder vests in the persons first becoming capable; and the estate opens and becomes devested in quantity by the birth of subsequent children, who are let in to take vested proportions of the estate. (*c*) So, a devise to A. in fee, *if* or *when* he attains the age of twenty-one years, *206 becomes a * vested remainder, provided the will contained an intermediate disposition of the estate, or of the rents and profits, during the minority of A., or if it directed the estate to go over in the event of A. dying under age. (*a*) But if there be no intermediate disposition of the estate, the estate so devised is not vested, but becomes a contingent or executory devise. (*b*)

3. Of Contingent Remainders. — A contingent remainder is limited so as to depend on an event or condition which is dubious and uncertain, and may never happen or be performed, or not until after the determination of the particular estate. It is not the

(*c*) Fearne, 394–396; Doe *v.* Perryn, 3 T. R. 484; Lawrence *v.* Maggs, 1 Eden, 453; Doe *v.* Provoost, 4 Johns. 61; Right *v.* Creber, 5 B. & C. 866; Annable *v.* Patch, 3 Pick. 360. A devise to B. for life, remainder to his children; but if he dies without leaving children, remainder over. Both the remainders are *contingent*, but if B. afterwards marries, and has a child, the remainder becomes *vested* in that child, subject to open and let in afterborn children, and the remainders over are gone forever. The remainder becomes a vested remainder in fee in the child as soon as it is born, and it does not wait for the parent's death; and if the child dies in the lifetime of the parent, the vested estate in remainder descends to its heirs. Doe *v.* Perryn, 3 T. R. 484, and see particularly the opinion of Mr. Justice Buller in that case. Right *v.* Creber, 5 B. & C. 866; Story, J., in Sisson *v.* Seabury, 1 Sumner, 243; Hannan *v.* Osborn, 4 Paige, 336; Marsellis *v.* Thalhimer, 2 id. 35. See also *infra*, 221 note, 251 note, 283 note.

(*a*) Boraston's Case, 3 Co. 19; Doe *v.* Underdown, Willes, 293; Goodtitle *v.* Whitby, 1 Burr. 228; Doe *v.* Lea, 3 T. R. 41; Bromfield *v.* Crowder, 4 Bos. & P. 313; Doe *v.* Moore, 14 East, 601.

(*b*) Bullock *v.* Stones, 2 Ves. 521; Sir William Grant, in Hanson *v.* Graham, 6 id. 243.

if there is a gift over upon a condition subsequent, and the failure of the first devisee is not by reason of the condition, the estate goes to the heirs of the testator. M'Carthy *v.* M'Carthy, 1 L. R. Ir. 189. And even an invalid devise over will defeat the first estate on the happening of the condition, unless the gift over is by way of substitution. Hurst *v.* Hurst, 21 Ch. D. 278; Doe *v.* Eyre, 5 C. B. 713; Gordier *v.* Johnson, 18 Ch. D. 441. As to the effect of a feoffment in destroying contingent remainders, see Faber *v.* Police, 10 S. C. 376; McElwee *v.* Wheeler, ib. 392.

uncertainty of enjoyment in future, but the uncertainty of the right to that enjoyment, which marks the difference between a vested and contingent interest. (*c*) The contingency on which the remainder is made to depend, must be a common or near possibility, as death, or death without issue, or coverture. If it be founded on a remote possibility, as a remainder to a corporation not then in being, or to the heirs of B., who is not then in being (and which the law terms a possibility upon a possibility), the remainder is void. (*d*) [1] The definition of a contingent remainder embraces four species of them; and Mr. Fearne is of opinion * that every known instance of a contingent * 207 remainder may be reduced to one or the other of the following classes: —

(*c*) Fearne on Rem. 3; Preston on Estates, i. 71, 74. By the statute in 1844, of 7 and 8 Vict. c. 76, for "simplifying the assurance of property by deed," contingent remainders are abolished, and every estate which would have taken effect as such, shall take effect, if in a will, as an executory devise; and if in a deed, as an executory limitation or estate of the same nature as an executory devise. Contingent remainders are by this statute abolished thereafter. Judge Williams, in his plain and familiar, but quite learned "Principles of the Law of Real Property," says that there is not an instance to be found of a valid contingent remainder, prior to the reign of Henry VI. The masterly treatise of Mr. Fearne, and which is now in a great degree rendered useless by the late statutes, presented, as he observes, a beautiful specimen of an endless variety of complex cases, all reducible to a few plain and simple principles. But the act of 1845, c. 106, repealed the act of 7 and 8 Vict. c. 76, which abolished contingent remainders retrospectively, and allowed contingent interests to be disposed by deed, but not to defeat or enlarge an estate tail.

(*d*) The Mayor of London *v.* Alford, Cro. Car. 576; 2 Co. 51, Cholmley's Case. This difficulty is provided for by the New York Revised Statutes, i. 724, sec. 26, which declare, that no future estate, otherwise valid, should be void on the ground of the probability or improbability of the contingency on which it is limited to take effect.

[1] *Remote Possibilities.* — This rule as to a possibility upon a possibility has been thought to be obsolete. Cole *v.* Sewell, 4 Dr. & War. 1, 32; s. c. 1 Con. & L. 335; affirmed 2 H. L. C. 186. See also Wms. R. P. 9th ed. 262. However this may be, another rule or a particular application of the former rule is still in force. The rule referred to forbids the raising of successive estates by purchase to unborn children, that is, to an unborn child for life, followed by a remainder to any child of such unborn child. In Monypenny *v.* Dering, 2 De G., M. & G. 145, 168, 170, Lord St. Leonards said that he had never meant to interfere with this. It has been argued that it was only an instance of the later rule against perpetuities, Lewis on Perpetuities, 408 *et seq.*, a view which seems to be in some degree sanctioned by the qualification quoted with approbation by Wood, V. C., from Mr. Preston, "unless there be a limitation of the time within which it is to take effect." Cattlin *v.* Brown, 11 Hare, 372. But it is thought to be an independent rule of general application in Wms. R. P. 9th ed. 264, and Appendix (F), where this subject is well treated.

(1.) The first sort is where the remainder depends on a contingent determination of the preceding estate, and it remains uncertain whether the use or estate limited *in futuro* will ever vest. Thus, if A. makes a feoffment to the use of B., till C. returns from Rome, and after such return remainder over in fee, the remainder depends entirely on the uncertain or contingent determination of the estate in B., by the return of C. from Rome. (*a*)

(2.) The second sort is where the contingency, on which the remainder is to take effect, is independent of the determination of the preceding estate, and must precede the remainder. As if a lease be to A. for life, remainder to B. for life, and if B. die before A., remainder to C. for life; the event of B. dying before A. does not affect the determination of the preceding estate, but is a dubious event which must precede, in order to give effect to the remainder in C. (*b*)

(3.) A third kind is where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it. Thus, if a grant be made to A. for life and after the death of B., to C. in fee; here, if the death of B. does not happen until after the death of A., the particular estate is determined before the remainder is vested, and it fails from the want of a particular estate to support it. (*c*)

(4.) The fourth class of contingent remainders is where the person to whom the remainder is limited is not ascertained, or not in being. As in the case of a limitation to two persons for life, remainder to the survivor of them; or in the case of a lease
* 208 to A. for life, remainder to the right heirs * of B. then living. B. cannot have heirs while living, and if he should not die until after A., the remainder is gone, because the particular estate failed before the remainder could vest. (*a*)

(*a*) 3 Co. 20, a, b; Lovie's Case, 10 Co. 85, a.

(*b*) 3 Co. 20, a; Co. Litt. 378, a.

(*c*) 3 Co. 20, a.

(*a*) Cro. Car. 102; 3 Co. 20, a; Fearne, 3–6. The examples which are here cited by Mr. Fearne to support and illustrate this classification of contingent remainders, are mostly taken from Boraston's Case, 3 Co. 19. As Mr. Fearne's treatise has attained the authority of a text book on this abstruse branch of the law, I have followed, though without entirely approving of his arrangement. The more comprehensive division by Sir William Blackstone has the advantage of being less complex and more simple. The definition in the New York Revised Statutes, i. 723, sec. 13, is brief and precise. A remainder, says the statute, is *contingent, whilst the person to whom,*

*There is a distinction which operates by way of exception to the third class of contingent remainders. Thus, a limitation for a long term of years, as, for instance, to A. for eighty years, if B. should live so long, with the remainder over, after the death of B., to C. in fee, gives a *vested* remainder to C., notwithstanding it is limited to take effect on the death of [B.], which possibly may not happen until after the expiration of the preceding estate for eighty years. The possibility that a life in being will endure thereafter for that period, is so exceedingly small, that it does not amount to a degree of uncertainty sufficient to constitute a *contingent* remainder. If, however, the limitation had been for a term of years so short, say twenty-one years, as to leave a common possibility that the life on which it is determinable may exceed it, then the remainder would be contingent, and there must be a present vested freehold estate to support it, and pre- *209

or the event upon which it is limited to take effect, remains uncertain. Contingent remainders are divided by Sir William Blackstone into two kinds, viz.: remainders limited to take effect either to a dubious and uncertain *person*, or upon a dubious and uncertain *event*. The three first of Mr. Fearne's remainders are all resolvable into the contingency of a dubious and uncertain event, and it is only the last that is limited to a dubious and uncertain person. Lord Ch. J. Willes, in the opinion which he gave before the House of Lords, on behalf of all the judges, in the case of Parkhurst *v.* Smith (Willes, 327), declared that there were but two sorts of contingent remainders: (1.) Where the person to whom the remainder was limited was not *in esse*. (2.) Where the commencement of the remainder depended on some matter collateral to the determination of the particular estate. He put, as an instance of the second kind, the case of a limitation to A. for life, remainder to B. after the death of C., or when D. returns from Rome; and Mr. Fearne's three first species of contingent remainders are included under the second class here stated. It must be admitted, in the words of Ch. J. Willes, that "the notion of a contingent remainder is a matter of a good deal of nicety." Professor Wooddeson, in his Vinerian Lectures (i. 191), though he had the classification of Mr. Fearne before him, followed that of his illustrious predecessor. Mr. Cornish, in his recent work, severely criticises Fearne's classification of contingent remainders, as not being tenable; though he admits that it imparted a beautiful and scientific arrangement to his essay. Three of Mr. Fearne's sorts of remainders are avowedly identical. Cruise, on the other hand, in his digest, has closely copied the arrangement of Fearne. On this vexatious subject of classifications, I am disposed to concur in the criticisms of Mr. Cornish; but in recurring to the chapter on expectant estates, in the commentaries of Sir William Blackstone, what a relief to the patience and taste of the reader! The doctrine of remainders, whether vested or contingent, is there most ably digested, and reduced to a few simple elementary principles. Its merits have never been duly acknowledged by subsequent writers on the subject. It far surpasses them all, if we take into one combined view its perspicuity, simplicity, comprehension, compactness, neatness, accuracy, and admirable precision. I have read the chapter frequently, but never without a mixture of delight and despair.

vent the limitation over from being void as a freehold to commence *in futuro*. (*a*)

Exceptions exist also to the generality of the rule which governs the fourth class of contingent remainders. Thus, if the ancestor takes an estate of freehold, and an immediate remainder is limited thereon, in the same instrument, to his heirs in fee, or in tail, the remainder is not contingent, or in abeyance, but is immediately executed in possession in the ancestor, and he becomes
* 210 seised in fee or in * tail. So, if some intermediate estate for life, or in tail, be interposed between the estate of freehold in A. and the limitation to his heirs, still the remainder to his heirs vests in the ancestor, and does not remain in contingency or abeyance. If there be created an estate for life to A., remainder to the heirs of his body, this is not a contingent remainder to the heirs of the body of A., but an immediate estate tail in A.; or if there be an estate for life to A., remainder to B. for life, remainder to the right heirs of A., the remainder in fee is here vested in A., and after the death of A., and the termination of the life estate in B., the heirs of A. take by descent as heirs, and not by purchase. (*a*) The possibility that the freehold in A. may determine in his lifetime, does not keep the subsequent limitation to his heirs from attaching in him; and it is a general rule, that when the ancestor takes an estate of freehold, and there is in the same conveyance an unconditional limitation to his heirs in fee, or in tail, either immediately, without the intervention of any estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately with the interposition of some such intervening estate, the subsequent limitation vests immediately in the ancestor, and becomes, as the case may be, either an estate of inheritance in possession, or a vested remainder. (*b*) The rule does not operate so as absolutely to merge the particular estate of freehold, where the limitations intervening between the preceding freehold and the subsequent limitation to the heirs, are contingent, because that would destroy such intervening limitations. The two limitations are united, and executed in the ancestor, only until such time as the intervening limitations become

(*a*) Napper *v.* Sanders, Hutton, 118; Opinion of Lord Ch. J. Hale, in Weale *v.* Lower, Pollexfen, 67; Fearne on Remainders, 17–28.

(*a*) Shelley's Case, 1 Co. 104; 2 Rol. Abr. 417.

(*b*) Fearne on Remainders, 32.

vested, and then they open and become separate, in order to admit such limitations as they arise. (*c*) But if the estate limited to the ancestor be merely an equitable or trust estate, and the subsequent *limitation to his heirs carries the legal *211 estate, the two estates will not incorporate into an estate of inheritance in the ancestor, as would have been the case under the rule in Shelley's case, if they had been of one quality, that is, both legal and both equitable estates; and the limitation to the heirs will operate as a contingent remainder. (*a*)

*The freehold in the ancestor, and the limitation to his *212 heirs, must be by the same deed or instrument, or they will not consolidate in the ancestor. If he acquires the freehold by one deed, and the limitation to his heirs be by another, the limitation will continue, as it originally was, a contingent remainder. (*a*)

(*c*) Fearne on Remainders, 36.

(*a*) Tippin *v.* Cosin, Carth. 272; 4 Mod. 380, s. c.; Jones *v.* Lord Say and Seal, 8 Viner, 262, pl. 19; Shapland *v.* Smith, 1 Bro. C. C. 75; Silvester *v.* Wilson, 2 T. R. 444; [Ward *v.* Amory, 1 Curtis, 419.] Mr. Fearne on Remainders, 67, supposes the rule to be the same if the case was reversed, and the ancestor had the legal estate, and the limitation over to his heirs was an equitable estate, as in a devise to A. for life, and after his death to the use of trustees, in trust for the heirs of his body. If such a devise in trust would not be a trust or use executed by the statute of uses, or entitled to the same construction as a legal estate, as I should think that it ought, under the doctrine in Wright *v.* Pearson, 1 Eden, 119, yet the New York Revised Statutes would operate to destroy such a trust; for it is declared (i. 727, 728, sec. 47, 49), that every disposition of lands, by deed or devise, shall be directly to the person in whom the right to the possession and profits shall be intended to be vested, and not to any other to the use of, or in trust for, such person; and if made to one or more persons, to the use of, or in trust for another, no estate or interest, legal or equitable, shall vest in the trustee. The legal estate is attached to the beneficial interest. There would be no difficulty, therefore, under that statute, of the union of the two estates in the case stated by Mr. Fearne, for they would both be legal estates; and upon the doctrine of the English law, the devisee for life would take an estate tail. But another insuperable obstacle to that conclusion occurs under the New York Revised Statutes, which have destroyed the rule in Shelley's case, root and branch. It is declared (New York Revised Statutes, i. 725, sec. 28) that where a remainder shall be limited to the heirs, or heirs of the body of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs, or heirs of the body, of such tenant for life, shall be entitled to take *as purchasers*, by virtue of the remainder so limited to them. The limitation, then, in the case stated by Mr. Fearne, instead of being an estate tail, settles down into a contingent remainder. This is arriving, *diverso intuitu*, to the same result with the English theory. The extent and consequences of this alteration in the doctrine of real estates, we shall have occasion to consider hereafter.

(*a*) Moore *v.* Parker, 1 Ld. Raym. 37, where Lord Ch. J. Holt traces back the distinction to 29 Edw. III.; Doe *v.* Fonnereau, Doug. 487.

But if the estate be limited to A. for life by one deed, and afterwards, in his lifetime, to the heirs of his body, under the execution of a power of appointment contained in the same deed, the limitations unite according to the general rule; and on this principle, that a limitation under a power contained in a conveyance to uses operates as a use created by and arising under the conveyance itself. It is a branch of one and the same settlement. (*b*) This arises from the retrospective relation which appointments bear to the instrument containing the power. (*c*)

Another exception to the fourth class of contingent remainders is where there is a limitation by a special designation by will to the heirs of a person *in esse*, as to *the heirs* of the body of A. *now living*. The limitation is deemed to be vested in the heirs so designated by purchase, and, consequently, there is no contingent remainder in the case. Heirs are construed here to be words of purchase, and not of limitation, in order to carry into effect the manifest intention of the testator, which, in this instance, controls the common-law maxim, that *nemo est hæres viventis*. (*d*)

(*b*) Butler's note, 261, to Co. Litt. 299, b. The observations of Mr. Fearne on this point are with his usual acuteness. Fearne on Remainders, 85.

(*c*) Mr. Preston on Abstracts of Title, i. 115, speaks too generally when he says, that all estates, arising from the execution of powers, operate by way of executory devise or shifting use. There is no doubt that a remainder may arise under the execution of a power. Cornish on Remainders, 45.

(*d*) Burchett *v.* Durdant, 2 Vent. 311; James *v.* Richardson, 2 Jones, 99; 2 Lev. 232, s. c.; Goodright *v.* White, 2 Wm. Bl. 1010. Lord Coke says (Co. Litt. 24, b), that if lands be given to A. and the *heirs female of his body*, and he dies, leaving a son and daughter, the daughter shall inherit. But if A. hath a son and daughter, and a lease for life be made, remainder to *the heirs female of the body of* A., the heir female takes nothing: for she must be both heir and heir female to take by purchase, and her brother, and not she, is heir. The distinction turns on the difference between the operation of words of limitation, and words of purchase. In the first case the daughter takes by descent, and in the second she takes by purchase, and must answer to the whole description, of being both *heir* and *female*. Mr. Hargrave, in a long and learned note (note 145), undertakes to vindicate the reasonableness and solidity of this distinction of Lord Coke, against the severity of modern criticism. Mr. Fearne (p. 277) refers with great approbation to this note of Mr. Hargrave; but I notice it only as one strong illustration of the fact, that the English law of real property has, in the lapse of ages, become incumbered with much technical and abstruse refinement, which destroys its simplicity and good sense, and renders it almost impossible for ordinary minds to obtain the mastery of the science. Lord Chancellor Cowper's scorn of this distinction is very apparent in his powerful and spirited opinion in Brown *v.* Barkham (Prec. in Ch. 461), where he says, that "it has no foundation in natural reason, but is raised and supported purely by the artificial reasoning of lawyers." Lord Hardwicke, also, when the same case was brought

*There is also a class of cases under this branch of the *213
law of remainder, which relate to the condition annexed to a preceding estate, and which give rise to the question whether it be not a condition *precedent* tending to give effect to the ulterior limitations. Mr. Fearne (*a*) distinguishes such cases by three classes: *first*, where there are limitations after a preceding estate, which is made to depend on a contingency that never takes effect; and the decisions show, that in order to support the testator's *intention*, the contingency is deemed to affect only the estate to which it is annexed, without extending to, or running over, the whole *ulterior train of limitations. (*a*) *Secondly*, *214
limitations over upon a conditional contingent determination of a preceding estate where such preceding estate never takes effect. Here there is no apparent distinction between the preceding estate and those which follow it, and, consequently, the contingency will extend to, and connect itself with, all the subsequent limitations, and destroy them, as contingent remainders, depending on a contingency which never happens. (*b*) *Thirdly*, limitations over upon the determination of a preceding estate by a contingency, which, though such preceding estate takes effect, never happens. In this case the subsequent limitations will take place. (*c*)

4. Of the Rule in Shelley's Case. — The rule in Shelley's case has been already alluded to, but it occupies so prominent a place in the history of the law of real property, that it ought not to be

before him, on a bill of review, declared himself "fully convinced of the unreasonableness of the rule," though he bowed to the authority of it.

(*a*) Essay on Remainders, 300.

(*a*) Napper *v.* Sanders, Hutton, 119; Tracy *v.* Lethieullier, 3 Atk. 774; Amb. 204, s. c.; Horton *v.* Whitaker, 1 T. R. 346.

(*b*) Davis *v.* Norton, 2 P. Wms. 390; Doe *v.* Shippard, Doug. 75.

(*c*) Scatterwood *v.* Edge, 1 Salk. 229; Avelyn *v.* Ward, 1 Ves. 422. Lord Hardwicke decided, in Tracy *v.* Lethieullier, in favor of a vested remainder after a conveyance of a conditional or determinable fee. This abstruse point is learnedly discussed in the American Jurist for January, 1843. To those who wish to pursue into greater detail these abstruse distinctions, I refer to Mr. Fearne's analysis of the cases which declare and enforce them, in order to carry into effect the intention of the testator. Fearne on Rem. 300–317. It would certainly be incompatible with the general purpose of these essays, to be raking in the ashes of antiquated cases, and critically shifting dry facts and circumstances arising on wills and settlements, merely to arrive at some technical reasoning, adapted to promote the testator's or the settler's views. As far as it is necessary, on this subject, it is happily done to our hand, by the acute investigations of Mr. Fearne himself.

passed over without more particular attention. In *Shelley's case*, (*d*) the rule was stated, on the authority of several cases in the Year Books, to be, "that when the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the *215 same *gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, *the heirs* are words of limitation of the estate, and not words of purchase." Mr. Preston, in his elaborate essay on the rule, (*a*) gives us, among several definitions, one of his own, which appears to be full and accurate. "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." (*b*) The word *heirs*, or *heirs of the body*, create a remainder in fee, or in tail, which the law, to prevent an abeyance, vests in the ancestor, who is tenant for life, and by the conjunction of the two estates he becomes tenant in fee or in tail; and whether the ancestor takes the freehold by express limitation, or by resulting use, or by implication of law; in either case the subsequent remainder to his heirs unites with, and is executed on, his estate for life. Thus, where A. was seised in fee, and covenanted to stand seised to the use of his heirs male, it was held that as the use during his life was undisposed of, it of course remained in him for life by implication, and the subsequent limitation to his heirs attached in him. (*c*)

The cases from the Year Books, as cited in *Shelley's case*, are 40 Edw. III., 38 Edw. III., 24 Edw. III., 27 Edw. III.; and Mr. Preston gives at large a translation of the first of these

(*d*) 1 Co. 104. (*a*) Preston on Estates, i. 263–419.

(*b*) I have ventured to abridge the definition in a slight degree, and with some small variation in the expression, without intending to impair its precision.

(*c*) Pibus *v.* Mitford, 1 Vent. 372; Hayes *v.* Foorde, 2 Wm. Bl. 698; Fearne on Remainders, 42, 52, 53. It was held, in Doe *v.* Welford, 12 Ad. & El. 61, on the authority of Baron Gilbert, in 6 Bacon's Abr. 7th ed. 655, tit. Remainder and Reversion, B. 2, and of Fearne on Cont. Rem. 29, that a remainder in tail, given to a party who takes a previous life estate by the same event, *does not exclude intermediate estates*, under any just construction of the rule in Shelley's case.

cases, as being one precisely in point in favor * of the * 216 rule. (*a*) Sir William Blackstone, in his opinion in the case of *Perrin* v. *Blake*, (*b*) relies on a still earlier case, in 18 Edw. II., as establishing the same rule. It has certainly the pretension of high antiquity, and it was not only recognized by the court in the case of Shelley, but it was repeated by Lord Coke, in his Institutes, as a clear and undisputed rule of law, and it was laid down as such in the great abridgments of Fitzherbert and Rolle. (*c*) The rule is equally applicable to conveyances by deed, and to limitations in wills, whenever the limitation gives the legal, and not the mere trust or equitable title. But there is more latitude of construction allowed in the case of wills, in furtherance of the testator's intention; and the rule seems to have been considered as of more absolute control in its application to deeds. When the rule applies, the ancestor has the power of alienation, for he has the inheritance in him; and when it does not apply, the children or other relations, under the denomination of "heirs," have an original title in their own right, and as purchasers by that name. The policy of the rule was, that no person should be permitted to raise in another an estate which was essentially an estate of inheritance, and at the same time make the heirs of that person purchasers.

Various considerations have been supposed to have concurred in producing the rule, but the judges, in *Perrin* v. *Blake*, imputed the origin of it to principles and policy deduced from feudal tenure; and that opinion has been generally followed in all the succeeding discussions.[1] The feudal policy undoubtedly favored

(*a*) The case of the Provost of Beverly, 40 Edw. III.; Preston on Estates, i. 304.
(*b*) Harg. Law Tracts, 501.
(*c*) Fitz. Abr. tit. Feoffment, pl. 109; Co. Litt. 22 b, 319 b; 2 Rol. Abr. 417.

[1] *The Rule in Shelley's Case* has been well explained in Williams on Real Property, part 2, c. 1. It is there observed, ib. c. 2; 9th ed. 254, n. (*e*), that one very good reason why a remainder to the heirs of a person who takes a prior estate of freehold was not held to be a contingent remainder was, that the rule was settled before contingent remainders were recognized by the law; citing the remark of Hankey, J., in Y. B. 11 Hen. IV. 74. *x*[1]

x[1] Further applications of the rule will be found in Cooper *v.* Kynock, 7 L. R. Ch. 398; *In re* White and Hindle's Contract, 7 Ch. D. 201; Dickson *v.* Satterfield, 53 Md. 317; Butler *v.* Huestis, 68 Ill. 594; Andrews *v.* Spurlin, 35 Ind. 262; Kleppner *v.* Laverty, 70 Penn. St. 70; Pressgrove *v.* Comfort, 58 Miss. 644; Carter *v.* Reddish, 32 Ohio St. 1. See also Bennett *v.* Garlock, 10 Hun, 328, 341.

descents as much as possible. There were feudal burdens which attached to the heir when he took as heir by descent, from
*217 which he would *have been exempted if he took the estate in the character of purchaser. An estate of freehold in the ancestor attracted to him the estate imported by the limitation to his heirs; and it was deemed a fraud upon the feudal fruits and incidents of wardship, marriage, and relief, to give the property to the ancestor for his life only, and yet extend the enjoyment of it to his heirs, so as to enable them to take as purchasers, in the same manner and to the same extent precisely as if they took by hereditary succession. The policy of the law would not permit this, and it accordingly gave the whole estate to the ancestor, so as to make it descendible from him in the regular line of descent. Mr. Justice Blackstone, in his argument in the Exchequer Chamber, in *Perrin* v. *Blake*, (*a*) does not admit that the rule took its rise merely from feudal principles; and he says he never met with a trace of any such suggestion in any feudal writer. He imputes its origin, growth, and establishment to the aversion that the common law had to the inheritance being in abeyance; and it was always deemed by the ancient law to be in abeyance during the pendency of a contingent remainder in fee, or in tail. Another foundation of the rule, as he observes, was the desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner, by vesting the inheritance in the ancestor, and thereby giving him the power of disposition. Mr. Hargrave, in his *Observations concerning the rule in Shelley's case*, (*b*) considers the principle of it to rest on very enlarged foundations; and though one object of it might be to prevent frauds upon the feudal lord, another and a greater one was, to preserve the marked distinctions between descent and purchase, and prevent title by descent from being stripped of its proper incidents, and disguised with the qualities and properties of a purchase. It would, by that invention, become a compound of descent and purchase — an amphibious species of inher-
*218 itance, *or a freehold with a perpetual succession to heirs without the other properties of inheritance. In *Doe* v. *Laming*, (*a*) Lord Mansfield considered the maxim to have been originally introduced, not only to save to the lord the fruits of

(*a*) Harg. Law Tracts, 489. (*b*) Ib. 551.
(*a*) 2 Burr. 1100.

his tenure, but likewise for the sake of specialty creditors. Had the limitation been construed a contingent remainder, the ancestor might have destroyed it for his own benefit; and if he did not, the lord would have lost the fruits of his tenure, and the specialty creditors their debts.

But whatever may have been the original cause and true policy of the rule, it has been firmly established as an axiom in the English law of real property for near five hundred years; and yet it is admitted to interfere, in most cases, with the presumed, and in many others with the declared, intention of the parties to the instrument to which it is applied. The rule as to legal estates has had a prescriptive and uncontrollable authority; but the courts of equity have not considered themselves bound to an implicit observance of it in respect to limitations which do not include or carry the legal estate. In marriage articles, for instance, where there is a covenant to settle an estate upon A. for life, and the heirs of his body, the courts look at the end and consideration of the settlement, and beyond the legal operation of the words; and heirs of the body are construed to be words of purchase, and an estate for life only is decreed to the first taker, and an estate tail to his eldest son, in order to carry marriage articles into execution by way of strict settlement. (*b*) So, also, in decreeing the execution of executory trust, the court of chancery has departed from what would be the legal operation of the words limiting the trust, when applied to legal estates; and the words "heirs of the body" of *cestui que trust*, although * preceded by a * 219 limitation for life to the *cestui que trust*, are construed to be words of purchase, and not of limitation. (*a*) When the testator devises the legal estate, he takes upon himself to order the limitations, and the rules of law will control them. But when the will or settlement is in the light of a set of instructions merely for the purpose of a conveyance to be made by the directions of chancery, a court of equity will follow the instructions, and execute the trust in conformity to the intention. (*b*) In *Bagshaw* v.

(*b*) Trevor *v.* Trevor, 1 Eq. Cas. Abr. 387, pl. 7; Jones *v.* Laughton, ib. 392, pl. 2; Streatfield *v.* Streatfield, Cases temp. Talb. 176; Honour *v.* Honour, 2 Vern. 658; Bale *v.* Coleman, 1 P. Wms. 142; Highway *v.* Banner, 1 Bro. C. C. 584.

(*a*) Fearne on Remainders, 141; Tallman *v.* Wood, 26 Wend. 1.

(*b*) Yates, J., in Perrin *v.* Blake, Roberts *v.* Dixwell, Sandys *v.* Dixwell, and Pyott *v.* Dixwell, 1 West, temp. Hardw. 542; Wood *v.* Burnham, 6 Paige, 513.

Spencer, (*c*) there was a devise to trustees in fee, in trust, and after divers limitations in trust, *then to B. for life*, remainder to the trustees and their heirs, during his life, to preserve contingent remainders, and after the death of B., *remainder to the heirs of his body*. Lord Hardwicke decided that this was a trust in equity, and that B. did not take an estate tail under the will; for the words "heirs of the body" were taken to be words of purchase to fulfil the manifest intent. This decision was founded upon a most elaborate examination of the cases, and a train of very forcible and ingenious reasoning. But it has not been able to endure the scrutiny of subsequent criticism. There is a settled distinction between trusts executory and trusts executed. In the former something is left to be done, some conveyance thereafter to be made; and where, as in the case of marriage articles, a trust is created to be subsequently carried into execution. (*d*) This discrimination Lord Hardwicke confounded in the case cited; and he endeavored to establish one general line of distinction between trusts and legal estates, in order to avoid the force of the decision of the K. B. in *Coulson* v. *Coulson*, (*e*) in * 220 which the rule in Shelley's * case had been emphatically and recently enforced in a similar case. The decision has been severely questioned, and permanently overruled, by Lord Northington, in *Wright* v. *Pearson*, (*a*) and by Lord Thurlow, in *Jones* v. *Morgan*, (*b*) on the ground that the case before Lord Hardwicke was not the case of an executory trust. It is settled that the same construction ought to be put upon, and the same rule of law applied to, words of limitation, in cases of trusts and of legal estates, except where the limitations were imperfect, and something was left to be done by the trustee, or, in other words, except the trust was executory, and not a trust executed. If a limitation in trust was perfected, and declared by the testator, it receives the same construction as an estate executed. (*c*)

(*c*) 1 Ves. 142; 2 Atk. 346, 578; 1 Coll. Jurid. No. 15. In this last work, the case is very fully reported, and taken from an original MS.

(*d*) Fearne on Remainders, 141, 175–181.

(*e*) 2 Atk. 248; Str. 1125.

(*a*) 1 Eden, 119; Fearne on Remainders, 159–169.

(*b*) 1 Bro. C. C. 206.

(*c*) In Papillon *v.* Voice, 2 P. Wms. 471, Lord King very clearly illustrated the distinction between executory and executed trusts. Where the devise was of lands to B. for life, with remainder to trustees, to support contingent remainders, remain-

There are several cases in which, in a devise, the words *heirs, or heirs of the body*, have been taken to be words of purchase, and not of limitation, in opposition to the rule in Shelley's case. (1.) Where no estate of freehold is devised to the ancestor, or he is dead at the time of the devise. In that case the heir cannot take by descent, when the ancestor never had in him any descendible estate. It is the same thing if the ancestor takes only a chattel interest by the devise; for if there be no vested estate of freehold interposed between the term of the ancestor and the estate of his heirs, the latter can take only by way of executory devise; and if there be such a vested estate, the contingent remainder to the heir is supported by the intermediate *estate, and *221 not by the chattel interest of the ancestor. (*a*) (2.) Where the testator annexes words of explanation to the word "heirs," as to the heirs of A. *now living*, showing thereby that he meant by the word "heirs" a mere *descriptio personarum*, or specific designation of certain individuals; (*b*) or where the testator superadds words of explanation, or fresh words of limitation, and a new inheritance is grafted upon the heirs to whom he gives the estate. Thus it is in the case of a limitation to A. for life only, and to the next heir male of his body, and the heirs male of such heir male; and in the case of a devise of gavelkind lands to A., and the heirs of her body, as well female as male, to take as tenants in common. In such cases it appears that the testator intended the heirs to be the root of a new inheritance, or the stock of a new descent, and the denomination of heirs of the body was merely descriptive of the persons who were intended to take. (*c*)

der to the heirs of the body of B., the limitation was held to be an estate tail in B.; but so far as the will directed lands to be purchased, and settled in the same way, it was an executory estate or trust, and the intention was to govern, and not the rule of law.

(*a*) Sir Thomas Tippen's case, cited in 1 P. Wms. 359; Co. Litt. 319, b.

(*b*) Burchett *v.* Durdant, 2 Vent. 311; Carth. 154, s. c.

(*c*) Archer's case, 1 Co. 66; Case put by Anderson in Shelley's case, 1 Co. 95, b; Lisle *v.* Gray, 2 Lev. 223; T. Raym. 315, s. c.; Luddington *v.* Kime, 1 Ld. Raym. 203; Backhouse *v.* Wells, 1 Eq. Cas. Abr. 184, pl. 27; King *v.* Burcel, Amb. 379; Goodright *v.* Pullyn, 2 Ld. Raym. 1437; Wright *v.* Pearson, 1 Eden, 119; Doe *v.* Laming, Burr. 1100; Mr. Justice Blackstone's argument, in Perrin *v.* Blake, Harg. Law Tracts, 504, 505; Brant *v.* Gelston, 2 Johns. Cas. 384. In a devise to A. and to *his male children* and *their heirs*, to be *equally divided amongst them and their heirs forever*, Judge Story held, after a critical review of numerous cases, and in which he

The great difficulty has been to settle when the rule, and when the intention in opposition to the rule, shall prevail. We have seen the effort that was made by Lord Hardwicke, in *Bagshaw* v. *Spencer*, to allow the rule to be controlled by the intention of the testator; and in the great case of *Perrin* v. *Blake* the Court of K. B. made the rule yield to the testator's manifest intent, even where the limitation was of a legal, and not of a trust estate.

In that case (*d*) the testator declared in his will his intent and meaning to be, that none of his children should sell his estate for a longer time than their lives; and to that "intent" he * 222 *devised a part of his estate to his son John, for and during the term of his natural life, remainder over during his life, remainder to the heirs of the body of John, with remainders over. The question was, whether the son took an estate for life, or an estate tail, under the will; and that depended upon the further question, whether the words "heirs of the body" were, as used in that will, to be taken to be words of purchase to affect the manifest intent of the will, or words of limitation, according to the rule in Shelley's case. A majority of the court decided that the intent was to prevail. On error to the Exchequer Chamber, the judgment of the K. B. was reversed by a large majority of the judges; and upon a further writ of error to the House of Lords, the dispute was at length compromised, and a *non pros.* entered on the writ of error by consent. The result of that famous controversy tended to confirm, by the weight of judicial authority at Westminster Hall, the irresistible preëminence of the rule, so that even the testator's manifest intent could not control the legal operation of the word "heirs," when

considered Doe *v.* Laming as very much in point, that A. took a life estate, with a contingent remainder in fee to his children, he having no children at the making of the will. Sisson *v.* Seabury, 1 Sumner, 235. If A. gives land by deed to B. *and his children* and to *their heirs*, the father of [and] all the children takes [take] a fee jointly by force of the words *their heirs*. Co. Litt. 9, a. So, where A. devised to B. for life, and then to C. *and her children* and *their heirs*, it was held that C. was jointly seised in fee with the children as joint tenants. Hatterley *v.* Jackson, Strange, 1172. In such cases, it is immaterial whether there be children born or not born, after the testator's death, and it is no objection that the several estates may commence at different times, for vested cases will, in such cases, open to let in afterborn children to partake equally of the estate. The Master of the Rolls, in Stanley *v.* Wife, 1 Cox Cases, 432; Strange, *supra*; Wild's Case, 6 Co. 16; Dingley *v.* Dingley, 5 Mass. 535; Doe *v.* Provoost, 4 Johns. 61.

(*d*) 1 Coll. Jurid. No. 10; 4 Burr. 2579.

standing for the ordinary line of succession as a word of limitation, and render it a word of purchase. If the term "heirs," as used in the instrument, comprehended the whole class of heirs, and they became entitled, on the death of the ancestor, to the estate, in the same manner, and to the same extent, and with the same descendible qualities as if the grant or devise had been simply to A. and his heirs, then the word "heirs" is a word of limitation, and the intention will not control the legal effect of the word. The term must be used as a mere designation of one or more individuals, or a new import given to it by superadded or engrafted words of limitation, varying its sense and operation, in order to make it a word of purchase. (*a*)

* In *Perrin* v. *Blake*, the judges considered the intention * 223 of the testator, that his son should take only an estate for life, to be manifest; and assuming that fact, they insisted that in the construction of wills the intention was always emphatically regarded. They were for confining the rule in Shelley's case within its exact bounds, especially as the reason and policy of the rule had ceased; and they relied upon a series of cases, principally in chancery, to show that words of limitation had, in particular cases, and in deeds as well as in wills, been held to be words of purchase, and controlled in their ordinary meaning, by superadding explanatory words denoting a different species of heirs to have been intended. (*a*) The strongest case in favor of the decision was *Bagshaw* v. *Spencer*, before Lord Hardwicke, in 1748; and the most difficult one to surmount, because the one of

(*a*) The case of Perrin *v.* Blake was first brought into discussion before the King's Bench in 1769, and decided there in February, 1770; but the litigation upon that will, involving merely the validity of a widow's jointure of £1,000 a year, was first commenced by an action of ejectment in the supreme court of the island of Jamaica, as far back as the year 1746; and after the question had travelled, in two ejectment suits, through the supreme court, and the court of appeals and errors in Jamaica, it passed the Atlantic on appeal in each suit to the king in council. After a reversal in one suit, a new ejectment was instituted in the island of Jamaica; and it passed through the court of appeals and errors there, and back again, to the king in council; and then, upon recommendation, the question was brought before the K. B., as already stated. The final termination (by mutual consent) of this protracted litigation was in 1777, after an exhausting strife of upwards of thirty years. See Harg. Law Tracts, 489–493, in the notes.

(*a*) Archer's case, 1 Co. 66; Walker *v.* Snowe, Palm. 359; Lisle *v.* Gray, 2 Lev. 223; and these two last cases arose upon deeds. Backhouse *v.* Wells, 1 Eq. Cas. Abr. 184; Luddington *v.* Kime, 1 Ld. Raym. 203; Bagshaw *v.* Spencer, 1 Coll. Jurid. No. 15.

the most point and authority against the innovation upon the rule, was *Coulson* v. *Coulson*, before the K. B., in 1744. Lord Mansfield denied, as he had done before in *Doe* v. *Laming*, that there was any solidity in the distinction between trusts executed and trusts executory; and he held that all trusts were executory, because a trust executed was within the statute of uses.

* 224 He insisted, also, * that there was no sense in the distinction between the trusts and the legal estate, and that courts of equity, as well as courts of law, were equally bound by a general rule of law. If he could have established these principles, he would have brought the decision in *Bagshaw* v. *Spencer* to bear upon the case with unqualified and imperative force. (*a*)

The minds of the court were well prepared for such a decision, for in *Doe* v. *Laming*, (*b*) which arose a few years

* 225 * before in the K. B., Lord Mansfield had reasoned upon the rule and authorities in the same way, and in a still more elaborate manner, and he scrutinized most of the cases. The doctrine of the court was, that the rule in Shelley's case was to be

(*a*) Lord Mansfield's opinion does not appear, upon the whole, to be equal to the occasion, or on a level with his fame. It is not to be compared, in research or ability, to that of Lord Hardwicke, in Bagshaw *v.* Spencer, and some of his reflections had a sarcastic allusion. "There are, and have been always," he observed, "lawyers of a different bent of genius, and of different course of education, who have chosen to adhere to the strict letter of the law; and they will say that Shelley's case is uncontrollable authority, and they will make a difference between trusts and legal estates, to the harassing of a suitor." Mr. Justice Yates, who dissented from the opinion of his brethren in this case, and in whose presence these words were pronounced, immediately resigned his seat as a judge, and was transferred to the C. B. He resigned, says Junius (Letter to Lord Mansfield), because, "after years of ineffectual resistance to the pernicious principles introduced by his lordship, and uniformly supported by his humble friends upon the bench, he determined to quit a court whose proceedings and decisions he could neither assent to with honor, nor oppose with success." But all this was monstrous exaggeration; and that celebrated and still unknown author was, in this instance, so far overcome by the malignity of his temper, and the bitterness of his invective, as to be utterly regardless of truth. Mr. Justice Yates had been associated with Lord Mansfield on the bench from January, 1764, to February, 1770; and with the exception of this case of Perrin *v.* Blake, and the great case of Miller *v.* Taylor, concerning copyright, there was no final difference of opinion in the court in any case, or upon any point whatsoever. Every order, rule, judgment, and opinion, until the decision of the latter case, in April, 1769, had been unanimous. See 4 Burr. 2395, 2582. It was, however, greatly to the credit of Judge Yates's abilities as a lawyer, that in both of these cases in which he dissented from the decision of the K. B. and on very nice and debatable questions, the decision was reversed upon error.

(*b*) 2 Burr. 1100.

adhered to as a rule of property, in all cases literally within it; but when circumstances took any case out of the letter of the rule, it was to be held subservient to the manifest intention, whether the limitation was created by deed or will.

In the opinion of Mr. Justice Blackstone, in the Exchequer Chamber, upon the case of *Perrin* v. *Blake*, (*a*) he admitted that the rule in Shelley's case might be controlled by the manifest intention of the testator; and he has classified and given a very clear and comprehensive summary of the several cases which have created exceptions to the operation of the rule. He concurred in principle with the Court of K. B.; but he held, that in the case before him, the intent was not sufficiently clear and precise, and, therefore, he was for reversing the judgment. It was true that the testator meant that his son should only take a life estate; but it was not certain, he said, that the testator meant that the heirs of the body should take as purchasers, and, consequently, the rule must be left to operate. According to this opinion, two things must appear upon the face of the will: (1.) That the testator meant to confine the first taker to an estate for his life; and (2.) that he meant to effectuate that intent by some clear and intelligent expression of a design to have the heirs of his son take by purchase, and not by descent. This opinion has been much admired, as containing incontestable evidence of the skill and talents of its great author. But the premises and the conclusion do not appear to be very consistent. The argument admits that the intention of the testator will control the rule; and it would seem then naturally to follow, that when the testator explicitly declared that the son was not to have a * power to sell and dispose of the estate for a longer time * 226 than his life, and *to that intent* gave him a life estate, with an intervening contingent remainder, and then with remainder to the heirs of his body, that the words, *heirs of the body*, were not intended to operate to the destruction of that intent, so as to give the son a fee with the power to sell. The presumption that those technical words were intended to be used in a technical sense, was certainly rebutted, when that technical sense would inevitably destroy the testator's declared intent, and confer upon the son, by the magical operation of attraction and merger, an estate tail, which the testator never intended.

(*a*) Harg. Law Tracts, 489.

The decision in *Perrin* v. *Blake* has called forth a series of essays upon the rule in Shelley's case, which have been distinguished for laborious learning, great talents, and free and liberal investigation. Mr. Hargrave, in his *observations on the rule*, is for giving it a most absolute and peremptory obligation. He considered that the rule was beyond the control of intention when a fit case for its application existed. It was a conclusion of law of irresistible efficacy, when the testator did not use the words "heirs," or "heirs of the body," in a special or restrictive sense, for any particular person or persons who should be the heir of the tenant for life at his death, and in that instance inaptly denominated "heir," and when he did not intend to break in upon and disturb the line of descent from the ancestor, but used the word "heirs" as a *nomen collectivum*, for the whole line of inheritable blood. It is not, nor ought to be, in the power of a grantor or testator, to prescribe a different qualification to heirs from what the law prescribes, when they are to take in their character of heirs; and the rule, in its wisdom and policy, did not intend to leave it to the parties to decide what should be a descent, and what should be a purchase. The rule is absolute (and this was the doctrine of Lord Thurlow, in *Jones* v. *Morgan*), (*a*) that whoever
* 227 takes in the character of heir, must take in the * quality of heir. All the efforts of the party to change the qualification, while he admits the character of heirs, by saying that they shall take as purchasers, or otherwise, are fruitless, and of no avail. The rule in Shelley's case, if applied to real property, enlarges the estate for life into an inheritance, and gives to the tenant for life the capacity of a tenant in fee, by which he can defeat the entail or strict settlement intended by the party. If the rule be applied to personal property, it makes the tenant for life absolute owner, instead of being a mere usufructuary, without any power over the property beyond the enjoyment of it for his life.

Mr. Fearne's essay on the rule in Shelley's case is in every view a spirited and masterly production; and it is confessedly the groundwork of Mr. Preston's complicated analysis and long and painful, but thorough, discussion of the rule. (*a*) All the great

(*a*) 1 Bro. C. C. 206.

(*a*) My objection to the work of Mr. Preston is, that he has analyzed, and divided,

property lawyers justly insist upon the necessity and importance of stable rules; and they deplore the perplexity, strife, litigation, and distress which result from the pursuit of loose and conjectural intentions, brought forward to counteract the settled and determinate meaning of technical expressions. (*b*) It is now generally admitted, that the decision in *Perrin* v. *Blake* was directly contrary to the stream of former authorities on the same subject; and, in Mr. Fearne's view of the case, (*c*) convenience and policy equally dictate an adherence to the old and established doctrine.

Since the termination of the case of *Perrin* v. *Blake*, Lord Thurlow came out a decided champion for the rule; and he held, in *Jones* v. *Morgan*, (*d*) that a devise to trustees * to * 228 stand seised to the use of A. for life, and after his death to the use of the heirs male of his body, severally, successively, and in remainder, created an estate tail in A. This was repugnant to the doctrine in *Bagshaw* v. *Spencer*, for here, as in that case, was a trust estate. So, the case of *Hodgson* v. *Ambrose*, (*a*) falling literally within the purview of that of *Coulson* v. *Coulson*, received from the K. B. the same determination; and Mr. Justice Buller observed, that if the testator made use of technical words only, the courts were bound to understand them in the legal sense. But if he used other words, manifestly indicating what his intention was, and that he did not mean what the technical words imported, the intention must prevail, *if consistent with the rules of law*. That qualification applies only to the nature and operation of the estate devised, and not to the construction of the words. A man is not to be permitted by will to counteract the rules of law, and change the nature of property; and, therefore, he cannot create a perpetuity, or put the freehold in abeyance, or make a chattel descendible to heirs, or destroy the power of alienation by a tenant in fee or in tail. In *Doe* v. *Smith*, (*b*) Lord Kenyon took a distinction between a general and secondary intention in a will, and he held, that the latter must give way when they interfered. If, therefore, the testator intended that the first

and subdivided the subject, already sufficiently intricate, until he has involved it still deeper in "involutions wild."

(*b*) Mantica, a civilian, wrote a learned treatise, *de conjecturis ultimarum voluntatum*; and Sir William Blackstone hoped never to see such a title in the English law.

(*c*) Fearne on Remainders, 223.

(*d*) 1 Bro. C. C. 206.

(*a*) Doug. 337.

(*b*) 7 T. R. 531.

taker should take only an estate for life, and that his issue should take as purchasers, yet, if he intended that the estate should descend in the line of hereditary succession, the general intent prevails, and the word "issue" is a word of limitation. To conclude: the rule in Shelley's case survived all the rude assaults which it received in the controversy under *Perrin* v. *Blake*; and it has continued down to the present time in full vigor, with commanding authority, and with its roots struck immovably deep in the foundations of the English law. All the modern cases contain one uniform language, and declare that the words,
* 229 *heirs of the body*, * whether in deeds or wills, are construed as words of limitation, unless it clearly and unequivocally appears that they were used to designate certain individuals answering the description of heirs at the death of the party. (*a*)

The rule in Shelley's case has been received and adopted in these United States, as part of the system of the common law. In South Carolina the rule was early acknowledged; (*b*) and, in a recent case, after a long controversy and conflicting decisions, the court of appeals, upon great consideration, decided a case upon the basis of the authority of the rule in Shelley's case. (*c*) It is assumed to be the rule in North Carolina, both in respect to lands

(*a*) Doe *v.* Colyear, 11 East, 548; Doe *v.* Jesson, 2 Bligh, 2; Doe *v.* Harvey, 4 B. & C. 610. But now, by the statute of 3 & 4 Wm. IV. c. 106, it is declared, that when lands are devised to the heir, he takes as *devisee* and not by descent; and a limitation by deed to the grantor or his heirs creates a new estate *by purchase*. And when any person takes by purchase or will, under a limitation to the heirs or the heirs of the body of the ancestor, the descent is to be traced as if such ancestor had been the purchaser.

(*b*) Dott *v.* Cunnington, 1 Bay, 453. [See also Simpers *v.* Simpers, 15 Md. 160; Cooper *v.* Cooper, 6 R. I. 261; Dennett *v.* Dennett, 40 N. H. 498; Kiser *v.* Kiser, 2 Jones, Eq. (N. C.) 28; Moore *v.* Brooks, 12 Gratt. (Va.) 135; otherwise in Williamson *v.* Williamson, 18 B. Mon. 329.]

(*c*) Carr *v.* Porter, 1 M'Cord, Ch. 60. Since the third edition of these commentaries, the rule in Shelley's case has been declared to be the law of the land in the State of Tennessee, in the case of Polk *v.* Faris, 9 Yerg. 209, after a profound, able, and spirited discussion in the supreme court of that state. It was declared, by Judge Reese, to be a settled principle of the common law; and that, whatever might have been the original policy of the rule, it was, as a rule of property, not inconsistent with the genius of our institutions, or with the liberal and commercial spirit of the age. It checked the disposition to lock up property and render it inalienable. The rule was considered as equally applicable to deeds and wills of personal property, and on the acknowledged principle that where the words would create an estate tail in real property, they would vest the entire and absolute property in chattels. [Hampton *v.* Rather, 30 Miss. 193.]

and chattels, though it was properly admitted not to operate where the estate limited to the ancestor and the estate limited to the heirs of his body were of different natures and could not unite; as if the first limitation was of a trust estate, and the subsequent limitation passed the real estate, the remainder over would go to the persons designated, in the character of purchasers. (*d*) The rule was also fully admitted as a binding authority in Virginia, in the case of *Roy* v. *Garnett*, (*e*) though it was allowed to be under the control of the testator's intention; and in Maryland it has received the clearest elucidation, and the most unqualified support. In *Horne* v. *Lyeth*, (*f*) the rule, under all its modifications and exceptions, was learnedly and accurately expounded. In that case, a devise of a term for ninety-nine years to A., during her natural life, and, after her death, to her heirs, was held to pass to A. the entire interest in the term. It was admitted by Ch. J. Dorsey, that if it had been a devise of an estate of inheritance, the remainder would have been immediately executed in the ancestor, and he would have been seised of an estate in fee. The word "heirs," when used alone, without explanation, is always a word of limitation, and not of purchase, and no presumed intention will control its legal operation. Even superadded words of limitation, engrafted on the first limitation, would not alter the rule, unless they went to alter, abridge, or qualify the words, and to establish a new succession, inconsistent with the descent pointed out by the first words, so as * to make the next heir the *terminus* or stock, by refer- * 230 ence to whom the future succession was to be regulated. (*a*) To change the term into a word of purchase, the heirs must not be able to take as heirs, by reason of a distributive direction incompatible with the ordinary course of descent, or the limitation must be directed to the then presumptive heirs of the person on whom the estate for life is limited. This correct view of the

(*d*) Payne *v.* Sale, 2 Dev. & Bat. Eq. 455; Davidson *v.* Davidson, 1 Hawks, 163. But by statute in North Carolina, of 1827, dying without issue is declared to mean issue living at the death of the first taker. The common-law rule previously prevailed, for in Swain *v.* Roscoe, 8 Iredell, 200, it was held, that in a will of personal property to A. for life, and if he should die leaving lawful heirs of his body, to be equally divided between them, it was a limitation for life to A., with remainder to his children as tenants in common. See also ib. 136.

(*e*) 2 Wash. 9.

(*f*) 4 Harr. & Johns. 431.

(*a*) *Vide supra*, 221, note (*c*).

rule of law admitted the acknowledged exceptions to the rule in the case of limitations in marriage articles, and of executory trusts, and also where the ancestor takes a trust or equitable estate, and the heir the legal estate, or an executed use; and, assuming the rule to have been introduced on feudal principles, "yet, to disregard rules of interpretation sanctioned by a succession of ages, and by the decisions of the most enlightened judges, under pretence that the reason of the rule no longer exists, or that the rule itself is unreasonable, would not only prostrate the great landmarks of property, but would introduce a latitude of construction, boundless in its range, and pernicious in its consequences."

It was further declared in the same case, that the rule in Shelley's case applied to leasehold estates, as well as to estates of inheritance; and that in the bequest of chattels, a gift to A. for life, with remainder to his heirs, or to the heirs of his body, would carry the entire interest. The word "issue," in grants, was exclusively a word of purchase; and in devises of real estate it often means children, and is then a word of purchase, though it may be used either as a word of limitation or of purchase. Afterwards, in *Lyles* v. *Digge*, (*b*) the rule was recognized as equally applicable to limitations in wills, and conveyances by deed; and a case was withdrawn from its operation on the acknowledged exception, in the instance where the testator shows a manifest intent to give the first taker only an estate for life, by using superadded words of explanation and limitation, * in the selection of sons of the first taker in succession, and the heirs of their bodies successively, and making those sons evidently the stock of a new line of descent.

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In Pennsylvania, in the case of *James's claim*, (*a*) the rule was recognized in a decided manner; and the word *issue*, in a case of a devise of an estate of inheritance to A. for life, remainder to his lawful issue, was held to be a word of limitation, and that A. consequently took an estate tail. Afterwards, in *Findlay* v. *Riddle*, (*b*) there was a devise to A. for life, and if he died, leaving

(*b*) 6 Harr. & J. 364.

(*a*) 1 Dall. 47; s. p. 7 Watts & S. 295.

(*b*) 3 Binney, 139. The rule in Shelley's case is declared to be the rule in Ohio, 5 Ohio, 465, M'Feely *v.* Moore; King *v.* King, 12 Ohio, 390. But by statute the rule is not now applicable in Ohio to wills taking effect since 1840, though in all other respects it is a rule of property. 12 Ohio, 471.

lawful issue, to his heirs as tenants in common, and their respective heirs and assigns; and the court, under the circumstances, in furtherance of the intent, held the words of limitation to be words of purchase, and that A. took only an estate for life, with a contingent remainder to his heirs. The English doctrine on the subject of Shelley's rule, with all its refinements and distinctions, was fully admitted, but with an evident leaning towards the doctrine of the K. B. in *Perrin* v. *Blake*, in favor of the manifest intent of the testator. The English rule was entirely recognized, in Connecticut, in the case of *Bishop* v. *Selleck*. (*c*) This was in 1804, but the rule has since been abrogated by statute; (*d*) and, in Massachusetts, by statute, in the year 1791, the rule was abolished, as to wills, by a provision declaring, that "a devise to a person for life, and after his death to his children, or heirs, or right heirs, in fee, shall vest an estate for life only in such devisee, and a remainder in fee in his children." The rule has also, in the subsequent revision of their statutes, been dispensed with as to deeds. (*e*)

In New York, the rule, according to the English view of it, was considered, in the case of *Brant* v. *Gelston*, (*f*) to be * of binding authority; and so it continued to be until the * 232 revisors lately recommended its abolition, as being a rule "purely arbitrary and technical," and calculated to defeat the intentions of those who are ignorant of technical language. (*a*) The New York Revised Statutes (*b*) have accordingly declared, that "where a remainder shall be limited to the heirs, or heirs

(*c*) 1 Day, 299.

(*d*) 5 Conn. 100; Statutes of Connecticut, 1821, p. 301; ib. 1838, p. 889. The Connecticut statute declares that all grants or devises of an estate in lands, to any person for life, and then to his heirs, shall be only an estate for life in the grantee or devisee.

(*e*) In New Jersey, by the statute of 1820, in the case of a devise to A. for life, with remainder to his heirs, or to the heirs of his body, the life estate is good, but after its determination, the lands go to the children or heirs of such devisee as tenants in common, in fee. New Jersey Revised Laws, 174; Elmer's Digest, 130; The Massachusetts Revised Statutes of 1836 adopted the same rule, and applied it equally to lands so given by deed or will.

(*f*) 2 Johns. Cas. 384.

(*a*) In Kingsland *v.* Rapelye, decided by the V ce-Chancellor, in the city of New York (1834), and in Schoonmaker *v.* Sheely, decided in the New York circuit court for the second circuit, in 1841, [3 Den. 485,] upon wills made prior to the operation of the revised statutes, the rule in Shelley's case was recognized, and strictly applied and enforced. 3 Edw. Ch. 1. The words *lawful issue* held to have as extensive a signification as heirs of the body.

(*b*) Vol. i. 725, sec. 28.

of the body of a person, to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs or heirs of the body of such tenant for life, shall be entitled to take as purchasers, by virtue of the remainder so limited to them." The abolition of the rule applies equally to deeds and wills; and in its practical operation it will, in cases where the rule would otherwise have applied, change estates in fee into contingent remainders. It sacrifices the paramount intention in all cases, and makes the heirs instead of the ancestor the *stirps* or *terminus* from which the posterity of heirs is to be deduced. It will tie up property from alienation during the lifetime of the first taker, and the minority of his heirs. But this, it may perhaps be presumed, was the actual intention of the party, in every case in which he creates an express estate for life in the first taker, for otherwise he would not have so limited it. It is just to allow individuals the liberty to make strict settlements of their property in their own discretion, provided there be nothing in such dispositions of it affecting the rights of others, nor inconsistent with public policy, or the settled principles of law. But this liberty of modifying at pleasure the transmission of property is in many respects controlled, as in the instance of a devise to a charity, or to aliens, or as to the creation of estates tail; and the rule in Shelley's case only operated as a check of the same kind, and to a very moderate degree. Under the existence of the rule, land might be bound up from circulation for a life, and twenty-one years afterwards, only the settler was required to use a little more explicitness of intention, and a more specific provision. The abolition of the rule facilitates such settlements, though it does not enlarge the individual capacity to make
*233 them; and it is a question for *experience to decide, whether this attainable advantage will overbalance the inconvenience of increasing fetters upon alienation, and shaking confidence in law, by such an entire and complete renunciation of a settled rule of property, memorable for its antiquity and for the patient cultivation and discipline which it has received. (*a*)

(*a*) The juridical scholar, on whom his great master, Coke, has bestowed some portion of the "gladsome light of jurisprudence," will scarcely be able to withhold an involuntary sigh, as he casts a retrospective glance over the piles of learning devoted to destruction by an edict as sweeping and unrelenting as the torch of Omar. He must bid adieu forever to the renowned discussions in Shelley's case, which

5. **Of the Particular Estate.** — There must be a particular estate to precede a remainder, for it necessarily implies that a part of the estate has been already carved out of it, and vested in immediate possession in some other person. The particular estate must be valid in law, and formed at the same time, and by the same instrument with the remainder. (*b*) The latter cannot *be created for a future time, without an intervening *234 estate to support it. If it be an estate of freehold, it must take effect presently, either in possession or remainder; for at common law, no estate of freehold could pass without livery of seisin, which must operate either immediately or not at all. "If a man," said Lord Coke, (*a*) "makes a lease for life, to begin at a day to come, he cannot make present livery to a future estate, and, therefore, in that case, nothing passeth." Though a term for years may be granted to commence *in futuro*, an estate of freehold, limited on such future interest, would be void. When, therefore, a freehold remainder is intended to be created and vested, it is necessary to create a previous particular estate to subsist in the mean time, and to deliver immediate possession of it, which is construed to be giving possession also to him in remainder, since the particular estate, and the remainder, constitute one and the same estate in law. The remainderman is seised of his remainder at the same time that the tenant of the particular estate is possessed of his estate. (*b*) It was necessary

were so vehement and so protracted as to rouse the sceptre of the haughty Elizabeth. He may equally take leave of the multiplied specimens of profound logic, skilful criticism, and refined distinctions, which pervade the varied cases in law and equity, from those of Shelley and Archer, down to the direct collision between the courts of law and equity, in the time of Lord Hardwicke. He will have no more concern with the powerful and animated discussions in Perrin *v.* Blake, which awakened all that was noble and illustrious in talent and endowment, through every precinct of Westminster Hall. He will have occasion no longer, in pursuit of the learning of that case, to tread the clear and bright paths illuminated by Sir William Blackstone's illustrations, or to study and admire the spirited and ingenious dissertation of Hargrave, the comprehensive and profound disquisition of Fearne, the acute and analytical essay of Preston, the neat and orderly abridgment of Cruise, and the severe and piercing criticisms of Reeves. What I have, therefore, written on this subject, may be considered, so far as my native state is concerned, as a humble monument to the memory of departed learning.

(*b*) Plowd. 25, a; Doctor and Student, dial. 2, c. 20; Moor *v.* Parker, 4 Mod. 316. [It is not necessary that a contingent equitable remainder should vest before the determination of the particular estate. Abbiss *v.* Burney, 17 Ch. D. 211; Berry *v.* Berry, 7 id. 657; Cunliffe *v.* Brancker, 3 id. 393.]

(*a*) Barwick's Case, 5 Co. 94, b. (*b*) 2 Bl. Comm. 166.

to make livery of seisin on the particular estate, even though that particular estate was a chattel interest, as a term for years, provided a freehold vested remainder was to be created. In no other way could a freehold in remainder be created at common law. It could not be made directly to the person in remainder without destroying the estate of the lessee for years; and livery to the particular tenant enures to the benefit of the remainderman, as the particular estate and the remainder are but one estate. (*c*) It follows, from these principles, that an estate *235 *at will cannot support a remainder; for livery to the tenant at will, and the limitation over, would either of them determine the will. (*a*)

If the particular estate be void in its creation, or be defeated afterwards, the remainder, created by a conveyance at common law, and resting upon the same title, will be defeated also, as being, in such a case, a freehold commencing *in futuro*. The person in remainder cannot take advantage of conditions annexed to the preceding estate. If, therefore, an estate for life be upon condition, and the grantor enters for breach of the condition, and avoids the estate, the remainder over, as we have already seen, (*b*) will be defeated, because the entry defeats the livery made to the first lessee or feoffee on the creation of the original estate, and the grantor is in of his old estate. (*c*) But if a vested remainder rests upon good title, and not upon the defeasible title of the particular estate, it will remain, though the particular estate be

(*c*) Litt. sec. 60; Co. Litt. ib.; Co. Litt. 217, a; Plowd. 25. The refinements anciently adopted upon this rule were very subtle and technical. Thus, to use the illustrations made by one of the sergeants in the case from Plowden, if a lease be made to A. for years, and the lessor afterwards *confirms* the estate for years, with remainder over in fee, the remainder is void, because the estate for years was created before, and not at the time of the confirmation and the remainder. And if the lessor disseise his tenant for life, and then grant him a new lease, with remainder over in fee, the remainder is void, because the tenant for life is *remitted* to his first estate. So, if the heir endows the widow with remainder over in fee, the remainder is void, though livery of seisin be made to the widow, because the dower has *relation back* to the death of the husband, and therefore the remainder was not coeval with it in point of time. To destroy an estate by the operation of such legal fictions, is very unreasonable and absurd. It is actually reversing the maxim, that *in fictione juris semper æquitas existit*.

(*a*) Bacon's Abr. tit. Remainder and Reversion, G. This head of Gwillim's Bacon was taken from a MS. treatise, by Lord Ch. B. Gilbert, furnished by Mr. Hargrave.

(*b*) *Supra*, 127.

(*c*) Wm. Jones, 58; Co. Litt. 298, a; 1 Rol. Abr. 474, P.

defeated; as in the case put by Coke, of a lease to an infant for life, remainder to B. in fee; though the infant disagrees to the estate for life when he comes of age, yet the remainder shall stand; for it did * not depend upon the same title * 236 with the particular estate, and it was once vested by a good title. (*a*) In *Doe* v. *Brabant*, (*b*) Lord Thurlow declared the old rule of law to be, that where there was a particular estate created, with a remainder over, and the first estate is void, as if made to a person incapable of taking, the remainderman will take immediately, as if it were an original estate. The observation can only be correct as to uses and devises, for, in conveyances at common law, and not to uses, the rule is clearly otherwise; and it is repugnant to the general principle, that a remainder cannot be created without a particular estate to precede it in its creation. The rule is well established in the old law, that if the particular estate be void in its inception, the remainder limited upon it is void also. (*c*) In the case of a grant for life to a person incapable of taking, or to a person not *in rerum natura*, with remainder over, the remainder is not good, for there is no particular estate to support it. (*d*) Though, in wills and conveyances to uses, the remainder may be good, notwithstanding the particular estate be void, yet in future uses and executory devises, if one class of limitations be void, the limitations over will be void for the same reason.

If the estate in remainder be limited in contingency, and amounts to a freehold, a vested freehold must precede it, and pass at the same time out of the grantor. (*e*) This rule holds equally in the limitation of uses, and in estates executed in possession at common law. Thus, in the case of a devise to B. for fifty years, if he should so long live, remainder to the heirs of his body, the remainder was held * void for the want of a freehold * 237 to support it. (*a*) But if the remainder had been to trus-

(*a*) Co. Litt. 298, a. (*b*) 3 Bro. C. C. 398.

(*c*) Plowd. 35, a; Dyer, 140, b.

(*d*) Sergeant Rolle cites for this 9 Hen. VI. 24, b, and he raises the true distinction in this respect between a grant and a devise. 2 Rol. Abr. 415, C. The same examples, by way of illustration, taken by Rolle from 9 Hen. VI., are relied on in Plowden, 35, a, 414, a, and in Comyns's Dig. tit. Estate, B. 14, in support of the same rule.

(*e*) Co. Litt. 217, a; 1 Co. 130, 134, b.

(*a*) Goodright v. Cornish, 1 Salk. 226.

tees during the life of B., remainder to the heirs of his body, in that case the contingent remainder has been good, because preceded by a vested freehold remainder to the trustees. (*b*) The reason of the rule requiring a contingent remainder to be supported by a freehold was, that the freehold should not be in abeyance, and that there should be always a visible tenant of the freehold, who might be made tenant to the *præcipe*, and answer for the services required. (*c*) It does not apply to contingent interests for years, for they were considered, in the case of *Corbet* v. *Stone*, (*d*) to be merely executory contracts. It will be sufficient if a right of entry exists in the rightful tenant of the particular estate, when the contingent remainder vests. The contingent remainder is not destroyed, though there be no actual seisin; for though a mere right of action will not, yet a right of entry will, support a contingent remainder. Lord Holt, in *Thompson* v. *Leach*, (*e*) illustrates the distinction by saying, that if there be a tenant for life with a contingent remainder over, and he be disseised, the whole estate is devested, but the right of entry remaining in the tenant will support the remainder; whereas, if, during the disseisin, the contingent remainder expectant upon the life estate does not vest before five years after a descent cast, the remainder is gone forever, for the right of entry is turned into a right of action. (*f*)

6. Of Remainders limited by Way of Use. — Remainders may be limited by way of use, as well as by common-law conveyances; but the operation which the statute of uses of 27 Hen. VIII. had upon contingent uses, was formerly a matter of *238 great and protracted discussion. *The history of the judicial controversy on this subject is a great curiosity; and though we have not much practical concern with it in the United States, it will well reward a few moments' attention of the diligent and inquisitive student, who desires to understand the progress, mutations, and genius of the very complicated machinery of the English law of real estates.

Before the statute of uses, the feoffees to uses were seised of the legal estate; and if they were disseised, no use could be

(*b*) Ellie *v.* Osborne, 2 Vern. 754. (*c*) Lord Mansfield, in 1 Burr. 107.
(*d*) T. Raym. 140. (*e*) 12 Mod. 174.
(*f*) In Mississippi, the rule of the common law, that an estate of freehold cannot be made by deed to commence *in futuro*, is abrogated. Revised Code of 1824, p. 459.

executed until, by their entry, they had regained their seisin, for the statute only executed those uses which had a seisin to support them. (*a*) After the statute of uses, there was great difficulty to ascertain where the estate, which was to support the contingent uses, resided. Some held that the estate was vested in the first *cestui que use*, subject to the uses which should be executed out of his seisin; but this opinion was untenable, for a use could not arise out of a use. It was again held that the seisin to serve contingent uses was *in nubibus*, or *in custodia legis*, or had no substantial residence anywhere; and the conclusion attached to these opinions was, that contingent uses could not be barred by any act whatever. Others were of opinion, that so much of the inheritance as was limited to the contingent uses remained actually vested in the feoffees until the uses arose. But the prevailing doctrine was, that there remained no actual estate, and only a possibility of seisin, or a *scintilla juris* in the feoffees, or releasees to uses, to serve the contingent uses as they arose. (*b*) The doctrine of *scintilla juris*, Mr. Sugden says, was first started in *Brent's case*, (*c*) in 16 Eliz.; and the judges had great difficulties in settling the construction of contingent uses. One opinion was, that the feoffees had a fee simple determinable, to continue until the future use arose, and that they were not devested of the whole interest until the execution * of * 239 all the uses limited upon the feoffment; but a sufficient portion of the fee simple to serve the contingent uses remained vested in the feoffees. It was also held, that the estate in the interim resulted to the feoffor. A majority of the court agreed, that the statute devested the feoffees of all the estate when the contingency arose by a person being *in esse* to take.

In *Manning and Andrew's case*, (*a*) the judges were equally unsettled in their notions respecting the operation of the statute on contingent uses. Some of them were of opinion that a sufficient actual estate remained in the feoffees to support the uses, while others thought that the feoffees were, by the statute of uses, made mere conduit pipes, through which the estate was conveyed to the uses as they arose, and they were devested of all estate. The statute drew the confidence out of the feoffees and

(*a*) Dalamere *v.* Barnard, Plowd. 346.
(*b*) Sugden on Powers, 2d London ed. 13, 14.
(*c*) Dyer, 340, a; 2 Leon. 14. (*a*) 1 Leon. 256.

reposed it upon the land, which rendered the use to every person entitled in his due season under the limitation. According to this opinion, the feoffees had no right of entry, and could not, by release, confirmation, or otherwise, do anything to the prejudice of the uses limited. In a few years *Chudleigh's case* (*b*) arose, and has ever been regarded as a great and leading case on the doctrine of contingent uses.

The principal question in that case was concerning the power of feoffees to uses to destroy contingent uses by fine or feoffment, before the uses came into being. It was a very complex settlement case. Lands were conveyed by feoffment to feoffees, in a series of successive uses, and, among others, to the use of the feoffees and their heirs, during the life of the settler's eldest son, remainder to the grandsons of the settler, successively in tail, with remainder to the right heirs of the eldest son. The feoffees seised to these uses after the death of the feoffor,
* 240 enfeoffed * his eldest son in fee without consideration, and with notice in the son of the uses in the settlement. The eldest son had a son born thereafter, and after that birth he conveyed to a stranger in fee; and the question arose between the title of the stranger under the conveyance, and the title of the grandson under that settlement. The point was, whether the act of the feoffees destroyed the contingent remainders, so that a use could never arise out of the estate of the feoffees, when the contingency afterwards happened by the birth of the grandson. The judgment of the court was, that by the feoffment the whole estate was devested, and drawn out of the feoffees, and the future contingent uses destroyed. (*a*)

(*b*) 1 Co. 120; Anderson, 209. Mr. Sugden says that Ch. J. Anderson's report of this case is indisputably the best; and an abstract of the translation of it is in Gilbert's Uses, by Sugden, app. 521.

(*a*) Chudleigh's case was argued several times before all the judges of England, and we find the great names of Bacon and Coke among the counsel who argued the cause. The case is replete with desultory and curious discussion, and some of it Lord Hardwicke admitted to be so refined and speculative as not to be easily understood. The disposition and policy of the judges was to check contingent uses, which they deemed to be productive of mischiefs, and tending to perpetuities. They regarded the statute of uses as intending to extirpate uses, which were often found to be subtle and fraudulent contrivances; and their evident object was to restore the simplicity and integrity of the common law. Notwithstanding the scholastic and mysterious learning with which the case abounds, it carries with it decisive evidence of the acuteness, industry, and patriotic views of the sages of the law at that day. Lord

The minority of the judges held that there was no estate, right, or *scintilla juris* remaining in the feoffees, and that the notion of a *scintilla* was as imaginary as the Utopia of Sir Thomas More. The seisin which the feoffees had at the beginning by the feoffment to them was sufficient to serve all the future uses when they came *in esse;* and it was not in their power to affect, suspend, or destroy the future uses, which were in the interim *in nubibus*, and in the preservation of the law, and the *cestui que use* was, consequently, entitled. But a large majority of the judges decided that the feoffment made by the feoffees devested all * the estates and the future uses; and they *241 assimilated contingent uses to contingent remainders, and endeavored to bring them within the same rules, and render them liable to be destroyed in the same manner. They held, that the statute could not execute any uses that were not *in esse*, and that contingent uses might be destroyed or discontinued before they came *in esse*, by all such means, as, for instance, by feoffment, forfeiture, or release of the estate, as uses might have been discontinued or destroyed by the common law. They held that not a mere *scintilla* remained in the feoffees, but a sufficient estate to serve and support the contingent uses when they came *in esse*, unless their possession was disturbed by disseisin or otherwise, and then they would have a right of entry, unless they did some act to bar it. One great principle of policy governed the judges in this case, in holding that contingent remainders might be thus destroyed, and that was to prevent perpetuities, which were so odious in the ancient law. (*a*) The decision in *Chudleigh's case* settled the doctrine, that contingent remainders, even by way of use, were destroyed by the destruction of the particular estate. The judges gave the same operation to a feoffment in regard to contingent uses, as they did in respect to contingent remainders. (*b*)

The fiction of a *scintilla juris*, or possibility of entry in the

Campbell says that Bacon's argument in this case was one of the most masterly ever heard in Westminster Hall, and it completely demolished the subtle device to create a perpetuity. His argument was afterwards shaped into a "Reading on the Statute of Uses."

(*a*) See 1 Vent. 306, where this principle is asserted.

(*b*) See Sugden on Powers, c. 1, sec. 3, who has examined all these cases, and whose clear analysis of them has guided and greatly assisted me. Mr. Preston, in his Treatise on Estates, i. 160–171, has gone over the same cases, though not in the same critical and masterly manner.

feoffees, or releases to uses, sufficient to feed the contingent uses when they come into existence, and thereby to enable the statute to execute them, has been deduced from these ancient
* 242 cases. (*c*) Such a particle of right or interest * has been supposed to be indispensable to sustain the contingent use. Upon conveyances to uses, when there is a person *in esse* seised to the uses, the seisin is immediately transferred to the *cestui que use*, and the whole estate is devested and drawn out of the feoffee or releasee. But contingent uses cannot be executed when there is no *cestui que use* in existence; and the doctrine has been stated (and it was assumed by the judges in *Chudleigh's case*) that there was a necessity of supposing some person seised to the use, when the contingency arose, to enable the statute to operate. There must be a person seised, and a use *in esse*, or there cannot be an execution of the possession to the use. The estate in the land is supposed to be transferred to the *person* who hath the estate in the use, and *not to the use;* and it is inferred, that no use can become a legal interest, until there shall be a person in whom the estate may vest. When the estate of the use is divided into portions, and there is a discontinuance of the legal estate, the contingent remainder by way of use cannot be continued, until the trustee, or the tenant of some preceding vested estate, hath by entry or action regained the seisin, so as to serve and supply the contingent uses when the contingency happens. To meet the difficulty, recourse was had to the refinement of a *scintilla juris* remaining in the feoffee to uses; and if the contingent use, limited upon a precedent estate of freehold, should be devested, actual entry was deemed necessary to revest the *scintilla juris* of the feoffees, or releasees to uses, and thereby enable them to support the contingent, springing, or shifting use when it arises. There must be either an actual seisin to support the contingent use, or this possibility of entry or *scintilla;* and if such seisin or *scintilla* be devested before the use arises, as was the fact in *Chudleigh's case*, the use is totally destroyed. (*a*)

* 243 * This view of the subject has been met and opposed by some of the most distinguished writers on real property at the present day.

(*c*) Chudleigh's Case, *supra;* Wegg *v.* Villers, 2 Rol. Abr. 796, pl. 11-16; 22 Viner, 228, 229, s. c.

(*a*) Preston on Estates, i. 159; Cruise's Dig. tit. Remainder, c. 5, sec. 3, 5, c. 6, sec. 37, 39.

Mr. Fearne (*a*) questions the existence and application of the doctrine of the *scintilla juris* to that extent, and denies the necessity of actual entry, any more in the case of contingent uses, than in the case of contingent remainders, in order to regain the requisite seisin to serve the contingent uses. He denies the necessity of actual entry by any person to restore a contingent use, so long as a right of entry subsists in the *cestui que use;* and the *scintilla juris*, if of any real efficacy, must be competent to serve contingent uses without the necessity of actual entry. The whole controversy relates to the common-law conveyances, as feoffments, releases, fines, and recoveries, which operate by transmutation of possession, and under which the fee simple vests in the feoffees, and the uses arise out of their seisin. Mr. Sugden takes a higher and bolder stand, and, by a critical review of all the cases, puts to flight this *ignis fatuus* of a *scintilla*, and shows that it never had any foundation in judicial decisions, but was deduced from extra-judicial *dicta*. He considers that the fiction operates mischievously, by requiring actual entry to restore the devested estate, or a feoffee to uses actually existing when the contingent uses arise. The sound construction of the statute requires, that limitations to uses should be construed in like manner as limitations at common law. Thus, if by feoffment or release to some third persons (who are generally strangers in interest to the estate), or by covenant, to stand seised, * or, perhaps, by bargain and * 244 sale, (*a*) a use be limited to A. for life, remainder to trus-

(*a*) Fearne on Remainders, 377-380.

(*a*) Mr. Sugden, in his Treatise on Powers, 38, says, that covenants to stand seised are, at this day, wholly disused. This I should not have supposed, from the great use of them in the precedents; and Lord Ch. J. Pollexfen, in Hales *v.* Risley (Pollex. 383), speaks of the covenants to stand seised, as one of the usual modes of raising uses in marriage settlement. It was said by Newdigate, J., in Heyns *v.* Villars (2 Sid. 158), that a contingent use could not be raised by bargain and sale; and Mr. Sugden is of the same opinion; because a bargain and sale requires a consideration, and the intended *cestui que use*, not *in esse*, cannot pay a consideration, and a consideration paid by the tenant for life would not extend to the unborn son. Gilbert on Uses, by Sugden, 398. Lord Chief Baron Gilbert raises a doubt upon the same point, and this is no doubt the settled English rule; but it is a hard and unreasonable technical objection, and the good sense of the thing is, that the consideration paid by the tenant for life should enure to sustain the deed throughout, in like manner as a promise to B., for the benefit of C., will enure to the benefit of C., and give him a right of action. Dutton *v.* Pool, 2 Lev. 210; T. Raym. 302; Schermerhorn *v.* Vanderheyden, 1 Johns. 139; Owings *v.* Owings, 1 Har. & G. 484; Sailly *v.* Cleveland, 10 Wend. 156; Kemper *v.* Smith, 3 Martin (La.), 622; Carnegie *v.* Morrison, 2 Met. 381; [Lawrence *v.* Fox,

tees to preserve contingent uses, remainder to the first and other unborn sons in tail, the use is vested in A., and the uses to the sons are contingent, depending on the particular estate; and in case of a feoffment and release by A., the tenant for life, the uses would be supported by the right of entry in the trustees. The feoffees, or releasees to uses, could neither destroy nor sup-
* 245 port the contingent uses. The statute * draws the whole estate in the land out of the feoffees, and they become devested, and the estates limited prior to the contingent use, take effect as legal estates, and the contingent uses take effect as they arise by force of the original seisin of the feoffees. If there be any vested remainders, they take effect according to the deed, subject to devest, and open, and let in the contingent uses, in the proportions in which persons afterwards arising may become capable of taking under the limitation. To give a fuller illustration of this abstruse point, we may suppose a feoffment in fee to A., to the use of B. for life, remainder to his first and other sons unborn, successively in tail, remainder to C. in fee; the statute immediately draws the whole estate out of A., and vests it in B. for life, remainder to C. in fee, and those estates exhaust the entire seisin of A., the feoffee. The estate in contingency in the unborn sons is no estate until the contingency happens; and the statute did not intend to execute contingent uses, but the contingent estates are supported by holding that the estate in B. and C. were vested *sub modo* only, and would open, so as to let

20 N. Y. 268. But see Mellen *v.* Whipple, 1 Gray, 317, and compare Garnsey *v.* Rogers, 47 N. Y. 233, 240.] The consideration requisite is merely nominal. A peppercorn is a sufficient consideration to raise a use. Anon., 2 Vent. 39. If no consideration be stated in the pleadings, setting forth a deed of bargain and sale, the omission is but matter of form, and can only be objected to on special demurrer. Bolton *v.* Bishop of Carlisle, 2 H. Bl. 259. And why should not the courts admit the consideration paid by the tenant for life to enure to sustain the deed, with all its contingent uses? An assignment of property to a creditor is good without his knowledge, if he comes in afterwards and assents to it (7 Wheaton, 556; 11 id. 97); and why should not the son, when he comes *in esse*, be permitted to advance a consideration, and give validity to the use? In New York, the question can never hereafter arise, for we have no longer any conveyances to uses. The statute of uses is repealed, and uses are abolished and turned into legal estates, except so far as they may exist in the shape of trusts, or be attendant on powers. All future or expectant estates, and all vested estates and interests in land, are equally conveyed by grant. Feoffments and fines are abolished; and though deeds of bargain and sale, and of lease and release, may continue to be used, they shall be deemed grants. New York Revised Statutes, i. 727, sec. 45; ib. 725, sec. 35; ib. 738, 739. See, also, further on this subject, *infra*, 491.

in the contingent estates as they come *in esse*. There is no *scintilla* whatever remaining in A., the feoffee, but the contingent uses, when they arise, take effect, by relation, out of the original seisin. By this clear and masterly view of the subject, Mr. Sugden destroys all grounds for the fiction of any *scintilla juris* in A., the feoffee, to feed the contingent uses. (*a*)

Mr. Preston, in his construction of the statute of uses, is also of opinion, that limitations of contingent uses do give contingent interests, and that the estate may be executed *to the use*, though there be no person in whom the estate thus executed may vest. The statute passes the estate of the feoffees in the land, to the estates and interests in the use, and apportions the estate in the land to the estates and interests in the use. Immediately after the conveyance to uses, no *scintilla juris*, or the most remote possibility of * seisin, remains with the trustees. But *246 Mr. Preston speaks with diffidence of his conclusions, and he is of opinion that the doctrine respecting the *scintilla juris* requires to be settled by judicial decision. (*a*)

I am not aware that the English doctrine of remainders and uses has undergone any essential alteration in the United States, except it be in the late Revised Statutes of New York. The general doctrines of the English law on the subject constitute, as I presume, a branch of the municipal jurisprudence of this country. A statute of Virginia, in 1792, made some alteration of the law of remainders, by declaring that a contingent remainder to a son or daughter unborn, was good, although there was no particular estate to support it after the father's death. But, in New York, very deep innovations have recently been made upon the English system. No valid remainder can be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder is limited to take effect; and the remainder takes effect when the contingency happens, in the same manner and to the same extent as if the precedent estate had continued. (*b*) This relieves us in New York, and

(*a*) Sugden on Powers, c. 1, sec 3.

(*a*) Preston on Estates, i. 164–184. It is rather extraordinary that Mr. Cornish should undertake to write and publish from the temple, an Essay on the Doctrine of Remainders, so late as 1827, and assert that the doctrine of *scintilla juris* rested on paramount authority, without even taking notice of such full and exhausting discussions in opposition to it, by such masters of the science as Preston and Sugden.

(*b*) New York Revised Statutes, i. 725, sec. 34.

fortunately and wisely relieves us, from the burden of investigating and following all the inventions and learning calculated to elude the fatal consequences of the premature destruction of the particular estate. But another and more momentous change in the law has annihilated at once all this doctrine of remainders by way of use. The New York Revised Statutes (*c*) have
* 247 abolished uses and trusts, except as * authorized and modified in that article, and have turned them into legal rights. The article is a very short one, and allows resulting trusts, and four sorts of express trusts. Every contingent remainder, which, under the English law, is by way of use, is now, in New York, a strictly legal contingent remainder, and governed by the same rules. There is no longer any need of trustees to preserve contingent remainders; and they could not exist if they were necessary, for their duty is not one of the express trusts which may be created. It is declared, that every disposition of lands, whether by deed or devise, shall be directly to the person in whom the right to the possession and profits shall be intended to be invested, and not to any other, to the use of, or in trust for such person; and if so made, no estate or interest, legal or equitable, vests in the trustee. (*a*)

But, to proceed with a review of the general law on the subject of remainders, there is one case which forms an exception to the rule, that a preceding particular estate of freehold is requisite to support contingent limitations, and that is where the legal estate is vested in trustees. The estate will continue in that instance, notwithstanding the failure of an intermediate life estate, until the persons who were to take the contingent remainder should come *in esse*, and in the interval the rents will belong to the grantor, or to his heirs, by way of resulting trusts. (*b*)

(*c*) Vol. i. 727, sec. 45, 50, 55.

(*a*) New York Revised Statutes, i. 728, sec. 49. See also *infra*, under the head of Uses and Trusts.

(*b*) Fearne on Remainders, 383, 384; Preston on Estates, i. 241. In Hopkins *v.* Hopkins, Cases temp. Talb. 43, Lord Talbot considered such a limitation as good by way of executory devise; but afterwards, in Chapman *v.* Blissel, ib. 145, he held it to be good either way, and might be taken as a future limitation or as a contingent remainder of a trust. A strict conditional limitation does not require any particular estate to support it. But the difficulty of distinguishing between such a limitation and a contingent remainder has been already noticed (see *supra*, 128, note); and in Doe *v.* Heneage (4 T. R. 13), both the bar and bench assumed a conditional limita-

*** 7. Of the Time within which a Contingent Remainder must vest.** — The interest to be limited as a remainder, either vested or contingent, must commence or pass out of the grantor in the same instrument, and at the time of the creation of the particular estate, and not afterwards. (*a*) It must vest in the grantee either *in esse*, or by right of entry, during the continuance of the particular estate, or at the very instant that it determines. (*b*) The rule was founded on feudal principles, and was intended to avoid the inconvenience of an interval when there should be no tenant of the freehold to do the services of the lord, or answer to the suit of a stranger, or preserve an uninterrupted connection between the particular estate and the remainder. If, therefore, A. makes a lease to B. for life, with remainder over, the day after his death; or if an estate be limited to A. for life, remainder to the eldest son of B., and A. dies before B. has a son, the remainder, in either case, is void, because the first estate was determined before the appointment of the remainder. There must be no interval, or "mean time," as Lord Coke expresses it, between the particular estate and the remainder supported by it. If the particular estate terminates before the remainder can vest, the remainder is gone forever; for a freehold cannot, according to the common law, commence *in futuro*. (*c*) This rule, upon a

tion to be, what Mr. Cornish says (Essay on Remainders, 221) it was not, viz., a contingent remainder. If this be so, the distinction must be very latent and fine spun, to have escaped detection by such judges as Lord Kenyon and Mr. Justice Buller!

(*a*) Plowd. 25, 28; Co. Litt. 49, a, b.

(*b*) Colthirst *v.* Bejushin, Plowd. 25; Archer's Case, 1 Co. 66; Chudleigh's Case, 1 Co. 138.

(*c*) 3 Co. 21, a; 2 Bl. Comm. 168; Preston on Abstracts, i. 114. In Festing *v.* Allen, 12 M. & W. 279, it was adjudged, that if there was a tenant for life under a devise, with a contingent remainder in fee for such of her children as should attain the age of twenty-one, and no child attained that age at her death, the estate as well as the limitations over were devested by her death, and the estate went to the heir at law. *x*[1] This was only a recognition of a settled principle, and yet the case was elaborately discussed. If the devise had been to the mother for life, and at her death to her children, then they would have had vested remainders in fee, according to the case of Doe *v.* Provoost, 4 Johns. 61. See *supra*, 205; [203, n. 1.]

x[1] But in a case otherwise similar to Festing *v.* Allen, a direction to pay debts was held to cause the entire legal estate to vest in the trustees and thus to preserve contingent remainders. Marshall *v.* Gingell, 21 Ch. D. 790. See further, *In re* Tanqueray-Willaume & Landau, 20 Ch. D. 465. The rule applied in Festing *v.* Allen has been changed by statute in England. Stat. 40 & 41 Vict. c. 33. See Williams on Seizin, 200, and App. B.

strict construction, was held by the courts of law to exclude a posthumous son from taking a contingent remainder, when the particular estate determined before he was born, and the person who succeeded took by purchase. But the decision of the K. B. upon that point was reversed by the House of
*249 *Lords; (*a*) and it is now the settled law in England and in this country, that an infant *en ventre sa mère* is deemed to be *in esse*, for the purpose of taking a remainder, or any other estate or interest which is for his benefit, whether by descent, by devise, or under the statute of distributions. (*b*)

The remainder must be so limited as to await the natural determination of the particular estate, and not to take effect in possession upon an event which prematurely determines it. (*c*) This is the true characteristic of a remainder; and the law will not allow it to be limited to take effect on an event which goes to defeat, or abridge, or work the destruction of the particular estate; and if limited to commence on such a condition, it is void. Thus, if there be a lease to A. for life, and if B. do a certain act, that the estate of A. shall then cease, and the remainder immediately vest in C., it is clear that the remainder will be void in that case. (*d*) This rule applies to common-law conveyances, and follows from the maxim that none but the grantor and his heirs shall take advantage of a condition; and both the preceding estate and the remainder are defeated by the entry of the grantor. (*e*) If limitations on such conditions be made in conveyances to uses and in wills, they are good as conditional limitations, or future or shifting uses, or executory devises; and upon the breach of
*250 the *condition the first estate, *ipso facto*, determines without entry, and the limitation over commences in posses-

(*a*) Reeve *v.* Long, 1 Salk. 227.

(*b*) Willes, Ch. J., in Goodtitle *v.* Wood, cited in 7 T. R. 103, note; Stedfast *v.* Nicoll, 3 Johns. Cas. 18; Swift *v.* Duffield, 5 Serg. & R. 38; Statute of Alabama, 1812; Harper *v.* Archer, 4 Smedes & M. 99; Marsellis *v.* Thalhimer, 2 Paige, 35. In the last two cases it was decided, that, as respects the rights of others, a child born dead, within such an early stage of pregnancy as to be incapable of living, is not deemed to have been *in esse*; and if born within the first six months after conception, the presumption is that it was incapable of living. This is the rule of the civil law, as adopted in the Code Napoleon, art. 312, 314, and in the Civil Code of Louisiana, art. 205. [Crisfield *v.* Storr, 36 Md. 129.]

(*c*) Cogan *v.* Cogan, Cro. Eliz. 360; Plowd. 24, b, 29, a, b.

(*d*) Plowd. 29, b.

(*e*) Fearne on Remainders, 332.

sion. (*a*) The distinction appears to turn essentially on the difference between a limitation and a condition; and the remainder over will be good in the former case; for it is of the nature of a limitation to embrace those estates to which fixed boundaries are prescribed, and which, by the terms of the instrument creating them, expire when they have arrived at those limits. (*b*)

The New York Revised Statutes (*c*) allow a remainder to be limited on a contingency, which, in case it should happen, would operate to abridge or determine the precedent estate; and every such remainder is to be construed a conditional limitation, and to have the same effect as such a limitation would have at law. This legislative provision meets the very case, and abolishes the strict and hard rule of the old law applicable to common-law conveyances; but as the rule was never applied to conveyances to uses, or to devises, the statute only reaches a dormant principle, which is rarely, if ever, awakened at the present day. The New York Revised Statutes, in many other respects, have made very essential alterations in the common-law doctrine of remainders; and a summary of those alterations cannot be unacceptable to the student in every state. Thus, a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the prior estate determines before the person to whom it is limited attains the age of twenty-one. (*d*) No remainder can be created upon an estate for the life of any other person or persons than the grantee or devisee of such estate, unless such a remainder be a fee; nor can a remainder be created upon such an estate in a term for years, * unless it be for the whole residue * 251 of such term. (*a*) Nor can a remainder be made to depend upon more than two successive lives in being; and if more lives be added, the remainder takes effect upon the death of the first two persons named. (*b*) A contingent remainder cannot be created on a term for years, unless the nature of the contingency on which it is limited be such that the remainder must vest an interest during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination

(*a*) Fearne on Remainders, 319.
(*b*) See *supra*, 126. (*c*) Vol. i. 725, sec. 27.
(*d*) New York Revised Statutes, i. 723, sec. 16.
(*a*) Ib. i. 724, sec. 18.
(*b*) Ib. sec. 19; [Tayloe *v.* Gould, 10 Barb. 388.]

thereof. (c) No estate for life can be limited as a remainder on a term of years, except to a person in being at the creation of such estate. (d) A freehold estate, as well as a chattel real (to which these regulations equally apply), may be created to commence at a future day; and an estate for life may be created in a term of years, and a remainder limited thereon; and a remainder of a freehold or chattel interest, either contingent or vested, may be created expectant on the determination of a term of years. (e) Two or more future estates may be created to take effect in the alternative, so that if the first in order shall fail to vest, the next in succession shall be substituted for it; and no future estate, otherwise valid, shall be void on the ground of the probability or improbability of the contingency on which it is limited to take effect. (f) When a remainder on an estate for life, or for years, shall not be limited on a contingency defeating or avoiding such precedent estate, it shall be construed as intended to take effect only on the death of the first taker, or the expiration by lapse of time, of such term of years. (g) No expectant estate shall *252 be defeated or barred by any alienation, or *other act of the owner of the intermediate estate, nor by any destruction of such precedent estate by disseisin, forfeiture, surrender, merger, or otherwise, except by some act or means which the party creating the estate shall, in the creation thereof, have provided for or authorized. (a) Nor shall any remainder be defeated by the determination of the precedent estate before the happening of the contingency on which the remainder is limited to take effect; and should the contingency afterwards happen, the remainder shall take effect in the same manner, and to the

(c) Ib. i. 724, sec. 20.

(d) Ib. i. 724, sec. 21. Upon a devise to A. for fifty years as an absolute term, remainder to B. for life if he should marry C., and remainder to the children of such marriage; here the remainder to B. is contingent, but must vest in interest, if ever, in his lifetime, and fails if he dies within the term. The ultimate remainder must vest, if ever, within the period of one life in being at the death of the testator. The first child would, upon its birth, take a vested interest in the ultimate remainder in fee, subject to open and let in after-born children. Marsellis *v.* Thalhimer, 2 Paige, 35; Hawley *v.* James, 5 Paige, 318; s. c. 16 Wend. 61; *vide supra*, 205.

(e) New York Revised Statutes, i. 724, sec. 24.

(f) Ib. i. 724, sec. 25, 26.

(g) Ib. i. 725, sec. 29.

(a) The Massachusetts Revised Statutes of 1836, pt. 2, tit. 1, c. 59, sec. 7, have made the same provision for the preservation of expectant estates.

same extent, as if the precedent estate had continued to the same period. (*b*)

Some of the above enactments are not very material, and are only declaratory of the existing law; but those which relate to the precedent estate, and render such an estate no longer requisite to sustain the remainder, will produce a very beneficial change in the doctrine of remainders, and disperse a cloud of difficulties, and a vast body of intricate learning relating to the subject. As these provisions do not affect vested rights, nor the construction of deeds and instruments which took effect prior to the first of January, 1830, (*c*) the learning of the English law on the subject of remainders and conveyances to uses will not become dormant in New York during the existence of the present generation.

A contingent remainder may fail as to some, and take effect as to other persons, in consequence of some only of the persons entitled in remainder coming *in esse* during the particular estate; as in the case of a remainder to the right heirs of A. and B., and A. only dies during the continuance * of the pre- * 253 ceding estate, whereby the remainder vests in his heirs. (*a*)

8. **Of the Destruction of Contingent Remainders.** — If the particular estate determine, or be destroyed before the contingency happens on which the expectant estate depended, and leave no right of entry, the remainder is annihilated. The alteration in the particular estate which will destroy the contingent remainder must amount to an alteration in its quantity, and not merely in the quality; (*b*) and, therefore, the severance of the jointure between two joint tenants for life will not destroy the contingent remainder, limited after their joint estate. The particular estate

(*b*) New York Revised Statutes, i. [725,] sec. 32, 33, 34. The remainderman may be let in to defend suits brought against the tenant of the particular estate, or to recover the same when lost by the tenant's default. Ib. ii. 339, sec. 1, 2. No undue recovery against the tenant bars the title of the remainderman to relief. Ib. ii. 340, sec. 6, 7. In Virginia, the doctrines of the common law, relating to the destruction of contingent remainders, by the determination of the particular estate before the contingency, have also undergone essential changes by statute, and the policy of the legislature was to place contingent remainders beyond the reach of accident to the particular estate. Trustees, to preserve contingent remainders, are no longer in much use. Lomax's Digest, i. 457, 463.

(*c*) New York Revised Statutes, i. 750, sec. 11.

(*a*) Bro. tit. Done and Rem. pl. 21; Matthews *v.* Temple, Comb. 467; Fearne on Remainders, 393.

(*b*) Fearne on Remainders, 426; Lane *v.* Pannell, 1 Rol. 238, 817, 438; Harrison *v.* Belsey, T. Raym. 413.

in the tenant in tail, or for life, may be destroyed by feoffment or fine; for these conveyances gain a fee by disseisin, and leave no particular estate *in esse*, or in right, to support the contingent remainder. (*c*) So, if the tenant for life disclaimed on record, as by a fine, a forfeiture was incurred upon feudal principles; and if the owner of the next vested estate of freehold entered for the forfeiture, the contingent remainder was destroyed. (*d*)

* 254 A merger, by the act * of the parties, of the particular estate, is also equally effectual as a fine to destroy a contingent remainder. (*a*) But with respect to this doctrine of merger, there are some nice distinctions arising out of the case of the inheritance becoming united to the particular estate for life by descent; for, as a general rule, the contingent remainder is destroyed by the descent of the inheritance on the particular tenant for life. Out of indulgence, however, to last wills, the law makes this exception, that if the descent from the testator or the particular tenant be *immediate*, there is no merger; as if A. devises to B. for life, remainder to his first son unborn, and dies, and the land descends on B. as heir at law. Here the descent is immediate. But if the fee, on the death of A., had descended on C., and at his death on B., here the descent from A. would be only *mediate*, and the contingent remainder to the unborn son of B. would be destroyed by merger of the particular estate on the accession of the inheritance. Mr. Fearne (*b*) vindicates this distinction, and reconciles the jarring cases by it; and it has been since judicially established, in *Crump* v. *Norwood*. (*c*)

(*c*) Archer's Case, 1 Co. 66; Chudleigh's Case, 1 Co. 120, 137, b; 2 Rol. Abr. 418, pl. 1, 2; Purefoy *v.* Rogers, 2 Lev. 39. Chudleigh's case is a strong authority to prove that a feoffment, without consideration, and even with notice in the feoffee of the trust, will destroy a contingent remainder. It is a doctrine flagrantly unjust, and repugnant to every settled principle in equity, as now understood.

(*d*) Co Litt. 252, a. There has been a long and vexed question in the English law, how far a common recovery, suffered by a tenant in tail, would bar a remainder to the king. It was declared by the highest authorities, in the House of Lords, in the late case of Blosse *v.* Clanmorris (3 Bligh, app. 62), to be still a doubtful point of law. I allude to it merely as fresh proof of the everlasting uncertainty that perplexes this branch of legal science.

(*a*) Purefoy *v.* Rogers, 2 Saund. 386; [Egerton *v.* Massey, 3 C. B. N. S. 338.]

(*b*) Fearne on Remainders, 432–434.

(*c*) 7 Taunt. 362. This is one among the thousand samples of the refinements which have gradually accumulated, until they have, in a very considerable degree, overshadowed and obscured many parts of the English law of real property; and I am more and more impressed with a sense of the great utility of the provision rescu-

In equity, the tenant for life of a trust cannot, even by a fine, destroy the contingent remainder dependent thereon; and it will only operate on the estate he can lawfully grant. (*d*) A court of equity does not countenance the * destruction of * 255 contingent remainders; and Lord Loughborough observed that it had been intended to bring a bill into Parliament to prevent the necessity of trustees to preserve contingent remainders. (*a*) There is also an established distinction between those wrongful conveyances at common law which act on the possession, and those innocent conveyances which do not; and, therefore, a conveyance of a thing lying in grant does not bar a contingent remainder. Nor do conveyances which derive their operation from the statute of uses, as a bargain and sale, lease and release, and covenant to stand seised, bar contingent remainders, for none of them pass any greater estate than the grantor may lawfully convey. (*b*) There are also some acts of a tenant for life, which, though they amount to a forfeiture of the estate, and give the vested remainderman a title to enter, yet they do not destroy the contingent remainder, unless advantage be taken of the forfeiture by some subsequent vested remainderman. They do not, *ipso facto*, discontinue, devest, or disturb any subsequent estate, nor make any alteration or merger of the particular estate. (*c*) Though a right of entry, even after the particular tenant be disseised, will support a contingent remainder, yet, when once the right of entry is gone, it is gone forever, and a new title of entry will not restore the remainder. If there be, therefore, a tenant for life, with contingent remainder over, and the tenant

ing contingent remainders, by legislative authority, from all perplexing dependence on the particular estate.

(*d*) Lord Hardwicke, in Lethieullier *v.* Tracy, 8 Atk. 730.

(*a*) 5 Ves. 648. This has been done, as we have already observed, in New York, by the New York Revised Statutes, i. 725, sec. 32, 34, rendering expectant estates or remainders no longer dependent on the continuance of the precedent estate. So, in Mississippi, by the Revised Code of 1824, p. 459, the same rule is declared, and an estate of freehold or inheritance may be made to commence *in futuro* by deed as well as by will. Mr. Cornish thinks that the doctrine of remainders can scarcely be said to apply to equitable estates; for every ulterior limitation of a trust is, in substance, an executory trust, and more analogous to a future use or executory devise than to a remainder. Cornish on Remainders, 208.

(*b*) Gilbert's Law of Uses, by Sugden, 312; Litt. sec. 600; Magennis *v.* M'Cullogh, Gilb. 236.

(*c*) Fearne on Remainders, 405, 406.

for life makes a feoffment in fee, upon condition, and the
* 256 contingency happens before the condition * is broken, or before entry for breach thereof, the remainder is totally destroyed, though the tenant for life should afterwards enter for the condition broken, and regain his former estate. (*a*)

To preserve the contingent remainder from the operation of the feoffment, which, in this respect, sacrificed right to fiction and metaphysical subtlety, recourse has been had to the creation of *trustees to preserve the contingent remainder* during the life of the tenant for life, notwithstanding any determination of the particular estate prematurely, by forfeiture or otherwise. This precaution is still used in settlements on marriage, or by will, where there are contingent remainders to be protected. The legal estate limited to trustees during the tenant's life, is a vested remainder in trust, existing between the beneficial freehold and the contingent remainder, and the limitation in trust is not executed by the statute of uses, and the legal estate in such cases remains in the trustees. The tenant for life has a legal estate, and the remainder of the same character and for the same period is vested in the trustees; and if the particular estate determines otherwise than by the death of the tenant, the estate of the trustees, *eo instanti*, takes effect, and as a particular estate in possession, it supports the remainder depending on the contingency. (*b*) The trustees are entitled to a right of entry in case of any wrongful alienation by the tenant for life, or whenever his estate for life determines in his lifetime by any other means. (*c*) The trustees are under the cognizance of a court of equity, and it will control their acts, and punish them for a breach of trust; and if the feoffment be made with notice by the purchaser of the trust, as was the fact in *Chudleigh's case*, a court of chancery will hold the lands still subject to the former trust. (*d*) But this interference of equity is regulated by the circumstances and justice of the particular case. The court may, in its discretion, forbear to interfere, or it may, and will, even allow or compel the

(*a*) Thompson *v.* Leach, 2 Salk. 576; Hale, C. J., in Purefoy *v.* Rogers, 2 Saund 387; Fearne on Remainders, 438, 439; 2 Woodd. Lec. 196, 197.

(*b*) Vanderheyden *v.* Crandall, 2 Denio, 1. The various forms of these settlements in trust were stated and illustrated by Lord Eldon, in Moody *v.* Walters, 16 Ves. 294, and in Vanderheyden *v.* Crandall, *supra*.

(*c*) 2 Bl. Comm. 171; Fearne on Remainders, 409, 410.

(*d*) Mansell *v.* Mansell, 2 P. Wms. 678.

trustees to join in a sale to destroy the contingent remainder, if it should appear that such a measure would answer the uses originally intended by the settlement. (*e*)

***9. Of other Properties of Contingent Remainders.** — If a *257 contingent remainder be created in conveyances by way of use, or in dispositions by will, the inheritance, in the mean time, if not otherwise disposed of, remains in the grantor or his heirs, or descends to the heirs of the testator, to remain until the contingency happens. This general and equitable principle is of acknowledged authority. (*a*) Conveyances to uses are governed by doctrines derived from courts of equity; and the principles which originally controlled them, they retained when united with the legal estate. So much of the use as is not disposed of remains in the grantor; and if the remainder in fee be in contingency, the inheritance or use, in the mean time, results to the grantor, and descends to his heirs, and becomes a springing or shifting use, as the contingency arises. The same doctrine is applied to executory devises; and the fee remains unaffected by the will, and goes to the heir, subject to be defeated when the devise takes effect, provided it takes effect within the period prescribed against perpetuities. (*b*) Though the fee descends, in the interim, to the heir, there shall be an *hiatus*, as was observed in *Plunket* v. *Holmes*, to let in the contingency when it happens. It was fully and definitely settled by Lord Parker, on appeal from the rolls in *Carter* v. *Barnadiston*, (*c*) that the inheritance descends to the heir, in the case of a contingent remainder created by will, to await the happening of the contingency. The only debatable question, according to Mr. Fearne, is, whether the rule applies to conveyances at common *law. *258 As conveyances in this country are almost universally by way of use, the question in this case, and in many others arising upon common-law conveyances, will rarely occur; (*a*) but it is

(*e*) Sir Thomas Tippen's Case, cited in 1 P. Wms. 359; Platt *v.* Sprigg, 2 Vern. 303; Frewin *v.* Charleton, 1 Eq. Cas. Abr. 386, pl. 4; Symance *v.* Tattam, 1 Atk. 613; Fearne on Remainders, 410–423; Biscoe *v.* Perkins, 1 Ves. & B. 485.

(*a*) Sir Edward Clere's Case, 6 Co. 17 b; Davis *v.* Speed, Carth. 262; Purefoy *v.* Rogers, 2 Saund. 380; Plunket *v.* Holmes, T. Raym. 28; Lord Parker, in Carter *v.* Barnadiston, 1 P. Wms. 516.

(*b*) Preston on Estates, i. 240, 242. (*c*) 1 P. Wms. 505.

(*a*) In New York, the conveyances by feoffment, with livery, and by fines, and common recoveries, are abolished. New York Revised Statutes, i. 738, sec. 136; ib.

still a point involved in the general history and doctrines of the English law, and is therefore deserving of the attention of the student.

If a conveyance be made to A. for life, the remainder to the heirs of B. then living, and livery be made to A., Mr. Fearne contends that the inheritance continues in the grantor, because there is no passage open for its transition at the time of the livery. The transition itself may rest in abeyance or expectation, until the contingency or future event occurs to give it operation; but the inheritance, in the mean time, remains in the grantor, for the very plain and unanswerable reason that there is no person *in rerum natura* to receive it; and he or his heirs must be entitled, on the determination of the particular estate, before the contingent remainder can take place, to enter and resume the estate. He treated with ridicule the notion that the fee was in abeyance, or *in nubibus*, or in mere expectation or remembrance, without any definite or tangible existence; and he considered it as an absurd and unintelligible fiction. (*b*) Of the exist-

* 259 ence of such a technical rule of * the common law there can be no doubt. The principle was, perhaps, coeval with the common law, that during the pendency of a contingent remainder in fee, upon a life estate, as in the case already stated, the inheritance was deemed to be in abeyance (*a*) But a state of abeyance was always odious, and never admitted but from necessity, because, in that interval, there could not be any seisin of the land, nor any tenant to the *præcipe*, nor any one of the ability to protect the inheritance from wrong, or to answer for its burdens and services. This was the principal reason why a particular estate for years was not allowed to support a contin-

ii. 343, sec. 24. All conveyances are now to be deemed grants; and though deeds of bargain and sale, and of lease and release, may be used, they are to be deemed grants. This was a common-law conveyance, and it is now declared to pass all the interest of the grantor, if so intended. Ib. [i.] 739, sec. 138, 142; ib. 748, sec. 1, 2. I see no reason why the question in the text should not apply to grants in New York, equally as it would have done to feoffments with livery before they were abolished.

(*b*) Fearne on Remainders, 452–458. That an estate in abeyance is to be considered as *in nubibus*, was a doctrine frequently suggested and admitted in Plowden (29, a, 35, a, 556, 563, 564), and Lord Coke, in Co. Litt. 342, b, said, that an estate placed in such a mondescript situation had the quality of fame; *inter nubila caput*. Such an occasional glimpse at fairy land serves at least to cheer us amidst the disheartening gloom of the subject.

(*a*) Bro. tit. Done and Rem. pl. 6; Gawdy, J., in Chudleigh's Case, 1 Co. 135.

gent remainder in fee. (*b*) The title, if attacked, could not be completely defended, because there was no one in being whom the tenant could pray *in aid* to support his right; and, upon a writ of right patent, the lessee for life could not join *the mise* upon the mere right. The particular tenant could not be punishable for waste, for the writ of waste could only be brought by him who was entitled to the inheritance. So many operations of law were suspended by this sad theory of an estate in abeyance, that great impediments were thrown in the way of it, and no acts of the parties were allowed to put the immediate freehold in abeyance by limiting it to commence *in futuro;* and we have seen, that one ground on which the rule in Shelley's case is placed, was to prevent an abeyance of the estate. (*c*) Though the good sense of the thing, and the weight of liberal doctrine, are strongly opposed to the ancient notion of an abeyance, the technical rule is, that livery of seisin takes the reversion or inheritance from the grantor, and leaves him no tangible or disposable interest. Instead of a reversion he has only a potential ownership, subsisting, in contemplation of law, or a possibility of reverter; and Mr. Preston (*a*) insists that an estate *260 of freehold depending on another estate of freehold, and limited in contingency, must be in abeyance, and not in the grantor. The fee passes out of the grantor, and a vested estate of freehold necessarily precedes the remainder, and the inheritance is in contingency as well against the grantor, who has no power over it, as against the person to whom the contingent remainder is limited. Mr. Preston confidently asserts, that the argument of Mr. Fearne, however abstractly just and reasonable, is without authority, and contrary to all settled technical rules. Another able writer (*b*) also contends, that the doctrine of abeyance was never shaken or attacked, until Mr. Fearne brought against it the weight of his eloquence and talents. (*c*)

(*b*) Hob. 153.

(*c*) Hob. 153; Sir William Blackstone's argument, in Perrin *v.* Blake; Preston on Estates, i. 229, 240–255.

(*a*) Preston on Estates, i. 255; Preston on Abstracts, ii. 103–106.

(*b*) Cornish's Essay on Remainders, 175.

(*c*) There can be no doubt, though good sense was with Mr. Fearne, that the book authorities are against him. We cannot surmount the technical rule, if technical rules are binding in questions on property. The one in this case deduces its lineage from high antiquity. It is found in the Year Books, and is dispersed over Plowden and Coke. Mr. Preston and Mr. Cornish have the undoubted advantage; and though

A vested remainder, lying in grant, passes by deed without livery; but a contingent remainder is a mere right, and cannot be transferred before the contingency happens, otherwise than by way of estoppel. Lord Coke (*d*) divides estoppels into three kinds; viz. — by matter of record, as by letters patent, fine, * 261 common recovery, and pleading; (*e*) by * matter in writing, as by deeds indented; and by matter *in pais*, by acts of notoriety, as by livery, by entry, by acceptance of rent and by partition. Any conveyance by matter of record, or by deed indented, of an executory or contingent interest, will work an estoppel. (*a*) Thus, if there be an estate to A. and B., and to the survivor in fee, a conveyance operating by way of an estoppel will bind the contingent remainder in fee in the survivor. A lease and release, if the latter be by deed indented, will work an estoppel. The estate for life is the only tangible interest, and the other is a mere possibility; and estoppels exist where no interest passes from the party. (*b*)

Mr. Fearne's Treatise on Remainders is distinguished for its searching analysis of cases, he has abandoned them in this instance, and followed the irresistible impulse of his judgment. Those other writers are equally masters of abstruse law; and the latter, in particular, is a shrewd and dry critic, dealing in occult points. The fee will take an occasional flight to the clouds, and cannot be stayed, for common sense is disabled, and pierced by the *longe fallente sagitta!*

(*d*) Co. Litt. 352, a.

(*e*) Where a tenant, in a writ of [entry], disclaimed all title to the land demanded, he was held to be afterwards estopped from setting up against the demandant, or his assignee, any title then existing in him. Hamilton *v.* Elliott, 4 N. H. 182.

(*a*) Weale *v.* Lower, Pollex. 54, 61; Noel *v.* Bewley, 3 Sim. 103.

(*b*) Co. Litt. 45 a; Bensley *v.* Burdon, 2 Sim. & Stu. 519. In an elaborate note of the learned English editor to the case of the Duchess of Kingston, in 2d vol. Smith's Leading Cases, the law of estoppels is considered, and the cases classified under the heads of, (1.) *Matter of Record;* Judgments in courts of record are estoppels, and conclusive between the same parties and privies thereto, either in blood, in law, or by estate. So, also, are decrees, as being *quasi of record* in other judicial proceedings, as decrees in chancery, in ecclesiastical, maritime, and military courts, for *nemo debet bis vexari pro eadem causa.* (2.) *Deed.* (3.) Matter *in pais.* All these heads, and the sound qualities of estoppels under each, are illustrated by apposite cases. The American editor, Mr. Hare, has also added an elaborate note on the same subject, confined principally to a critical discussion of American cases. S. C. Law Library, U. S. xxviii., and to the consideration of them I would refer the student. The sense of estoppels is, that a man, for the sake of good faith and fair dealing, ought to be estopped from saying that to be false which by his means has once become accredited for truth, and by his representations has led others to act. The very definition of an estoppel, said Mr. Justice Cowen, in 3 Hill, 219, is when an admission is intended to lead and does lead a man with whom a party is dealing into a line of conduct which

All contingent and executory interests are assignable in equity, and will be enforced, if made for a valuable consideration; and

must be prejudicial to his interest, unless the party estopped be cut off from the power of retraction. So, an estoppel affecting the right of a party in real estate, may be created by matter *in pais*, consisting of acts and declarations of a person, by which he designedly induces another to alter his position injuriously to himself. Brown *v.* Wheeler, 17 Conn. 345; Kinney *v.* Farnsworth, ib. 355; [Nixon *v.* Carco, 28 Miss. 414; Freeman *v.* Cooke, 2 Exch. 654; Copeland *v.* Copeland, 28 Me. 525.] In Doe *v.* Martyn, 8 B. & C. 497, Mr. Justice Bayley, after an elaborate examination of cases, concluded, that a fine by a contingent remainderman passed nothing; and that when the contingency happened, then in the mouth of a stranger to the fine, it was no bar against a claim in the name of the remainderman. It operates by estoppel, and by estoppel only; and parties and privies may avail themselves of that estoppel. [Corbett *v.* Norcross, 35 N. H. 99.] But in Doe *v.* Oliver, 10 B. & C. 181, the above opinion was qualified, and it was held that a fine by a contingent remainderman did not operate by estoppel *only*. It had an ulterior operation when the contingency happened. It then operates upon *the estate* as though it had been vested at the time the fine was levied, and the estoppel becomes an estate in interest. Where a party is estopped by his deed, all persons claiming under or through him are equally bound by the estoppel. Stow *v.* Wyse, 7 Conn. 214. Recitals in a deed of land estop parties and privies. Story, J., Carver *v.* Jackson, 4 Peters, 83; Jackson *v.* Parkhurst, 9 Wend. 209. A party executing a deed is estopped by the recital of a particular fact, to deny that fact. Shelley *v.* Wright, Willes, 9. Every man is bound to speak and act according to the truth of the case, and the law will presume he has done so, and will not allow him to contradict such a reasonable presumption. This is the reason and foundation of the doctrine of estoppels. The estoppel prevents circuity of action. The truth is deemed to be shown by what estops. But the estoppel must be certain to every intent, for no one shall be denied setting up the truth, unless it be in a case of plain contradiction to his former allegations and acts. Nelson, J., in Pelletreau *v.* Jackson, 11 Wend. 117; Jackson *v.* Waldron, 13 Wend. 178, Tracy, senator. And as the effect of an estoppel may be to shut out the *real* truth, by its artificial *representative*, estoppels, whether at law or in equity, are not to be favored or extended by construction. Gaston, J., Jones *v.* Sasser, 1 Dev. & Batt. (N. C.) 464. A recital does not operate as an estoppel in an action by another party not founded on the deed, and wholly collateral to it. Carpenter *v.* Buller, 8 M. & W. 209. Whenever the application of the doctrine of estoppel would be likely to defeat the principle on which it rests, to effect justice and prevent wrong, it becomes the duty of the courts to prevent its application. Blake *v.* Tucker, 12 Vt. 44. [See, especially, Robertson *v.* Pickrell, 109 U. S. 608, 613, *et seq.*] Technical estoppels by deed or matter of record sometimes conclude the party, without any reference to the *moral* qualities of his conduct, but it is otherwise as to estoppels *in pais*. Welland Canal Co. *v.* Hathaway, 8 Wend. 483; Bronson, J., in Dezell *v.* Odell, 3 Hill, 215. Nor do estoppels bind the sovereign or state. Candler *v.* Lunsford, 3 Battle (N. C.), 407. A release, or other deed, when the releasor or grantor has no right at the time, passes nothing, and will not carry a title subsequently acquired, unless it contains a clause of warranty; and then it operates by way of estoppel, and not otherwise. Litt. sec. 446; Co. Litt. ib.; Jackson *v.* Wright, 14 Johns. 193; Dart *v.* Dart, 7 Conn. 250; Jackson *v.* Winslow, 9 Cowen, 1; Pelletreau *v.* Jackson, 11 Wend. 110; [Nash *v.* Spofford, 10 Metc. 192; Averill *v.* Wilson, 4 Barb. 180; Haynes *v.* Stevens, 11 N. H. 28; Bell *v.* Twilight, 6 Fost. (26 N. H.) 401; Pike *v.* Galvin, 29 Me. 183.] See *supra*,

it is settled, that all contingent estates of inheritance, as well as springing and executory uses and possibilities, coupled with an interest, where the person to take is certain, are transmis-
*262 sible by descent, and are devisable and assignable. (c) *If the person be not ascertained, they are not then possibilities coupled with an interest, and they cannot be either devised or descend, at the common law. (a) Contingent and executory, as well as vested interests, pass to the real and personal representatives, according to the nature of the interest, and entitle the representatives to them when the contingency happens. (b)

35. The deed of a *feme covert* will not operate by way of estoppel, so as to bar her subsequently acquired interest in the land. Jackson *v.* Vanderheyden, 17 Johns. 167. But a fine levied by husband and wife will bar her contingent interest, by way of estoppel. Helps *v.* Hereford, 2 B. & Ald. 242. By statute in Missouri, if a person conveys and purports to convey in fee when he has not the legal estate, and he afterwards acquires it, the same shall pass immediately to the grantee. Revised Statutes of Missouri, 1835, p. 119.

(c) Whitfield *v.* Fausset, 1 Ves. 391; Wright *v.* Wright, ib. 411; Lawrence *v.* Bayard, 7 Paige, 76; Varick *v.* Edwards, 1 Hoff. Ch. 383, 395–405; Pond *v.* Bergh, 10 Paige, 141. See also *supra*, ii. 475, note. [See, especially, Putnam *v.* Story, 132 Mass. 205, where it was held that a remainder to "heirs," though contingent, was assignable, it appearing that there were children living at the time. Grayson *v.* Tyler's Admx., 80 Ky. 358; Payne *v.* Rosser, 53 Ga. 662; Chess' App., 87 Penn. St. 362; Buck *v.* Launtz, 49 Md. 439. But see De Lassus *v.* Gatewood, 71 Mo. 871.]

(a) Lampet's Case, 10 Co. 46, with Fraser's notes, ib. 47, b; Roe *v.* Jones, 1 H. Bl. 30; Moore *v.* Hawkins, cited in 1 ib. 33; Jones *v.* Roe, 3 T. R. 88; Roe *v.* Griffiths, 1 Wm. Bl. 605. But possibilities which cannot be granted or devised, may be released to the owner of the land. Lord Hardwicke, Wright *v.* Wright, 1 Ves. 411. In the case of Jackson *v.* Waldron, 13 Wend. 178, after a full and learned discussion, it was decided, that *a mere naked possibility*, without being coupled with an interest, as that a son may inherit to his father who is living; or where there is a devise of White Acre to A., and of Black Acre to B., and if either die without issue, his estate to go to the survivor, and both be living, such a possibility cannot be assigned, or released, or devised, or pass by descent, and can only be extinguished by estoppel. On the other hand, if the possibility *be coupled with an interest*, as when a person, who is to take upon the happening of the contingency, is ascertained and fixed, such a possibility may be released, devised, or assigned, like any other future estate in remainder. Fortescue *v.* Satterthwaite, 1 Iredell (N. C.), 570, s. p. A mere *jus precarium*, or possibility of right resting on courtesy, or an anticipated donation, is not assignable. Co. Litt. 446; Long on Sales, Boston ed. 4; Vasse *v.* Comegys, 4 Wash. 570, 574; Story, J., in 1 Peters, 193, 213; Munsell *v.* Lewis, 4 Hill (N. Y.), 635.

(b) Fearne on Remainders, 459; Preston on Abstracts, ii. 119; Goodtitle *v.* Wood, Willes, 211; Goodright *v.* Searle, 2 Wilson, 29. See *infra*, 284. I apprehend that the rule at the common law, that executory interests cannot be transferred by deed, except by way of estoppel, no longer exists in New York. By the New York Revised Statutes (i. 723, sec. 9, 10, 13, ib. 725, sec. 35), estates in expectancy include all future estates, vested and contingent; and all expectant estates are descendible, devisable, and alienable, in the same manner as estates in possession. This sweeping

provision would seem to embrace every executory and contingent interest; and all conveyances whatsoever are reduced to simple grants. So, by the Massachusetts Revised Statutes of 1835, when any contingent remainder, executory devise, or other estate in expectancy, is so limited to any person, that in case of his death before the contingency happens the estate would descend to his heirs in fee, such person may sell, assign, or devise the same, subject to the contingency. Also, by the statute of 1 Vict. c. 26, all contingent interests may be devised, and by the statute of 7 and 8 Vict. c. 76, made to simplify the transfer of property, all executory interests are made alienable by deed, and this applies not only to real estate, but to executory interests in leasehold estates, though it is said to be doubted whether the doctrine of executory bequests is applicable to any other chattels than real chattels. Williams on the Principles of Real Property, Part IV. c. 1, 298.

LECTURE LX.

OF EXECUTORY DEVISES.

AN executory devise is a limitation by will of a future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyances at law. If the limitation by will does not depart from those rules prescribed for the government of contingent remainders, it is, in that case, a contingent remainder, and not an executory devise. (*a*) Lord Kenyon observed, in *Doe* v. *Morgan*, (*b*) that the rule laid down by Lord Hale had uniformly prevailed without exception, that "where a contingency was limited to depend on an estate of freehold, which was capable of supporting a remainder, it should never be construed to be an executory devise, but a contingent remainder."

1. Of the History of Executory Devises. — The reason of the institution of executory devises was to support the will of the testator; for when it was evident that he intended a contingent remainder, and when it could not operate as such by the rules of law, the limitation was then, out of indulgence to wills, held to be good as an executory devise. They are not mere possibilities, but certain and substantial interests and estates, and are put under such restraints only as have been deemed requisite to prevent the mischiefs of perpetuities, or the existence of estates that were unalienable. (*c*)

The history of executory devises presents an interesting view of the stable policy of the English common law, which abhorred perpetuities, and the determined spirits of the courts of justice to uphold that policy, and keep property free from the fetters of entailments, under whatever modification or form they might

(*a*) Carwardine *v.* Carwardine, 1 Eden, 27.
(*b*) 3 T. R. 763.
(*c*) Lord Ch. J. Willes, in Goodtitle *v.* Wood, Willes, 211.

assume. Perpetuities, as applied to real estates, were conducive to the power and grandeur of ancient families, and gratifying to the pride of the aristocracy; but they were extremely disrelished, by the nation at large, as being inconsistent with the free and unfettered enjoyment of property. "The reluctant spirit of English liberty," said Lord Northington, (*d*) "would not submit to the statute of entails; and Westminster Hall, siding with liberty, found means to evade it." Common recoveries were introduced to bar estates tail; and then, on the other hand, provisos and conditions not to alien with a cesser of the estate on any such attempt by the tenant, were introduced to recall perpetuities. The courts of law would not allow any such restraints by condition, upon the power of alienation, to be valid. (*e*) Such perpetuities, said Lord Bacon, (*f*) would bring in use the former inconveniences attached to entail; and he suggested that it was better for the sovereign and the subject, that men should be "in hazard of having their houses undone by unthrifty posterity, than be tied to the stake by such perpetuities."

Executory limitations were next resorted to, that men might attain the same object. Mr. Hargrave (*g*) has gleaned *from the oldest authorities a few imperfect samples of an *265 executory devise; but this species of limitation may be considered as having arisen since the statutes of uses and of wills. It was slowly and cautiously admitted, prior to the leading case of *Pells* v. *Brown*. (*a*) Springing uses of the inheritance furnished a precedent for similar limitations in the form of executory devises; and it was decided in *Pells* v. *Brown*, that a fee might be limited upon a fee by way of executory devise, and that such a limitation could not be barred by a common recovery. That case was silent as to executory bequests of chattels; and Mr. Justice Dodridge was opposed to the doctrine of the decision,

(*d*) Duke of Marlborough *v.* Earl Godolphin, 1 Eden, 417.

(*e*) *Vide supra*, 131.

(*f*) Use of the law in Bacon's Law Tracts, 145.

(*g*) See his elaborate argument as counsel in the great case of Thellusson *v.* Woodford, 4 Ves. 249–264. Lord Ch. J. Bridgman, in the case of Bate *v.* Amherst, T. Raym. 82, had, however, long preceded him in the research; for he insists, in that case, that executory devises were grounded upon the common law, and he refers to 49 Edw. III. 16, a, and Hen. VI. 13, a, as evidence of it. Both of those cases are cited by Lord Coke, and the latter in 7 Co. 9, a, to prove that an infant *en ventre sa mère* was, in many cases, "of consideration in the law."

(*a*) 1 Cro. Jac. 590.

and showed that he was haunted with the apprehension of reviving perpetuities under the shelter of an executory devise. The case, however, established the legality of an executory devise of the fee upon a contingency not exceeding one life, and that it could not be barred by a recovery. The same point was conceded by the court in *Snowe* v. *Cuttler*; (*b*) and the limits of an executory devise were gradually enlarged, and extended to several lives wearing out at the same time. Thus, in *Goring* v. *Bickerstaffe*, (*c*) a limitation of a term from one to several persons in remainder in succession, was held to be good, and not tending to a perpetuity, if they were all alive together; for, as Ch. B. Hale observed in that case, *all the candles were lighted together*, and the whole period could not amount to more than the life of the last survivor.

The great case of the Duke of Norfolk, (*d*) on the doc-
* 266 trine * of perpetuities, was finally decided in 1685, and the three senior judges at law were associated with Lord Chancellor Nottingham. The question arose upon the trust of a term for years upon a settlement by deed, and it was, whether a limitation over upon the contingency of A. dying without issue, was valid. The subject of executory devises was involved in the elaborate and powerful discussion in that case. The judges were exceedingly jealous of perpetuities, and would not allow limitations over upon an estate tail to be good; but the chancellor was of a different opinion, and he supported the settlement, and his opinion was affirmed in the House of Lords. While he admitted that a perpetuity was against the reason and policy of the law, he insisted that future interests, springing and executory trusts, and remainders, that were to arise upon contingencies, if not too remote, were not within the reason of the objection, and were necessary to provide for the exigencies of families. The principle of that case was, that terms for years were, equally with inheritances, subject to executory devise, and to trusts of the same nature, and it led to the practice of a strict settlement of that species of property, by executory devise, to the extent of lives in being, and twenty-one years afterwards. The doctrine of execu-

(*b*) 1 Lev. 135.

(*c*) Pollex. 31; 1 Cases in Chancery, 4; 2 Freeman, 163; Lord Bridgman's MS. report of the case, cited by Mr. Hargrave, in 4 Ves. 258.

(*d*) 3 Ch. Cas. Pollex. 223; 2 Ch. 229.

tory devises grew and enlarged, *pari passu*, in its application to terms for years, and to estates of inheritance. In *Scatterwood* v. *Edge*, (*a*) the judges considered lives in being as the ultimatum of contingency in point of time; and they showed that they inherited the spirit of the old law against such limitations. Every executory devise was declared to be a perpetuity as far as it went, and rendered the estate unalienable during the period allowed for the contingency to happen, though all mankind should join in the conveyance. (*b*)[1] The question which arose about the

* same time in *Lloyd* v. *Carew* (*a*) was, whether a limita- * 267 tion could be extended for one year beyond coexisting lives. The decision in chancery was, that it could not; but the decree was reversed upon appeal, and the limitation with that advance allowed, though not without great efforts to prevent it, on the ground that perpetuities had latterly increased to the entanglement and ruin of families. Afterwards, in *Luddington* v. *Kime*, (*b*) Powell, J., was of opinion, that a limitation, by way of executory devise, might be extended beyond a life *in esse*, so as to include a posthumous son. But Ch. J. Treby was of a different opinion, and he held that the time allowed for executory devises to take effect ought not to be longer than the life of one person then in being, according to *Snowe* and *Cuttler's* case. At last, in *Stephens* v. *Stephens*, in 1736, (*c*) the doctrine was finally settled and defined by precise limits. The addition of twenty-one years to a life or lives in being was held to be admissible; and that decision received the sanction of the Court of Chancery, and of the judges of the King's Bench. A devise of lands in fee, to such unborn son of a *feme covert* as should first attain the age of twenty-one, was held to be good; for the utmost length of time that could happen before the estate would vest, was the life of the mother, and the

(*a*) 1 Salk. 229; 12 Mod. 278.

(*b*) This last observation of Mr. Justice Powell is supposed to be rather too strong; for the owner of the contingent fee, together with the executory devisee, may bar it by a common recovery, and it may be barred by fine by way of estoppel. But in those states where there are no fines or recoveries, the executory devise is a perpetuity as far as it goes. Fearne on Executory Devises, by Powell, 56.

(*a*) Prec. in Ch. 72; Shower, P. C. 137, s. c.; Marks *v.* Marks, 10 Mod. 419, s. p.; Thellusson *v.* Woodford, 4 Ves. 227; 11 id. 112.

(*b*) 1 Ld. Raym. 203.

(*c*) 2 Barnard. K. B. 375; Cases temp. Talb. 228.

[1] See 283, n. 1.

subsequent infancy of the son. Since that time, an executory devise of the inheritance to the extent of a life or lives in being, and twenty-one years, and the fraction of another year, to reach the case of a posthumous child, has been uniformly allowed; and the same rule equally applies to chattel interests. (*d*) And thus, notwithstanding the constant dread of perpetuities, and the jealousy of executory devises, as being an irregular and
* 268 limited species of entail, a sense of the * convenience of such limitations in family settlements, has enabled them, after a struggle of nearly two centuries, to come triumphantly out of the contest. They have also become firmly established (though with some disabilities, in New York, as we have already seen (*a*)) as part of the system of our American testamentary jurisprudence. (*b*)

2. Of the Several Kinds and General Qualities of Executory Devises. — There are two kinds of executory devises relative to real estate, and a third sort relative to personal estate. (*c*) 1. Where the devisor parts with his whole estate, but, upon some contingency, qualifies the disposition of it, and limits an estate on that contin-

(*d*) Atkinson *v.* Hutchinson, 3 P. Wms. 258; Goodman *v.* Goodright, 1 Blacks. 188; 2 Bl Comm. 174; Long *v.* Blackall, 7 T. R. 100; Cadell *v.* Palmer, 1 Clark & Fin. 373; 10 Bing. 140, s. c. In this last case, it was decided in the House of Lords, in accordance with the opinion of the twelve judges, that a limitation by way of executory devise is valid, though it is not to take effect until after the determination of a life or lives in being, and a term of twenty-one years afterwards as a term in gross *without reference to the infancy of any person who is to take under such limitation.* [The period of gestation is allowed in those cases only in which the gestation exists. Ib.; Dungannon *v.* Smith, 12 Cl. & Fin. 546, 629.]

(*a*) *Supra*, 17.

(*b*) Though the Code Napoleon has abolished all perpetuities and substitutions (as see *supra*, 21), yet the convenience and policy of giving some reasonable effect to the will of the testator, even on the subject of *fidei commissa*, has prevailed. There are *fidei commissa*, and substitutions, which are held not to be prohibited; and it is declared to be the spirit of the existing jurisprudence of France, not to annul a testamentary disposition made under the code, except it *necessarily* presents a substitution, and cannot receive any other construction. Toullier, v. Nos. 15, 16, 30, 44; and he refers to a decision of the court of Besançon, reported in the Recueil de Jurisprudence du Code Civil, xvi., in support of this principle.

(*c*) This is the classification made by Powell, J., in Scatterwood *v.* Edge, 1 Salk. 229, and it has been followed by Mr. Fearne. Mr. Preston goes on to a greater subdivision; and he says there are six sorts of executory devises applicable to freehold interests, and two, at least, if not three, sorts of executory bequests applicable to chattel interests. Preston on Abstracts of Title, ii. 124. I have chosen not to perplex the subject by divisions too refined and minute. The object in elementary discussions, according to the plan of these Lectures, is to generalize as much as possible.

gency. Thus, if there be a devise to A. for life, remainder to B. in fee, provided that if C. should, within three months after the death of A., pay one thousand dollars to B., then to C. in fee, this is an executory devise to C., and if he dies, in the lifetime of A., his heir may perform the condition. (*d*) 2. Where the testator * gives a future interest to arise upon a con- *269 tingency, but does not part with the fee in the mean time; as in the case of a devise to the heirs of B., after the death of B., or a devise to B. in fee, to take effect six months after the testator's death; or a devise to the daughter of B., who shall marry C. within fifteen years. (*a*) 3. At common law, as was observed in a former volume, (*b*) if there was an executory bequest of personal property, as of a term for years to A. for life, and after his death to B., the ulterior limitation was void, and the whole property vested in A. There was, then, a distinction between the bequest of the use of a chattel interest, and of the thing itself; but that distinction was afterwards exploded, and the doctrine is now settled, that such limitations over of chattels real or personal, in a will, or by way of trust, are good. The executory bequest is equally good, though the ulterior devisee be not at the time *in esse;* (*c*) and chattels, so limited, are not subject to the demands of creditors, beyond the life of the first taker, who cannot pledge them, nor dispose of them beyond his life interest therein. (*d*)

An executory devise differs from a remainder in three very material points. (1.) It needs not any particular estate to precede and support it, as in the case of a devise in fee to A. upon his marriage. Here is a freehold limited to commence *in futuro*, which may be done by devise, because the freehold passes without livery of seisin; and until the contingency happens, the fee passes, in the usual course of descent, to the heirs at law. (2.) A fee may be limited after a fee, as in the case of a devise of land to B. in fee, and if he dies without issue, or before the age of twenty-one, then to C. in fee. (3.) A term for years may

(*d*) Marks *v.* Marks, 10 Mod. 419; Prec. in Ch. 486; [Stones *v.* Maney, 3 Tenn. Ch. 731.]

(*a*) Bate *v.* Amherst, T. Raym. 82; Lamb *v.* Archer, 1 Salk. 225; Lord Ch. J. Treby, in Clark *v.* Smith, 1 Lutw. 793.

(*b*) ii. 352.

(*c*) Cotton *v.* Heath, 1 Eq. Cas. Abr. 191, pl. 2.

(*d*) Hoare *v.* Parker, 2 T. R. 376; Fearne on Executory Devises, 46.

* 270 be * limited over, after a life estate created in the same.

At law, the grant of the term to a man for life would have been a total disposition of the whole term. (*a*) Nor can an executory devise or bequest be prevented or destroyed by any alteration whatsoever, in the estate out of which, or subsequently to which, it is limited. (*b*) The executory interest is wholly exempted from the power of the first devisee or taker. If, therefore, there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A. in fee, and if he dies *possessed* of the property without lawful issue, the remainder over, or remainder over the property which he, dying without heirs, should *leave*, or without *selling* or *devising* the same; in all such cases the remainder over is void as a remainder, because of the preceding fee; and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate, or power of disposition expressly given, or necessarily implied by the will. (*c*) *y*[1] A valid executory devise cannot subsist under an absolute power of disposition in the first taker. When an executory devise is duly created, it is a species of entailed estate, to the extent of the authorized period of limitation. It is a stable and inalienable interest, and the first taker has only the use of the land or chattel pending the contingency mentioned in the will. The executory devise cannot be devested even by a feoff-

(*a*) 2 Bl. Comm. 173, 174.

(*b*) Pells *v.* Brown, Cro. Jac. 590; Fearne on Executory Devises, 46, 51–58.

(*c*) Jackson *v.* Bull, 10 Johns. 19; Attorney General *v.* Hall, Fitzg. 314; Ide *v.* Ide, 5 Mass. 500; Jackson *v.* Robins, 16 Johns. 537. [Cf. Andrews *v.* Roye, 12 Rich. 536.] [See the rule here stated criticised in Gray on Restraints on Alienation, § 67 *et seq.*]

y[1] If only a life estate is granted, the addition of a power of disposition has been held not to invalidate a remainder or executory devise over. Perry *v.* Cross, 132 Mass. 454; Johnson *v.* Battelle, 125 Mass. 453; Smith *v.* Snow, 123 Mass. 323; Hall *v.* Otis, 71 Me. 326; Burleigh *v.* Clough, 52 N. H. 267; Wommack *v.* Whitmore, 58 Mo. 448; Wead *v.* Gray, 8 Mo. App. 515. And the rule that, where the fee or absolute interest is given with an absolute power of disposition, an executory devise over is void has been criticised in Gray on Restraints on Alienation, § 66 *et seq.* It is difficult to perceive any good reason why the executory devise should not be considered valid, subject to be defeated by a disposition of all the property, just as a remainder after a life estate with a power of appointment is valid, but subject to be devested by an appointment. But the rule has very recent authority in its favor. Jones *v.* Bacon, 68 Me. 34; McKenzie's App., 41 Conn. 607; Rona *v.* Meier, 47 Iowa, 607. See especially, Kelley *v.* Meins, 135 Mass. 231 and cases cited. See also Howard *v.* Carusi, 109 U.S. 725; Mussoorie Bank *v.* Raynor, 7 App. Cas. 321.

ment; (*d*) but the stability of these executory limitations is, nevertheless, to be understood with this single qualification, that if an executory devise or interest follows an *estate tail*, a common recovery suffered by the tenant in tail before the condition occurred, will bar the estate depending on that condition; for a common recovery bars all subsequent * and conditional limitations. (*a*) It is not so with a recovery suffered by a tenant in fee; for that will not bar an executory devise, as was decided in *Pells* v. *Brown*; (*b*) and the reason of the distinction is, that the issue in tail is barred in respect of the recompense in value, which they are presumed to recover over against the vouchee; whereas the executory devisee is entitled to no part of the recompense, for that would go to the first taker, or person having the conditional fee. It is further to be observed, that a change of circumstances, either before or after a testator's death, may convert into a remainder, a limitation which, at the death of the testator, and without such change, could only have operated by way of executory devise. (*c*) *271

3. **Of Limitations in Executory Devises.** — (1.) *When too remote.* — We have seen, (*d*) that an executory devise, either of real or personal estate, is good if limited to vest within the compass of twenty-one years after a life or lives in being; and the contingency may depend on as many lives in being as the settler pleases, for the whole period is no more than the life of the survivor. (*e*) This rule of the English law has been restricted by the New York Revised Statutes, (*f*) which will not allow the absolute power of alienation to be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more

(*d*) Mullineux's Case, cited in Palm. 136. [See also *In re* Barber's Settled Estates, 18 Ch. D. 624.]

(*a*) Driver *v.* Edgar, Cowp. 379; Fearne, 66, 67, 107.

(*b*) Cro. Jac. 590.

(*c*) Preston on Abstracts, ii. 154; Doe *v.* Howell, 10 B. & C. 191.

(*d*) *Supra*, 267.

(*e*) *Vide supra*, 17. In the case of a devise of real estate to trustees, in trust for wife for life, and after her death in trust for the grandchildren of B. then living, to be received by them in equal proportions, when they should severally attain the age of twenty-five years, the testator left the widow and B. surviving. Eight grandchildren were living at the death of the widow, and several were born afterwards. It was held, in Kevern *v.* Williams, 5 Sim. 171, that the devise was not void for remoteness, but those only of the grandchildren took who were in existence at the widow's death.

(*f*) i. 723, sec. 14, 15, 16; *vide infra*, 283.

than two lives in being at the creation of the estate; except in the single case of a contingent remainder in fee, which may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years; or upon any other contingency by which the estate of such persons may be determined before they attain their full age. Every future estate is declared to be void in its creation, which suspends the absolute power of alienation for a longer period than is above prescribed. (*g*) The

(*g*) A trust estate, if it be so limited that it cannot, in any event, continue longer than the actual minority of two or more infants in being at the creation of the estate and who have an interest therein, either vested or contingent, is not necessarily invalid in New York; for this, in no event, suspends the power of alienation for a longer period than twenty-one years, and the usual period of gestation, if there was a posthumous child. Hawley *v.* James, 5 Paige, 318; s. c. 16 Wend. 61. In this case of Hawley *v.* James, it was urged upon the argument by one of the counsel (and who had been himself one of the revisers), that the rule of the common law permitting a suspension of the absolute power of alienation *for a moderate term of years without reference to lives*, was not within the policy or purview of the Revised Statutes, and remained unchanged. Blackstone observes, that in the two species of executory devises, the contingencies ought to be such as may happen *within a reasonable time;* as within one or more life or lives in being, or *within a moderate term of years*. 2 Bl. Comm. 173. The object of the statute was to reduce the number of lives to two, and to abolish the twenty-one years as an absolute term, after the expiration of the lives, and confining the additional suspense to an actual minority. See 5 Paige, 394–403. But a *moderate term for years* was probably deemed not sufficiently definite and precise, and the decision in the case seems to have regarded the statutory restriction as the only one existing. It was decided, that where a trust term created by will was to continue until a number of children and grandchildren, *exceeding two*, attained the age of twenty-one, it was void under the statute; for the power of alienation of a fee could not be suspended, by means of a trust term, beyond the continuance of, or at the expiration of, not more than two lives in being at the death of the testator, and to be designated by the will, for a term limited upon the minorities of more than two persons *not designated*, would depend upon more than two lives and be void. Three or more minorities were considered by the court, in that case, as being equivalent to three or more lives, and equally fatal, unless at least two of the minors or persons were specially designated as being those on whom the contingency or event of the estate depended. So, again, in Hone *v.* Van Schaick, 7 Paige, 221; s. c. 20 Wend. 564, a similar limitation of a trust of real estate, directing the trustees to apply the future income thereof to several children and their representatives, for the term of twenty-one years from the date of the will, and then, or as soon as the trustees should deem discreet, to divide the fund among the children and their representatives; and the children to take only life estates, with remainders in fee to their descendants, was held to be void under the New York Revised Statutes, and upon the principles established in Coster *v.* Lorillard and Hawley *v.* James. It rendered the interests of the *cestui que trust* inalienable for too long a time. Every estate is void in its creation which suspends the absolute power of alienation for more than two *designated* lives in being at the creation of the estate. *Life* must, in some form, enter

New York statute has, in effect, destroyed all distinction between contingent remainders and executory devises. They are equally future or expectant estate, subject to the same provisions, and may be equally created by grant or by will. *The *272 statute (*a*) allows a freehold estate, as well as a chattel real, to be created, to commence at a future day; and an estate for life to be created in a term for years, and a remainder limited thereon; and a remainder of a freehold or chattel real, either contingent or vested, to be created expectant on the determination of a term of years; and a fee to be limited on a fee, upon a contingency. There does not appear, therefore, to be any real distinction left subsisting between contingent remainders and executory devises. They are so perfectly assimilated, that the latter may be considered as reduced substantially to the same class; and they both come under the general denomination of expectant estates. Every species of future limitation is brought within the same definition and control. Uses being also abolished by the same code, (*b*) all expectant estates, in the shape of springing, shifting, or secondary uses, created by conveyances to uses, are, in effect, become contingent remainders, and subject precisely to the same rules. What I shall say, hereafter, on the subject of executory devises, will have reference to the English law, as it existed in New York prior to the late revision, and as it still exists in other states of the Union. (*c*)

into the limitation. So, again, in Van Vechten *v.* Van Vechten, 8 Paige, 104, it was held that where the testator devised real estate to trustees to sell, and apply the proceeds to the support of *four* daughters during the lives, the devise was void, by suspending the power of alienation for more than two lives, because the will directed, if either daughter died leaving issue, the income of her share to be applied to the support of such issue, and if without issue, the income of her share to go to the survivors. The remainder, after the death of the daughter, was held to be vested in her issue absolutely. De Peyster *v.* Clendining, 8 Paige, 295, s. P. [See Amory *v.* Lord, 9 N. Y. 403; Morgan *v.* Masterton, 4 Sandf. 442; Jennings *v.* Jennings, 5 Sandf. 174.]

(*a*) New York Revised Statutes, i. 724, sec. 24.

(*b*) New York Revised Statutes, i. 728, sec. 45.

(*c*) We may not be able to calculate with certainty upon the future operation of the changes which have been recently made in the doctrine of expectant estates by the New York revised code of statute law. But the first impression is, that these innovations will be found to be judicious and beneficial. It appears to be wise to abolish the technical distinction between contingent remainders, springing or secondary uses, and executory devises, for they serve greatly to perplex and obscure the subject. It contributes to the simplicity, uniformity, and certainty of the law, to bring those various executory interests nearer together, and resolve them into a few

*273 *(2.) *Of Dying without Issue, as to Real Estate.* — If an executory devise be limited to take effect after a dying

plain principles. It is convenient and just that all expectant estates should be rendered equally secure from destruction by means not within the intention of the settlement, and that they should all be controlled by the same salutary rules of limitation. Some of the alterations are not material, and it is doubtful whether confining future estates to two lives in being was called for by any necessity or policy, since the candles were all lighted at the same time, let the lives be as numerous as caprice should dictate. It was a power not exposed to much abuse; and, in the case of children, it might be very desirable and proper that the father should have it in his power to grant life estates in his paternal inheritance to all his children in succession. The propriety of limiting the number of lives was much discussed recently, before the *English Real Property Commissioners.* The objection to a large number of lives is, that it increases the chance of keeping the estate locked up from circulation to the most extended limit of human life; and very respectable opinions are in favor of a restriction to the extent of two or three lives only, *besides the lives of the parties in interest, or to whom life estates may be given.*

In the case of Coster *v.* Lorillard, decided in the court of errors of New York, in December, 1835, on appeal from chancery (5 Paige, 172; s. c. 14 Wend. 265), the limitation in the statute to the suspension of the power of alienation beyond two lives in being was strictly sustained. The devise was to trustees in fee, in trust to receive the rents and profits, and pay over and divide the same equally between twelve nephews and nieces, and the survivors and survivor of them, during their lives respectively; and, after the deaths of all the testator's nephews and nieces, remainder in fee to the children of the twelve nephews and nieces living, and to the children of such as may then be dead *per stirpes.* The will would have been good under the English law, and under the law of New York as it stood before the Revised Statutes of 1830, for that allowed real property to be rendered inalienable during the existence of a life, or any number of lives in being, and twenty-one years and nine months afterwards, or until the son of a tenant for life should attain his full age. But the New York Revised Statutes, i. 723, sec. 15, prohibited the suspension of the absolute power of alienation, by any limitation or condition whatever, for any longer period than two lives in being at the creation of the estate, and the prohibition applied to all estates, whether present or future. Here was an attempt to contravene the letter and the policy of the statute, for a sale by the trustees would have been in contravention of the trust, and therefore void. The New York Revised Statutes, i. 730, sec. 65. Nor could the nephews and nieces convey, for the whole estate in law and equity was in the trustees, subject only to the execution of the trust. New York Revised Statutes, i. 729, sec. 60. The nephews and nieces had no other right than a beneficial right in action to enforce in equity performance of the trust. The remaindermen, that is, the grand nephews and nieces then in existence, could not convey, for who were to take in remainder was contingent, and could not be ascertained until the death of the survivor of the nephews and nieces. They had no present estate, and only a possibility. If they survived the twelve nephews and nieces, they took, and not otherwise. The estate given in remainder, therefore, suspended the power of alienation during the continuance of the twelve nephews and nieces, and by the force of the statute the remainder was held to be void, and the trust also void, as being in contravention of the statute; and the estate (and which was stated in the case as amounting to three millions of dollars, and the rents and profits to upwards of eighty thousand dollars annually) descended to the heirs at law. It was therefore decided, that a devise in

without heirs, or *without issue*, or *on failure of issue*, or *without leaving issue*, the limitation is held to be void, because the contingency is too remote, as it is not to take place until after an indefinite failure of issue. Nothing is more common, in cases upon devises, than the failure of the contingent devise, from the want of a particular estate to support it as a remainder; or by reason of its being too remote, after a general failure of issue, to be admitted as good by way of executory devise. If the testator meant that the limitation over was to take effect on failure of issue *living at the time of the death* of the person named as the first taker, then the contingency determines at his death, and no rule of law is broken, and the executory devise is sustained. The difficult and vexed question which has so often been discussed by the courts is, whether the testator, by the words *dying without issue*, or by words of similar import, and with or without additional expressions, meant a dying without issue living at the time of the death of the first taker, or whether he meant a general or indefinite failure of issue. Almost every case on wills, * with remainders over, that has occurred within the * 274 last two centuries, alludes, by the use of such expressions, to the failure of issue, either definitely or indefinitely.

A definite failure of issue is, when a precise time is fixed by the will for the failure of issue, as in the case of a devise to A., but if he *dies without lawful issue living at the time of his death.* An indefinite failure of issue is a proposition the very converse of the other, and means a failure of issue, whenever it shall happen, sooner or later, without any fixed, certain, or definite period, within which it must happen. It means the period when the issue, or descendants of the first taker, shall become extinct, and when there is no longer any issue of the issue of the grantee, without reference to any particular time or any particular event;

trust of an entire estate, to receive the rents or income thereof, and to distribute it among several *cestui que trusts*, could not be considered as a separate devise of the share of each *cestui que trust*, so as to protect the share of each as a tenant in common during his own life; and that as the trust was to endure for a longer period than two lives in being at the death of the testator, the whole devise in trust was void. This was the amount of the decree in the court of errors, and the discussions in the case, and the contrariety of views taken by the different members of the court affords a striking illustration of the indiscretion and danger of disturbing and uprooting, as extensively as the revisers in their revised statutes have done, the old established doctrine of uses, trusts, and powers, and which were, as Ch. J. Savage observed in that case, "subjects which baffled their powers of modification."

and an executory devise, upon such an indefinite failure of issue, is void, because it might tie up property for generations. A devise in fee with remainder over upon an indefinite failure of issue, is an estate tail; and in order to support the remainder over as an executory devise, and to get rid of the limitation as an estate tail, the courts have frequently laid hold of slender circumstances in the will, to elude or escape the authority of adjudged cases. (*a*) The idea that testators mean by a limitation over upon the event of the first taker dying without issue, the failure of issue living at his death, is a very prevalent one, but it is probable that, in most instances, testators have no precise meaning on the subject, other than that the estate is to go over if the first taker has no posterity to enjoy it. If the question was to be put to a testator, whether he meant by his will, that if his son, the first taker, should die leaving issue, and that issue should become extinct in a month, or a year afterwards, the remainder over should not take effect, he would probably, in most cases, answer in the negative. In the case of a remainder over upon the event of the first devisee dying *without lawful issue*, Lord Thurlow, following the whole current of cases, held the limitation over too remote, and observed, that he rather thought the testator *meant* the remainder persons to take *whenever* *275 there should * be a failure of issue of the first taker. (*a*)

Lord Macclesfield declared, (*b*) that even the technical rule was created for the purpose of supporting the testator's intention. If, says he, lands be devised to A., and if he dies without issue, then to B., this gives an estate tail to the issue of the devisee. And this construction, he observes, "is contrary

(*a*) Where there was a devise to A. *for life*, with remainder to her child or children, *if she should leave any*, and if she should die and *leave no lawful issue*, then with remainder over; A. survived the testator and had one child, and she survived her child and was left a widow. It was held that the devise to her children or issue was a *contingent* remainder in fee, and which, on the birth of a child, became a *vested* remainder in fee, subject to open and let in after-born children. Macomb *v.* Miller, 9 Paige, 265; s. c. 26 Wend. 229. If it had been an *estate tail* in A. turned by our law into a fee simple, the remainder over was not good by way of executory devise, because it was upon an indefinite failure of issue. King *v.* Burchell, 1 Eden, 424; Doe *v.* Perryn, 3 T. R. 484; Den *v.* Bagshaw, 6 T. R. 512; Doe *v.* Elvy, 4 East, 313, and 1 Fearne, 141, 3d ed. referred to in that case; Dansey *v.* Griffiths, 4 Maule & S. 61; Right *v.* Creber, 5 B. & C. 866; Franklin *v.* Lay, 6 Mad. Ch. 258; Hannan *v.* Osborn, 4 Paige, 336; [James *v.* Rowland, 52 Md. 462; Fisher *v.* Webster, 14 L. R. Eq. 283.]

(*a*) Jeffrey *v.* Sprigge, 1 Cox's Cases, 62. (*b*) Pleydell *v.* Pleydell, 1 P. Wms. 750.

to the natural import of the expression, and made purely to comply with the intention of the testator, which seems to be, that the land devised should go to the issue, and their issue, to all generations." So, in *Tenny* v. *Agar*, (*c*) the devise was to the son and daughter in fee; but if they should happen to *die without having any child or issue lawfully begotten*, then remainder over. Lord Ellenborough said, that nothing could be clearer than that the remainderman was not intended by the testator to take anything until the issue of the son and daughter were all extinct, and the remainder over was, consequently, void. The same construction of the testator's real intention was given to a will, in *Bells* v. *Gillespie*, (*d*) where there was a devise to the sons, and if either should die without lawful issue, his part was to be divided among the survivors. Mr. Justice Carr declared, that the testator meant that the land given to each son should be enjoyed by the family of that son, so long as any branch of it remained. He did not mean to say, "You have the land of C. if he has no child living *at his death*, but if he leave a child you shall not have it, though the child dies the next hour." A father, as he justly observed, is not prompted by such motives.

The opinion of these distinguished judges would seem to prove, that if the rule of law depended upon the real fact of intention, that intention would still be open to discussion, * and *276 depend very much upon other circumstances and expressions in the will in addition to the usual words.

The series of cases in the English law have been uniform, from the time of the Year Books down to the present day, in the recognition of the rule of law, that a devise in fee, with a remainder over if the devisee dies without issues or heirs of the body, is a fee cut down to an estate tail; and the limitation over is void, by way of executory devise, as being too remote, and founded on an indefinite failure of issue. (*a*) The general course of American

(*c*) 12 East, 253.

(*d*) 5 Rand. 273; Caskey *v.* Brewer, 17 Serg. & R. 441, s. P.

(*a*) The number of cases in which that point has been raised, and discussed, and adjudged, is extraordinary, and the leading ones are here collected for the gratification of the curiosity of the student. Assize, 35 Edw. III. pl. 14; Sonday's Case, 9 Co. 127; King *v.* Rumbail, Cro. Jac. 448; Chadock *v.* Cowly, ib. 695; Holmes *v.* Meynel, T. Raym. 452; Forth *v.* Chapman, 1 P. Wms. 663; Brice *v.* Smith, Willes, 1; Hope *v.* Taylor, 1 Burr. 268; Attorney General *v.* Bayley, 2 Bro. C. C. 553; Knight *v.* Ellis, ib. 570; Doe *v.* Fonnereau, Doug. 504; Denn *v.* Slater, 5 T. R. 335; Doe *v.* Rivers,

authorities would seem to be to the same effect, and the settled English rule of construction is considered to be equally the settled rule of law in this country; though, perhaps, it is not deemed of quite so stubborn a nature, and is more flexible, and more easily turned aside by the force of slight additional expressions in the will. (*b*) The English rule has been adhered to, and has not been permitted, either in England or in this country, to be affected by such a variation in the words of the limitation over, as *277 dying without *leaving* *issue; (*a*) nor, if the devise was to two or more persons, and either should die without issue, the *survivor* should take. (*b*) But if the limitation over was upon the first taker dying without issue *living*, it was held, so long ago as the case of *Pells* v. *Brown*, (*c*) that the will meant issue living at the death of the first taker; and the limitation

7 id. 276; Doe *v.* Ellis, 9 East, 382; Tenny *v.* Agar, 12 id. 253; Romilly *v.* James, 6 Taunt. 263; Barlow *v.* Salter, 17 Ves. 479.

(*b*) For the strict effect of the rule, see Ide *v.* Ide, 5 Mass. 500; Dallam *v.* Dallam, 7 Harr. & Johns. 220; Newton *v.* Griffith, 1 Harr. & Gill, 111; Sydnor *v.* Sydnors, 2 Munf. 263; Carter *v.* Tyler, 1 Call, 165; Hill *v.* Burrow, 3 id. 342; Bells *v.* Gillespie, 5 Rand. 273; Broaddus *v.* Turner, ib. 308; Den *v.* Wood, Cam. & Norw. 202; Cruger *v.* Hayward, 2 Desaus. 94; Irwin *v.* Dunwoody, 17 Serg. & R. 61; Caskey *v.* Brewer, ib. 441; Heffner *v.* Knepper, 6 Watts, 18; Paterson *v.* Ellis, 11 Wend. 259; Moody *v.* Walker, 3 Ark. 198; Hollett *v.* Pope, 3 Harr. (Del.) 542.

(*a*) Forth *v.* Chapman, 1 P. Wms. 663; Den *v.* Shenton, 2 Chitty, 662; Romilly *v.* James, 6 Taunt. 263; Daintry *v.* Daintry, 6 T. R. 307; Croly *v.* Croly, 1 Batty, 1; Carr *v.* Porter, 1 M'Cord, Ch. 60; Nowton *v.* Griffith, 1 Harr. & Gill, 111. In Carr *v.* Jeannerett and the Same *v.* Green, 2 M'Cord, 66–75, there was a devise of the rest of the *estate* to B. and C., to be equally divided between them, and delivered to them at the age of twenty-one; but should they die, *leaving no lawful issue*, devise over to D. and others. The court of appeals at law, in May, 1821, held that C., having arrived at the age of twenty-one, and having issue, took a *fee*, and that B. having died under age, and without issue, C. became entitled to the entire estate, and his children took by limitation, and not by purchase. The court of appeals in equity, in May, 1822, gave a different opinion. They admitted that C., the survivor, and his issue, took a cross remainder by implication. That the *general intent* of the will was to be satisfied; and if the *secondary intent* interfered with it, the former was to prevail. That as the testator intended that the estate should go eventually to the issue of B. and C., an absolute estate in fee to B. and C. would be inconsistent with that general intent; and B. and C., therefore, took only *estates for life*, with a contingent remainder in the issue as purchasers.

(*b*) Chadock *v.* Cowly, Cro. Jac. 695; Newton *v.* Griffith, 1 Harr. & Gill, 111; Bells *v.* Gillespie, 5 Rand. 273; Broaddus *v.* Turner, 5 id. 308; *contra*, Ranelagh *v.* Ranelagh, 2 Myl. & K. 441; Den *v.* Cox, 3 Dev. (N. C.) 894; Radford *v.* Radford, 1 Keen, 486; De Treville *v.* Ellis, and Stevens *v.* Patterson, 1 Bailey, Eq. 40, 42. These last decisions seem to be sufficient to change the former rule, and that a limitation to *the survivor* may be good by way of executory devise.

(*c*) Cro. Jac. 590.

over was not too remote, but good as an executory devise. The same construction was given to a will, when the limitation over was upon the event of the first taker dying without leaving issue *behind* him; (*d*) or where the will, in a bequest of personal estate only, was to two, and upon either dying *without children, then to the survivor;* (*e*) or when the first taker * should die, * 278 and *leave no issue*, then to A. and B., who were *in esse*, or the *survivor*, and were to take *life estates only;* (*a*) or when the first taker should happen to die, and *leave no child or children.* (*b*) [1]

(*d*) Porter *v.* Bradley, 3 T. R. 143.

(*e*) Hughes *v.* Sayer, 1 P. Wms. 534; Nicholls *v.* Skinner, Prec. in Ch. 528.

(*a*) Roe *v.* Jeffrey, 7 T. R. 589.

(*b*) Doe *v.* Webber, 1 B. & Ald. 713. In Ranelagh *v.* Ranelagh, 2 Myl. & K. 441, it was declared, that if separate legacies were given to two or more persons, with a limitation over to *the survivors* or survivor, in case of the death of either, *without legitimate issue*, the presumption was that the testator had not in contemplation an indefinite failure of issue.

The term *issue* may be used either as a word of purchase or of limitation, but it is generally used by the testator as synonymous with child or children.

[1] "*Die without Issue.*" — The construction of these words as meaning an indefinite failure of issue is recognized in Feakes *v.* Standley, 24 Beav. 485 (but see Taylor *v.* Taylor, 63 Penn. St. 481, 485); Burrough *v.* Foster, 6 R. I. 534; Arnold *v.* Brown, 7 R. I. 188; Allen *v.* Trustees of Ashley School Fund, 102 Mass. 262, 264; Gast *v.* Baer, 62 Penn. St. 35; Vaughan *v.* Dickes, 20 Penn. St. 509, Eichelberger *v.* Barnitz, 9 Watts, 447; Kirk *v.* Furgerson, 6 Cold 479; Addison *v.* Addison, 9 Rich. Eq 58; Tongue *v.* Nutwell, 13 Md. 415, Randolph *v.* Wendel, 4 Sneed, 646; [Dickson *v.* Satterfield, 53 Md. 317; Voris *v.* Sloan, 68 Ill. 588; Mangum *v.* Piester, 16 S. C. 316.] See Hall *v.* Chaffee, 14 N. H. 215; Downing *v.* Wherrin, 19 N. H. 9. Cases where the same rule was applied to personalty are Candy *v.* Campbell, 2 Cl. & Fin. 421; Edelen *v.* Middleton, 9 Gill, 161; Albee *v.* Carpenter, 12 Cush. 382. The result of these cases is that when real estate is devised to A., or to A. and his heirs, and, if he die without issue, over to B., A. takes an estate tail, and B. a remainder subject to it, whereas a similar limitation of personalty gives the entire interest to A. Cases *supra; post*, 283; Cole *v.* Goble, 13 C. B. 445; Hall *v.* Priest, 6 Gray, 18, 22; Albee *v.* Carpenter, *supra* But the words have been construed to mean without issue living at the time of the death, and not an indefinite failure of issue, either *prima facie* or on slight circumstances, in other American cases besides those mentioned by the author Parish *v.* Ferris, 6 Ohio St. 563; Niles *v.* Gray, 12 Ohio St. 320; Armstrong *v.* Armstrong, 14 B. Mon. 333; Daniel *v.* Thompson, ib. 663; Bullock *v.* Seymour, 33 Conn. 289; Hudson *v.* Wadsworth, 8 Conn. 348, 359; [Clark *v.* Stanfield, 38 Ark. 347; Mendenhall *v.* Mower, 16 S. C. 303.] Cases of bequests of personalty are Ladd *v.* Harvey, (1 Fost.) 21 N. H. 514; Griswold *v.* Greer, 18 Ga. 545; Bedford's Appeal, 40 Penn. St. 18, 22; [*In re* Merceron's Trusts, 4 Ch. D. 182.]

The words may be shown to have this restricted meaning by the context. Thus when the gift over is expressly to take effect on the death of the person to whom the fee is given expressly or by implication in the first instance, the latter will

and showed that he was haunted with the apprehension of reviving perpetuities under the shelter of an executory devise. The case, however, established the legality of an executory devise of the fee upon a contingency not exceeding one life, and that it could not be barred by a recovery. The same point was conceded by the court in *Snowe* v. *Cuttler*; (*b*) and the limits of an executory devise were gradually enlarged, and extended to several lives wearing out at the same time. Thus, in *Goring* v. *Bickerstaffe*, (*c*) a limitation of a term from one to several persons in remainder in succession, was held to be good, and not tending to a perpetuity, if they were all alive together; for, as Ch. B. Hale observed in that case, *all the candles were lighted together*, and the whole period could not amount to more than the life of the last survivor.

The great case of the Duke of Norfolk, (*d*) on the doc-
* 266 trine * of perpetuities, was finally decided in 1685, and the three senior judges at law were associated with Lord Chancellor Nottingham. The question arose upon the trust of a term for years upon a settlement by deed, and it was, whether a limitation over upon the contingency of A. dying without issue, was valid. The subject of executory devises was involved in the elaborate and powerful discussion in that case. The judges were exceedingly jealous of perpetuities, and would not allow limitations over upon an estate tail to be good; but the chancellor was of a different opinion, and he supported the settlement, and his opinion was affirmed in the House of Lords. While he admitted that a perpetuity was against the reason and policy of the law, he insisted that future interests, springing and executory trusts, and remainders, that were to arise upon contingencies, if not too remote, were not within the reason of the objection, and were necessary to provide for the exigencies of families. The principle of that case was, that terms for years were, equally with inheritances, subject to executory devise, and to trusts of the same nature, and it led to the practice of a strict settlement of that species of property, by executory devise, to the extent of lives in being, and twenty-one years afterwards. The doctrine of execu-

(*b*) 1 Lev. 135.

(*c*) Pollex. 31; 1 Cases in Chancery, 4; 2 Freeman, 163; Lord Bridgman's MS. report of the case, cited by Mr. Hargrave, in 4 Ves. 258.

(*d*) 3 Ch. Cas. Pollex. 223; 2 Ch. 229.

tory devises grew and enlarged, *pari passu*, in its application to terms for years, and to estates of inheritance. In *Scatterwood* v. *Edge*, (*a*) the judges considered lives in being as the ultimatum of contingency in point of time; and they showed that they inherited the spirit of the old law against such limitations. Every executory devise was declared to be a perpetuity as far as it went, and rendered the estate unalienable during the period allowed for the contingency to happen, though all mankind should join in the conveyance. (*b*)[1] The question which arose about the

*same time in *Lloyd* v. *Carew* (*a*) was, whether a limita- *267
tion could be extended for one year beyond coexisting lives. The decision in chancery was, that it could not; but the decree was reversed upon appeal, and the limitation with that advance allowed, though not without great efforts to prevent it, on the ground that perpetuities had latterly increased to the entanglement and ruin of families. Afterwards, in *Luddington* v. *Kime*, (*b*) Powell, J., was of opinion, that a limitation, by way of executory devise, might be extended beyond a life *in esse*, so as to include a posthumous son. But Ch. J. Treby was of a different opinion, and he held that the time allowed for executory devises to take effect ought not to be longer than the life of one person then in being, according to *Snowe* and *Cuttler's* case. At last, in *Stephens* v. *Stephens*, in 1736, (*c*) the doctrine was finally settled and defined by precise limits. The addition of twenty-one years to a life or lives in being was held to be admissible; and that decision received the sanction of the Court of Chancery, and of the judges of the King's Bench. A devise of lands in fee, to such unborn son of a *feme covert* as should first attain the age of twenty-one, was held to be good; for the utmost length of time that could happen before the estate would vest, was the life of the mother, and the

(*a*) 1 Salk. 229; 12 Mod. 278.

(*b*) This last observation of Mr. Justice Powell is supposed to be rather too strong; for the owner of the contingent fee, together with the executory devisee, may bar it by a common recovery, and it may be barred by fine by way of estoppel. But in those states where there are no fines or recoveries, the executory devise is a perpetuity as far as it goes. Fearne on Executory Devises, by Powell, 56.

(*a*) Prec. in Ch. 72; Shower, P. C. 137, s. c.; Marks *v.* Marks, 10 Mod. 419, s. p.; Thellusson *v.* Woodford, 4 Ves. 227; 11 id. 112.

(*b*) 1 Ld. Raym. 203.

(*c*) 2 Barnard. K. B. 375; Cases temp. Talb. 228.

[1] See 283, n. 1.

subsequent infancy of the son. Since that time, an executory devise of the inheritance to the extent of a life or lives in being, and twenty-one years, and the fraction of another year, to reach the case of a posthumous child, has been uniformly allowed; and the same rule equally applies to chattel interests. (*d*) And thus, notwithstanding the constant dread of perpetuities, and the jealousy of executory devises, as being an irregular and
* 268 limited species of entail, a sense of the * convenience of such limitations in family settlements, has enabled them, after a struggle of nearly two centuries, to come triumphantly out of the contest. They have also become firmly established (though with some disabilities, in New York, as we have already seen (*a*)) as part of the system of our American testamentary jurisprudence. (*b*)

2. Of the Several Kinds and General Qualities of Executory Devises. — There are two kinds of executory devises relative to real estate, and a third sort relative to personal estate. (*c*) 1. Where the devisor parts with his whole estate, but, upon some contingency, qualifies the disposition of it, and limits an estate on that contin-

(*d*) Atkinson *v.* Hutchinson, 3 P. Wms. 258; Goodman *v.* Goodright, 1 Blacks. 188; 2 Bl. Comm. 174; Long *v.* Blackall, 7 T. R. 100; Cadell *v.* Palmer, 1 Clark & Fin. 373; 10 Bing. 140, s. c. In this last case, it was decided in the House of Lords, in accordance with the opinion of the twelve judges, that a limitation by way of executory devise is valid, though it is not to take effect until after the determination of a life or lives in being, and a term of twenty-one years afterwards as a term in gross *without reference to the infancy of any person who is to take under such limitation.* [The period of gestation is allowed in those cases only in which the gestation exists. Ib.; Dungannon *v.* Smith, 12 Cl. & Fin. 546, 629.]

(*a*) *Supra*, 17.

(*b*) Though the Code Napoleon has abolished all perpetuities and substitutions (as see *supra*, 21), yet the convenience and policy of giving some reasonable effect to the will of the testator, even on the subject of *fidei commissa*, has prevailed. There are *fidei commissa*, and substitutions, which are held not to be prohibited; and it is declared to be the spirit of the existing jurisprudence of France, not to annul a testamentary disposition made under the code, except it *necessarily* presents a substitution, and cannot receive any other construction. Toullier, v. Nos. 15, 16, 30, 44; and he refers to a decision of the court of Besançon, reported in the Recueil de Jurisprudence du Code Civil, xvi., in support of this principle.

(*c*) This is the classification made by Powell, J., in Scatterwood *v.* Edge, 1 Salk. 229, and it has been followed by Mr. Fearne. Mr. Preston goes on to a greater subdivision; and he says there are six sorts of executory devises applicable to freehold interests, and two, at least, if not three, sorts of executory bequests applicable to chattel interests. Preston on Abstracts of Title, ii. 124. I have chosen not to perplex the subject by divisions too refined and minute. The object in elementary discussions, according to the plan of these Lectures, is to generalize as much as possible.

gency. Thus, if there be a devise to A. for life, remainder to B. in fee, provided that if C. should, within three months after the death of A., pay one thousand dollars to B., then to C. in fee, this is an executory devise to C., and if he dies, in the lifetime of A., his heir may perform the condition. (*d*) 2. Where the testator * gives a future interest to arise upon a con- *269 tingency, but does not part with the fee in the mean time; as in the case of a devise to the heirs of B., after the death of B., or a devise to B. in fee, to take effect six months after the testator's death; or a devise to the daughter of B., who shall marry C. within fifteen years. (*a*) 3. At common law, as was observed in a former volume, (*b*) if there was an executory bequest of personal property, as of a term for years to A. for life, and after his death to B., the ulterior limitation was void, and the whole property vested in A. There was, then, a distinction between the bequest of the use of a chattel interest, and of the thing itself; but that distinction was afterwards exploded, and the doctrine is now settled, that such limitations over of chattels real or personal, in a will, or by way of trust, are good. The executory bequest is equally good, though the ulterior devisee be not at the time *in esse;* (*c*) and chattels, so limited, are not subject to the demands of creditors, beyond the life of the first taker, who cannot pledge them, nor dispose of them beyond his life interest therein. (*d*)

An executory devise differs from a remainder in three very material points. (1.) It needs not any particular estate to precede and support it, as in the case of a devise in fee to A. upon his marriage. Here is a freehold limited to commence *in futuro*, which may be done by devise, because the freehold passes without livery of seisin; and until the contingency happens, the fee passes, in the usual course of descent, to the heirs at law. (2.) A fee may be limited after a fee, as in the case of a devise of land to B. in fee, and if he dies without issue, or before the age of twenty-one, then to C. in fee. (3.) A term for years may

(*d*) Marks *v.* Marks, 10 Mod. 419; Prec. in Ch. 486; [Stones *v.* Maney, 3 Tenn. Ch. 731.]

(*a*) Bate *v.* Amherst, T. Raym. 82; Lamb *v.* Archer, 1 Salk. 225; Lord Ch. J. Treby, in Clark *v.* Smith, 1 Lutw. 793.

(*b*) ii. 352.

(*c*) Cotton *v.* Heath, 1 Eq. Cas. Abr. 191, pl. 2.

(*d*) Hoare *v.* Parker, 2 T. R. 376; Fearne on Executory Devises, 46.

* 270 be * limited over, after a life estate created in the same.

At law, the grant of the term to a man for life would have been a total disposition of the whole term. (*a*) Nor can an executory devise or bequest be prevented or destroyed by any alteration whatsoever, in the estate out of which, or subsequently to which, it is limited. (*b*) The executory interest is wholly exempted from the power of the first devisee or taker. If, therefore, there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A. in fee, and if he dies *possessed* of the property without lawful issue, the remainder over, or remainder over the property which he, dying without heirs, should *leave*, or without *selling* or *devising* the same; in all such cases the remainder over is void as a remainder, because of the preceding fee; and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate, or power of disposition expressly given, or necessarily implied by the will. (*c*) *y*[1] A valid executory devise cannot subsist under an absolute power of disposition in the first taker. When an executory devise is duly created, it is a species of entailed estate, to the extent of the authorized period of limitation. It is a stable and inalienable interest, and the first taker has only the use of the land or chattel pending the contingency mentioned in the will. The executory devise cannot be devested even by a feoff-

(*a*) 2 Bl. Comm. 173, 174.

(*b*) Pells *v.* Brown, Cro. Jac. 590; Fearne on Executory Devises, 46, 51–58.

(*c*) Jackson *v.* Bull, 10 Johns. 19; Attorney General *v.* Hall, Fitzg. 314; Ide *v.* Ide, 5 Mass. 500; Jackson *v.* Robins, 16 Johns. 537. [Cf. Andrews *v.* Roye, 12 Rich. 536.] [See the rule here stated criticised in Gray on Restraints on Alienation, § 67 *et seq.*]

y[1] If only a life estate is granted, the addition of a power of disposition has been held not to invalidate a remainder or executory devise over. Perry *v.* Cross, 132 Mass. 454; Johnson *v.* Battelle, 125 Mass. 453; Smith *v.* Snow, 123 Mass. 323; Hall *v.* Otis, 71 Me. 326; Burleigh *v.* Clough, 52 N. H. 267; Wommack *v.* Whitmore, 58 Mo. 448; Wead *v.* Gray, 8 Mo. App. 515. And the rule that, where the fee or absolute interest is given with an absolute power of disposition, an executory devise over is void has been criticised in Gray on Restraints on Alienation, § 66 *et seq.* It is difficult to perceive any good reason why the executory devise should not be considered valid, subject to be defeated by a disposition of all the property, just as a remainder after a life estate with a power of appointment is valid, but subject to be devested by an appointment. But the rule has very recent authority in its favor. Jones *v.* Bacon, 68 Me. 34; McKenzie's App., 41 Conn. 607; Rona *v.* Meier, 47 Iowa, 607. See especially, Kelley *v.* Meins, 135 Mass. 231 and cases cited. See also Howard *v.* Carusi, 109 U.S. 725; Mussoorie Bank *v.* Raynor, 7 App. Cas. 321.

ment; (*d*) but the stability of these executory limitations is, nevertheless, to be understood with this single qualification, that if an executory devise or interest follows an *estate tail*, a common recovery suffered by the tenant in tail before the condition occurred, will bar the estate depending on that condition; for a common recovery bars all subsequent * and conditional limitations. (*a*) It is not so with a recovery suffered by a tenant in fee; for that will not bar an executory devise, as was decided in *Pells* v. *Brown*; (*b*) and the reason of the distinction is, that the issue in tail is barred in respect of the recompense in value, which they are presumed to recover over against the vouchee; whereas the executory devisee is entitled to no part of the recompense, for that would go to the first taker, or person having the conditional fee. It is further to be observed, that a change of circumstances, either before or after a testator's death, may convert into a remainder, a limitation which, at the death of the testator, and without such change, could only have operated by way of executory devise. (*c*)

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3. Of Limitations in Executory Devises. — (1.) *When too remote.* — We have seen, (*d*) that an executory devise, either of real or personal estate, is good if limited to vest within the compass of twenty-one years after a life or lives in being; and the contingency may depend on as many lives in being as the settler pleases, for the whole period is no more than the life of the survivor. (*e*) This rule of the English law has been restricted by the New York Revised Statutes, (*f*) which will not allow the absolute power of alienation to be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more

(*d*) Mullineux's Case, cited in Palm. 136. [See also *In re* Barber's Settled Estates, 18 Ch. D. 624.]

(*a*) Driver *v.* Edgar, Cowp. 379; Fearne, 66, 67, 107.

(*b*) Cro. Jac. 590.

(*c*) Preston on Abstracts, ii. 154; Doe *v.* Howell, 10 B. & C. 191.

(*d*) *Supra*, 267.

(*e*) *Vide supra*, 17. In the case of a devise of real estate to trustees, in trust for wife for life, and after her death in trust for the grandchildren of B. then living, to be received by them in equal proportions, when they should severally attain the age of twenty-five years, the testator left the widow and B. surviving. Eight grandchildren were living at the death of the widow, and several were born afterwards. It was held, in Kevern *v.* Williams, 5 Sim. 171, that the devise was not void for remoteness, but those only of the grandchildren took who were in existence at the widow's death.

(*f*) i. 723, sec. 14, 15, 16; *vide infra*, 283.

than two lives in being at the creation of the estate; except in the single case of a contingent remainder in fee, which may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years; or upon any other contingency by which the estate of such persons may be determined before they attain their full age. Every future estate is declared to be void in its creation, which suspends the absolute power of alienation for a longer period than is above prescribed. (*g*) The

(*g*) A trust estate, if it be so limited that it cannot, in any event, continue longer than the actual minority of two or more infants in being at the creation of the estate and who have an interest therein, either vested or contingent, is not necessarily invalid in New York; for this, in no event, suspends the power of alienation for a longer period than twenty-one years, and the usual period of gestation, if there was a posthumous child. Hawley *v.* James, 5 Paige, 318; s. c. 16 Wend. 61. In this case of Hawley *v.* James, it was urged upon the argument by one of the counsel (and who had been himself one of the revisers), that the rule of the common law permitting a suspension of the absolute power of alienation *for a moderate term of years without reference to lives*, was not within the policy or purview of the Revised Statutes, and remained unchanged. Blackstone observes, that in the two species of executory devises, the contingencies ought to be such as may happen *within a reasonable time;* as within one or more life or lives in being, or *within a moderate term of years*. 2 Bl. Comm. 173. The object of the statute was to reduce the number of lives to two, and to abolish the twenty-one years as an absolute term, after the expiration of the lives, and confining the additional suspense to an actual minority. See 5 Paige, 394–403. But a *moderate term for years* was probably deemed not sufficiently definite and precise, and the decision in the case seems to have regarded the statutory restriction as the only one existing. It was decided, that where a trust term created by will was to continue until a number of children and grandchildren, *exceeding two*, attained the age of twenty-one, it was void under the statute; for the power of alienation of a fee could not be suspended, by means of a trust term, beyond the continuance of, or at the expiration of, not more than two lives in being at the death of the testator, and to be designated by the will, for a term limited upon the minorities of more than two persons *not designated*, would depend upon more than two lives and be void. Three or more minorities were considered by the court, in that case, as being equivalent to three or more lives, and equally fatal, unless at least two of the minors or persons were specially designated as being those on whom the contingency or event of the estate depended. So, again, in Hone *v.* Van Schaick, 7 Paige, 221; s. c. 20 Wend. 564, a similar limitation of a trust of real estate, directing the trustees to apply the future income thereof to several children and their representatives, for the term of twenty-one years from the date of the will, and then, or as soon as the trustees should deem discreet, to divide the fund among the children and their representatives; and the children to take only life estates, with remainders in fee to their descendants, was held to be void under the New York Revised Statutes, and upon the principles established in Coster *v.* Lorillard and Hawley *v.* James. It rendered the interests of the *cestui que trust* inalienable for too long a time. Every estate is void in its creation which suspends the absolute power of alienation for more than two *designated* lives in being at the creation of the estate. *Life* must, in some form, enter

New York statute has, in effect, destroyed all distinction between contingent remainders and executory devises. They are equally future or expectant estate, subject to the same provisions, and may be equally created by grant or by will. *The *272 statute (*a*) allows a freehold estate, as well as a chattel real, to be created, to commence at a future day; and an estate for life to be created in a term for years, and a remainder limited thereon; and a remainder of a freehold or chattel real, either contingent or vested, to be created expectant on the determination of a term of years; and a fee to be limited on a fee, upon a contingency. There does not appear, therefore, to be any real distinction left subsisting between contingent remainders and executory devises. They are so perfectly assimilated, that the latter may be considered as reduced substantially to the same class; and they both come under the general denomination of expectant estates. Every species of future limitation is brought within the same definition and control. Uses being also abolished by the same code, (*b*) all expectant estates, in the shape of springing, shifting, or secondary uses, created by conveyances to uses, are, in effect, become contingent remainders, and subject precisely to the same rules. What I shall say, hereafter, on the subject of executory devises, will have reference to the English law, as it existed in New York prior to the late revision, and as it still exists in other states of the Union. (*c*)

into the limitation. So, again, in Van Vechten *v.* Van Vechten, 8 Paige, 104, it was held that where the testator devised real estate to trustees to sell, and apply the proceeds to the support of *four* daughters during the lives, the devise was void, by suspending the power of alienation for more than two lives, because the will directed, if either daughter died leaving issue, the income of her share to be applied to the support of such issue, and if without issue, the income of her share to go to the survivors. The remainder, after the death of the daughter, was held to be vested in her issue absolutely. De Peyster *v.* Clendining, 8 Paige, 295, s. P. [See Amory *v.* Lord, 9 N. Y. 403; Morgan *v.* Masterton, 4 Sandf. 442; Jennings *v.* Jennings, 5 Sandf. 174.]

(*a*) New York Revised Statutes, i. 724, sec. 24.

(*b*) New York Revised Statutes, i. 728, sec. 45.

(*c*) We may not be able to calculate with certainty upon the future operation of the changes which have been recently made in the doctrine of expectant estates by the New York revised code of statute law. But the first impression is, that these innovations will be found to be judicious and beneficial. It appears to be wise to abolish the technical distinction between contingent remainders, springing or secondary uses, and executory devises, for they serve greatly to perplex and obscure the subject. It contributes to the simplicity, uniformity, and certainty of the law, to bring those various executory interests nearer together, and resolve them into a few

*273 *(2.) *Of Dying without Issue, as to Real Estate.* — If an executory devise be limited to take effect after a dying

plain principles. It is convenient and just that all expectant estates should be rendered equally secure from destruction by means not within the intention of the settlement, and that they should all be controlled by the same salutary rules of limitation. Some of the alterations are not material, and it is doubtful whether confining future estates to two lives in being was called for by any necessity or policy, since the candles were all lighted at the same time, let the lives be as numerous as caprice should dictate. It was a power not exposed to much abuse; and, in the case of children, it might be very desirable and proper that the father should have it in his power to grant life estates in his paternal inheritance to all his children in succession. The propriety of limiting the number of lives was much discussed recently, before the *English Real Property Commissioners.* The objection to a large number of lives is, that it increases the chance of keeping the estate locked up from circulation to the most extended limit of human life; and very respectable opinions are in favor of a restriction to the extent of two or three lives only, *besides the lives of the parties in interest, or to whom life estates may be given.*

In the case of Coster *v.* Lorillard, decided in the court of errors of New York, in December, 1835, on appeal from chancery (5 Paige, 172; s. c. 14 Wend. 265), the limitation in the statute to the suspension of the power of alienation beyond two lives in being was strictly sustained. The devise was to trustees in fee, in trust to receive the rents and profits, and pay over and divide the same equally between twelve nephews and nieces, and the survivors and survivor of them, during their lives respectively; and, after the deaths of all the testator's nephews and nieces, remainder in fee to the children of the twelve nephews and nieces living, and to the children of such as may then be dead *per stirpes.* The will would have been good under the English law, and under the law of New York as it stood before the Revised Statutes of 1830, for that allowed real property to be rendered inalienable during the existence of a life, or any number of lives in being, and twenty-one years and nine months afterwards, or until the son of a tenant for life should attain his full age. But the New York Revised Statutes, i. 723, sec. 15, prohibited the suspension of the absolute power of alienation, by any limitation or condition whatever, for any longer period than two lives in being at the creation of the estate, and the prohibition applied to all estates, whether present or future. Here was an attempt to contravene the letter and the policy of the statute, for a sale by the trustees would have been in contravention of the trust, and therefore void. The New York Revised Statutes, i. 730, sec. 65. Nor could the nephews and nieces convey, for the whole estate in law and equity was in the trustees, subject only to the execution of the trust. New York Revised Statutes, i. 729, sec. 60. The nephews and nieces had no other right than a beneficial right in action to enforce in equity performance of the trust. The remaindermen, that is, the grand nephews and nieces then in existence, could not convey, for who were to take in remainder was contingent, and could not be ascertained until the death of the survivor of the nephews and nieces. They had no present estate, and only a possibility. If they survived the twelve nephews and nieces, they took, and not otherwise. The estate given in remainder, therefore, suspended the power of alienation during the continuance of the twelve nephews and nieces, and by the force of the statute the remainder was held to be void, and the trust also void, as being in contravention of the statute; and the estate (and which was stated in the case as amounting to three millions of dollars, and the rents and profits to upwards of eighty thousand dollars annually) descended to the heirs at law. It was therefore decided, that a devise in

without heirs, or *without issue*, or *on failure of issue*, or *without leaving issue*, the limitation is held to be void, because the contingency is too remote, as it is not to take place until after an indefinite failure of issue. Nothing is more common, in cases upon devises, than the failure of the contingent devise, from the want of a particular estate to support it as a remainder; or by reason of its being too remote, after a general failure of issue, to be admitted as good by way of executory devise. If the testator meant that the limitation over was to take effect on failure of issue *living at the time of the death* of the person named as the first taker, then the contingency determines at his death, and no rule of law is broken, and the executory devise is sustained. The difficult and vexed question which has so often been discussed by the courts is, whether the testator, by the words *dying without issue*, or by words of similar import, and with or without additional expressions, meant a dying without issue living at the time of the death of the first taker, or whether he meant a general or indefinite failure of issue. Almost every case on wills, * with remainders over, that has occurred within the * 274 last two centuries, alludes, by the use of such expressions, to the failure of issue, either definitely or indefinitely.

A definite failure of issue is, when a precise time is fixed by the will for the failure of issue, as in the case of a devise to A., but if he *dies without lawful issue living at the time of his death.* An indefinite failure of issue is a proposition the very converse of the other, and means a failure of issue, whenever it shall happen, sooner or later, without any fixed, certain, or definite period, within which it must happen. It means the period when the issue, or descendants of the first taker, shall become extinct, and when there is no longer any issue of the issue of the grantee, without reference to any particular time or any particular event;

trust of an entire estate, to receive the rents or income thereof, and to distribute it among several *cestui que trusts*, could not be considered as a separate devise of the share of each *cestui que trust*, so as to protect the share of each as a tenant in common during his own life; and that as the trust was to endure for a longer period than two lives in being at the death of the testator, the whole devise in trust was void. This was the amount of the decree in the court of errors, and the discussions in the case, and the contrariety of views taken by the different members of the court affords a striking illustration of the indiscretion and danger of disturbing and uprooting, as extensively as the revisers in their revised statutes have done, the old established doctrine of uses, trusts, and powers, and which were, as Ch. J. Savage observed in that case, "subjects which baffled their powers of modification."

and an executory devise, upon such an indefinite failure of issue, is void, because it might tie up property for generations. A devise in fee with remainder over upon an indefinite failure of issue, is an estate tail; and in order to support the remainder over as an executory devise, and to get rid of the limitation as an estate tail, the courts have frequently laid hold of slender circumstances in the will, to elude or escape the authority of adjudged cases. (a) The idea that testators mean by a limitation over upon the event of the first taker dying without issue, the failure of issue living at his death, is a very prevalent one, but it is probable that, in most instances, testators have no precise meaning on the subject, other than that the estate is to go over if the first taker has no posterity to enjoy it. If the question was to be put to a testator, whether he meant by his will, that if his son, the first taker, should die leaving issue, and that issue should become extinct in a month, or a year afterwards, the remainder over should not take effect, he would probably, in most cases, answer in the negative. In the case of a remainder over upon the event of the first devisee dying *without lawful issue*, Lord Thurlow, following the whole current of cases, held the limitation over too remote, and observed, that he rather thought the testator *meant* the remainder persons to take *whenever* *275 there should * be a failure of issue of the first taker. (a)

Lord Macclesfield declared, (b) that even the technical rule was created for the purpose of supporting the testator's intention. If, says he, lands be devised to A., and if he dies without issue, then to B., this gives an estate tail to the issue of the devisee. And this construction, he observes, "is contrary

(a) Where there was a devise to A. *for life*, with remainder to her child or children, *if she should leave any*, and if she should die and *leave no lawful issue*, then with remainder over; A. survived the testator and had one child, and she survived her child and was left a widow. It was held that the devise to her children or issue was a *contingent* remainder in fee, and which, on the birth of a child, became a *vested* remainder in fee, subject to open and let in after-born children. Macomb *v.* Miller, 9 Paige, 265; s. c. 26 Wend. 229. If it had been an *estate tail* in A. turned by our law into a fee simple, the remainder over was not good by way of executory devise, because it was upon an indefinite failure of issue. King *v.* Burchell, 1 Eden, 424; Doe *v.* Perryn, 3 T. R. 484; Den *v.* Bagshaw, 6 T. R. 512; Doe *v.* Elvy, 4 East, 313, and 1 Fearne, 141, 3d ed. referred to in that case; Dansey *v.* Griffiths, 4 Maule & S. 61; Right *v.* Creber, 5 B. & C. 866; Franklin *v.* Lay, 6 Mad. Ch. 258; Hannan *v.* Osborn, 4 Paige, 336; [James *v.* Rowland, 52 Md. 462; Fisher *v.* Webster, 14 L. R. Eq. 283.]

(a) Jeffrey *v.* Sprigge, 1 Cox's Cases, 62. (b) Pleydell *v.* Pleydell, 1 P. Wms. 750.

to the natural import of the expression, and made purely to comply with the intention of the testator, which seems to be, that the land devised should go to the issue, and their issue, to all generations." So, in *Tenny* v. *Agar*, (*c*) the devise was to the son and daughter in fee; but if they should happen to *die without having any child or issue lawfully begotten*, then remainder over. Lord Ellenborough said, that nothing could be clearer than that the remainderman was not intended by the testator to take anything until the issue of the son and daughter were all extinct, and the remainder over was, consequently, void. The same construction of the testator's real intention was given to a will, in *Bells* v. *Gillespie*, (*d*) where there was a devise to the sons, and if either should die without lawful issue, his part was to be divided among the survivors. Mr. Justice Carr declared, that the testator meant that the land given to each son should be enjoyed by the family of that son, so long as any branch of it remained. He did not mean to say, "You have the land of C. if he has no child living *at his death*, but if he leave a child you shall not have it, though the child dies the next hour." A father, as he justly observed, is not prompted by such motives.

The opinion of these distinguished judges would seem to prove, that if the rule of law depended upon the real fact of intention, that intention would still be open to discussion, * and *276 depend very much upon other circumstances and expressions in the will in addition to the usual words.

The series of cases in the English law have been uniform, from the time of the Year Books down to the present day, in the recognition of the rule of law, that a devise in fee, with a remainder over if the devisee dies without issues or heirs of the body, is a fee cut down to an estate tail; and the limitation over is void, by way of executory devise, as being too remote, and founded on an indefinite failure of issue. (*a*) The general course of American

(*c*) 12 East, 253.

(*d*) 5 Rand. 273; Caskey *v.* Brewer, 17 Serg. & R. 441, s. p.

(*a*) The number of cases in which that point has been raised, and discussed, and adjudged, is extraordinary, and the leading ones are here collected for the gratification of the curiosity of the student. Assize, 35 Edw. III. pl. 14; Sonday's Case, 9 Co. 127; King *v.* Rumbail, Cro. Jac. 448; Chadock *v.* Cowly, ib. 695; Holmes *v.* Meynel, T. Raym. 452; Forth *v.* Chapman, 1 P. Wms. 663; Brice *v.* Smith, Willes, 1; Hope *v.* Taylor, 1 Burr. 268; Attorney General *v.* Bayley, 2 Bro. C. C. 553; Knight *v.* Ellis, ib. 570; Doe *v.* Fonnereau, Doug. 504; Denn *v.* Slater, 5 T. R. 335; Doe *v.* Rivers,

authorities would seem to be to the same effect, and the settled English rule of construction is considered to be equally the settled rule of law in this country; though, perhaps, it is not deemed of quite so stubborn a nature, and is more flexible, and more easily turned aside by the force of slight additional expressions in the will. (*b*) The English rule has been adhered to, and has not been permitted, either in England or in this country, to be affected by such a variation in the words of the limitation over, as *277 dying without *leaving* *issue; (*a*) nor, if the devise was to two or more persons, and either should die without issue, the *survivor* should take. (*b*) But if the limitation over was upon the first taker dying without issue *living*, it was held, so long ago as the case of *Pells* v. *Brown*, (*c*) that the will meant issue living at the death of the first taker; and the limitation

7 id. 276; Doe *v.* Ellis, 9 East, 382; Tenny *v.* Agar, 12 id. 253; Romilly *v.* James, 6 Taunt. 263; Barlow *v.* Salter, 17 Ves. 479.

(*b*) For the strict effect of the rule, see Ide *v.* Ide, 5 Mass. 500; Dallam *v.* Dallam, 7 Harr. & Johns. 220; Newton *v.* Griffith, 1 Harr. & Gill, 111; Sydnor *v.* Sydnors, 2 Munf. 263; Carter *v.* Tyler, 1 Call, 165; Hill *v.* Burrow, 3 id. 342; Bells *v.* Gillespie, 5 Rand. 273; Broaddus *v.* Turner, ib. 308; Den *v.* Wood, Cam. & Norw. 202; Cruger *v.* Hayward, 2 Desaus. 94; Irwin *v.* Dunwoody, 17 Serg. & R. 61; Caskey *v.* Brewer, ib. 441; Heffner *v.* Knepper, 6 Watts, 18; Paterson *v.* Ellis, 11 Wend. 259; Moody *v.* Walker, 3 Ark. 198; Hollett *v.* Pope, 3 Harr. (Del.) 542.

(*a*) Forth *v.* Chapman, 1 P. Wms. 663; Den *v.* Shenton, 2 Chitty, 662; Romilly *v.* James, 6 Taunt. 263; Daintry *v.* Daintry, 6 T. R. 307; Croly *v.* Croly, 1 Batty, 1; Carr *v.* Porter, 1 M'Cord, Ch. 60; Nowton *v.* Griffith, 1 Harr. & Gill, 111. In Carr *v.* Jeannerett and the Same *v.* Green, 2 M'Cord, 66–75, there was a devise of the rest of the *estate* to B. and C., to be equally divided between them, and delivered to them at the age of twenty-one; but should they die, *leaving no lawful issue*, devise over to D. and others. The court of appeals at law, in May, 1821, held that C., having arrived at the age of twenty-one, and having issue, took a *fee*, and that B. having died under age, and without issue, C. became entitled to the entire estate, and his children took by limitation, and not by purchase. The court of appeals in equity, in May, 1822, gave a different opinion. They admitted that C., the survivor, and his issue, took a cross remainder by implication. That the *general intent* of the will was to be satisfied; and if the *secondary intent* interfered with it, the former was to prevail. That as the testator intended that the estate should go eventually to the issue of B. and C., an absolute estate in fee to B. and C. would be inconsistent with that general intent; and B. and C., therefore, took only *estates for life*, with a contingent remainder in the issue as purchasers.

(*b*) Chadock *v.* Cowly, Cro. Jac. 695; Newton *v.* Griffith, 1 Harr. & Gill, 111; Bells *v.* Gillespie, 5 Rand. 273; Broaddus *v.* Turner, 5 id. 308; *contra*, Ranelagh *v.* Ranelagh, 2 Myl. & K. 441; Den *v.* Cox, 3 Dev. (N. C.) 894; Radford *v.* Radford, 1 Keen, 486; De Treville *v.* Ellis, and Stevens *v.* Patterson, 1 Bailey, Eq. 40, 42. These last decisions seem to be sufficient to change the former rule, and that a limitation to *the survivor* may be good by way of executory devise.

(*c*) Cro. Jac. 590.

over was not too remote, but good as an executory devise. The same construction was given to a will, when the limitation over was upon the event of the first taker dying without leaving issue *behind* him; (*d*) or where the will, in a bequest of personal estate only, was to two, and upon either dying *without children, then to the survivor;* (*e*) or when the first taker * should die, * 278 and *leave no issue*, then to A. and B., who were *in esse*, or the *survivor*, and were to take *life estates only;* (*a*) or when the first taker should happen to die, and *leave no child or children.* (*b*) [1]

(*d*) Porter *v.* Bradley, 3 T. R. 143.

(*e*) Hughes *v.* Sayer, 1 P. Wms. 534; Nicholls *v.* Skinner, Prec. in Ch. 528.

(*a*) Roe *v.* Jeffrey, 7 T. R. 589.

(*b*) Doe *v.* Webber, 1 B. & Ald. 713. In Ranelagh *v.* Ranelagh, 2 Myl. & K. 441, it was declared, that if separate legacies were given to two or more persons, with a limitation over to *the survivors* or survivor, in case of the death of either, *without legitimate issue*, the presumption was that the testator had not in contemplation an indefinite failure of issue.

The term *issue* may be used either as a word of purchase or of limitation, but it is generally used by the testator as synonymous with child or children.

[1] "*Die without Issue.*" — The construction of these words as meaning an indefinite failure of issue is recognized in Feakes *v.* Standley, 24 Beav. 485 (but see Taylor *v.* Taylor, 63 Penn. St. 481, 485); Burrough *v.* Foster, 6 R. I. 534; Arnold *v.* Brown, 7 R. I. 188; Allen *v.* Trustees of Ashley School Fund, 102 Mass. 262, 264; Gast *v.* Baer, 62 Penn. St. 35; Vaughan *v.* Dickes, 20 Penn. St. 509; Eichelberger *v.* Barnitz, 9 Watts, 447; Kirk *v.* Furgerson, 6 Cold 479; Addison *v.* Addison, 9 Rich. Eq. 58; Tongue *v.* Nutwell, 13 Md. 415; Randolph *v.* Wendel, 4 Sneed, 646; [Dickson *v* Satterfield, 53 Md. 317; Voris *v.* Sloan, 68 Ill. 588; Mangum *v.* Piester, 16 S. C. 316.] See Hall *v.* Chaffee, 14 N. H. 215; Downing *v.* Wherrin, 19 N. H. 9. Cases where the same rule was applied to personalty are Candy *v.* Campbell, 2 Cl. & Fin. 421; Edelen *v.* Middleton, 9 Gill, 161; Albee *v.* Carpenter, 12 Cush. 382. The result of these cases is that when real estate is devised to A., or to A. and his heirs, and, if he die without issue, over to B., A. takes an estate tail, and B. a remainder subject to it, whereas a similar limitation of personalty gives the entire interest to A. Cases *supra; post*, 283; Cole *v.* Goble, 18 C. B. 445; Hall *v.* Priest, 6 Gray, 18, 22; Albee *v.* Carpenter, *supra* But the words have been construed to mean without issue living at the time of the death, and not an indefinite failure of issue, either *prima facie* or on slight circumstances, in other American cases besides those mentioned by the author Parish *v.* Ferris, 6 Ohio St. 563; Niles *v.* Gray, 12 Ohio St. 320; Armstrong *v.* Armstrong, 14 B. Mon. 333; Daniel *v.* Thompson, ib. 663; Bullock *v.* Seymour, 33 Conn. 289; Hudson *v.* Wadsworth, 8 Conn. 348, 359; [Clark *v.* Stanfield, 38 Ark. 347; Mendenhall *v.* Mower, 16 S. C. 303.] Cases of bequests of personalty are Ladd *v.* Harvey, (1 Fost.) 21 N. H. 514; Griswold *v.* Greer, 18 Ga. 545; Bedford's Appeal, 40 Penn. St. 18, 22; [*In re* Merceron's Trusts, 4 Ch. D. 182.]

The words may be shown to have this restricted meaning by the context. Thus when the gift over is expressly to take effect on the death of the person to whom the fee is given expressly or by implication in the first instance, the latter will

The disposition in this country has been equally strong, and, in some instances, much more effectual than that in the English courts, to break in upon the old immemorial construction *279 on this subject, and to sustain the limitation *over as an executory devise. In *Morgan* v. *Morgan*, (*a*) the limitation over was upon dying *without children*, then over to *the brothers* of the first taker; and it was held to mean children living at the death of the first taker. So, in *Den* v. *Schenck*, (*b*) the words creating the remainder over were, if any of the children should happen to die without any issue *alive*, such share to go to the *survivors;* and it was held to be good as an executory devise. (*c*) The case of *Anderson* v. *Jackson* (*d*) was discussed

(*a*) 5 Day, 517.

(*b*) 3 Halst. 29.

(*c*) It was declared, in Cutter *v.* Doughty, 23 Wend. 513, to be settled, that a devise to the *survivor* or *survivors* of another, after his death, without lawful issue, was not void as a limitation upon an indefinite failure of issue. It is good by way of executory devise. The word *survivor* qualifies the technical or primary meaning of the words *dying without issue*, and must be read, *dying, without issue living at the time of his death.* See also to s. p. *supra*, p. 277, n. a. [Lovett *v.* Buloid, 3 Barb. Ch. 137.]

(*d*) 16 Johns. 382.

take a fee with an executory devise over. Parker *v.* Birks, 1 Kay & J. 156; Blinston *v.* Warburton, 2 K. & J. 400. Other cases in which a definite failure of issue was thought to be meant are Doe *d.* Johnson *v.* Johnson, 8 Exch. 81; Newman *v.* Miller, 7 Jones (N. C.), 516, Woodley *v.* Findlay, 9 Ala. 716 (but compare Torrance *v.* Torrance, 4 Md. 11); Sheets' Estate, 52 Penn. St. 257, 268; Stevenson *v* Evans, 10 Ohio St. 307. *x*[1]

The principle of Hughes *v.* Sayer, 277, n. (*e*), is sustained by Bedford's Appeal, 40 Penn. St. 18, 22; Rapp *v.* Rapp, 6 Penn. St. 45; Moody *v.* Walker, 3 Pike, 147, 202; Williams *v.* Graves, 17 Ala. 62; Powell *v.* Glenn, 21 Ala. 458; Fairchild *v.* Crane, 2 Beasl. 105. See Greenwood *v.* Verdon, 1 Kay & J. 74. The same principle is thought to apply to realty in McCorkle *v.* Black, 7 Rich. Eq. 407; Russ *v.* Russ, 9 Fla. 105, 134; Deboe *v.* Lowen, 8 B. Mon. 616; Brightman *v.* Brightman, 100 Mass. 238; Abbott *v.* Essex Co., 2 Curt. 126; s. c. 18 How. 202. But see Burrough *v.* Foster, 6 R. I. 534; Wall *v.* McGuire, 24 Penn. St. 248; Jackson *v.* Dashiel, 3 Md. Ch. 257.

The fact that the gift over is for life is not sufficient to cut down the meaning of the words according to *Re* Rye's Settlement, 10 Hare, 106, 111; Watkins *v.* Sears, 3 Gill, 492. But see Wilson *v.* Wilson, 32 Barb. 328; Drury *v.* Grace, 2 Har. & J. 356; Taylor *v.* Taylor, 63 Penn. St. 481.

x[1] The presumption is fixed in England by statute in favor of a definite failure. 1 Vict. c. 26, § 29; Upton *v.* Hardman, 9 Ir. R. Eq. 157. See further, O'Mahoney *v.* Burdett, 7 L. R. H. L. 388; Ingram *v.* Soutten, ib. 408. But it may be shown by the context that the words were intended to provide for an indefinite failure, or for death without issue during the life of the testator, or during the life of an intervening life tenant. Treharne *v.* Layton, 10 L. R. Q. B. 459; *In re* Luddy, 25 Ch. D. 394; Besant *v.* Cox, 6 Ch. D. 604; Olivant *v.* Wright, 1 Ch. D. 346.

very elaborately in the courts of New York; and it was finally decided in the Court of Errors, that after the devise to the sons A. and B. in fee, the limitation, that if either should die *without lawful issue*, his share was to go to the *survivor*, was good as an executory devise; because there was no estate tail created by these words, but the true construction was a failure of issue living at the death of the first taker. (*e*)

(*e*) The decision in Anderson *v.* Jackson rested entirely upon the word "survivor." If that word will not support it, then it is an anomalous and unsound authority. The preceding words of the will, in that case, were those ordinary words creating an estate tail, as declared by all the authorities, ancient and modern, and without the instance of a single exception to the contrary, according to the remark of Lord Thurlow and of Lord Mansfield. When that case was afterwards brought into review, in Wilkes *v.* Lion (2 Cowen, 333), it was declared, that the construction assumed by the court rested upon the effect to be given to the word *survivor*. The cases have already been referred to, in which it has been often held that the word "survivor" did not alter the settled construction of the words "dying without issue;" and there is no case in which it has been construed to alter them, unless there was a material auxiliary circumstance, as in Roe *v.* Jeffrey; or the word "survivor" was coupled not with issue, but with children, in reference to personal property, as in Hughes *v.* Sayer; or it was the case of dying without issue alive, as in Den *v.* Schenck. The case of Anderson *v.* Jackson was, therefore, a step taken in advance of all preceding authority, foreign and domestic, except that found in the court below; and it shifted and disturbed real property in the city of New York to a very distressing degree. The same question, under the same will, arose in the circuit court of the United States for the southern district of New York; and it was eventually decided in the Supreme Court of the United States (Jackson *v.* Chew, 12 Wheaton, 153), in the same way. But the court, without undertaking to settle the question upon the English law, constituting the prior common law of New York, decided it entirely upon the strength of the New York decisions, as being the local law of real property in the given case. This was leaving the merits of the question, independent of the local decisions, untouched; and, therefore, the doctrine of the Supreme Court of the United States is of no authority beyond the particular case. If the same question had been brought up, at the same term, on appeal from the circuit court of Virginia, in a case unaffected by statute, the decision must have been directly the reverse, because the rule of construction in that state, under like circumstances, is different. The local law of Virginia ought to be as decisive in the one case, as the local law of New York in the other. The testamentary dispositions in the cases above referred to, from 5 Rand., agree, in all particulars, with the case in New York. The devise in each was to the sons, and if either should die without lawful issue, then over to the survivor; and the question was profoundly discussed, and decided in opposition to the New York decision, and with that decision full before the court. It seems to be a settled principle in the Supreme Court of the United States, in deciding on local statutes, or on titles to real property in the different states, to follow the local decisions, whether they are grounded on the construction of the statutes of the state, or form part of the unwritten law of the state. This was the doctrine declared in Pollard *v.* Dwight, 4 Cranch, 429 Hinde *v.* Vattier, 5 Peters, 398; Jackson *v.* Chew, 12 Wheaton, 153; Bank of United States *v.* Daniels, 12 Peters, 53; Thompson *v.* Phillips, 1 Bald. C. C. 246; Porterfield *v* Clark, 2 How. 76. But the decisions of state courts on the con-

In Virginia by statute, in 1819, and in Mississippi, by the revised code of 1824, and in North Carolina, by statute in 1827, (*f*) the rule of construction of devises, as well as * 280 deeds, with contingent limitations, * depending upon the dying of a person, without heirs, or without heirs of the body, or issue, or issue of the body, or children, was declared to be, that the limitation should take effect on such dying without heirs or issue living at the time of the death of the first taker, or born within ten months thereafter. (*a*) So, also, by the New York Revised Statutes, (*b*) it is declared, that where a remainder in fee shall be limited upon any estate which would be adjudged a fee tail, according to the law of the state as it existed before the abolition of entails, the remainder shall be valid as a contingent limitation upon a fee, and shall vest in possession, on the death of the first taker, without issue living at the time of his death. It is further declared, that when a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words *heirs or issue* shall be construed to mean heirs or issue living at the death of the person named as ancestor. It is, however, further provided, (*c*) that where a future estate shall be limited to heirs, or issues, or children, posthumous children shall be entitled to take in the same manner as if living at the death of their parent; and if the future estate be depending on the contingency of the death of any person without heirs, or issue, or children, it shall be defeated by the death of the posthumous child. These provisions sweep

struction of wills do not constitute rules of decision in the federal courts. Lane v. Vick, 3 How. 464. See also *supra*, i. 342, 394, note. The local law, which forms a rule of decision in the federal courts, applies to rights of person and property. But questions of commercial law are not included in that branch of local law, which the federal courts deem themselves bound to follow and administer. Story, J., 2 Sumner, 378. Nor does the local law apply to the practice of the federal courts. See *supra*, vol. i. The federal jurisprudence concerning real property, under the operation of the rule of decision assumed by the Supreme Court of the United States (and perhaps it could not have been discreetly avoided), may, however, in process of time, run the risk of becoming a system of incongruous materials, "crossly indented and whimsically dovetailed."

(*f*) N. C. R. S. i. 259, 622; Mississippi R. Code, 458.

(*a*) By the New Jersey Revised Statutes of 1847, p. 740, a devise to A. for life, and at his death to his heirs or issue, or heirs of the body, the lands, after the death of the devisee for life, shall go to his children, as tenants in common in fee.

(*b*) i. 722, sec. 4; ib. 724, sec. 22.

(*c*) i. 724, sec. 30, 31.

away, at once, the whole mass of English and American adjudications on the meaning, force, and effect of such limitations. The statute speaks so peremptorily as to the construction which it prescribes, that the courts may not, perhaps, hereafter, feel themselves at liberty to disregard its direction, even though other parts of the will should contain evidence of an intention not to fix the period of the devisee's death for * the contin- * 281 gency to happen, and that the testator had reference to the extinction of the posterity of the devisee, though that event might not happen until long after the death of the first taker. They might be led to regard any such other intent, collected from the whole will, if such a case should happen, not to be consistent with the positive rule of construction given by the statute to the words *heirs* and *issue*. Yet, when we consider the endless discussions, and painful learning, and still more painful collisions of opinion, which have accompanied the history of this vexatious subject, it is impossible not to feel some relief, and to look even with some complacency, at the final settlement, in any way, of the litigious question by legislative enactment. (*a*)

(*a*) The English statute of wills of 1 Victoria, c. 26, declares, that the words "die without issue," or "die without leaving issue," or other words which may import either a want or failure of issue, are to be construed to mean dying without issue living, at the death of the person, and not an indefinite failure of issue, unless a contrary intention shall appear by the will, without any implication arising from the words denoting a want or failure of issue, and if such intention appears, the case is exempted from the provision of the statute. The New York Revised Statute makes no such exception. Here, also, the English law is rescued from all that body of learning and litigation which has so long been a fruitful source of discussion and acute investigation.

The great objection to legislative rules on the construction of instruments, and to all kinds of codification, when it runs into detail, is, that the rules are not malleable; they cannot be accommodated to circumstances; they are imperative. And such interference is the more questionable when a permanent, inflexible construction is attempted to be prescribed even for the words used by a testator in his will. The noted observation of Lord Hobart naturally occurs, that "the statute is like a tyrant — where he comes he makes all void; but the common law is like a nursing father, and makes only void that part where the fault is, and preserves the rest." It is not, however, to be understood that even a statute prohibition will destroy those parts of an instrument or contract which are not within the prohibition, or dependent upon the part prohibited, provided the sound part can be separated from the unsound. 1 Ashmead, 212. Other cases on this point are collected in the American Jurist, No. 20, art. 1, and No. 45, art. 1; and in Goodman *v.* Newell, 18 Conn. 75. In this last case the history and character, and true principle and limitation of the maxim, are well and fully explained.

It was a point discussed by Mr. Justice Cowen, with learning and ability, in Salmon

(3.) *Of dying without Issue as to Chattels.* — The English courts long since took a distinction between an executory devise of real and of personal estate, and held that the words "dying without issue" made an estate tail of real property, yet that, in respect to personal property, which is transient and perishable, the testator could not have intended a general failure of issue, but issue at the death of the first taker. This distinction was raised by Lord Macclesfield, in *Forth* v. *Chapman*, (*b*) and supported afterwards by such names as Lord Hardwicke, Lord Mansfield, and Lord Eldon. But the weight of other distinguished authorities, such as those of Lord Thurlow, Lord Loughborough, and Sir

v. Stuyvesant, 16 Wend. 321, how far a will, invalid under the statute as to some of its provisions, would be sustained as to others not in conflict with the statute; and when a will would be avoided *in toto* on the ground that the invalidity of portions of it defeats the main intention of the testator. The same question was again discussed by him and the other judges of the Supreme Court, in Root *v.* Stuyvesant, 18 Wend. 257, in a case on appeal from the Court of Chancery, with great force and upon sound authority. The final judgment in the case, as rendered by a majority of the senate, was against their opinions, but those opinions were exceedingly well stated. They held that powers and limitations in a will, which passed the limits prescribed by statute, were to be considered as valid so far as they were capable, by the terms of them, of being executed within statutory limits, and that they were void so far only as they transgressed those limits. The independent provisions in a will, which were free from objections, would be sustained and not overthrown, on the ground that another independent provision was contrary to law. Thus a will not duly executed to pass real property, would, nevertheless, be good to pass personal estate. An illegal provision would not destroy a legal one, unless the latter essentially depended upon the former. The rule is to save all that agrees with the statute. If, however, said Chancellor Walworth, in another case, a deed be declared void by statute, on account of some illegal or fraudulent provision therein, all the provisions of the deed must fall together. Rogers *v.* De Forest, 7 Paige, 277. Finally, in the Court of Errors, in Hone's Executors *v.* Van Schaick, 20 Wend. 564, the same salutary principle, advanced by the judges of the Supreme Court, in Root *v.* Stuyvesant, was declared and adopted, and settled in the last resort. A bequest in a will, in itself free from objection, and having no necessary connection with a trust adjudged void, was held to be valid, and a like principle had been established in Hawley *v.* James, 16 Wend. 61, and was also established in Darling *v.* Rogers, in the Court of Errors, on appeal from chancery, 22 Wend. 483. It is now considered to be the settled rule of law in New York, that the will of a testator is to be carried into effect, so far as that intention is consistent with the rules of law. That although some of the objects for which a trust is created, or some future interests limited upon a trust estate are illegal and void, yet if any of the purposes of the trust are valid, the legal title vests in the trustees during the continuance of such valid objects of the trust, provided the legal be not so mixed up with the illegal objects of the trust that the one cannot be sustained without giving effect to the other. Irving *v.* De Kay, 9 Paige, 521, 528. [s. c. 5 Denio, 646; Savage *v.* Burnham, 17 N. Y. 561.]

(*b*) 1 P. Wms. 663.

William Grant, is brought to bear against any such distinction. There is such an array *of opinion on each side, *282 that it becomes difficult to ascertain the balance upon the mere point of authority; but the importance of uniformity in the construction of wills, relative to the disposition of real property, has, in a great degree, prevailed over the distinction; though in bequests of personal property, the rule will, more readily than in devises of land, be made to yield to other expressions, or slight circumstances in the will, indicating an intention to confine the limitation to the event of the first taker dying without issue living at his death. The courts, according to Mr. Fearne, lay hold, with avidity, of any circumstance, however slight, and create almost imperceptible shades of distinction, to support limitations over of personal estates. (*a*)

(*a*) Fearne on Executory Devises, by Powell, 186, 239, 259; Doe *v.* Lyde, 1 T. R. 593; Dashiell *v.* Dashiell, 2 Harr. & Gill, 127; Eichelberger *v.* Barnetz, 17 Serg. & R. 293; Doe *ex dem.* Cadogan *v.* Ewart, 7 Ad. & El. 636. The conflict of opinion, as to the solidity of the distinction in Forth *v.* Chapman, is very remarkable, and forms one of the most curious and embarrassing cases in the law, to those well disciplined minds that desire to ascertain and follow the authority of adjudged cases. Lord Hardwicke (2 Atk. 314); Lord Thurlow (1 Bro. C. C. 188; 1 Ves. 286); Lord Loughborough (3 Ves. 99); Lord Alvanley (5 id. 440); Lord Kenyon (3 T. R. 133; 7 id. 595); Sir William Grant (17 Ves. 479), and the Court of K. B., in 4 Maule & S. 62, are authorities against the distinction. Lord Hardwicke (2 Atk. 288; 2 Ves. 180, 616); Lord Mansfield (Cowp. 410; Den *v.* Shenton, 2 Chitty, 662); Lord Eldon (9 Ves. 203), and the House of Lords, in Keily *v.* Fowler, 6 Bro. P. C. 309, are authorities for the distinction. As Lord Hardwicke has equally commended and equally condemned the distinction, without any kind of explanation, his authority may be considered as neutralized, in like manner as mechanical forces of equal power, operating in contrary directions, naturally reduce each other to rest. In the case of Campbell *v.* Harding, 2 Russell & Mylne, 390, it was held at the Rolls, and afterwards by the Chancellor on appeal, that where, by will, a sum of stock and also real estate were given to C., and in case of her death, *without lawful issue*, then over, she took an absolute interest in the *stock*, inasmuch as the bequest over, limited after a general failure of issue, was void. The old rule was reasserted. The American cases, without adopting absolutely the distinction in Forth *v.* Chapman, are disposed to lay hold of slighter circumstances in bequests of chattels, than in devises of real estate, to tie up the generality of the expression *dying without issue*, and confine it to dying without issue living at the death of the party, in order to support the devise over; and this is the extent to which they have gone with the distinction. Executors of Moffat *v.* Strong, 10 Johns. 12; Newton *v.* Griffith, 1 Harr. & Gill, 111; Royall *v.* Eppes, 2 Munf. 479; Brummet *v.* Barber, 2 Hill (S. C.), 544, 545; Williams *v.* Turner, 10 Yerger, 287; Robards *v.* Jones, 4 Iredell (N. C.), 53. In Arnold *v.* Congreve, 1 Tamlyn, 347, it was said by the Master of the Rolls to be now perfectly well settled, that there is no difference with respect to a limitation of freehold and personalty; and the rule was also declared in Zollicoffer *v.* Zollicoffer, 3 Batt. (N. C.) 438, on the

*283 *The New York Revised Statutes (*a*) have put an end to all semblance of any distinction in the contingent limitation of real and personal estates, by declaring that all the provisions relative to future estates should be construed to apply to limitations of chattels real, as well as to freehold estates; and that the absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance, and until the termination of not more than two lives in being at the date of the instrument containing the limitation or condition, or, if it be a will, in being at the death of the testator. In all other respects, limitations of future or contingent interests in personal property are made subject to the rules prescribed in relation to future estates in land.

The same limitation under the English law, which would create an estate tail if applied to real estates, would vest the whole interest absolutely in the first taker, if applied to chattels. (*b*) And if the executory limitation, either of land or chattels, be too remote in its commencement, it is void, and cannot be helped by any subsequent event, or by any modification or restriction in the execution of it. The possibility, at its creation, that the event

ground of the presumed intention of the testator that executory limitations of land and chattels were to be construed alike, and to go over on the same event; and in this last case in North Carolina, the limitation over a devise of land and chattels was held good where the gift was to the children, and in case of either dying without lawful heirs of the body, his share to go to the *survivors*. In Mazyck *v.* Vanderhost, 1 Bailey, Eq. 48, it was held that in a devise of real and personal estate to B., and to the heirs of her body, but if she should depart this life *leaving* no heirs of her body, then over, the word "leaving" restrained the otherwise indefinite failure of issue to the death of the first taker, and that the limitation over was good by way of executory devise as to the personal estate; [Usilton *v.* Usilton, 3 Md. Ch. Dec. 36; Flinn *v.* Davis, 18 Ala. 132;] but was too remote and void as to the real estate, although both species of property were disposed of by the same words in the same clause of the will. This sanction of the case of Forth *v.* Chapman was in the court of appeals in South Carolina, in 1828, but the reporter, in an elaborate note annexed to the case, questions the reason, justice, and applicability of the rule to the jurisprudence in this country, and ably contends that the rule of construction which imputes a difference of intention to a testator in respect to his real and personal estate, when he devises both by the same words, ought to be abandoned. See the case of Moody *v.* Walker, 3 Ark. 147, to the same point, and that case maintains an able and elaborate discussion of the doctrine of executory devises.

(*a*) i. 724, sec. 23; i. 773, sec. 1, 2; *vide supra*, 271.

(*b*) Attorney General *v.* Bayley, 2 Bro. C. C. 553; Knight *v.* Ellis, ib. 570; Lord Chatham *v.* Tothill, 6 Bro. P. C. 450; Britton *v.* Twining, 3 Meriv. 176; Paterson *v.* Ellis, 11 Wend. 259. See also *supra*, [278, n. 1,] ii. 354.

on which the executory limitation depends, may exceed, in point of time, the authorized period, is fatal to it; [1] though there are

[1] *Perpetuities.* — The text is confirmed by Brattle Square Church *v.* Grant, 3 Gray, 142; Sears *v.* Russell, 8 Gray, 86; Sears *v.* Putnam, 102 Mass. 5, 7; Tayloe *v.* Gould, 10 Barb. 388, 398; [Slade *v.* Patten, 68 Me. 380; Bailey *v.* Bailey, 28 Hun, 603.] See especially, Curtis *v.* Lukin, 5 Beav. 147. The rule regards the vesting of the title, not the possession. 1 Jarm. on W. 3d ed. 274; Loring *v.* Blake, 98 Mass. 253, 259; [Evans *v.* Walker, 3 Ch. D. 211.]

In deciding whether an executory devise is too remote, the state of things at the testator's death and not at the date of his will is to be regarded, according to the weight of authority. Vanderplank *v.* King, 3 Hare, 1, 17; Faulkner *v.* Daniel, ib. 199, 216; Williams *v.* Teale, 6 id. 239, 251; Peard *v.* Kekewich, 15 Beav. 166, 173; Southern *v.* Wollaston, 16 id. 166, 276; Cattlin *v.* Brown, 11 Hare, 372, 382; Challis *v.* Doe, 18 Q. B. 231, 247; Monypenny *v.* Dering, 2 De G., M. & G. 145, 169; Ibbetson *v.* Ibbetson, 10 Sim. 495, 515; Dungannon *v.* Smith, 12 Cl. & Fin. 546; Hosea *v.* Jacobs, 98 Mass. 65, 67. [But see Odell *v.* Youngs, 64 How. Pr. 56.]

The object of the rule against perpetuities cannot be simply to prevent the tying up a particular parcel of land, or other specific thing, as would seem from the language of many of the books, Stephens *v.* Stephens, Cas. temp. Talb. 228, 232; 1 Jarm. on W. 3d ed. 273; Carne *v.* Long, 2 De G, F. & J. 75, 80; Lovering *v.* Worthington, 106 Mass. 86; French *v.* Old South Soc., ib. 479, 488; x^1 for it is applied to a legacy of money, and

x^1 Perhaps the object of the statute may be more accurately stated to be that the property shall vest within the limited time in some one who shall have over it a power of absolute disposition. Thus a limitation after an estate tail is not void since it may be barred at any time. Heasman *v.* Pearse, 7 L. R. Ch. 275. So also a limitation is not void if the facts (*e. g.* the age of the beneficiaries) show that it must vest and give to some one an absolute power of disposal within the time limited. Cooper *v.* Laroche, 17 Ch. D. 368. See also Todhunter *v.* The D. M. & I. M. R. Co., 58 Iowa, 205; Robert *v.* Corning, 89 N. Y. 225. A restraint on alienation extending beyond the allowed period is void, as is also an agreement to reconvey at any time in the future. Cooper *v.* Laroche, *supra;* London, &c. Ry. Co. *v.* Gomm, 20 Ch. D. 562. In the case of a gift to a class, the whole gift is void if it is too remote as to an unascertained portion of the class. Pearks *v.* Moseley, 5 App. Cas. 714; Hale *v.* Hale, 3 Ch. D. 643; Bentinck *v.* Duke of Portland, 7 Ch. D. 693; Blight *v.* Hartnoll, 19 Ch. D. 295. See Picken *v.* Matthews, 10 Ch. D. 264; Caldwell *v.* Willis, 57 Miss. 555. The cases as to charities would seem to have no bearing upon the argument as to the object of the rule, they being acknowledged exceptions to the rule, on the ground that their nature, as being in aid of charity, overcomes the objections to perpetuity founded on public policy, on which the rule is based. See further, Russell *v.* Allen, 107 U. S. 163, where the authorities are reviewed; Jones *v.* Habersham, ib. 174; Chamberlayne *v.* Brockett, 8 L. R. Ch. 206; *In re* Dutton, 4 Ex. D. 54; Yeap Cheah Neo *v.* Ong Cheng Neo, 6 L. R. P. C. 381. In some states no distinction as to charitable trusts is recognized. Methodist Church *v.* Clark, 41 Mich. 730. See also Kain *v.* Gibboney, 101 U. S. 362, where, in a case arising under the law of Virginia, a charitable trust was held void for indefiniteness.

Though it is not the sole ground on

cases in which the limitation over has been held too remote only *pro tanto*, or in relation to a branch of the disposition. (*c*)

(*c*) Fearne on Executory Devises, 159, 160; Phipps *v.* Kelynge, ib. 84. A limitation to an unborn child for life is not good, unless the remainder vests in interest at the same time. A gift in remainder, expectant upon the death of unborn children, is too remote. 4 Russ. 311. In Hannan *v.* Osborn, 4 Paige, 336, there was a devise of real and personal estate to a sister and her children, with devise over, if she should die, and all her children, without leaving children. The sister had but one child at the making of the will and at the testator's death. It was held that the sister took

also when the trustees of the instrument creating the limitation have power to change the investment. In such cases no specific property is rendered inalienable, as the objectionable limitation only operates on the fund for the time being in the hands of the trustees. See, *e. g.*, Thomson *v.* Shakespear, 1 De G., F. & J. 399; Speakman *v.* Speakman, 8 Hare, 180, 182, 187; Palmer *v.* Holford, 4 Russ. 403; Fosdick *v.* Fosdick, 6 Allen, 41; Lovering *v.* Worthington, 106 Mass. 86, 87. Compare the New York statute and cases decided under it. Savage *v.* Burnham, 17 N. Y. 561, 563, bottom, 572. A perpetuity of this sort is necessarily created when a fund is devoted to a charity absolutely. Even if specific property is not rendered inalienable, the proceeds of the fund can only be applied in one way forever. See Thomson *v.* Shakespear, 1 De G., F. & J. 399. It does not matter in such cases whether the property is given to one charity or two. This would be even more clearly the case if the mere giving of property to a charity rendered it inalienable, as assumed in the statement of Christ's Hospital *v.* Grainger, *infra*, in 1 Jarm. on W. 3d ed. 273, and as is practically the case in England, *post*, 311, n. (*a*). See also comments on Attorney General *v.* Hungerford, 2 Cl. & Fin. 357, 374, in Sugden's Law of Property as administered by the House of Lords, 535; Magdalen College *v.* Attorney General, 6 H. L. C. 189, 205, 213; Carne *v.* Long, 2 De G., F. & J. 75, 80; and the following cases which treat an indefinite restraint on the alienation of specific lands as allowable in the case of a charity. Perin *v.* Carey, 24 How. 465, 507; Yard's Appeal, 64 Penn. St. 95; Philadelphia *v.* Girard, 45 Penn. St. 9, 26; *ante*, 131, n. 1.

Accordingly there is an exception to the general rule against perpetuities, when a gift is made to one charity and then over to another. Christ's Hospital *v.* Grainger, 1 Macn. & G. 460, 464; s. c. 16 Sim. 83, 100. In like manner a trust for accumulation to be applied to a charity after fifty years is good, Odell *v.* Odell, 10 Allen, 1; Williams *v.* Williams, (4 Seld.) 8 N. Y. 525; although it is otherwise under the New York statutes, Rose *v.* Rose Benevolent Ass., stated 271, n. 3, in last edition of this volume; see s. c. Bascom *v.* Albertson, 34 N. Y. 584, 590; disapproving Williams *v.* Williams, *supra*. But if the limitation over, which may infringe the rule, is to an individual, Wells *v.* Heath, 10 Gray, 17; or if it is to a charity after a limitation to an individual in the first instance, it is void, Commissioners of Donations *v.* Clifford, 1 Dr. & War. 245.

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which the rule against perpetuities rests, it seems there is a principle that equity will not allow property to be uselessly tied up for a long time. Thus it was held in Brown *v.* Burdett, 21 Ch. D 667, that a direction in a will to block up certain rooms in a house for twenty years was invalid.

*** 4. Of other Matters relating to Executory Devises.—** * 284 When there is an executory devise of the real estate, and the freehold is not, in the mean time, disposed of, the inheritance descends to the testator's heir until the event happens. So, where there is a preceding estate limited, with an executory devise over of the real estate, the intermediate profits between the determination of the first estate and the vesting of the limitation over, will go to the heir at law, if not otherwise appropriated by the will. (*a*) The same rule applies to an executory devise of the personal estate; and the intermediate profits, as well before the estate is to vest, as between the determination of the first estate and the vesting of a subsequent limitation, will fall into the residuary personal estate. (*b*) These executory interests, whether in real or personal estates, like contingent remainders, may be assigned or devised, and they are transmissible to the representatives of the devisee, if he dies before the contingency happens; and they vest in the representatives, either of the real or personal estate, as the case may be, when the contingency does happen. (*c*)

In the great case of *Thellusson* v. *Woodford*, (*d*) it was the declared doctrine, that there was no limited number of lives for the purpose of postponing the vesting of an executory interest. There might be an indefinite number of concurrent lives no way connected with the enjoyment of the estate; for, be there ever so many, there must be a survivor, and the limitation is only for the length of that life. (*e*) * The purpose of * 285

an estate for life, and the child a *vested* remainder in fee, subject to open and let in after-born children, but that the limitation over was void, as being too remote as to the after-born children. In that case the real and personal estate was held subject to the same rule, and the chancellor said that there was no difference in principle under the New York Revised Statutes on this subject, between the devise of real and personal estates, in respect to limitations over. See also Gott *v.* Cook, 7 Paige, 521, and Hone *v.* Van Schaick, 7 Paige, 222, to the same point.

(*a*) Pay's Case, Cro. Eliz. 878; Hayward *v.* Stillingfleet, 1 Atk. 422; Hopkins *v.* Hopkins, Cases temp. Talb. 44.

(*b*) Chapman *v.* Blissett, Cases temp. Talb. 145; Duke of Bridgwater *v.* Egerton, 2 Ves. 122.

(*c*) Pinbury *v.* Elkin, 1 P. Wms. 563; Goodright *v.* Searle, 2 Wils. 29; Fearne on Executory Devises, 529–535; New York Revised Statutes, i. 725, sec. 35; 2 Saund. 388, k. note. See also the concluding part of the last Lecture.

(*d*) 4 Ves. 227; 11 id. 112, s. c.

(*e*) Lord Thurlow, in Robinson *v.* Hardcastle, 2 Bro. C. C. 30; Lord Eldon, in Thellusson *v.* Woodford, 11 Ves. 115.

accumulation was no objection to an executory devise, nor that the enjoyment of the subject was not given to the persons during whose lives it was to accumulate. The value of the thing was enlarged, but not the time. The accumulated profits arising prior to the happening of the contingency might all be reserved for the persons who were to take upon the contingent event; and if the limitation of the executory devise was for any number of lives in being, and a reasonable time for a posthumous child to be born, and twenty-one years thereafter, it was valid in law. The devise in that case was, that all the real and personal estate of the testator should be converted into one common fund, to be vested in trustees in fee for the rents and profits to accumulate during all the lives of all the testator's sons, and of all the testator's grandsons, born in his lifetime, or living at his death, or then *en ventre sa mère*, and their issue, to receive the profits during all that time in trust, and to invest them from time to time in other real estates, and thus be adding income to principal. After the death of the last survivor of all the enumerated descendants, the estates were to be conveyed to those branches of the respective families of the sons who, at the end of the period, should answer the description of the heirs male of the respective bodies of the sons. The testator's object was to protract the power of alienation, by taking in lives of persons who were mere nominees, without any corresponding interest. The trusts created by the Thellusson will were held valid by the Court of Chancery, and the decree was affirmed in the House of Lords. The property was thus tied up from alienation, and from enjoyment for three generations; and when the period of distribution shall arrive, the accumulated increase of the estate will be enormous. (*a*)

This is the most extraordinary instance upon record of calculating and unfeeling pride and vanity in a testator, disregarding the ease and comfort of his immediate descendants, for
* 286 the miserable satisfaction of enjoying in anticipation * the wealth and aggrandizement of a distant posterity. Such an iron-hearted scheme of settlement, by withdrawing property for so long a period from all the uses and purposes of social life, was

(*a*) The testator died in 1797. He left three sons and three daughters, and half a million sterling, on an accumulating fund. If the limitation should extend to upwards of one hundred years, as it may, the property will have amounted to upwards of one hundred millions sterling!

intolerable. It gave occasion to the statute of 39 and 40 Geo. III. c. 98, prohibiting thereafter any person, by deed or will, from settling or devising real or personal property, for the purpose of accumulation, by means of rents or profits, for a longer period than the life of the settler, or twenty-one years after his death, or during the minority of any person or persons living at his decease, who, under the deed or will directing the accumulation, would, if then of full age, be entitled to the rents and profits. (*a*)

The New York Revised Statutes (*b*) have allowed the accumulation of rents and profits of real estate, for the benefit of one or more persons, by will or deed; but the accumulation must commence either on the creation of the estate out of which the rents and profits are to arise, and it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; or if directed to commence at any time subsequent to the creation of the estate, it must commence within the time authorized by the statute for the vesting of future estates, and during the minority of the persons for whose benefit it is directed, and terminate at the expiration of such minority. If the direction for accumulation be for a longer time than during the minorities aforesaid, it shall be void for the excess of time; and all other directions for the accumulation of the rents and profits of real estate are void. It is further provided, that whenever there is, by a valid limitation, a suspense of the power of alienation, and no provision made for the disposition, in the mean time, of the rents and profits, they shall belong to the persons presumptively entitled to the next eventual estate. If the trust of accumulation of the income of personal property be void under the statute, the income descends as if the testator had died intestate. (*c*)

(*a*) The Thellusson Act does not operate to alter any disposition in a will, except only the direction to accumulate. 2 Keen, 564. [Conf. Jagger *v.* Jagger, 25 Ch. D. 729.] The New York Revised Statutes, 1 R. S. 773, was founded on the Thellusson Act, suspending the absolute ownership of personal property, and does not apply to charitable *perpetuities*. Shotwell *v.* Mott, 2 Sandf. Ch. 56.

(*b*) I. 726, sec. 37–40. As to the regulation of accumulation of personal property, see *ante*, ii. 353, note.

(*c*) Vail *v.* Vail, 4 Paige, 317. In that case the chancellor considered the statute check to accumulation a salutary provision, and that no man ought to be permitted to withhold the income of his estate, for the sole purpose of hoarding up wealth by compound interest after his death, to provide for a second or a third future generation, or

The intermediate rents and profits arising on an estate given by way of executory devise, will pass by a devise of
* 287 *all the residue of the estate. (*a*) But if these are not devised, when the estate is devised to trustees for any lawful purpose whatever, they are then, at common law, thrown upon the heir for want of some other person to take them, and they attend the estate in its descent to the heir, and belong to him during the continuance of the trust estate. So, it is a settled rule, that where there is an executory devise of a real estate, and the freehold is not, in the mean time, disposed of, the freehold and inheritance descends to the testator's heir at law. (*b*) If the profits are bequeathed, and the land left, in the mean time, to descend to the heir until the contingent limitation takes effect, and no other person made trustee of the profits, the heir becomes a trustee, and the rents and profits will accumulate in his hands for the benefit of the party under the will. (*c*)

even for his immediate descendants, to be given to them at the close of their lives, when they are no longer in a situation to enjoy it. The statute ought to be carried into effect according to its spirit and intent, and so as to meet and correct those evils. But under the English statute, trusts by wills for accumulation during a life contrary to the statute, are good for twenty-one years. Griffiths *v.* Vere, 9 Ves. 127.

(*a*) Stephens *v.* Stephens, Cases temp. Talb. 228.

(*b*) Clarke *v.* Smith, 1 Lutw. 793; Hopkins *v.* Hopkins, Cases temp. Talb. 44; Gibson *v.* Lord Montfort, 1 Ves. 485; Amb. 93, s. c.; Duffield *v.* Duffield, 1 Dow & C. 268, 310.

(*c*) Rogers *v.* Ross, 4 Johns. Ch. 388.

LECTURE LXI.

OF USES AND TRUSTS.

1. **Of Uses.** — A use is where the legal estate of lands is in A., in trust, that B. shall take the profits, and that A. will make and execute estates according to the direction of B. (*a*) Before the statute of uses, a use was a mere confidence in a friend, to whom the estate was conveyed by the owner without consideration, to dispose of it upon trusts designated at the time, or to be afterwards appointed by the real owner. The feoffee or trustee was, to all intents and purposes, the real owner of the estate at law, and the *cestui que use* had only a confidence or trust, for which he had no remedy at the common law.

(1.) *Of their History.* — In examining the *History of Uses*, we shall find that they existed in the Roman law, under the name of *fidei commissa*, or trusts. They were introduced by testators, to evade the municipal law, which disabled certain persons, as exiles and strangers, from being heirs or legatees. The inheritance or legacy was given to a person competent to take, in trust, for the real object of the testator's bounty. But such a confidence was precarious, and was called by the Roman lawyers, *jus precarium;* for it rested entirely on the good faith of the trustee, who was under no legal obligation to execute it. To invoke the patronage of the emperor in favor of these defenceless trusts, they were created * under an appeal *290 to him, as *rogo te per salutem*, or *per fortunam Augusti.* Augustus was flattered by the appeal, and directed the prætor to afford a remedy to the *cestui que trust;* and these fiduciary interests increased so fast, that a special equity jurisdiction was created to enforce the performance of the trusts. This "particular chancellor for uses," as Lord Bacon terms him, who was charged with the support of these trusts, was called *prætor fidei*

(*a*) Gilbert on Uses, 1.

commissarius. (*a*) If the testator, in his will, appointed Titius to be his heir, and requested him, as soon as he should enter upon the inheritance, to restore it to Caius, he was bound to do it, in obedience to the trust reposed in him. The Emperor Justinian gave greater efficacy to the remedy against the trustee, by authorizing the prætor, in cases where the trusts could not otherwise be proved, to make the heir, or any legatee, disclose or deny the trust upon oath, and when the trust appeared, to compel the performance of it. (*b*)

The English ecclesiastics borrowed uses from the Roman law, and introduced them into England in the reign of Edward III. or Richard II., to evade the statutes of mortmain, by granting lands to third persons to the use of religious houses, and which the clerical chancellors held to be *fidei commissa*, and binding in conscience. (*c*) When this evasion of law was met and suppressed by the statute of 15 Richard II., uses were applied to save lands from the effects of attainders; for the use, being a mere right in equity, of the profits of land, was exempt from feudal responsibilities; and uses were afterwards applied to a variety of purposes in the business of civil life, and grew up into a refined and
* 291 regular system. They were required by the * advancing state of society and the growth of commerce. The simplicity and strictness of the common law would not admit of secret transfers of property, or of dispositions of it by will, or of those family settlements which become convenient and desirable. A fee could not be mounted upon a fee, or an estate made to shift from one person to another by matter *ex post facto;* nor could a freehold be made to commence *in futuro*, nor an estate spring up at a future period independently of any other; nor could a power be reserved to limit the estate, or create charges on it in derogation of the original feoffment. All such refinements were repugnant to the plain, direct mode of dealing, natural to simple manners and unlettered ages. The doctrine of livery of seisin rendered it impracticable to raise future uses upon feoffment; and if a person wished to create an estate for life, or in tail, in himself, he was obliged to convey the whole fee to a third person, and then take back the interest required. Conditions annexed

(*a*) Inst. 2. 23. 1; Vinnius, h. t.; Bacon on the Statute of Uses, Law Tracts, 315.
(*b*) Inst. 2. 23. 12.
(*c*) 2 Bl. Comm. 328; Saunders on Uses and Trusts, 14.

to the feoffment would not answer the purpose, for none other than the grantor, or his heir, could enter for the breach of it; and the power of a freeholder to destroy all contingent estates by feoffment or fine, rendered all such future limitations at common law very precarious.

The facility with which estates might be modified, and future interests secured, facilitated the growth of uses, which were so entirely different in their character from the stern and unaccommodating genius of feudal tenure. Uses, said Lord Bacon, "stand upon their own reasons, utterly different from cases of possession." (a) They were well adapted to answer the various purposes to which estates at common law could not be made subservient, by means of the relation of trustee and *cestui que use*, and by the power of disposing of uses by will, and by means of shifting, secondary, contingent, springing, and resulting *uses, and by the reservation of a power to revoke the *292 uses of the estate and direct others. These were pliable qualities belonging to uses, and which were utterly unknown to the common law, and grew up under the more liberal and more cultivated principles of equity jurisprudence.

The contrast between uses and estates at law was extremely striking. When uses were created before the statute of uses, there was a confidence that the feoffee would suffer the feoffor to take the profits, and that the feoffee, upon the request of the feoffor, or notice of his will, would execute the estate to the feoffor and his heirs, or according to his directions. (a) When the direction was complied with, it was essentially a conveyance by the feoffor, through his agent the feoffee, who, though even an infant or *feme covert*, was deemed in equity competent to execute a power and appoint a use. The existing law of the land was equally eluded in the selection of the appointee, who might be a corporation, or alien, or traitor, and in the mode of the direction, which might be by parol.

As the feoffee to uses was the legal owner of the estate, he had complete control over it, and he was exposed to the ordinary

(a) Bacon's Law Tracts, 310. Lord Bacon's Reading on the Statute of Uses has a scholastic and quaint air pervading it; but is very instructive to read, because it is profoundly intelligent.

(a) Lord Bacon says that these properties of a use were exceedingly well set forth by Walmsley, J., in a case in 36 Eliz., to which he refers. Bacon's Law Tracts, 307.

legal claims, debts and forfeitures, to dower, curtesy, wardship, and attainder. (*b*) When uses were raised by conveyances at common law, operating by transmutation of possession, the uses declared in such conveyances did not require a consideration. The real owner had devested himself of the legal estate, and the person in whom it was vested, being a mere naked trustee, equity held him bound in conscience to execute the directions of the donor. If, however, no uses were declared, then the feoffee, or releasee, took, to the use of the feoffor or releasor, to whom the use resulted; for if there was no consideration, and no
*293 declaration * of uses, the law would not presume that the feoffor or releasor intended to part with the use. But in the case of covenants to stand seised, and of a bargain and sale, which did not transfer the possession to the covenantee or bargainee, the inheritance remained in the contracting party; and it was a mere contract, which a court of equity would not enforce, for a use could not be raised when the conveyance was without a sufficient consideration. The same principle applied to the case of a release, which was a conveyance operating at common law. (*a*) Uses were alienable without any words of limitation requisite to carry the absolute interest; for, not being held by tenure, they did not come within the technical rules of the common law. (*b*) A use might be raised after a limitation in fee, or it might be created *in futuro*, without any preceding limitation; or the order of priority might be changed by shifting uses, or by powers; or a power of revocation might be reserved to the grantor, or to a stranger, to recall and change the uses. (*c*) Uses were descendible, according to the rules of the common law, in the case of inheritances in possession. (*d*) They were also devisable, as they were only declarations of trust binding in conscience; and Lord Bacon, in opposition to Lord Coke, who in *Chudleigh's case* had put the origin of uses entirely upon the

(*b*) Co. Litt. 271, b, note.

(*a*) Bacon on Uses, Law Tracts, 312; Sugden on Powers, 5, 6. [See further, as to when a limitation operates by the common law, and when under the statute of uses, and as to the effect of this upon the possession conferred. Orme's Case, 8 L. R. C. P. 281; Hadfield's Case, ib. 306.]

(*b*) 1 Co. 87, b, 100, b.

(*c*) Bro. Feoff. al Use, pl. 30; Jenk. Cent. 8 Ca. 52; Co. Litt. 237, a; Preston on Estates, i. 154.

(*d*) 2 Rol. Abr. 780.

ground of frauds invented to elude the statutes of mortmain, maintained that uses were introduced to get rid of the inability at common law to devise lands. (*e*) It is probable that both these causes had their operation, though the doctrine of uses existed in the civil law, and would naturally be suggested in every community by the wants and policy of civilized life. The wife could not be endowed, or the husband have his curtesy of a use, nor was the use available by writ of *elegit* or other legal process in favor of the creditor of *cestui que use.* (*f*) Lord Bacon complained that uses were "turned to deceive many of their just and reasonable rights." Uses were certainly perverted to mischievous purposes; and the complaint is constant and vehement in the old books, and particularly in *Chudleigh's case* and in the preamble to the statute of uses, against the abuses and frauds which were practised *by uses prior to the *294 statute of uses. It was the intention of the statute to extirpate such grievances, by destroying the estate of the feoffee to uses, and reducing the estate in the use to an estate in the land. There was a continual struggle maintained for upwards of a century between the patrons of uses and the English Parliament, the one constantly masking property, and separating the open legal title from the secret equitable ownership, and the other, by a succession of statutes, endeavoring to fix the duties and obligations of ownership upon the *cestui que use.* At last the statute of 27 Hen. VIII., commonly called the statute of uses, transferred the uses into possession by turning the interest of the *cestui que use* into a legal estate, and annihilating the intermediate estate of the feoffee; so that if a feoffment was made to A. and his heirs, to the use of B. and his heirs, B., the *cestui que use*, became seised of the legal estate, by force of the statute. The legal estate, as soon as it passed to A., was immediately drawn out of him and transferred to B., and the use and the land became convertible terms.

The equitable doctrine of uses was, by the statute, transferred to the courts of law, and became an additional branch of the law of real property. Uses had new and peculiar qualities and capacities. They had none of the lineaments of the feudal system, which had been deeply impressed upon estates at common law.

(*e*) Bacon's Law Tracts, 316.

(*f*) 4 Co. 1; Bro. Abr. tit. Executions, 90.

Their influence was sufficient to abate the rigor, and, in many respects, to destroy the simplicity of the ancient doctrine. When the use was changed from an equitable to a legal interest, the same qualities which were proper to it in its fiduciary state, followed it when it became a legal estate. The *estate* in the use, when it became an interest in the land, under the statute, became liable to all those rules to which common-law estates were liable; but the *qualities* which had attended uses in equity were not separated from them when they changed their nature, and became an estate in the land itself. If they were contingent in their fiduciary state, they became contingent interests in the land. They
* 295 * were still liable to be overreached by the exercise of powers, and to be shifted, and to cease, by clauses of *cesser*, inserted in the deeds of settlement. The statute transferred the use, with its accompanying conditions and limitations, into the land. (*a*) Contingent, shifting, and springing uses presented a method of creating a future interest in land, and executory devises owed their origin to the doctrine of shifting or springing uses. But uses differ from executory devises in this respect; that there must be a person seised to the uses when the contingency happens, or they cannot be executed by the statute. If the estate of the feoffee to such uses be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed for ever; whereas, by an executory devise, the freehold is transferred to the future devisee. (*b*) Contingent uses are so far similar to contingent remainders, that they also require a preceding estate to support them, and take effect, if at all, when the preceding estate determines. The statute of uses meant to exclude all possibility of future uses, (*c*) but the necessity of the allowance of free modifications of property introduced the doctrine, that the use need not be executed the instant the conveyance is made, and that the operation of the statute might be suspended until the use should arise, provided the suspension was confined within reasonable limits as to time. (*d*) In the *Duke of Norfolk's Case*, Lord Not-

(*a*) Brent's Case, 2 Leon. 16; Manwood, J., 2 And. 75; Preston on Estates, i. 155, 156, 158.

(*b*) 2 Bl. Comm. 334; Fearne on Executory Devises, by Powell, 86, note.

(*c*) Bacon on Uses, Law Tracts, 335, 340.

(*d*) Dyer, J., in Bawell & Lucas's Case, 2 Leon. 221; Holt, C. J., in Davis *v.* Speed, 12 Mod. 38; 2 Salk. 675, s. c.

tingham was of opinion (as we have already seen), that there was no inconvenience, nor any of the mischiefs of a perpetuity, in permitting future uses, under the various names of springing, shifting, contingent, or secondary uses, to be limited to the same period to which the law *permits the vesting of an *296 executory devise to be postponed. Uses and contingent devises became parallel doctrines, and what, in the one case, was a future use, was, in the other, an executory devise.

The statute having turned uses into legal estates, they were thereafter conveyed as legal estates, in the same manner and by the same words. (*a*) The statute intended to destroy uses in their distinct state, but it was not the object of it to interfere with the new modes of conveyance to uses; and the manner of raising uses out of the seisin created by a lawful transfer, stood as it had existed before. If it was really the object of the statute of uses to abolish uses and trusts, and have none other than legal estates, the wants and convenience of mankind have triumphed over that intention, and the beneficial and ostensible ownerships of estates were kept as distinct as ever. The *cestui que use* takes the legal estate according to such quality, manner, and form as he had in the use. The complex and modified interests annexed to uses were engrafted upon the legal estate; and upon that principle it was held to be competent, in conveyances to uses, to revoke a former limitation of a use, and to substitute others. The classification of uses into shifting or secondary, springing, and future, or contingent and resulting uses, seems to be necessary, to distinguish with precision their nice and varying characters; and they all may be included under the general denomination of future uses.

(2.) *Shifting or Secondary Uses.* — Shifting or secondary uses take effect in derogation of some other estate, and are either limited by the deed creating them, or authorized to be created by some person named in it. Thus, if an estate be limited to A. and his heirs, with a proviso, that if B. pay to A. one hundred dollars, by a given time, the use of A. shall cease, and the estate go to B. in fee, the estate is vested in A., subject to a shifting or secondary use in fee in B. So, if the proviso be, *that C. may revoke the use to A., and limit it to B., then *297 A. is seised in fee, with a power in C. of revocation and

(*a*) Willes, 180.

limitation of a new use. (*a*) These shifting uses are common in all settlements; and in marriage settlements the first use is always to the owner in fee till the marriage, and then to other uses. The fee remains with the owner until the marriage, and then it shifts as uses arise. These shifting uses, whether created by the original deed, or by the exercise of a power, must be confined within proper limits, so as not to lead to a perpetuity; which is neatly defined by Sir Edward Sugden (*b*) to be such a limitation of property as renders it inalienable beyond the period allowed by law. If, therefore, the object of the power be to create a perpetuity, it is void. (*c*) And yet, in England, it is well settled, that a shifting use may be created after an estate tail; and the reason given is, that such a limitation, to take effect at any remote period, has no tendency to a perpetuity, as the tenant in tail may, when he pleases, by a recovery, defeat the shifting use; for the recovery bars and destroys every species of interest ulterior to the tenant's estate. It is on this principle that a power of sale or exchange, in cases of strict settlement, is valid, though not confined to the period allowed for suspending alienation, provided the estate be regularly limited in tail. (*d*) Shifting and secondary uses may be created by the execution of a power; as if an estate be limited to A. in fee, with a power to B. to revoke and limit new uses, and B. exercises the power, the uses created by him will be shifting or secondary in reference to A.'s estate; but they must receive the same construction as if they had been created by the original deed.

(3.) *Springing Uses.* — Springing uses are limited to
* 298 arise on a future event, * where no preceding estate is limited, and they do not take effect in derogation of any preceding interest. If a grant be to A. in fee, to the use of B. in fee, after the first day of January next, this is an instance of a springing use, and no use arises until the limited period. The use, in the mean time, results to the grantor, who has a determinable fee. (*a*) A springing use may be limited to arise within

(*a*) Bro. Feoff. al Uses, 339, a, pl. 30; Mutton's Case, Dyer, 274, b; Gilbert on Uses, by Sugden, 152–155.

(*b*) Gilbert on Uses, by Sugden, 260, note.

(*c*) Spencer *v.* Duke of Marlborough, 5 Bro. P. C. 592.

(*d*) Nicholls *v.* Sheffield, 2 Bro. C. C. 218; St. George *v.* St. George, in the House of Lords, cited in Gilbert on Uses, by Sugden, 157.

(*a*) Woodliffe *v.* Drury, Cro. Eliz. 439; Mutton's Case, Dyer, 274, b.

the period allowed by law in the case of an executory devise. A person may covenant to stand seised, or bargain and sell, to the use of another at a future day. (*b*) By means of powers, a use, with its accompanying estate, may *spring up* at the will of any given person. Land may be conveyed to A. and his heirs, to such uses as B. shall by deed or will appoint, and in default of, and until such appointment, to the use of C. and his heirs. Here a vested estate is in C. subject to be devested or destroyed at any time, by B. exercising his power of appointment, and B., though not the owner of the property, has such a power, but it extends only to *the use* of the land, and the fee simple is vested in the appointee, under the operation of the statute of uses, which instantly annexes the legal estate to the use. (*c*) These springing uses may be raised by any form of conveyance; but in conveyances which operate by way of transmutation of possession, as a feoffment, a fine or deed of lease and release, the estate must be conveyed, and the use be raised out of the seisin created in the grantee by the conveyance. A feoffment to A. in fee, to the use of B. in fee, at the death of C., is good, and the use would result to the feoffor, until the springing use took effect by the death of C. (*d*) A good springing use must be limited at once, independently of any preceding estate, and not by way of remainder, for it then becomes a contingent and not a springing use; and contingent uses, as we have already seen, are subject to the same rules precisely as contingent remainders. The other mode of conveyance by which uses may be raised, operates, not by transmutation of the estate of the grantor, but the use is severed out of the grantor's seisin, and executed by the statute. This is the case in covenants to stand seised, and in conveyances by bargain and sale.

(4.) *Future or Contingent Uses.* — Future or contingent uses are limited to take effect as remainders. If lands be granted to A. in fee, to the use of B. on his return from Rome, it is a future contingent use, because it is uncertain whether B. will ever return. (*e*)

(*b*) Roe *v.* Tranner, 2 Wils. 75; Holt, C. J., 2 Salk. 675; Rogers *v.* Eagle Fire Insurance Company of New York, 9 Wend. 611.

(*c*) Williams on the Principles of Real Property, pt. II. c. 3, p. 231.

(*d*) Gilbert on Uses, by Sugden, 163, 176.

(*e*) Sir Edward Sugden, in a note to his edition of Gilbert on Uses, 152–178, has given a clear and methodical analysis, definition, and description of these various

*299 *(5.) *Resulting Uses.* — If the use limited by deed expired, or could not vest, or was not to vest but upon a contingency, the use *resulted* back to the grantor who created it. The rule is the same when no uses are declared by the conveyance. So much of the use as the owner of the land does not dispose of, remains with him. If he conveys without any declaration of uses, or to such uses as he shall thereafter appoint, or to the use of a third person on the occurrence of a specified event, in all such cases there is a use resulting back to the grantor. (*a*)

(6.) *Abolished in New York.* — The English doctrine of uses and trusts, under the statute of 27 Henry VIII., and the conveyances founded thereon, have been very generally introduced into the jurisprudence of this country. (*b*) But in the remarks which accompanied the bill for the revision of the New York statutes, relative to uses and trusts, the following objections were made to uses as they now exist: (1.) They render conveyances more complex, verbose, and expensive than is requisite, and perpetuate

modfications of future uses. In Mr. Preston's Abstracts of Title, i. 105, 106, 107, and ii. 151, we have, also, illustrations of the various shades of distinction between them.

(*a*) Co. Litt. 23, a, 271, b; Sir E. Clere's Case, 6 Co. 17, b; Armstrong *v.* Wholesey, 2 Wils. 19.

(*b*) Chamberlain *v.* Crane, 1 N. H. 64; [Exeter *v.* Odiorne, ib. 237;] French *v.* French, 3 id. 239; Parsons, Ch. J., in Marshall *v.* Fish, 6 Mass. 31; Johns. *passim*, 3 Binney, 619. It is doubted whether the statute of uses was ever in force in the State of Ohio. Thompson *v.* Gibson, 2 Ohio, 439; Helfenstine *v.* Garrard, 7 id. 275. The statute of uses of Hen. VIII. was a part of the colonial law of Virginia; but the Revised Statutes of Virginia, since 1792, adopted as a substitute, the provisions which only execute the seisin to the use in the cases of deeds of bargain and sale, of lease and release, and of covenants to stand seised to use. The statute only executes the seisin to the use in those specified cases, and does not, like the English statute, include every case where any person should stand seised to the use of any other person. Lomax's Digest of the Laws respecting Real Property, i. 198.[1]

[1] *The Statute of Uses* is treated as in force in the following cases, either as part of the common law of the state, or by reënactment: Bryan *v.* Bradley, 16 Conn. 474, 483; Johnson *v.* Johnson, 7 Allen, 196; Chanery *v.* Stevens, 97 Mass. 77, 85; Richardson *v.* Stodder, 100 Mass. 528; Rollins *v.* Riley, 44 N. H. 9; Nightingale *v.* Hidden, 7 R. I. 115, 132; [Sprague *v.* Sprague, 18 R. I. 701; Howard *v.* Henderson, 18 S. C. 184; Blake *v.* Collins, 69 Me. 156;] Horton *v.* Sledge, 29 Ala. 478, 496; Adams *v.* Guerard, 29 Ga. 651. See Ready *v.* Kearsley, 14 Mich. 215; Van der Volgen *v.* Yates, 5 Seld. (9 N. Y.) 219; 3 Barb. Ch. 242; [Hooberry *v.* Harding, 10 Lea, 392.] It is not in force in Vermont, according to Redfield, C. J., in Sherman *v.* Dodge, 28 Vt. 26; Gorham *v.* Daniels, 23 Vt. 600; (disapproving Society for the Propagation of the Gospel *v.* Hartland, 2 Paine, 536.)

in deeds the use of a technical language, unintelligible as a "mysterious jargon," to all but the members of one learned profession. (2.) Limitations intended to take effect at a future day, may be defeated by a disturbance of the seisin, arising from a forfeiture or change of the estate of the person seised to the use. (3.) The difficulty exists of determining whether a particular limitation is to take effect as an executed use, as an estate at common law, or as a trust. These objections were deemed so strong and unanswerable, as to induce the revisers to recommend the entire abolition of uses. They considered, that by making a *grant, without the actual delivery of possession, or livery of seisin, effectual to pass every estate and *300 interest in land, the utility of conveyances deriving their effect from the statute of uses would be superseded; and that the new modifications of property which uses have sanctioned, would be preserved by repealing the rules of the common law, by which they were prohibited, and permitting every estate to be created by grant which can be created by devise. The New York Revised Statutes (*a*) have, accordingly, declared that uses and trusts, except as authorized and modified in the article, were abolished; and every estate and interest in land is declared to be a legal right, or cognizable in the courts of law, except where it is otherwise provided in the chapter; and every estate held as a use executed under any former statute, confirmed as a legal estate. The conveyance by grant is a substitute for the conveyance to uses; and the future interests in land may be conveyed by grant as well as by devise. (*b*) The statute gives the legal estate, by virtue of a grant, assignment, or devise; and the word *assignment* was introduced to make the assignment of terms, and other chattel interests, pass the legal interest in them, as well as in freehold estates; though, under the English law, the use in chattel interests was not executed by the statute of uses.

The operation of the statute of New York in respect to the doctrine of uses will have some slight effect upon the forms of conveyance, and it may give them more brevity and simplicity. But it would be quite visionary to suppose that the science of law, even in the department of conveyancing, will not continue to

(*a*) I. 727, sec. 45, 46.

(*b*) New York Revised Statutes, i. 724, sec. 24; ib. 738, 739, sec. 137, 138, 142, 146; ib. 727, sec. 47.

have its technical language, and its various, subtle, and profound learning, in common with every other branch of human science. The transfer of property assumes so many modifications, to meet the varying exigencies of speculation, wealth, and refine-
* 301 ment, and to supply family wants and wishes, that the *doctrine of conveyancing must continue essentially technical, under the incessant operation of skill and invention. The abolition of uses does not appear to be of much moment, but the change which the law of trusts has been made to undergo, becomes extremely important. (*a*)

2. Of Trusts. — The object of the statute of uses, so far as it was intended to destroy uses, was, as we have already seen, subverted by the courts of law and equity.

(1.) *Growth and Doctrine of Trusts.* — It was soon held that the statute executed only the first use, and that a use upon a use was void. In a feoffment to A., to the use of B., to the use of C., the statute was held to execute only the use to B., and there the estate rested, and the use to C. did not take effect. (*b*) In a bargain and sale to A. in fee, to the use of B. in fee, the statute passes the estate to A., by executing the use raised by the bargain and sale; but the use to B., being a use in the second degree, is not executed by the statute, and it becomes a mere trust, and one which a court of equity will recognize and enforce. (*c*) Shifting or substituted uses do not fall
* 302 within this technical rule at law, for * they are merely alternate uses. Thus, a deed to A. in fee, to the use of

(*a*) Lord Hardwicke is reported to have said, in the course of his opinion, in Hopkins *v.* Hopkins (1 Atk. 591), that the statute of uses had no other effect than to add, at most, three words to a conveyance. This was rather too strongly expressed; but I presume the abolition of uses with us will not have much greater effect. It was the abolition of a phantom. The word *grant* is not more intelligible to the world at large, than the words *bargain and sale;* and the fiction, indulged for two hundred years, that the bargain raised a use, and the statute transferred the possession to the use, was as cheap and harmless as anything could possibly be. It would, perhaps, have been as wise to have left the statute of uses where it stood, and to have permitted the theory engrafted upon it to remain untouched, considering that it had existed so long, and had insinuated itself so deeply and so thoroughly into every branch of the jurisprudence of real property.

(*b*) Tyrrell's Case, Dyer, 155; 1 And. 37; Meredith *v.* Jones, Cro. Car. 244; Lady Whetstone *v.* Bury, 2 P. Wms. 146; Doe *v.* Passingham, 6 B. & C. 305; [Orme's Case, 8 L. R. C. P. 281.]

(*c*) Lord Hardwicke, in Hopkins *v.* Hopkins, 1 Atk. 591; Jackson *v.* Cary, 16 Johns. 302.

B. in fee, and if C. should pay a given sum in a given time, then to C. in fee; the statute executes the use to B., subject to the shifting use declared in favor of C. (*a*) Chattel interests were also held not to be within the statute, because it referred only to persons who were *seised;* and a termor was held not to be technically seised, and so the statute did not apply to a term for years. (*b*) An assignment of a lease to A., to the use of B., was held to be void as to the use, and the estate was vested wholly in A. This strict construction at law of the statute gave a pretext to equity to interfere; and it was held in chancery, that the uses in those cases, though void at law, were good in equity; and thus uses were revived under the name of trusts. (*c*) A regular and enlightened system of trusts was gradually formed and established. The ancient use was abolished, with its manifold inconveniences, and a secondary use or trust introduced. Trusts have been modelled and placed on true foundations, since Lord Nottingham succeeded to the great seal; and we have the authority of Lord Mansfield for the assertion, that a rational and uniform system has been raised, and one proper to answer the exigencies of families, and other civil purposes, without any of the mischiefs which the statute of uses meant to avoid. (*d*)

Trusts have been made subject to the common-law canons of descent. They are deemed capable of the same limitations as legal estates; and courtesy was let in by analogy to legal estates, though, by a strange anomaly, dower has been excluded. (*e*) Executed trusts are enjoyed in the same condition, and entitled to the same benefits of ownership, and are, consequently, disposable and devisable, exactly as if they were legal estates; and these rights the **cestui que trust* possesses, without *303 the intervention of the trustee. Any disposition of the land by the *cestui que trust*, by conveyance or devise, is binding upon the trustee. (*a*) In limitations of trusts, either of real or personal estates, the construction, generally speaking, is the same

(*a*) Preston on Abstracts, i. 307–310.

(*b*) Anon., Dyer, 369, a.

(*c*) A conveyance in trust to receive the profits, and pay them over to a third person, was never a use within the statute, but an equitable trust at common law.

(*d*) Lord Mansfield, in Burgess *v.* Wheate, 1 Wm. Bl. 160.

(*e*) But see *supra*, 44, 46.

(*a*) North *v.* Champernoon, 2 Ch. Cas. 78; Lord Alvanley, in Phillips *v.* Brydges, 3 Ves. 127.

as in the like limitations of legal estates, though with a much greater deference to the testator's manifest intent. (*b*) And if the statute of uses had only the direct effect of introducing a change in the form of conveyance, it has, nevertheless, gradually given occasion to such modifications of property as were well suited to the varying wants and wishes of mankind, and affording an opportunity to the courts of equity of establishing a code of very refined and rational jurisprudence. (*c*)

Trusts are now what uses were before the statute, so far as they are mere fiduciary interests, distinct from the legal estate, and to be enforced only in equity. Lord Keeper Henley, in *Burgess* v. *Wheate*, (*d*) observed, that there was no difference in the principles between the modern trust and the ancient use, though there was a wide difference in the application of those principles. The difference consists in a more liberal construction of them, and, at the same time, a more guarded care against abuse. The *cestui que trust* is seised of the freehold in the contemplation of equity. The trust is regarded as the land, and the declaration of trust is the disposition of the land. But

* 304 though equity follows the law, and applies the doctrines appertaining to legal estates * to trusts, yet, in the exercise of chancery jurisdiction over executory trusts, the court does not hold itself strictly bound by the technical rules of law, but takes a wider range and more liberal view in favor of the intention of the parties. An assignment or conveyance of an interest in trust, will carry a fee, without words of limitation, when the intent is manifest. The *cestui que trust* may convey his interests at his pleasure, as if he were the legal owner, without the technical forms essential to pass the legal estate. There is no particular set of words or mode of expression requisite for the purpose of raising trusts. (*a*) The advantages of trusts in

(*b*) Lord Hardwicke, in Garth *v.* Baldwin, 2 Ves. 655; Saunders on Uses, 187, Phil. ed. 1830.

(*c*) Sugden's Int. to Gilbert on Uses contains an interesting summary of the rise and progress of uses, down to the statute of uses, and of the effect of the statute upon them. A masterly sketch is given by Lord Mansfield, in his opinion in Burgess *v.* Wheate; but the historical view of this subject, by Sir Wm. Blackstone, in his Commentaries (ii. 328–337), is neat and comprehensive to a superior degree.

(*d*) 1 Wm. Bl. 180.

(*a*) Gibson *v.* Mountfort, 1 Ves. 491; Lord Hardwicke, in Villiers *v.* Villiers, 2 Atk 72; Oates *v.* Cooke, 3 Burr. 1684; Fisher *v.* Fields, 10 Johns. 495; Preston on Abstracts, ii. 233, 234; Saunders on Uses, 215, 216.

the management, enjoyment, and security of property, for the multiplied purposes arising in the complicated concerns of life, and principally as it respects the separate estate of the wife, and the settlement of portions upon the children, and the security of creditors, are constantly felt, and they keep increasing in importance as society enlarges and becomes refined. The decisions of the courts of justice bear uniform testimony to this conclusion. (*b*)

A trust, in the general and enlarged sense, is a right on the part of the *cestui que trust* to receive the profits and to dispose of the lands in equity. But there are special trusts, for the accumulation of profits, the sale of estates, and other dispositions of trust funds, which preclude all power of interference on the part of the *cestui que trust*, until the purposes of the trusts are satisfied. (*c*) Trusts are of two kinds, executory and executed.[1] A trust is *executory* when it is to be perfected at a future period by a conveyance or settlement, as in the case of a conveyance to * B. in trust to convey to C. It is *executed*, either when * 305 the legal estate passes, as in a conveyance to B. in trust, or for the use of C., or when only the equitable title passes, as in the case of a conveyance to B., to the use of C., in trust for D. The trust in this last case is executed in D., though he has not the legal estate. (*a*)

(2.) *How created.* — Though there be no particular form of words requisite to create a trust, if the intention be clear, yet the English statute of frauds, 29 Car. II. c. 3, secs. 7, 8 (and which is generally the adopted law through this country), requires this

(*b*) Neville *v.* Saunders, 1 Vern. 415; Say & Seal *v.* Jones, 1 Eq. Cas. Abr. 383, pl. 4; Harton *v.* Harton, 7 T. R. 652; Bagshaw *v.* Spencer, 1 Coll. Jurid. 378; Benson *v.* Leroy, 4 Johns. Ch. 651.

(*c*) Saunders on Uses, 186.

(*a*) Preston on Estates, i. 190. Where real estate is devised to A. and his heirs *in trust*, to permit the wife to take the rents and profits simply, the use would be executed by the statute; but when the trustee has some duty to perform, as to permit the wife to take the *net* rents and profits for life, subject to a rent charge, and with remainders over, the legal estate in fee remains in the trustee. Barker *v.* Greenwood, 1 Horn. & Hurlst. 389.

[1] The distinction depends on whether the party has left the court to make out from general expressions what his intention is, or has been his own conveyancer. Egerton *v.* Earl Brownlow, 4 H. L. C. 1, 210; [Cushing *v.* Blake, 30 N. J. Eq. 689; Badgett *v.* Keating, 31 Ark. 400. Comp. Padfield *v.* Padfield, 72 Ill. 322; Boyd *v.* England, 56 Ga. 598.]

declaration or creation of trusts of lands to be manifested and proved by some writing signed by the party creating the trust; and all grants or assignments of any trust or confidence are also to be in writing, and signed in like manner. (*b*) It is sufficient under the statute if the terms of the trust can be duly ascertained by the writing. A letter acknowledging the trust will be sufficient to establish the existence of it. A trust need not be created by writing, but it must be evidenced by writing. (*c*) [1]

(*b*) New York Revised Statutes, ii. 137, sec. 2, s. p.

(*c*) Lord Alvaney, 3 Ves. 707; Leman *v.* Whitley, 4 Russ. 423; Fisher *v.* Fields, 10 Johns. 495; Steere *v.* Steere, 5 Johns. Ch. 1; Movan *v.* Hays, 1 id. 339; Rutledge *v.* Smith, 1 M'Cord, Ch. 119; [McClellan *v.* McClellan, 65 Me. 500.] In North Carolina, the law on this point is the same as the English law was before the statute of frauds, and parol declarations of trust are valid. Foy *v.* Foy, 2 Hayw. 141. In a will, a devise to A., with a *recommendation* or *request* to provide in his discretion for B., was held not to be sufficient to raise a trust in favor of B., by reason of the discretion. Heneage *v.* Lord Andover, 10 Price, 230. But where the testator gave, by will, all his estate to his wife, having *confidence* that she would dispose of it, after her decease, according to his views communicated to her, and it being alleged that the testator, at the time of making the will, *desired his wife* to give the whole of his property to B., and that she promised to do it, it was held, that the allegation being proved, a trust would be created, as to the whole of the property, in favor of B. Podmore *v.* Gunning, 7 Sim. 644. When the words *desire, request, entreat, confidence, hoping, recommending, &c.*, will be sufficiently imperative to create a trust, see the learned note to Lawless *v.* Shaw, Lloyd & G. 154; Coate's Appeal, 2 (Barr) Penn. St. 129. The words *in the fullest confidence* are imperative, and create a trust. Wright *v.* Atkyns, 1 Turn. & R. 143.

[1] *Creation of Trusts.* — (*a*) *Writing.* — When the legal and equitable estates are already separated, a subsequent declaration of trust is properly signed by the equitable owner, not by the trustee. Tierney *v.* Wood, 19 Beav. 330; [Kronheim *v.* Johnson, 7 Ch. D. 60.] A writing is not required in some states. Miller *v.* Thatcher, 9 Tex. 482; Osterman *v.* Baldwin, 6 Wall. 116; Shelton *v.* Shelton, 5 Jones, Eq. 292; Bank of U. S. *v.* Carrington, 7 Leigh, 566, 576. *x*[1]

(*b*) *Precatory Trusts.* — The imperative effect of precatory words is as old as the Roman law. Verba autem utilia fidei commissorum hæc recte maxime in usu esse videntur *Peto, Rogo, Volo, Fidei Committo*, quæ proinde firma singula sunt ac si omnia in unum congesta sint. Gaii Inst. 2. § 249, D. 30. 1. 115, 118. The English rule is thus stated in Malim *v.* Keighley, 2 Ves. 333, 335: "I will lay down the rule as broad as this; wherever any person gives property, and points out

x[1] A trust of personalty may be created and proved by parol. Gadsden *v.* Whaley, 14 S.C. 210; Perkins *v.* Perkins, 134 Mass. 441; Chace *v.* Chapin, 130 Mass. 128; Ray *v.* Simmons, 11 R. I. 266. And land subsequently bought with such trust property will be impressed with the trust. Cobb *v.* Knight, 74 Me. 253. That a trust is voluntary is of course no objection to its enforcement, except where the rights of creditors are concerned. Ray *v.* Simmons, *supra*; Reiff *v.* Horst, 52 Md. 255; Estate of Webb, 49 Cal. 541.

(3.) *Resulting Trusts.* — In addition to the various direct modes of creating trust estates, there are resulting trusts implied by law

the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressed is to be controlled by the party; and that he shall have an option to defeat it." In s. c. ib. 529, the Lord Chancellor said: "There is really no fair analogy to the Roman law; as to which it stood thus: Antecedent to the edict there was no method of putting any limitation upon the heir. He took *universum jus defuncti* absolutely. Therefore it could be only by appeal to his honor. The same words continued, when the Prætor came to execute these trusts, which had always been created by supplicatory words." Cf. Just. Inst. 2. 23, § 1. But although there may be no fair analogy, the rule has undoubtedly been borrowed from the Roman law. It is sanctioned by a great weight of authority, both in this country and in England. Harrison *v.* Harrison, 2 Gratt. 1 Lucas *v.* Lockhart, 10 Smedes & M. 466; McKonkey's Appeal, 13 Penn. St. 253; (a case on the same will as Coate's Appeal, 305, n. (c), overruled, however, in another case on the same will, Pennock's Estate, 20 Penn. St. 268;) Anderson *v.* McCullough, 3 Head, 614; Negroes *v.* Plummer, 17 Md. 165; Van Amee *v.* Jackson, 35 Vt. 173; Warner *v.* Bates, 98 Mass. 274; Reed *v.* Reed, 30 Ind. 313; Bonser *v.* Kinnear, 2 Giff. 195; Shovelton *v.* Shovelton, 32 Beav. 143; and English cases next cited. But see Pennock's Estate, *supra*; Burt *v.* Herron, 66 Penn. St. 400; Van Duyne *v.* Van Duyne, 1 McCarter, 397; Gilbert *v.* Chapin, 19 Conn. 342; Ellis *v.* Ellis, 15 Ala. 296. See an article in 4 Am. Law Rev. 617. [x2]

Vagueness in the object is evidence that no trust was intended to be created. But even when the object is not pointed out with sufficient certainty to be ascertained, yet if it appears that there is a definite object, the court will raise a trust, so far as not to allow the party to whom the request is addressed to take the beneficial interest, *e. g.*, where the object was "to carry out my wishes, often expressed to him by word," and testatrix had never expressed her wishes. See Bernard *v.* Minshull, H. R. V. Johnson, 276; Briggs *v.* Penny, 3 Macn. & G. 546; Irvine *v.* Sullivan, L. R. 8 Eq. 673; Ingram *v.* Fraley, 29 Ga. 553. [See *post*, 307, n. y2.]

(c) *Charitable trusts* differ from other trusts in not resulting to the donor because of uncertainty in the object. In fact indefiniteness in the number of the beneficiaries, and the absence of a certain *cestui que trust* in whom is the equitable title, is one of the characteristic marks of a charity. Fontain *v.* Ravenel, 17 How. 369, 384; Saltonstall *v.* Sunders, 11 Allen, 446, 456. [x3]

[x2] It has been said that the doctrine of precatory trusts is not to be extended, and uncertainty as to the nature and amount of the property given over was held a strong indication that words of desire were not intended to be imperative. Mussoorie Bank *v.* Raynor, 7 App. Cas. 321. The true rule upon principle, and according to the weight of the more recent authorities, seems to be that the whole will must be examined to determine whether the words used were intended to impose an obligation or to give the devisee full discretion. *In re* Hutchinson & Tenant, 8 Ch. D. 540; Howard *v.* Carusi, 109 U. S. 725; Foose *v.* Whitmore, 82 N. Y. 405; Barrett *v.* Marsh, 126 Mass. 218; Sears *v.* Cunningham, 122 Mass. 538; Hess *v.* Singler, 114 Mass. 56; Frierson *v.* General Assembly, 7 Heisk. 683. Comp. Cockrill *v.* Armstrong, 31 Ark. 580; Bohon *v.* Barrett's Exec., 79 Ky. 378.

[x3] The difference between private and charitable trusts as regards the certainty

from the manifest intention of the parties, and the nature and justice of the case; and such trusts are expressly excepted from the operation of the statute of frauds. (*d*) y^1 Where an estate is purchased in the name of A., and the consideration money is actually paid at the time by B., there is a resulting trust in favor of B., provided the payment of the money be clearly proved. The payment *at the time* is indispensable to the creation of the trust; and this fact may be established, or the resulting trust rebutted, by parol proof. (*e*) Lord Hardwicke said, that a

(*d*) The statute of frauds, said the lord chancellor, in Lamplugh *v.* Lamplugh, 1 P. Wms. 111, which declares that conveyances, where trusts result by implication of law, are not within the statute, must relate to *trusts* and equitable interests, and cannot relate to a *use* which is a legal estate. The statute of frauds in Rhode Island contains no exception in favor of resulting trusts, but Mr. Justice Story considered this exception immaterial, for it has been deemed merely affirmative of the general law. 1 Sumner, 187. And most certainly trusts must arise in many cases in equity, from the manifest justice and necessity of the thing, without any statutory exception, and especially in cases of conveyances procured by fraud.

(*e*) Willis *v.* Willis, 2 Atk. 71; Bartlett *v.* Pickersgill, 1 Eden, 515; Boyd *v.* M'Lean,

required seems to be one of degree only, since even a charitable trust is enforced only upon the theory of carrying out the manifested intent of the testator. In the case of a charity the particular objects of the settlor's bounty cannot be specified, but the class who are to receive benefit must be indicated, leaving only the method to be used for conferring such benefit to the discretion of the trustees. Ould *v.* Washington Hospital, 95 U. S. 303; Russell *v.* Allen, 107 U. S. 163.

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y^1 *Resulting Trusts.* — To give rise to a resulting trust, the intention of the settlor, actual or presumed, to create a trust must concur with a state of facts which, in the view of a court of equity, would work a fraud if a trust were not established. Parol proof of the intention alone is not admissible where realty is involved, since such proof could only tend to show an express trust, and it would seem that such evidence would not be admissible, even in connection with any state of facts, but that the intention must be shown wholly by the facts which give rise to the trust. Burden *v.* Sheridan, 36 Iowa, 125; Lehman *v.* Lewis, 62 Ala. 129; Keller *v.* Kunkel, 46 Md. 565; Nestal *v.* Schmid, 29 N. J. Eq. 458. But parol evidence is admissible to show the state of facts necessary to give rise to a resulting trust. Newton *v.* Taylor, 32 Ohio St. 399; Ward *v.* Armstrong, 84 Ill. 151; Boskowitz *v.* Davis, 12 Nev. 446; Whitmore *v.* Learned, 70 Me. 276; Thomas *v.* Standiford, 49 Md. 181; Miller *v.* Blose, 30 Gratt. 744. And such evidence is also admissible to show that the alleged creator of the trust did not intend to establish such a trust. Such evidence may be either direct or of other facts inconsistent with such intention. Fowkes *v.* Pascoe, 10 L. R. Ch. 343; Byers *v.* Danley, 27 Ark. 77; Blasdel *v.* Locke, 52 N. H. 238; Carter *v.* Montgomery, 2 Tenn. Ch. 216. Thus, no trust results where a husband or father buys land and has it conveyed to his wife or child. Jackson *v.* Jackson, 91 U. S. 122; Stevens *v.* Stevens, 70 Me. 92; Higdon *v.* Higdon, 57 Miss. 264; Lorentz *v.* Lorentz, 14 W. Va. 809; Bowser *v.* Bowser, 82 Penn. St. 57; Edgerly *v.* Edgerly, 112 Mass. 175.

a resulting trust, arising * by operation of law, existed, *306 (1.) When the estate was purchased in the name of one person, and the consideration came from another. (2.) When a trust was declared only as to part, and nothing was said as to the residue, that residue remaining undisposed of remained to the heir at law. He observed, that he did not know of any other instances of a resulting trust, unless in cases of fraud. (*a*) The mere want of a valuable consideration will not, of itself, and without any auxiliary circumstance, create a resulting trust, and convert a grantee into a trustee; for this, as Mr. Saunders has truly observed, (*b*)

1 Johns. Ch. 582; Botsford *v.* Burr, 2 id. 405; Steere *v.* Steere, 5 id. 1; Dorsey *v.* Clarke, 4 Harr. & J. 551; Hall *v.* Sprigg, 7 Martin (La.), 243; Story, J., in Powell *v.* Monson and Brimfield Man. Company, 3 Mason, 362, 363; Stark *v.* Cannady, 3 Littell, 399; Jackman *v.* Ringland, 4 Watts & S. 149; [Rogan *v.* Walker, 1 Wis. 527, 591;] [Miller *v.* Blose, 30 Gratt. 744; Sale *v.* McLean, 29 Ark. 612; Brooks *v.* Shelton, 54 Miss. 353; McClure *v.* Doak, 6 Baxt. 364.] In Boyd *v.* M'Lean, it was held, after an examination of the cases, that a resulting trust might be established by parol proof, not only against the face of the deed itself, but in opposition to the answer of the nominal purchasers denying the trust, and even after the death of such purchaser. This point is fully discussed in art. n. 5, in the Law Magazine, n. 7, and the same conclusion drawn. Buck *v.* Pike, 2 Fairf. 1, s. p.

(*a*) Lloyd *v.* Spillett, 2 Atk. 150. That parol proof is admissible to show fraud, and consequently a resulting trust in a deed absolute on its face, notwithstanding any denial by the answer, see Ross *v.* Norvell, 1 Wash. 14; Watkins *v.* Stockett, 6 Harr. & J. 435; Strong *v.* Stewart, 4 Johns. Ch. 167; English *v.* Lane, 1 Porter, (Ala.) 328.

Judge Lomax, in his copious and valuable Digest of the Laws respecting Real Property in the United States, considers the doctrine of implied trusts, in reference to the following cases, extracted from the numberless varieties of trusts: —

(1.) Implied trusts arising out of the equitable conversion of land into money, or money into land. (2.) Where an estate is purchased in the name of one person, and the consideration is paid by another. (3.) Where a conveyance is made of land without any consideration or declaration of the uses. (4.) Where a conveyance is made of land in trust declared as to part, and the conveyance is silent as to the residue. (5.) Where a conveyance of land is made upon such trust as shall be appointed, and there is a default of appointment. (6.) Where an estate is conveyed on particular trusts, which fail of taking effect. (7.) Where a purchase is made by a trustee with trust money. (8.) Where a purchase of real estate is made by partners with partnership funds. (9.) Where a renewal of a lease is obtained by a trustee, or other person standing in some confidential relation. (10.) Where purchases are made of outstanding claims upon an estate by trustees, or some of the tenants thereof, connected by privity of estate with others having an interest therein. (11.) Where fraud has been committed in obtaining a conveyance. (12.) Where a purchase has been made of land without a satisfaction of the purchase-money to the vendor. (13.) Where a joint purchase has been made by several, and payments of the purchase-money to the vendor have been made by some beyond their proportion. Lomax's Digest, i. 200.

(*b*) Saunders on Uses, 227.

would destroy the effect of every voluntary conveyance. There must be the absence of both a consideration, and a declaration of the use. If only part of the purchase-money be paid by the third party, there will be a resulting trust in his favor *pro tanto;* and the doctrine applies to a joint purchase. (*c*) [1] So, if a purchase be made by a trustee, with trust moneys, a trust will result to the owner of the money. (*d*) If a trustee renews a lease, the new lease will be subject to the trust affecting the old one; and it is a general and well settled principle, that whenever a trustee or agent deals on his own account, and for his own benefit with the subject intrusted to his charge, he becomes chargeable *307 with * the purchase as a trustee. (*a*) If a trustee converts trust property contrary to his duty, the *cestui que trust* has the option to hold him responsible personally, or to follow the property if not held by a *bona fide* purchaser without notice, or to pursue the proceeds or the substituted property. (*b*) *y*[1] There

(*c*) Ryall *v.* Ryall, 1 Atk 59; Amb. 413; Bartlett *v.* Pickersgill, 1 Eden, 515; Lane *v.* Dighton, Amb. 409; Wray *v.* Steele, 2 Ves. & B. 388; Story, J., 3 Mason, 364.

(*d*) Kirk *v.* Webb, Prec. in Ch. 84; Ryal *v.* Ryal, cited in Amb. 413; [Newton *v.* Taylor, 32 Ohio St. 399; Tilford *v.* Torrey, 53 Ala. 120; Coles *v.* Allen, 64 Ala. 98; Ward *v.* Armstrong, 84 Ill. 151. See Waldron *v.* Sanders, 85 Ind. 270.] If one partner purchase lands with partnership funds, a resulting trust will arise. Philips *v.* Crammond, 2 Wash. 441.

(*a*) Holridge *v.* Gillespie, 2 Johns. Ch. 30; Davoue *v.* Fanning, ib. 252, and the various cases there referred to. Philips *v.* Crammond, 2 Wash. 441.

(*b*) Oliver *v.* Piatt, 3 How. 333, 401.

[1] Hall *v.* Young, 37 N. H. 134; [Smith *v.* Smith, 85 Ill. 189.] See Brothers *v.* Porter, 6 B. Mon. 106. But it has been held that this is only true when the part of the purchase-money was paid for some specific part or distinct interest in the

y[1] Trust money may be followed so far as it can be traced in specie or into other specific property, or into a mass of the same kind and quality, the amount being ascertainable. *In re* Hallett's Estate, 13 Ch. D. 696; *In re* Mawson, 44 L. T. 523; United States *v.* State Bank, 96 U. S. 30; Houghton *v.* Davenport, 74 Me. 590; Morrison *v.* Kinstra, 55 Miss. 71. See Mills *v.* Post, 76 Mo. 426. A trustee who mixes trust property with his own and uses it in business is chargeable with all profits actually made, or at the option of the *cestui que trust*, with compound interest. But if the property was not used in business, only simple interest will be allowed. Attorney-General *v.* Alford, 4 D. M. & G. 843; Burdick *v.* Garrick, 5 L. R. Ch. 233; Liquidators, &c. *v.* Coleman, 6 L. R. H. L. 189. It has been held that a trustee in investing trust property is bound only to exercise a sound business discretion. Brown *v.* French, 125 Mass 410. But also that a trustee invests at his peril in securities outside the jurisdiction in which he was appointed.

will be equally a resulting trust when the purposes for which an estate has been conveyed fail, by accident or otherwise, either in whole or in part, or if a surplus remains after the purposes of the trust are satisfied. (*c*)

A court of equity will regard and enforce trusts in a variety of other cases, when substantial justice, and the rights of third persons, are essentially concerned. (*d*) y^2 If a trust be created for the

(*c*) Randall *v.* Bookey, Prec. in Ch. 162; Emblyn *v.* Freeman, ib. 541; Stonehouse *v.* Evelyn, 3 P. Wms. 252; Digby *v.* Legard, cited in ib. 22, note; [McElroy *v.* McElroy, 113 Mass. 509; Robinson *v.* McDiarmid, 87 N. C. 455.]

(*d*) The general rule is, that trustees are responsible only for their own acts, and not for the acts of each other. 2 Story, Eq. 652. [Comp. Lewis *v.* Nobbs, 8 Ch. D. 591.] But one trustee is liable for an abuse of trust by his cotrustees. (1.) When the money has been received jointly. (2.) When a joint receipt has been given, unless it be shown by satisfactory proof that the joining in the receipt was necessary, or merely formal, and that the money was in fact paid to the cotrustee. (3.) When the moneys were in fact paid to his companion, yet so paid by his act, direction, or agreement. Monell *v.* Monell, 5 Johns. Ch. 283; Pim *v.* Downing, 11 Serg. & R. 66; Deaderick *v.* Cantrell, 10 Yerg. 270; Booth *v.* Booth, 1 Beav. 125; Lincoln *v.* Wright, 4 id. 427; [Rodbard *v.* Cooke, 36 L. T. 504; Ormiston *v.* Olcott, 84 N. Y. 339.] Joint trustees cannot separately act or give a discharge. Montgomery *v.* Clark, 2 Atk. 379; Walker *v.* Symonds, 3 Swanst. 63; Hertell *v.* Van Buren, 3 Edw. Ch. 20; [Boston *v.* Robbins, 126 Mass. 384.] The power, interest, and authority of

estate. McGowan *v.* McGowan, 14 Gray, 119; Baker *v.* Vining, 30 Me. 421. x^1 See Sayre *v.* Townsend, 15 Wend. 647; Perry *v.* McHenry, 13 Ill. 227, 233.

Ormiston *v.* Olcott, 84 N. Y. 339. In England the matter is now regulated by statute, but the rule at common law was much more strict than the American rule, and allowed investment only in government securities. See further, *In re* Brackenbury's Trusts, 31 L. T. 79; *In re* Chennell, 8 Ch. D. 492; Adair *v.* Brimmer, 74 N. Y. 539; Singleton *v.* Lowndes, 9 S. C. 465; Lathrop *v.* Smalley's Executors, 23 N. J. Eq. 192.

y^2 Thus, if a testator is induced to devise or bequeath property to a person by an express or implied promise of such person to hold it in trust for a given object, such a trust will be enforced. Williams *v.* Vreeland, 29 N. J. Eq. 417; Brook *v.* Chappell, 34 Wis. 405; De Laurencel *v.* De Boom, 48 Cal. 581. So it has been held that if one having a claim on certain property that is to be sold relies upon the promise of another to buy for his benefit and does not attend the sale, the one so buying will be held a trustee *ex maleficia*. Wolford *v.* Herrington, 86 Penn. St. 39; Boynton *v.* Housler, 73 Penn. St. 453; Leggett *v.* Leggett, 88 N. C. 108. *Contra*, if the plaintiff had no previous claim. Wolford *v.* Herrington, *supra*; Parsons *v.* Phelan, 134 Mass. 109. But see Manning *v.* Hayden, 5 Saw. 360.

x^1 Olcott *v.* Bynum, 17 Wall. 44; McKeown *v.* McKeown, 33 N. J. Eq. 384; Burks *v.* Burks, 7 Baxt. 353. But see Rupp's App., 100 Penn. St. 531. Even if there is no technical trust when the money is not paid for a definite part of the land, yet if the money is paid without the consent of the owner he has an equitable lien for the amount. Bresnihan *v.* Sheehan, 125 Mass. 11; National Bank *v.* Barry, ib. 20; Watson *v.* Thompson, 12 R. I. 466.

benefit of a third person without his knowledge, he may, when he has notice of it, affirm the trust, and call upon the court to enforce the performance of it. (*e*) Collateral securities given by a debtor to his surety are considered as trusts for the better security of the creditor's debt; and chancery will see that their intention be fulfilled. (*f*) So, a purchaser of land, with notice of a trust, becomes himself chargeable as a trustee, if it be in a case in which the trustee was not authorized to sell. (*g*)

cotrustees in the subject-matter of the trust, being equal and undivided, they cannot, like executors, act separately, but all must join. This principle enters into all cases depending upon the discretion and judgment of the trustees, in contradistinction to acts of a mere ministerial nature. The former require the concurrence of all the trustees; the latter may be performed by one. Vandever's Appeal, 8 Watts & S. 405. The same rule applies in the case of two or more assignees of a bankrupt. Opinions of the Attorneys-General of the United States. Washington, 1841; i. 93; Rigby, *ex parte*, 19 Ves. 463.

(*e*) Neilson *v.* Blight, 1 Johns. Cas. 205; Weston *v.* Barker, 12 Johns. 281; Small *v.* Oudley, 2 P. Wms. 427; Moses *v.* Murgatroyd, 1 Johns. Ch. 129; Com. Dig. tit. Chancery, 4 W. 5; ib. 2 A. 1; Story's Com. on Eq. Juris. ii. 307; Suydam *v.* Dequindre, Harr. (Mich.) Ch. 347. If a person receives money, and promises to pay it over to a third person, that person may sue for it. Crampton *v.* Ballard, 10 Vt. 251. This doctrine, in a late case, has been much restricted in England. In the case of Garrard *v.* Lord Lauderdale (3 Sim. 1), it was held that if a debtor convey to a trustee, upon trust to sell, and pay certain schedule creditors, they cannot enforce the trust, unless they have become parties to the deed by executing it. See *supra*, ii. 533. But in Marigny *v.* Remy, 15 Martin (La.), 607, it was decided, that one might have an action on a stipulation in his favor in a deed to which he was not a party. See Smith *v.* Kemper, 3 id. 622, and 4 id. 409, and Duchamp *v.* Nicholson, 14 id. 672, s. p. This is conformable to the French law. Toullier, Droit Civil Français, liv. 3, tit. 3, c. 2, n. 150; Pothier, Traité des Oblig. n. 71. An action *at law* will not lie by a *cestui que trust* against a trustee or his executor, &c., upon an implied promise arising from the acceptance of the draft, and the conversion of the funds into money. The remedy is in *equity*. But the action will lie upon an express promise to pay, founded in assets in hand. Weston *v.* Barker, 12 Johns. 276; Dias *v.* Brunnell, 24 Wend. 1. The general doctrine is, that trusts are of exclusive equity cognizance. Watkins *v.* Holman, 16 Peters, 25, 58, 59; Conway, *ex parte*, 4 Ark. 302.

(*f*) Maure *v.* Harrison, 1 Eq. Cas. Abr. 93, K. 5; Wright *v.* Morley, 11 Ves. 12, 22. If A. owes B., and the latter orders it, or a part of it, to be paid to C., and B. has notice of the order in the first case, and accepts of it in the other, it is an assignment of the debt, or a part of it, as the case may be, to C., and equity will enforce payment of the trust so created in favor of the equitable assignee. *Ex parte* South, 3 Swanst. 392; Tiernan *v.* Jackson, 5 Peters, 598. [As to notice and priority in such assignments, see Calisher *v.* Forbes, 7 L. R. Ch. 109; Addison *v.* Cox, 8 L. R. Ch. 76; Saffron, &c. Soc. *v.* Rayner, 10 Ch. D. 696; First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.]

(*g*) Murray *v.* Ballou, 1 Johns. Ch. 566; Shepherd *v.* M'Evers, 4 id. 136; Graves *v.* Graves, 1 A. K. Marsh. 165; Ligget *v.* Wall, 2 id. 149; Marshall, Ch. J., 1 Cranch, 100.

And *if a weak man sells his estate for a very inadequate *308
consideration, equity will raise a trust in favor of him, or his family. (a) But it would lead me too far from the restricted nature of this work to attempt to specify all the cases in which trusts are construed to exist, under the enlarged and comprehensive view of equitable rights and titles, which come within the protection of a court of equity. Mr. Humphreys, in his Observations on Real Property, (b) divided trusts into active and passive. In the former, confidence is placed, and duty imposed, demanding activity and integrity. The latter he considers as a mere technical phantom; and he mentions the instances of trustees introduced into assignments of terms for protecting the inheritance, and into marriage settlements for preserving contingent remainders, and raising portions for younger children. All these passive or formal trusts he proposes, in his Outlines of a Code, to abolish, as useless or mischievous, and to prescribe regulations to active trusts, with a reservation of the existing cases of a resulting trust.

(4.) *Restricted in New York.* — The New York Revised Statutes, (c) in relation to trusts, seem to have adopted these, or similar suggestions; and they have abolished passive trusts where the trustee has only a naked and formal title, and the whole beneficial interest, or right in equity, to the possession and profits of land, is vested in the person for whose benefit the trust was created. The statute declares, that the person so entitled in interest shall be deemed to have a legal estate therein, of the same quality and duration and subject to the same conditions, as his beneficial interest. (d) If any such passive trust be created

(a) Brogden *v.* Walker, 2 Harr. & J. 285; Rutherford *v.* Ruff, 4 Desaus. Eq. 350.
(b) Pages 16, 17. (c) I. 727, sec. 47, 49.
(d) Lands, tenements, and real estate, held in trust by one person for the use of another, are consequently made liable to debts, judgments, decrees, executions, and attachments, against the person to whose use they are holden. New York Revised Statutes, ii. 368, sec. 26. This had always been the law of New York, and the Statute of 1787 (sess. 10, c. 37, sec. 4) reënacted, *verbatim*, the statute of 29 Charles II. c. 8, sec. 10, on this subject. It rendered liable, on an execution at law against the estate of a *cestui que trust*, the lands of which he had the whole or entire beneficial interest, and the trustee only a mere naked legal title. But it did not apply to cases in which the *cestui que trust* had only an equitable interest in an imperfect state, or a special trust created for his benefit without being liable for his debts, or when the trustee, having the legal title, was entitled to retain it until some further act, as payment or otherwise, was done by the *cestui que trust*. Foote *v.* Colvin, 3 Johns. 216;

by any disposition of lands by deeds or devise, no estate or interest whatever vests in the trustee. This provision is founded in sound policy. The revisers have justly observed, that *309 the separation of * the legal and equitable estates in every such case, appears to answer no good purpose, and it tends to mislead the public, and obscure titles, and facilitate fraud. The New York statute has confined trusts to two classes: (1.) Trusts arising or resulting by implication of law. The existence of these trusts is necessary to prevent fraud; but they are laid under certain restrictions calculated to prevent the revival of passive, in the shape of resulting trusts. It is accordingly provided, (*a*) that where a grant for a valuable consideration shall be made to one person, and the consideration paid by another, no trust shall result in favor of the person paying the money, if the conveyance was so made by consent of the owner of the fund; but the title shall vest in the alienee, subject to the claims of the existing creditors of the person paying the money. (*b*) [1] The

Bogart *v.* Perry, 1 Johns. Ch. 52; s. c. 17 Johns. 351; [Sage *v.* Cartwright, 5 Seld. (9 N. Y.) 49.] The same law, taken from the English statute, prevails in other states. Richards *v.* M'Kie, Harper, Eq. (S. C.) 184; Hopkins *v.* Stump, 2 Harr. & J. 401; Vaux *v.* Parke, 7 Watts & S. 19; Fisher *v.* Taylor, 2 Rawle, 33; Goodwin *v.* Anderson, 5 Smedes & M. 730; Thornhill *v.* Gilmer, 4 Smedes & M. 153; Shute *v.* Harder, 1 Yerg. 1; Revised Statutes of Indiana, 1838; [Haynes *v.* Baker, 5 Ohio St. 253; Doswell *v.* Anderson, 1 P. & H. (Va.) 185; Hutchins *v.* Hanna, 8 Ind. 533; Biscoe *v.* Royston, 18 Ark. 508.] [See, especially, Gray's Restraints on Alienation, §§ 170–178.] But not in New Jersey, as see *supra*, ii. 443. A judgment under the statute of uses, which authorized a sale of the equitable interest in real estate of a judgment debtor, did not bind the equitable interest as against a *bona fide* purchaser from the time of docketing the judgment, but only from the time of issuing the execution. Hunt *v.* Coles, Comyns, 226; Harris *v.* Pugh, 12 J. B. Moore, 577. In Tennessee, entries or locations of land held by the debtor are vendible on execution. Statute Laws of Tennessee, 1836, p. 280. So is a resulting trust, being an equitable interest. Pool *v.* Glover, 2 Iredell (N. C.), 129. But where the legal estate is in a trustee, and the trust so requires it, the trust estate cannot be sold on execution. Davis *v.* Garrett, 3 Iredell, 459.

(*a*) New York Revised Statutes, i. 728, sec. 50–54.

(*b*) Norton *v.* Stone, 8 Paige, 222; [Garfield *v.* Hatmaker, 15 N. Y. 475;] [Reitz *v.* Reitz, 80 N. Y. 538.] The statute provision gives the like effect to such conveyances

[1] [This is a resulting trust in favor of creditors only. The person to whom the conveyance is made, takes the estate impressed with that trust. The person paying the consideration takes no estate or interest which can be seized and sold on judgment and execution at law. Garfield *v.* Hatmaker, 15 N. Y. 475, overruling Wait *v.* Day, 4 Denio, 439. The remedy is to enforce the trust in favor of the creditor in equity. The right of a creditor of the person paying the consideration under such a trust, is superior to the right of a subsequent alienee or mortgagee of the

resulting trust will still be valid, however, if the alienee took the deed in his own name, without the knowledge or consent of the person paying the money, or in violation of some trust. Nor can a resulting trust be set up to affect the title of a purchaser for a valuable consideration, without notice of the trust. (2.) Active trusts are, where the trustee is clothed with some actual power of disposition or management, which cannot be properly exercised without giving him the legal estate and actual possession. This is the only efficient class of trusts, and they are indispensable to the proper enjoyment and management of property. All the provisions in the statute on the subject of trusts are intended to limit their continuance, and define their purposes: and express trusts are allowed in those cases only in which the *purposes of the trust require that the legal *310 estate should pass to the trustees. (a)

as equity had already given to voluntary conveyances. They are void as against existing creditors; but if the party be not indebted, and the case be free from fraud in fact, they are good as against subsequent creditors. Battersbee *v.* Farrington, 1 Swanst. 106; Reade *v.* Livingston, 3 Johns. Ch. 481. The statute is silent as to *subsequent* creditors in that case; but it is to be presumed, that they would also be entitled to relief, according to the doctrine in Reade *v.* Livingston, if there was sufficient ground to infer a fraudulent intent.

(a) Express trusts are abolished in Louisiana by their civil code, art. 1507, but implied trusts, which are the creatures of equity, have not been abrogated, and the Circuit Court of the United States exercises chancery jurisdiction in Louisiana, though

person to whom the conveyance is made, unless such subsequent purchase or mortgage is upon a present valuable consideration, and without notice of the trust. A mortgage so taken for an antecedent debt will not prevail over the prior trust. Wood *v.* Robinson, 22 N. Y. 564. And see 1 Paige, 125; 6 id. 310; 3 Barb. (N.Y.) 267.

The statute, in fact, abrogates the resulting trust in favor of the person paying the consideration, and creates a new one in favor of creditors. But the same statute excepts the case where an "absolute conveyance" is taken to a third person without the consent or knowledge of the person who pays for the estate, and in such cases, therefore, the resulting trust remains as at common law. 1 R. S. 728, §§ 51, 53. Such a trust is good, although the person making the payment intended that a third person should take the deed in trust for his benefit. Lounsbury *v.* Purdy, 18 N. Y. 515. See further, as to resulting trusts, both before and since the enactment of the New York statute, Sieman *v.* Austin, 83 Barb. (N. Y.) 9; McCartney *v.* Bostwick, 31 id. 390; Astor *v.* L'Amoreux, 4 Sand. (N. Y.) 564; Reid *v.* Fitch, 11 Barb. (N. Y.) 399.

A resulting trust does not arise in favor of a person paying part only of the purchase-money of real estate conveyed to another, unless such payment is made for some specific or distinct part of the estate. McGowan *v.* McGowan, 14 Gray, 119. Nor does it arise in favor of a purchaser paying the consideration, who has the deed taken to a third person for the purpose of defrauding his creditors. Proesus *v.* McIntyre, 5 Barb. (N. Y.) 424. C.]

Express or active trusts are allowed, (1.) To sell lands for the benefit of creditors; (2.) To sell, mortgage, or lease lands, or for the purpose of satisfying any charge thereon; (*b*) (3.) To receive the rents and profits of lands and apply them to the use of any person; (*c*) or to accumulate the same for the purposes and within

not upon any new or foreign principle, but only by changing the mode of redressing wrongs and protecting rights. Gaines *v.* Chew, 2 How. 619.

(*b*) In Darling *v.* Rogers, the chancellor of New York decided, that an assignment of real estate for the benefit of creditors to assignees in trust to sell or *mortgage* the same, was void, inasmuch as the word *charge* in the statute was confined to provisions by devise, and that the assignment, being void in that respect, was wholly void. But the court of errors, on appeal, in December, 1839, reversed the decree on both points. The power to mortgage was valid, as the word *charge* comprehended incumbrances, and even if not valid, the other provisions in the assignment, not being inextricably mingled with the former, remained good. If a deed contains a provision which is illegal and void, whether by statute or common law, and has another independent provision which is good, the deed shall stand good as to the latter provision. Darling *v.* Rogers, 22 Wend. 483; Adams and Lambert's Case, 4 Co. 104, b; s. c. Moore, 648, and the cases there cited.

(*c*) New York Revised Statutes, i. 728, sec. 55; Laws of New York, sess. 53, c. 320, sec. 10; passed April 20, 1830. This last act was in amendment of the New York Revised Statutes, which had too much limited the application of this third class of trusts. Ch. J. Savage, in the great case of Coster *v.* Lorillard, decided in the court of errors of New York, in 1835 (14 Wend. 265), was led to make some observations on the third class of active trusts, allowed by the statute, which are rather startling, and calculated to increase our regret at the legislative attempt to reduce all trusts to the three specific objects mentioned. A conveyance in trust to receive rents and profits, and *pay over*, was a familiar trust at common law (36 Hen. VIII. 1 Cruise's Dig. 12. 1. 12), but the Revised Statutes abolish all trusts except those expressly authorized, and no trust to receive rents and profits, and *pay them over to another*, is authorized or valid. The provision in the statute is to receive the rents and profits, and *apply them to the use of another*. The Ch. J. says, he is not to pay over, he is to *apply them to the use*, and which must mean to provide means and pay debts. *He is to judge of the propriety of the expenditures.* He has the whole estate, legal and equitable, and the whole management of it. The *cestui que trust* has no estate, but only a right to enforce the trust in equity. A trust to receive and *pay over*, gives to *cestui que trust* an equitable estate, but the statute permits no such trust. The trust to receive and apply was intended for the cases of minors, married women, lunatics, and spendthrifts. If this construction be correct, what inconveniences have been produced by the statutory demolition of the system of trusts? Who would be a trustee, and be bound to look into, and judge of, and pay all the expenditures of a married woman, or of an absent friend, or of the aged or infirm, who stood in need of the agency of a trustee? But the severity of this construction has been since relaxed; and in the case of Gott *v.* Cook, 7 Paige, 521, the Chancellor concluded that the person who creates a trust to receive rents and profits or income for the use of another, might direct the manner in which they should be applied, and that he might direct them to be paid over from time to time to the *cestui que trust*, to enable him to provide himself with necessaries. [Leggett *v.* Perkins, 2 Comst. 297; Leggett *v.* Hunter, 19 N. Y. 445.]

the limits already mentioned. In all these cases, the whole estate in law and equity is vested in the trustee, subject only to the execution of the trusts; and if an express trust be created for any other purpose, no estate vests in the trustee; though, if the trust authorizes the performance of any act lawful under a power, it becomes valid as a power in trust. Every estate and interest not embraced in an express trust, and not otherwise disposed of, remains in, or reverts to, the person who created the trust; and he may dispose of the lands subject to the trust, or in the event of the failure or termination of the trust; and the grantee or devisee will have a legal estate, as against all persons but the trustee. (*d*) The declaration of the trust must be contained in the conveyance to the trustee, or the conveyance will be deemed absolute as against the subsequent creditors of the trustee, without notice of the trust, or as against purchasers for a valuable consideration, and without notice; (*e*) and when the trust is expressed in the instrument creating the estate, every act of the trustee in contravention of the trust is * void. (*a*) So, * 311

(*d*) New York Revised Statutes, i. 728, 729, sec. 55, 58, 61, 62. The rule, independent of statute, is, that trustees take that quantity of interest only which the purposes of the trust require, and the instrument creating it permits. The legal estate is in them so long as the execution of the trust requires it, and no longer, and then it vests in the person beneficially entitled. Bayley, J., in Doe *v.* Nicholls, 1 B. & C. 336; Denman, C. J., in Doe *v.* Edlin, 4 Ad. & El. 582; Doe *v.* Simpson, 5 East, 162; Doe *v.* Needs, 2 M. & W. 129; Doe *v.* Timins, 1 B. & Ald. 530. The modern chancery cases of Stanton *v.* Hall, 2 Russ. & Myl. 175, and Tyler *v.* Lake, 4 Sim. 144; s. c. 2 Russ. & Myl. 183, carried the marital rights or claim over property vested in trustees for the wife, to a great extent, and a rule of rigid construction against any separate beneficial interest in the wife was adopted, as being repugnant to the common-law principles of the *jus mariti*. But the elder cases, and other and more reasonable rules of construction, have supported the separate interest of the wife under deeds of settlement, according to the interest and equity of the case, and have upheld the technical rights of the trustees against any future husband, when such an intention was reasonably and fairly to be inferred from the language and spirit, and object of the deed of settlement. Such appears to be the doctrine in the cases of Nevil *v.* Saunders, 1 Vern. 415; Jones *v.* Lord Say and Seal, 1 Eq. Cas. Abr. 383, pl. 4; s. c. 8 Viner, 262, pl. 19; (Lord Kenyon said that the case was best reported in Viner, and was good law;) Dixon *v.* Olmius, 2 Cox, 414; Doe *v.* Willan, 2 B. & Ald. 84; Wagstaff *v.* Smith, 9 Ves. 520; Doe *v.* Scott, 4 Bing. 505.

(*e*) This is only declaratory of what was the law before. Preston on Abstracts, ii. 230. Saunders on Uses and Trusts, 219. And it follows, of course, that the trust attaches upon the purchaser with notice of it, unless he be a purchaser from a person who had purchased for a valuable consideration without notice. Lowther *v.* Carlton, 2 Atk. 241; and see *supra*, p. 179.

(*a*) New York Revised Statutes, i. 730, sec. 64, 65; [Briggs *v.* Davis, 20 N. Y. 15;

if the trust be to receive the rents and profits of land, and apply them to the use of any person during the life of such person, or for any shorter period, the person beneficially interested therein cannot assign, or in any manner dispose of such interest. (*b*) The statute further provides for the case of the death

s. c. 21 N. Y. 574.] In Louisiana, a man may transfer property to another, to stand in the other's name for his use. Hope *v.* State Bank, 4 La. 212. The relation of trustee once established, pervades every transaction respecting the trust property, until it is dissolved, and the *cestui que trust* may pursue the property through every mutation, if the change was effected by the schemes of the trustee, and the property or its proceeds come back to him. De Bevoise *v.* Sandford, 1 Hoff. Ch. 192.

A trustee of a charity cannot alienate, nor grant long or perpetual leases, and the *cestui que trust* may pursue the land in the hands of the purchaser chargeable with notice. Blackston *v.* Hemsworth Hospital, Duke's Charitable Uses, 644; Lydiatt *v.* Foach, 2 Vern. 410; Lewin on Trusts, 404; Attorney General *v.* Green, 6 Ves. 452. But in a proper case, trustees of a charity have power to alienate the charity property. Master of the Rolls, in Attorney General *v.* S. Sea Company, 4 Beav. 453. [See Attorney General *v.* Newark, 1 Hare, 395, 400; *Re* Ashton Charity, 22 Beav. 288.]

A bequest by will to executors *in trust to send the testator's slaves to Liberia, there to remain free*, is a valid trust, and a bill by the heirs to set aside the will dismissed. Ross *v.* Vertner, 5 How. (Miss.) 305.

(*b*) New York Revised Statutes, i. 728, sec. 55, amended by Act, in April, 1830; ib. 730, sec. 63. The value of this provision in settlements upon children, and especially married daughters, is stated *supra*, ii. 170. In Hawley *v.* James, Chancellor Walworth held that a trust to pay annuities out of the rents and profits of the estate was sufficient to sustain a trust term in executors and trustees, until the youngest child or grandchild arrived at the age of twenty-one, if any of the annuitants so long lived. 5 Paige, 318. So, a trust for the payment of debts and legacies, to continue until a child or grandchild arrives at the age of twenty-one, will not determine by the death of the child or grandchild under age, unless the testator intended that the trust should then cease; but it will continue until the time when he would have arrived at that age if he had lived, and this for the benefit of creditors and legatees. Boraston's Case, 3 Co. 21, a; Sir Joseph Jekyll, in Lomax *v.* Holmeden, 8 P. Wms. 176; Master of the Rolls, in Stanley *v.* Stanley, 16 Ves. 506. Where an annuity, or the rents and profits of land, are placed in trust for the sole use and benefit of the *cestui que trust*, the interest will pass to the assignee of the *cestui que trust* under bankrupt or insolvent laws, notwithstanding the trustees have a discretion as to the time and manner of the application, or the annuity be declared to be given for the maintenance of the *cestui que trust*, and not be liable for his debts or charges. The policy of the law will not permit property to be so limited as to remain in the grantee for life, free from the incidents of property, and not subject to his debts. Brandon *v.* Robinson, 18 Ves. 429; Graves *v.* Dolphin, 1 Sim. 66; Green *v.* Spicer, 1 Russ. & Myl. 395; [see 131, n. 1.] So, under the New York Revised Laws, i. 729, sec. 57, and 730, sec. 63, and ii. 174, sec. 38, it has been held, in Hallett *v.* Thompson, 5 Paige, 583, that a creditor's bill can reach the rents and profits of land given in trust to a *cestui que trust*, when the whole beneficial interest is given to him, reserving to him under the statute sufficient and necessary for "his support and education." The creditor's bill will also reach a similar interest in the surplus income of personal property held in trust beyond what

of all the trustees, by declaring that the trust shall not descend to the real or personal representatives of the surviving trustee, but shall be vested in the Court of Chancery, to be executed under its direction. (*c*) The court may also accept the resignation of a trustee, and discharge him, or remove him for just cause, and supply the vacancy, or any want of trustees, in its discretion. (*d*)

These powers, conferred upon the Court of Chancery, are essentially declaratory of the jurisdiction which equity already possessed and exercised; and it was also well settled, that a trustee who had accepted a trust, could not afterwards devest himself of it without performance, unless with the assent of the *cestui que trust*, or under the direction of chancery. (*e*) But the pro-

is necessary for the support of the *cestui que trust*. But to protect the necessary support from the reach of the creditor, the interest of the *cestui que trust* must be inalienable during the existence of the trust. This, according to the case cited, is the condition of the reservation of the necessary maintenance of the *cestui que trust*, both as to real and personal property so placed in trust. An annuity to a child is inalienable under the New York Revised Statutes, and it cannot be reached by a creditor's bill in advance or before the quarterly payments had become due, nor does it pass to assignees under insolvent laws. And if the income or interest of the trust fund be necessary for the support of the *cestui que trust*, nothing but a surplus thereof beyond such necessity can be reached by a creditor's bill. Clute *v.* Bool, 8 Paige, 88.

(*c*) At common law when the trustee, if alone, dies, the trust in land, with the legal title, devolves upon the heirs of the trustee. The surviving trustee in England of an estate in fee is not bound to let it descend to the heir at law, but may devise it in trust. Lord Langdale, Titley *v.* Wolstenholme, 7 Beavan, 425. The heir may refuse the office, or chancery be applied to for the appointment of a new trustee. Until this is done, the trust follows the estate, except in New York, where the Revised Statutes have provided otherwise. Berrien *v.* McLane, 1 Hoff. Ch. 422. If it was a trust of personal property, it passed to the executor of the trustee, but not as assets, and the executor took as trustee, subject to the terms on which it was held by the testator. Dias *v.* Brunell, 24 Wend. 1. It was left as an unsettled point in De Peyster *v.* Clendining, 8 Paige, 296, whether an administrator, with the will annexed, could execute a trust given by the will to an executor who refused to act; and to avoid all difficulty the chancellor in that case appointed the administrator such trustee.

(*d*) New York Revised Statutes, i. 730, sec. 68, 69, 70, 71; Shotwell *v.* Mott, 2 Sand. Ch. 46, 58; [Cruger *v.* Halliday, 11 Paige, 314]. By the Massachusetts Revised Statutes of 1836, pt. 2, tit. 4, 69, the duties of all trustees appointed by will are especially prescribed, and the courts of probate, and the supreme judicial court, are invested with general chancery powers in respect to all such trusts. In Pennsylvania, by the statute of 1836, the courts of common pleas have enlarged and equity jurisprudence to appoint, control, and dismiss trustees. Purdon's Dig. 76; [Wilson *v.* Pennock, 27 Penn. St. 238.]

(*e*) Shepherd *v.* M'Ever, 4 Johns. Ch. 136; Sir Thomas Plumer, in Chalmer *v.*

vision that trusts shall not descend to the representatives of the trustee, is very valuable; for the trust, in such a case, might be deposited very insecurely for the *cestui que trust*, and in the case of chattels there are doubt and difficulty as to the transmission. (*f*) The object of the New York Revised Statutes was to abolish all trusts in real estate, except the express trusts which are enumerated, and resulting trusts. The provisions as to uses and trusts were earnestly recommended by the revisers, under the conviction that they would "sweep away an immense mass of
*312 useless refinements and distinctions, relieve the *law of real property, to a great extent, from its abstruseness and uncertainty, and render it, as a system, intelligible and consistent; that the security of creditors and purchasers will be increased, the investigation of titles much facilitated, the means of alienation be rendered far more simple and less expensive, and, finally, that numerous sources of vexatious litigation will be perpetually closed."

It is very doubtful whether the abolition of uses, and the reduction of all authorized trusts to those specially mentioned, will ever be productive of such marvellous results. The appre-

Bradley, 1 Jac. & Walk. 68. See also Read *v.* Truelove, Amb. 417; Doyle *v.* Blake, 2 Sch. & Lef. 231. By a statute in Maryland, in 1829, a trustee under a will may, by a declaration in writing, filed with the register of wills, relinquish his trust.

It is a settled principle in equity, that a trust is not to fail from the want of a trustee, or for any other cause, unless it would be inconsistent with law or public policy. Shepherd *v.* M'Ever, 4 Johns. Ch. 136; Stagg *v.* Beekman, 2 Edw. Ch. 89; Ray *v.* Adams, 3 Myl. & K. 237.

It was settled in New York, prior to the Revised Statutes, in the case of Jackson *v.* De Lancy, 13 Johns. 537, after a full review of the English authorities, that trust estates, including the interest of a mortgagee, passed under the general words in a will, relating to the realty, unless it could be collected from the expressions in the will, or the purposes and objects of the testator, that his intention was *otherwise*, in which case, if there was no surviving trustee, the trust estate would descend to the heirs at law, and in either case the real or personal representatives would take the estate as trustees chargeable with the trust. See, in addition to the authorities cited in 13 Johnson, and to the same point, Woodhouse *v.* Meredith, 1 Meriv. 450; Ballard *v.* Carter, 5 Pick. 112. See also *infra*, pp. 334, 335, as to the execution of powers by will.

(*f*) Trust property does not pass to the assignees of the trustee, except subject to the trust (Godfrey *v.* Furzo, 3 P. Wms. 185; *Ex parte* Dumas, 1 Atk. 232; *Ex parte* Sayers, 5 Ves. 169; Dexter *v.* Stewart, 7 Johns. Ch. 52); and equity will lay hold of trust property passing to the representatives of the trustee, and direct it for the benefit of the *cestui que trust*. Dunscomb *v.* Dunscomb, 2 Hen. & Munf. 11; Ridgely *v.* Carey, 4 Harr. & M'Hen. 167.

hension is, that the boundaries prescribed will prove too restricted for the future exigencies of society, and bar the jurisdiction of equity over many cases of trusts which ought to be protected and enforced, but which do not come within the enumerated list, nor belong strictly to the class of resulting trusts. The attempt to bring all trusts within the narrowest compass, strikes me as one of the most questionable undertakings in the whole business of the revision. It must be extremely difficult to define with precision, and with a few brief lines and limits, the broad field of trusts of which equity ought to have cognizance. The English system of trusts is a rational and just code, adapted to the improvements, and wealth, and wants of the nation, and it has been gradually reared and perfected by the sage reflections of a succession of eminent men. Nor can the law be effectually relieved from its "abstruseness and uncertainty," so long as it leaves undefiled and untouched that mysterious class of trusts "arising or resulting by implication of law." Those trusts depend entirely on judicial construction; and the law on this branch of trusts is left as uncertain and as debatable as ever. Implied trusts are liable to be extended, and pressed indefinitely, in cases where there may be no other way to recognize and enforce the obligations which justice imperiously demands. The statute further provides, that if an express trust shall be created for a purpose not enumerated, and it shall authorize the performance of any act lawful under a power, the trust shall be valid "as a power in trust."[1] *This provision reani- *313

[1] [This provision may, in some degree, alleviate the inconveniences arising from the very narrow limits within which the New York statute has confined express trusts. But, as the author shows, it leaves open the whole field of trust limitations, under the name of powers in trust. Powers are also codified and regulated in the same revision of the statutes. But the purposes for which they may be created are not defined or limited. A power is defined by the statute to be an "authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon which the owner granting or reserving such power might himself lawfully perform." 1 R. S. 732, § 73. Whatever dominion, therefore, the owner of an estate may exercise over it for the benefit of another, he may, by a power, authorize to be exercised by a third person, subject only to the rules against the creation of perpetuities in property. It would seem, then, that the principal result of the statute restricting trusts, is to withdraw from the trustee the legal estate, although expressly granted to him, in all cases except the specially permitted trusts, but leaving the limitation in full force as a power, if the purpose is lawful

mates a class of trusts under a new name, with which the profession is not familiar, and it opens a wide door for future forensic discussion. It is in vain to think that an end can be put to the interminable nature of trusts arising in a great community, busy in the pursuit, anxious for the security, and blessed with the enjoyment of property in all its ideal and tangible modifications. The usages of a civilized people are the gradual result of their wants and wishes. They form the best portions of their laws. Opinion and habits coincide; they are accommodated to circumstances, and mould themselves to the complicated demands of wealth and refinement. We cannot hope to check the enterprising spirit of gain, the pride of families, the anxieties of parents, the importunities of luxury, the fixedness of habits, the subtleties of intellect. They are incessantly active in engendering distinctions calculated to elude, impair, or undermine the fairest and proudest models of legislation that can be matured in the closet, and ushered into the world, under the imposing forms of legislative sanction. (*a*)

(*a*) In the Massachusetts Revised Statutes of 1836, there is no innovation made upon the former established systems of trusts. The statute of 29 Charles II. c. 3, sec. 7 and 8, is adopted without alteration, and with the further declaratory provi-

and the laws of perpetuity are not transcended. The intended trustee may do, under the power, whatever he might have done if the statute had suffered the legal title to vest in him, subject in many cases, however, to the inconvenience of having an estate to manage or protect, without the title which remains in the author of the limitation or descends to his heir. The result thus achieved certainly does not seem to be a very triumphant one. Limitations having the general character of trust and confidence, are as incapable of definition as the wants and wishes of mankind. To prohibit them as trusts with the legal title in the trustee, while they are suffered to exist as powers divorced from the title, is not to relieve the subject of its intricacies and perplexities. That such limitations, either as trusts or powers, are indispensable in every advanced society, no one will question. The views here suggested were adopted, in substance, by the Court of Appeals, and somewhat elaborated in the opinion of the chief judge in the recent case of Downing *v.* Marshall, 23 N. Y. 366. In that case, the land was devised in terms to executors, upon a trust which was regarded as one to receive and pay over rents and profits, and finally to sell and pay over the proceeds. The trust was lawful in its nature, but it was not constituted in the precise manner prescribed by the statute. It was sustained, therefore, as a power in trust, the legal title descending to the heirs of the testator. A similar conclusion in regard to trusts and powers in trust was very ably maintained by Judge Duer, in Lang *v.* Rope, 5 Sandf. (N. Y.) 374. C.] [See further, Heermans *v.* Robertson, 64 N. Y. 332; Heermans *v.* Burt, 78 N. Y. 259.]

sion, that no trust, whether implied by law or created by the parties, should defeat the title of a *bona fide* purchaser for a valuable consideration, and without notice of the trust, or prevent a creditor without such notice from attaching the land. The commissioners who prepared the Massachusetts statute code, have given an excellent specimen of precision and brevity. They profess to have kept in view the general plan of the New York Code, but in several respects they have (and wisely, I think) not carried on their revision with so bold a hand.

LECTURE LXII.

OF POWERS.

THE powers with which we are most familiar in this country are common-law authorities, of simple form and direct application; such as a power to sell land, to execute a deed, to make a contract, or to manage any particular business; with instructions more or less specific, according to the nature of the case. But the powers now alluded to are of a more latent and mysterious character, and they derive their effect from the statute of uses. They are declarations of trust, and modifications of future uses; and the estates arising from the execution of them have been classed under the head of contingent uses. They are so much more convenient and manageable than common-law conditions, that they have been largely introduced into family settlements. It was repugnant to a feoffment at common law, that a power should be reserved to revoke it; and a power of entry, for a condition broken, could not be reserved to a stranger. These technical difficulties gave occasion to the introduction of powers in connection with uses; and Mr. Sugden says, that modern settlements were introduced, and powers arose, after uses were established in equity, and before they were recognized at law.

All these powers are, in fact, powers of revocation and appointment. Every power of appointment is strictly a power of revocation; for it always postpones, abridges, or defeats, in a
* 316 greater or less degree, the previous uses and * estates, and appoints new ones in their stead. As soon as the power granted or reserved in the instrument settling an estate is exerted, by changing the old, and appointing other uses to which the feoffee is to stand seised, the estate of the feoffee is drawn to the new uses as soon as they arise by means of the power, and the statute executes the possession. An appointment under a

power operates to substitute one *cestui que use* for another. (*a*) The use arising from the act of the person nominated in a deed of settlement is a use arising from the execution of a power. It is a future or contingent use until the act be done, and then it becomes an actual estate by the operation of the statute. By means of powers the owner is enabled either to reserve to himself a qualified species of dominion, distinct from the legal estate, or to delegate that dominion to strangers, and withdraw the legal estate out of the trustee, and give it a new direction. The power operates as a revocation of the uses declared or resulting, by means of the original conveyance, and as a limitation of new uses.

1. **Of the Nature and Division of Powers.** — In creating a power, the parties concerned in it are, the *donor*, who confers the power, the *appointor*, or *donee*, who executes, and the *appointee*, or person in whose favor it is executed. Mr. Sugden, upon the authority of *Sir Edward Clere's case*, (*b*) defines a power to be an authority enabling a person to dispose, through the medium of the statute of uses, of an interest, vested either in himself or in another person. It is a mere right to limit a use; and the appointment in pursuance of it is the event on which the use is to arise. (*c*) The usual classification of powers is as follows: (1.) Powers *appendant* or *appurtenant;* and they enable * the *317 party to create an estate, which attaches on his own interest. If an estate be limited to a man for life, with power to make leases in possession, every lease which he executes under the power must take effect out of his life estate. (2.) *Powers collateral or in gross*, do not attach on the interest of the party, but they enable him to create an estate independent of his own. Thus, if a tenant in fee settles his estate on others, and reserves to himself only a particular power, the exercise of that power must be on the interest created and settled on another. So, a power given to a tenant for life to appoint the estate after his death, as a jointure to his wife, or portions to his children, or to raise a term to commence from his death, is a power collateral, or

(*a*) Butler's note, 231, to Co. Litt. lib. 3.

(*b*) 6 Co. 17, b.; Sugden on Powers, 82.

(*c*) [Burleigh *v.* Clough, 52 N. H. 267.] The New York Revised Statutes have substituted the words *grantor* and *grantee* for the donor and donee of a power in the English law.

in gross, for it cannot affect the life estate of the donee of the power. A power given to a stranger to dispose of, or charge the land for his own benefit, is a power also of this class. (*a*) (3.) *Powers simply collateral*, are those which are given to a person who has no interest in the land, and to whom no estate is given. Thus, a power given to a stranger to revoke a settlement, and appoint new uses to other persons designated in the deed, is a power simply collateral. (*b*)

This classification of powers is admitted to be important only with reference to the ability of the donee to suspend, extinguish, or merge the power. The general rule is, that a power shall not be exercised in derogation of a prior grant by the appointor. But this whole division of powers is condemned, as too artificial and arbitrary; and it serves to give an unnecessary complexity to the subject by overstrained distinctions. Mr. Powell makes a
* 318 very plain and intelligible * division of powers, into general powers and particular powers; (*a*) and Mr. Humphreys (*b*) adopts the same division, and concludes that a more simple and better distribution of powers would be into, (1.) General powers to be exercised in favor of any person whom the appointor chooses. (2.) Particular powers, to be exercised in favor of specific objects. The suggestion has been essentially followed in the New York Revised Statutes, (*c*) which have abolished the existing law of powers, and established new provisions for their creation, construction, and execution. (*d*) A power is defined in them to be an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner, granting or reserving such power, might himself lawfully perform;

(*a*) It has been the opinion of eminent lawyers, that a power in a tenant for life to charge or appoint portions for his children, was merely a power of selection or nomination, and not a power in gross, and so not to be extinguished by a fine or feoffment. But Sir Edward Sugden has clearly shown that this idea was founded in error. Sugden on Powers, 72, 74, 79.

(*b*) Hale, Ch. B., Hardres, 415; Sugden on Powers, 46–49, 2d London ed. [*In re* D'Angibau, 15 Ch. D. 228.]

(*a*) See his long note to Fearne on Executory Devises, 347–388, which is a clear and able view of the doctrine of powers of revocation and appointment.

(*b*) Observations on Real Property, 83. (*c*) Vol. i. 732.

(*d*) The New York Revised Statutes have abolished powers at common law, as well as powers under the statute of uses, so far as they related to land, except it be a simple power of attorney to convey lands for the benefit of the owner. The article commences with this broad proposition, *powers are abolished*.

and it must be granted by some person capable at the time of alienating such interest in the land. Powers, says the statute, are general or special, and beneficial, or in trust. A *general* power authorizes the alienation in fee, by deed, will, or charge, to any alienee whatever. The power is *special* when the appointee is designated, or a lesser interest than a fee is authorized to be conveyed. (*e*) It is *beneficial* when no person other than the grantee has, by the terms of its creation, any interest in its execution. (*f*) *A general power is in trust*, when any person other than the grantee of the power is designated as entitled to the whole, or part of the proceeds, or other *benefit to result from the execution of the power. A *special power is in trust*, when the dispositions it authorizes are limited to be made to any person or class of persons, other than the grantee of the power; or when any person or class of persons, other than the grantee, is designated, as entitled to any benefit from the disposition or charge authorized by the power. (*a*) *319

2. Of the Creation of Powers. — (1.) *Estate created by the Power.* — No formal set of words is requisite to create or reserve a power. It may be created by deed or will; and it is sufficient that the intention be clearly declared. The creation, execution, and destruction of powers, all depend on the substantial intention of the parties; and they are construed equitably and liberally in furtherance of that intention. (*b*) Nor is it material whether the donee of the power be authorized to limit and appoint the estate, or whether the language of the settlement goes at once to the practical effect intended, and authorizes the donee to sell, lease, or exchange. (*c*) A devise of an estate generally, or indefinitely, with a power of disposition over it, carries a fee. (*d*) But where the estate is given for life only, the devisee takes only an estate

(*e*) New York Revised Statutes, 732, sec. 74, 75, 76, 77, 78. There is the same definition of a general and of a special power, in Sugden, 425, and in Butler's note, 231, to Co. Litt. 271, b.

(*f*) New York Revised Statutes, i. 732, sec. 79.

(*a*) New York Revised Statutes, i. 734, sec. 93, 95; Laws New York, April 20, 1830, c. 320, sec. 11.

(*b*) Lord Mansfield, Doug. 293; Lord Ellenborough, 3 East, 441; Jackson *v.* Veeder, 11 Johns. 169.

(*c*) Sugden on Powers, 96.

(*d*) Dalison, 58; 1 W. Jones, 137; Co. Litt. 9, b; see *infra*, 536, s. P. An estate for life, with an unqualified power to appoint an inheritance, makes the whole an equitable fee. Barford *v.* Street, 16 Ves. 135.

for life, though a power of disposition, or to appoint the fee by deed or will, be annexed; unless there should be some manifest general intent of the testator, which would be defeated by adhering to this particular intent. Words of implication do not merge or destroy an express estate for life, unless it becomes absolutely necessary to uphold some manifest general intent. (*e*) The rule is more inflexible where a specific mode of exercising the
* 320 power is pointed out; but if the estate * for life be given to let in estates to strangers, and no specific mode is required in the disposition of the inheritance, there, if the intervening estates do not take effect, the devisee takes the entire fee. (*a*) The New York Revised Statutes (*b*) have provided for this case, by declaring, that where an absolute power of disposition, not accompanied by any trust, or a general and beneficial power to devise the inheritance, shall be given to the owner of a particular estate for life or years, such estate shall be changed into a fee, absolute in respect to the right of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed, or the lands sold for debt. So, if a like power of disposition be given to any person to whom no particular estate is limited, he takes a fee, subject to any future estates limited thereon, but absolute in respect to creditors and purchasers. The absolute power of disposition exists, when the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit. (*c*)

(2.) *Devise to Executors.* — The earlier cases established the distinction, that a devise of land to executors to sell, passed the interest in it; but a devise that *executors shall sell*, or *that the lands shall be sold by them*, gave them but a power. This distinction was taken as early as the time of Henry VI., (*d*) and it received the sanction of Littleton and Coke, and of the modern determinations. (*e*) A devise *of the land to be sold by the executors*, con-

(*c*) 3 Leon. 71; 4 id. 41, s. c.; Liefe *v.* Saltingstone, 1 Mod. 189; Doe *v.* Thorley, 10 East, 438; Thomlinson *v.* Dighton, 1 Salk. 239; Crossling *v.* Crossling, 2 Cox, 396; Reid *v.* Shergold, 10 Ves. 370; Jackson *v.* Robins, 16 Johns. 588; In the case of Flintham, 11 Serg. & R. 16. See also *infra*, 585, 586.

(*a*) Sugden on Powers, 96-101.

(*b*) I. 732, sec. 81, 82, 84.

(*c*) New York Revised Statutes, i. 732, sec. 85.

(*d*) Y. B. 9 Hen. VI. 13, b, 24, b.

(*e*) Litt. sec. 169; Co. Litt. 113, a, 181, b; Houell *v.* Barnes, Cro. Car. 382; Yates

fers a power, and does not give any *interest. (a) The *321
New York Revised Statutes have interfered with these distinctions, though they seem not to have settled them in the clearest manner. They declare (b) that "*a devise of land to executors, or other trustees, to be sold or mortgaged* where the trustees are not also empowered to receive the rents and profits, shall vest no estate in the trustees; but the trust shall be valid as a power, and the lands shall descend to the heirs or pass to the devisees of the testator, subject to the execution of the power." If the construction of this section be, that a devise of the lands to executors to be sold, does not pass an interest *without a special authority to receive the rents*, then the estate does not, in any of the cases already mentioned, pass to the executors, and the devise is only a power simply collateral. The English rule is, that an estate may be conveyed to trustees to sell, with a provision that the rents and profits be, in the mean time, received by the party who would have been entitled if the deed had not been made, and yet the trustees will take a fee. (c) If the trust be *valid as a power*, then, in every such case, (d) "the lands to which

v. Compton, 2 P. Wms. 308; Bergen *v.* Bennett, 1 Caines's Cas. 16; Jackson *v.* Schauber, 7 Cowen, 187; Peck *v.* Henderson, 7 Yerg. 18.

(a) Ferebee *v.* Proctor, 2 Dev. & Batt. 439; [Patton *v.* Crow, 26 Ala. 426. But compare Shippen *v.* Clapp, 29 Penn. St. 265.] This is the opinion of Sir Edward Sugden, and I think it is, upon the whole, the better opinion; but Mr. Hargrave thought differently; and he refers to Lord Coke in support of the position, that if one *devises lands to be sold by his executors*, an interest passes. Sugden on Powers, 104–108; Harg. Co. Litt. 113, a, note 146. A devise that executors or others may sell, is always a naked power. 1 Chance on Powers, 52. But it is understood that a person may, by a single instrument, be invested with a power coupled with an interest as to one estate, and a naked power as to another estate in the same land. Bloomer *v.* Waldron, 3 Hill, 361. The distinctions on this subject have the appearance of too curious and overstrained a refinement; and Mr. Hargrave pushed his opinion to the extent of holding that a devise that *executors should sell*, and a devise *of lands to be sold* by executors, equally invested them with a fee. The general doctrine applicable to the subject is, that trustees are to be presumed to have been clothed with an estate commensurate with the charges or duties imposed on them, and were not by mere construction to take a greater estate than the nature of the trust requires. Lord Hardwicke, in Gibson *v.* Mountford, 1 Ves. 491; Heath, J., in Doe *v.* Barthrop, 5 Taunt. 385.

(b) New York Revised Statutes, i. 729, sec. 56.

(c) Keene *v.* Deardon, 8 East, 248. In Ohio, a power given to executors to sell land, when they deem it can be done to good advantage, and distribute the proceeds, is a power with an interest, and entitles them to the possession of the land, though the fee in the mean time descends to the heir. Dabney *v.* Manning, 3 Ohio, 321.

(d) New York Revised Statutes, i. 729, sec. 59.

the trust relates remain in, or descend to, the persons
*322 *entitled, subject to the trust as a power." The statute (*a*) authorizes "express trusts to be created to sell lands, for the benefit of creditors, or for the benefit of legatees, or for the purpose of satisfying charges." These are the very trusts or powers relative to executors which we are considering; and by the same statute, (*b*) "every express trust, valid as such in its creation, *except as therein otherwise provided*, vests the whole estate in the trustees, subject to the execution of the trust." The conclusion would seem to be that, as a general rule, every express trust created by will to sell lands, carries the fee with it; but if the executors *be not also empowered to receive the rents and profits*, they take no estate, and the trust becomes a power without interest. This restriction of the general rule applies to the case of a "*devise of lands to executors*, to be sold or mortgaged;" and the usual case of *a direction in the will to the executors to sell lands* to pay debts or legacies, is not within the liberal terms of the restriction; and it may be a question whether it be one of the cases in which, according to the 60th section above mentioned, "the whole estate is in the trustees." (*c*)

(3.) *Powers under the Statute of Uses.* — Powers of appointment and revocation may be reserved, in conveyances under the statute of uses, as well as in conveyances at common law; but the deed of bargain and sale, or of covenant to stand seised, must be sustained by a sufficient consideration, according to the nature of the deed. In consequence of the necessity of a consideration, a *general* power to lease, at the discretion of the donee, cannot be valid, even in a bargain and sale, or covenant to stand seised; because a consideration must move from the lessee, or become a

(*a*) Ib. i. 729, sec. 55.

(*b*) Ib. 729, sec. 60. In sales of lands by executors, under a power in the will for the payment of debts and legacies, the sales must be conducted under the same regulations prescribed in the case of sales by order of any surrogate. Ib. ii. 109, sec. 56.

(*c*) [See Dominick *v.* Michael, 4 Sandf. 374; Mosby *v.* Mosby, 9 Gratt. 584; Carrington *v.* Goddin, 13 Gratt. 587.] By the New Jersey Revised Bills, as reported by the reviser in 1834, it was proposed that a naked authority by will to executors to sell land should give them the same interest and power over the estate for the purposes of the sale, and the same remedy by entry and action, as if the lands had been devised to them to be sold. This provision does not appear to have been enacted [Snowhill *v.* Snowhill, 3 Zabr. 447], but a provision in the same words exists in Pennsylvania. Purdon's Dig. 392.

debt due from him, at the time that the deed creating the power was executed; and this cannot * take place when *323 the lessee is not then designated, as is the case in a general power. (a) It is different in conveyances operating by way of transmutation of possession, as by fine or feoffment, because the feoffees become seised to uses, and are bound to execute them without reference to any consideration. (b)

A power given by will to sell an estate is a common-law authority, and it may also operate under the statute of uses. Lands may be devised without the aid of the statute of uses, and, on the other hand, the statute may operate on uses created by will, provided a seisin is raised to feed the uses created by it; and the statute will, in most cases, transfer the possession to them. (c) The question has now become unimportant, and is matter of mere speculation, as Mr. Butler, and after him, Mr. Sugden, equally admit. A devise to uses, without a seisin to serve the uses, is good; and if an estate be devised to A. for the benefit of B., the courts will execute the use in A. or B., as the testator's intention shall clearly indicate; for the intention controls every such question.

The seisin must be coextensive with the estate authorized to be created under the power; and, therefore, if a life estate be conveyed to A., to such uses as B. should appoint, he cannot appoint any greater interest than that conveyed to A. (d) It is upon the same principle that no estate can be limited through the medium of a power, which would not have been valid if inserted in the deed creating * the power; and the estate, valid by *324 means of a power, would have been so if limited by way of use in the original deed. When the object of the power is to create a perpetuity, it is simply void; (a) and when the power is void, or when no appointment is made under it, the estates limited in the instrument creating the power take effect in the

(a) Goodtitle v. Pettoe, Fitzg. 299.

(b) Gilbert on Uses, by Sugden, 90, 91; Sugden on Powers, 191.

(c) Sugden on Powers, 129–133. Mr. Butler was of opinion that uses created by will were executed by the statute of wills, and not by the statute of uses. The question was, whether a devise to A. in fee, to the use of B. in fee, took effect by virtue of the statute of uses, or the statute of wills. The opinion of that great conveyancer, Mr. Booth, whose opinions are often cited as quite oracular, was vibratory on the question. Butler's note, 231 (iii. 5), to Co. Litt. lib. 8; Sugden on Powers, 130, n.

(d) Gilbert on Uses, 127; Sugden on Powers, 135.

(a) Duke of Marlborough v. Earl Godolphin, 1 Eden, 404.

same manner as if the power had not been inserted. (*b*) While upon this subject, it is proper to notice the question, which has been greatly discussed in the English courts, whether the estates limited in default of appointment are to be considered as vested or contingent during the continuance of the power. The question was most learnedly discussed in three successive arguments in the K. B. in *Doe* v. *Martin*, (*c*) and settled upon great consideration, that the estates so limited were vested, subject, nevertheless, to be devested by the execution of the power. The plain reason is, that there is no estate limited under the power until the appointment be made. Lord Hardwicke had decided in the same way, on the same question, in *Cunningham* v. *Moodey*, (*d*) and the doctrine is now definitely settled, and it applies equally to personal estate. (*e*)

3. Of the Execution of Powers. — (1.) *Who may execute.* — Every person capable of disposing of an estate actually vested in himself, may exercise a power, or direct a conveyance of the land. The rule goes farther, and even allows an infant to execute a power simply collateral, and that only; *y*[1] and a *feme covert* may execute any kind of power, whether simply collateral, appendant, or in gross, and it is immaterial whether it was given to her * 325 while sole * or married. The concurrence of the husband is in no case necessary. (*a*)

By the New York Revised Statutes, (*b*) though a power may be vested in any person capable in law of holding, it cannot be exercised by any person not capable of aliening lands, except in

(*b*) Sugden on Powers, 141. [So, also, where for any reason the appointees cannot take. *In re* Farncombe's Trusts, 9 Ch. D. 652; *In re* Kerr's Trusts, 4 id. 600.]

(*c*) 4 T. R. 39. (*d*) 1 Ves. 174. (*e*) Sugden on Powers, 144.

(*a*) Sugden, *ubi supra*, 148–155; Thompson *v.* Murray, 2 Hill, Ch. (S. C.) 214, s. p.; [Doe *v.* Eyre, 3 C. B. 557, 5 C. B. 713; Thompson *v.* Lyon, 20 Mo. 155.] I have deemed it sufficient, on this particular subject, to refer to Sir Edward Sugden's very authoritative work, for principles that are clearly settled, without overloading the pages with references to the adjudged cases. Mr. Sugden cites upwards of fifty cases to the point of the general competency of a *feme covert*, and the limited capacity of an infant, to execute a power. He says he has anxiously *consulted the report of every case referred to in his volume.* I have examined all his leading authorities, and have found them as he stated them. The work is admirably digested, and distinguished for perspicuity, accuracy, and plain good sense.

(*b*) Vol. i. 735, sec. 109, 110, 111; ib. i. 137, sec. 130.

y[1] An infant may execute a power in gross as well as a power simply collateral. *In re* Cardross' Settlement, 7 Ch. D. 728; *In re* D'Angibau, 15 Ch. D. 228.

the case of a married woman. She may execute a power during her marriage, by grant or devise, according to the power, without the concurrence of her husband; but she cannot exercise it during her infancy. If she be entitled to an estate in fee, she may be authorized by a power to dispose of it during her marriage, and create any estate which she might create if unmarried. (*c*)

(2.) *When Powers survive.* — A naked authority, without interest, given to several persons, does not survive; and it was a rule of the common law, that if the testator, by his will, directed his executors by name to sell, and one of them died, the others could not sell, because the words of the testator could not be satisfied. (*d*) There are, however, some material qualifications to the rule. The statute of 21 Henry VIII. c. 4, declared, that the executors who accepted their trust might sell, though one or more of the executors should refuse to act. (*e*) This statute has probably been generally adopted in this country, and it

(*c*) See *supra*, ii. 171, 172, s. P.; [Wright *v.* Tallmadge, 15 N. Y. 307.] In Jackson *v.* Edwards, 7 Paige, 386, where there was a conveyance to a *feme covert*, to hold for her separate use, during the joint lives of herself and her husband, and to such uses as she should by deed or writing appoint, and in default of such appointment, then to herself in fee, in case she survived her husband, and if not, and in default as aforesaid, then to such uses as she should by will appoint, and in default thereof, to the use of her children, or issue living at her death, and in default of such issue, to her right heirs. It *was held* that in default of appointment, the deed gave the wife an absolute estate for life only, and a vested remainder in fee after her husband's death, subject to be devested in favor of children by her death in the lifetime of her husband; and that, under the New York Revised Statutes, i. 732, sec. 80–85, the power to dispose of the contingent remainder, limited to her children, was valid, and, if duly executed, would convey an estate fee to the appointee.

(*d*) Co. Litt. 112, b, 113, a, 181, b; Shep. Touch. tit. Testament, 448, pl. 9; Bro. tit. Devise, pl. 31; Dyer, 177; Osgood *v.* Franklin, 2 Johns. Ch. 19; Peter *v.* Beverly, 10 Peters, 533.

(*e*) A power to sell land, conferred by will upon several executors, must be executed by all who proved the will. Wasson *v.* King, 2 Dev. & Batt. 262; [Neel *v.* Beach, 92 Penn. St. 221.] But if one executor only acts, his sale under a power in the will is good. If the others do not assume the trust, the presumption will be that they have renounced or refused to join in the sale. The delinquents need not renounce before the ordinary to render the acts of the other valid. A refusal *in pais* to act is sufficient. Perkins, sec. 545; Bonifaut *v.* Greenfield, Cro. Eliz. 80; Geddy *v.* Butler, 3 Munf. 345; Wood *v.* Sparks, 1 Dev. & Batt. 389; Ross *v.* Clore, 3 Dana (Ky.), 195; [McDowell *v.* Gray, 29 Penn. St. 211; Miller *v.* Meetch, 8 (Barr) Penn. St. 417.] If the will gives no *direction* to the executors to sell, but refers the power to sell to the judgment and *discretion* of the executors, all must join in the sale. Moore, 61, pl. 172; Sir Wm. Grant, in Cole *v.* Wade, 16 Ves. 27, 45, 46, 47; Walter *v.* Maunde, 19 id. 424; Clay *v.* Hart, 7 Dana (Ky.), 8, 9; [Bartlett *v.* Sutherland, 24 Miss. 395.]

*326 has been reënacted in the successive *revisions of the statute law of New York. The provision is continued by the New York Revised Statutes; (a) but in other cases of powers granted to more than one person, it is provided, that "where a power is vested in several persons, all must unite in its execution; though if, previous to such execution, one or more of them should die, the power may be executed by the survivors or survivor." (b) The result of the English cases is, that where a power is given to two or more persons by their proper names, and they are not executors, or where it is given to them *nominatim* as executors, and the word "executors" is used as a mere *descriptio personarum*, the power does not survive without express words; but where it is given to several persons by their name of trust, as *to my executors or trustees*, or to several persons generally, as *to my sons*, it will survive so long as the plural number remains. (c) If the executors having the power to sell, are vested with any interest, legal or equitable, in the estate, or are charged with a trust relative to the estate, and depending on the power to sell, in these cases, also, the power survives. (d) If the will directs

(a) Vol. ii. 109, sec. 55; [Taylor v. Morris, 1 Comst. 341; Leggett v. Hunter, 19 N. Y. 445.] See also the Statute Laws of Connecticut, 1784, pl. 119, and of 1821, p. 304; Revised Code of Illinois, ed. 1833, p. 641; Statute of Kentucky, 1797.

(b) Ib. i. 735, sec. 112. This is no more than a declaration of the general rule of the common law, that all the persons named must join in the execution of a power; but the powers referred to in the New York Revised Statutes, i. 731–735, relate exclusively to lands.

(c) Bro. tit. Devise, pl. 50; Perkins, sec. 550, 551; Jenkins, 43, case 83; Co. Litt. 112, b; Dyer, 177, a; Sugden on Powers, 159. If power be given by will to the executors, to sell land, the power survives, though they be named individually, for the authority is given to them in their character of executors. Lessee of Zebach v. Smith, 3 Binney, 69; Peter v. Beverly, 10 Peters, 533, 565.

(d) Co. Litt. 112, b; Hearle v. Greenbank, 3 Atk. 714; Eyre v. Countess of Shaftesbury, 2 P. Wms. 102; Garfoot v. Garfoot, 1 Ch. Ca. 35; Barnes's Case, Sir Wm. Jones, 352; Cro. Car. 382; Osgood v. Franklin, 2 Johns. Ch. 20, 21; Muldrow v. Fox, 2 Dana (Ky.), 79; Peter v. Beverly, 10 Peters, 532, 564; [Gray v. Lynch, 8 Gill, 403; Williams v. Otey, 8 Humph. 563; Miller v. Meetch, 8 Penn. St. 417.] Where the power to sell is coupled with an interest, or with an express trust, it may survive to one alone. Ib. I apprehend that, by the statute law of the states generally, the survivor and survivors of several executors, with a devise to them of lands to sell, or a naked power to sell, and also the acting executor or executors, when one or more resigns or refuses to act, or is superseded, have the same interest and power in and over the estate, for the purpose of sale, as all might have had. Purdon's Penn. Dig. 392; Elmer's N. J. Dig. 598, 599; New York Revised Statutes, *supra*, 326, and note (c). [That a mere power to sell gives no interest in the estate, see Atwater v. Perkins (Conn., 1883), 17 Rep. 200.]

the estate to be sold, without naming a donee of the power, it naturally, and by implication, devolves upon the executors, provided they are charged with the distribution of the fund.(*e*)

The power to sell *cannot be executed by attorney, when *327 personal trust and confidence are implied, for discretion cannot be delegated. (*a*) But if the power be given to the donee and *his assigns*, it will pass by assignment, if the power be annexed to an interest in the donee; (*b*) and if it be limited to such uses *as A. shall appoint*, it is equivalent to ownership in fee; and, in such cases, the owner may limit it to such uses as

(*e*) Blatch *v.* Wilder, 1 Atk. 420; Davoue *v.* Fanning, 2 Johns. Ch. 254. See also 1 Yeates, 422; 3 id. 163; Bogert *v.* Hertell, 4 Hill (N. Y.), 492; [Meakings *v.* Cromwell, 2 Sandf. 512; 5 N. Y. (1 Seld.) 136.] Mr. Sugden (Powers, 160–165) mentions several ancient cases to the same effect. In South Carolina, the executor's authority to sell, under such circumstances, is denied; and the course is to apply to chancery to give validity to the sale. Drayton *v.* Drayton, 2 Desaus. 250, note. But a decree in chancery directing a person who has no power to sell, and has not the legal estate, to sell land, will not vest a legal estate in the vendee. The court, except in sales on execution from that court, or on partition, only directs those who have the legal estate, or who have a power to sell, to join in the sale. Ferebee *v.* Proctor, 2 Dev. & Batt. 439, 448, 449. New York Revised Statutes, i. 734, sec. 101, would seem to have changed the law on this subject, and to have made it conformable to the South Carolina practice, for it is declared, that where a power is created by will, and the testator has omitted to designate by whom the power is to be exercised, its execution shall devolve on the Court of Chancery. This is requiring a resort to chancery in every case where the executor, or other donee of the power, is not expressly named; or where the power of sale by the executor is not impliedly included in the power given by the will to the executor over the produce of the sale.

(*a*) Combes's Case, 9 Co. 75, b; Ingram *v.* Ingram, 2 Atk. 88; Cole *v.* Wade, 16 Ves. 27; [Chambers *v.* Tulane, 1 Stockt. 146.]

(*b*) How *v.* Whitfield, 1 Vent. 338, 339. The New York Revised Statutes, i. 735, sec. 104, declare, that every beneficial power shall pass to the assignees of the estate and effects of the donee of the power, under an assignment in insolvent cases. In Virginia, if the executor renounces, the administrator with the will annexed may, under a statute authority, execute the power to sell. Brown *v.* Armistead, 6 Rand. 594. It has been adjudged in New York, where there is no statute authority in the case, that a power to the executor to sell land, cannot, after his death, be executed by an administrator, *cum testamento annexo*. The power is given to the executor as a *personal* trust. Conklin *v.* Egerton's Adm., 21 Wend. 430; [s. c. 25 Wend. 224; Dominick *v.* Michael, 4 Sandf. 374; Beekman *v.* Bonsor, 23 N. Y. 298; Fontain *v.* Ravenel, 17 How. 369; Greenough *v.* Welles, 10 Cush. 571;] Wills *v.* Cowper, 2 Ohio, 124, s. p. But in Kentucky, a power given by will to executors to sell land, devolves by operation of law, upon an administrator with the will annexed. Peebles *v.* Watts, 9 Dana, 102; Steele *v.* Moxley, ib. 139. A statute of Kentucky of 1810, declares the rule. This is the case by statute in North Carolina. Revised Statutes, c. 46, sec. 34.

another shall appoint. (*c*) Should the appointment be to A., to the use of B., the statute would only execute the first use, and it would vest in A. under the original seisin; and the use to B. would be void at law, though good in equity as a trust. (*d*)

(3.) *Valid Execution.* — The appointee under the power derives his title, not from the person exercising the power, but from the instrument by which the power of appointment was created; and it has been well observed in the New York Revised Statutes, (*e*) that no person can take under an appointment, who would not
*328 have been capable of * taking under the instrument by which the power was granted. Every instrument of execution operates as a direction of the use; and the appointee takes in the same manner as if the use had been limited to him in the original settlement creating the power. The use declared by the appointment under the power is fed (to use the mysterious language of the conveyancers) by the seisin of the trustees to uses in the original conveyance. The consequence of this principle is, that the uses declared in the execution of the power must be such as would have been good if limited in the original deed; and if they would have been void as being too remote, or tending to a perpetuity in the one case, they will be equally void in the other. (*a*) [1] A general power of appointment enables the party to appoint the

(*c*) Combes's Case, 9 Co. 75, b. If an estate be given to A. for life, with power of disposition by deed or will, he may execute the power and acquire an absolute interest.

(*d*) Sugden on Powers, 170, 181, 182.

(*e*) I. 737, sec. 129.

(*a*) Badham *v.* Mee, 1 Myl. & K. 82. By the New York Revised Statutes, i. 737, sec. 128, the period during which the absolute right of alienation is suspended, is to be computed, not from the date of the instrument in execution of the power, but from the time of the creation of the power. A power in trust given to tenants for life, to devise the ultimate fee to any of their descendants *who may not be in existence at the death of the tenants for life*, or to appoint any other estates than absolute fees, except in the single case of death during minority (as see *supra*, p. 250, New York Revised Statutes, i. 723, sec. 16), is void. Hawley *v.* James, New York, July, 1835. [See 16 Wend. 61.]

[1] It is now considered in England that a power of sale in a deed or will containing limitations in strict settlement, is valid, although not restricted to the period allowed by law. When the purposes of the settlement are spent, the power, it is said, can no longer be exercised. Lantsbery *v.* Collier, 2 K. & J. 709; Biddle *v.* Perkins, 4 Sim. 135; Wallis *v.* Freestone, 10 Sim. 225; Nelson *v.* Callow, 15 Sim. 353; 1 Jarm. on W. 3d ed. 272; Sugd. on P. 8th ed. 850, c. 19, § 1. [See Barnum *v.* Barnum, 26 Md. 119.]

estate to any persons he may think proper, who may have a capacity to take; but a special power restrains him to the specified objects; and they equally suspend the alienation of the estate. Whenever the estate is executed in the appointee, the uses before vested are devested, and give place to the new uses, under the character of shifting and springing uses; and no disposition can be made by the persons who possess the legal estate, during the time that the power hangs over it, which will not be subject to its operation. (*b*)

Every instrument executing a power, should mention the estate or interest disposed of; and it is best to declare it to be *made in exercise of the power; and the formalities re- *329 quired in the execution of the power must appear on the face of the instrument. Every well-drawn deed of appointment, says Mr. Sugden, embraces these points. (*a*) The deed for executing the power consists of two parts, — an execution of the power, and a conveyance of the estate. If a person hath a power, and an estate limited in default of appointment, he usually first exercises the power, and then conveys his interest. Mr. Booth said, that he never saw a deed settled with good advice, but which contained an appointment by virtue of the power, and a conveyance of the estate remaining in the vendor, or his trustee, in default of appointment. (*b*) And yet all this is useless machinery; for if the power be subsisting and valid, the execution of it would, *per se*, devest the estate. In every settlement taking effect through the medium of uses, where a special power is reserved to sell or devise, the deed operates, in the first place, as a revocation of the old uses; and the legal estate is restored to the original trustees to uses, freed and discharged from the uses previously declared. It is, then, understood to remain in the trustees for an instant, ready to feed the new uses limited under the power. The donee of the power wants no estate to appoint or transfer previous to the time that he exercises the power. Whether he be the trustee of the legal estate, or a third person be the trus-

(*b*) Fearne on Executory Devises, by Powell, note, 347–388. Mr. Powell writes better in the instructive note here referred to, than in his original "Essay on the Learning of Powers;" and which, from the want of proper divisions of the subject, and resting places for the student, and from the insertion of cumbersome cases at large, was always a very repulsive work, and provokingly tedious and obscure.

(*a*) Sugden on Powers, 185. (*b*) Ib. 190, note.

tee, is immaterial. An estate arises in the trustee on the revocation of the former uses, by means of the magical transmutation of possession which the statute of uses produces. To explain this more fully, a conveyance to A. in fee passes the legal seisin, and if the use be declared in his favor, he continues seised. But the use may be declared partly in favor of A., and partly in favor of B., or it may be varied in any other manner. In every such case the use is executed by the statute, unless it be repug-
* 330 nant to some * use previously declared, and amounts to a use upon a use. If there be a vacancy in the ownership under the declaration of uses, as in a conveyance by A. to B. in fee, to the use of the heirs of A., the use results to A. for life, and is executed by the statute. In short, to render the title complete, there must be an estate of freehold or inheritance to supply the seisin to uses, and there must be a person capable of taking the use, and the use must be declared and warranted by the rules of law. (*a*) Should a fine be levied without a deed to declare the uses, it would destroy all the powers ; but a deed to declare, or lead uses, controls the fine. It is a part of the same estate, and the fine becomes subservient to it. (*b*)

(4.) *Strict Execution.* — When a mode in which a power is to be executed is not defined, it may be executed by deed or will, or simply by writing. It is nothing more than declaring the use upon an estate already legally created to serve it ; and whatever instrument be adopted, it operates as a declaration of use, or, in other words, of an appointment of the estate under the power. But it is the plain and settled rule, that the conditions annexed to the exercise of the power must be strictly complied with, however unessential they might have been, if no such precise directions had been given. They are incapable of admitting any equivalent or substitution ; for the person who creates the power has the undoubted right to create what checks he pleases to impose, to guard against a tendency to abuse. The courts have
* 331 been uniformly and severely exact on this point. (*c*) If * a

(*a*) Fearne on Executory Devises, by Powell, note, 379–387 ; Preston on Abstracts, ii. 237–243.

(*b*) Tyrrell *v.* Marsh, 3 Bing. 31.

(*c*) Hawkins *v.* Kemp, 3 East, 410 ; Doe *v.* Peach, 2 Maule & S. 576 ; Wright *v.* Barlow, 3 id. 512 ; Wright *v.* Wakeford, 17 Ves. 454 ; 4 Taunt. 212, s. c. ; Allen *v.* Bradshaw, 1 Curteis, 110. The great leading case of Wright *v.* Wakeford was very much criticised and condemned by a majority of the court in the House of Lords, in the

deed be expressly required, the power cannot be executed by a will; (*a*) and if the power is to be executed by will, it cannot be executed by any act to take effect in the lifetime of the donee of the power. (*b*) As a general rule, a power to sell and

case of Burdett *v.* Spilsbury (6 Mann. & Gr. 386). In this case of Wright *v.* Wakeford, the execution of the power was required to be by an instrument *signed*, sealed, and delivered. It was in fact done so, but the execution did not say so in terms, but only that it was sealed and delivered, and a majority of the court of C. B. adjudged that the power was not well executed. The case of Burdett *v.* Spilsbury is very distinguished by the learning and ability with which it was discussed in the opinions of all the judges of Westminster before the House of Lords. The question was, whether a power of appointment, contained in a marriage settlement, was duly executed by a will required to be "signed, sealed, and delivered in the presence of, and *attested* by three or more credible witnesses." The will was signed, sealed, and published in the presence of three witnesses, and was attested by them by writing their names under the word *witness*. It was contended by the judges on one side, that the will was not duly attested according to the power, for it did not say expressly that the will was *signed, sealed, and published* by the testatrix in the presence of the witnesses, and so by them attested. On the other side it was held, by a large majority of the judges, that the execution was sufficient, for all that was requisite was implied in the general attestation, in reference to the instrument itself. The question ceases to be important, and never can again revive under the statute law of England and New York, but the discussion forms a very interesting item in the history of the administration of English jurisprudence, by the display of the caution, moderation, and discretion with which, on the one hand, the stability of established rules of property and of construction is revered and regarded; and on the other hand the spirit of justice and good sense which will surmount obstacles that impede the investigation of truth. Sugden on Powers, 205, 206, 220, 229, 230, 252–262; [*Re* Ricketts' Trusts, 1 J. & H. 70; s. c. *sub nom.* Newton *v.* Ricketts, 9 H. L. C. 262; Vincent *v.* Bishop of Sodor & Man, 5 Exch. 683; Ladd *v.* Ladd, 8 How. 10. See Orange *v.* Pickford, 4 Drew. 363.] The case of Doe *v.* Smith, first decided in the K. B., then a reversal in the Exchequer Chamber, and then the last judgment reversed in the House of Lords, gave rise to immense discussion, on the simple question, whether a lease, providing that if the rent should be unpaid *by the space of fifteen days* beyond the time of payment, and there should be *no sufficient distress* on the premises, then a reëntry, &c., was a due execution of a power to lease, so as there be contained in every lease a *power of reëntry for non-payment of rent*. The judges were very much divided in opinion as to the validity of the objection to the execution of the power. It was admitted to be one *strictissimi juris*; and the opinion finally prevailed, that the power of reëntry, *under those two conditions*, was a due execution of the power. It was deemed a reasonable construction and inference of the intention, which must have referred to a reasonable power of reëntry. 1 Brod. & B. 97; 2 id. 473.

(*a*) Woodward *v.* Halsey, MS. cited in Sugden, 208; Earl of Darlington *v.* Pulteney, Cowp. 260.

(*b*) Whaley *v.* Drummond, MS. cited in Sugden, 209; ib. 209–220; [Moore *v.* Dimond, 5 R. I. 121. See Christy *v.* Pulliam, 17 Ill. 59.] [But the mere fact that the power is not to take effect until the death of the appointor will not prevent its execution by deed. Benesch *v.* Clark, 49 Md. 497; *In re* Jackson's Will, 13 Ch. D. 189.]

convey does not confer a power to mortgage. (*c*) A power to sell for a specified sum means a cash sale, and not for approved notes. (*d*) When there are several modes of executing a power, and no directions are given, the donee may select his mode; and the courts seldom require any formalities in the execution of the power, beyond those required by the strict letter of the power. It may, in such a case, be executed by a will, without the solemnities required by the statute of frauds. (*e*)

The excessive and scrupulous strictness required as to the forms prescribed in the execution of powers, particularly with respect to the attestation of instruments of appointment and revocation, called for relief by act of Parliament; and the statute of 54 Geo. III., in 1814, was passed merely as to retrospective cases, and it left the rule for the future as uncertain as ever. The subsequent English statutes of 7 Wm. IV. and 1 Vict. c. 26, have gone to a liberal extent in respect to *forms of attestation* in the execution of appointments by will, in imitation of the New York statutes. The New York Revised Statutes have made some very valuable amendments to the law respecting the execution of powers; and while many of the provisions are merely * 332 declaratory of the existing law, there are others * which have rescued this part of the law from much obscurity and uncertainty. No power can be executed except by some instrument in writing, which would be sufficient in law to pass the estate or interest intended to pass under the power, if the person executing the power were the actual owner; and every instrument, except a will, in execution of a power, and although the power may be a power of revocation only, shall be deemed a conveyance within, and subject to, the provisions of that part of the revised statutes relative to the proof and recording of conveyances. (*a*) The rule of law, before the statute, was the same

(*c*) Sugden on Powers, 538, 6th London ed.; 2 Chance on Powers, 388; Bloomer *v.* Waldron, 3 Hill, 366, 367; [Albany Fire Ins. Co. *v.* Bay, 4 Comst. 9, 19. See Coutant *v.* Servoss, 3 Barb. 128; *post*, 345;] [Stokes *v.* Payne, 58 Miss. 614; s. c. 38 Am. R. 340 and note; Hoyt *v.* Jaques, 129 Mass. 286; Ferry *v.* Laible, 31 N. J. Eq. 566. Held to give a power to exchange in Mayer *v.* McCune, 59 How. Pr. 78. A power to "sell and exchange" includes a power to partition. Phelps *v.* Harris, 101 U. S. 370; *In re* Frith and Osborne, 3 Ch. D. 618. But see Borel *v.* Rollins, 30 Cal. 408.]

(*d*) Ives *v.* Davenport, 3 Hill, 373.

(*e*) Sugden on Powers, 201. [So by a trust settlement. Perry *v.* Cross, 132 Mass. 454; Boyd *v.* Satterwhite, 10 S. C. 45. See Busk *v.* Aldam, 19 L. R. Eq. 16.]

(*a*) New York Revised Statutes, i. 735, 736, sec. 113, 114.

on this point; and the same technical expressions are requisite, and the same construction is put upon deeds of appointment, as in feoffments and gifts at common law. (*b*) So, if the power to dispose of lands be confined to a disposition by devise or will, the instrument of execution, under the New York Revised Statutes, must be a will duly executed according to the provisions relative to the execution and proof of wills of real property. And where a power is confined to a disposition by grant, it cannot be executed by will, although the disposition be not intended to take effect until after the death of the party executing the power. Again, where the grantor of the power shall have directed or authorized it to be executed by an instrument not sufficient in law to pass the estate, the power shall not be void, but its execution shall be governed by the rules previously prescribed in the article. (*c*) And if the grantor shall have directed any formalities to be observed in the execution of the power, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formalties shall not be necessary to a valid * execution of the power. (*a*) If the conditions annexed * 333

(*b*) Tapner *v.* Merlott, Willes, 177; Lord Kenyon, 3 T. R. 765.

(*c*) This, I presume, is referring it to the courts to cause the power to be executed according to the general intention, by an instrument competent for the purpose. In England, by the statute of 1 Victoria, c. 26, all appointments by will in execution of a power, must be executed with the formalities required in the execution of wills, and no other formalities are requisite. The statutes of 7 William IV. and 1 Victoria declare that *no form of attestation* shall be necessary to render valid an appointment by will, even though the donor of the power may have expressly required it.

(*a*) This provision sweeps away a vast mass of English cases, requiring the exact performance of prescribed formalities. It gives great simplicity to the execution of powers, but it essentially abridges the right of the donor to impose his own terms upon the disposition of his own property. The English real property commissioners, in their report, in April, 1833, recommended a provision that wills, made in execution of a power, should be executed in the same manner as other wills, and that the direction of any additional formalities, with respect to the mode of execution, should be invalid. The statute of 1 Victoria, c. 26, sec. 27, is to this effect, and declares, that a general devise of real and personal estate shall operate as an execution of a power of the testator over the same, unless a contrary intention should appear in the will. [See 335, n. 1.]

By act of New York, May 9, 1835, c. 264, sales by execution under a power in a will may be (unless otherwise directed by the will, and except in the city of New York) public or private, and on such terms as the executors shall deem best. Such sales of lands in the city of New York are to be by auction, on six weeks' notice, as in the case of sales by order of the surrogate, under the New York Revised Statutes, ii. 104. The regulation requiring sales in the city and county of New York to be by auction, does not apply, when the will gives other and specific directions, as when it

to a power be merely nominal, and evince no intention of actual benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded in the execution of the power. *In all other respects* the intention of the grantor of a power as to the mode, time, and conditions of its execution, must be observed, subject to the power of the Court of Chancery to supply defective executions. When the consent of a third person to the execution of a power is requisite, the consent shall be expressed in the instrument by which the power is executed, or shall be certified in writing thereon. (*b*) In the first case the instrument of execution, in the second the certificate, shall be signed by the party whose consent is required, and be duly proved or acknowledged. When the instrument conveys an estate, or creates a charge, which the grantee of the power would have no right to convey or create, unless by virtue of the power, it shall be deemed a valid execution of the power, although the power be not cited or referred to. Lands embraced in a power to devise shall pass by a will purporting to convey all the real estate of the testator, unless a contrary intent appears expressly or by necessary implication. (*c*)

It is the general rule, that a power cannot be exercised before the time in which it was the intention of the gran-
* 334 tor * of the power that it should be exercised. This was a principle assumed by Lord Coke; (*a*) and in *Coxe* v.

authorizes a private sale at the discretion of the executor. The statute is not clearly expressed, but the true construction I apprehend to be, that the direction for the city of New York applies, "unless otherwise directed in the will;" and it is not to be supposed that the statute meant to compel all sales by executors under a power to be in the city of New York, by auction, though the will should give other directions.

(*b*) It was adjudged in 4 Elizabeth, that if the testator by will directs that after the death of his son, his executors should sell his land by the advice of A. and B., and A. dieth in the life of the son, a sale afterwards by the executors would not be good, for the assent of A. as well as of B. was essential. Cro. Eliz. 26; Leon. 286; 3 id. 106; Dyer, 219, pl. 8; Lee's Case, s. p. [See Barber *v.* Caty, 11 N. Y. 397. As to the effect of withholding assent from wrong motives, see Norcum *v.* D'Œnch, 17 Mo. 98.]

(*c*) New York Revised Statutes, i. 735, 736, 737, sec. 113–116, 118, 119, 120–124, 126. This last paragraph is a declaratory provision; for it was already the settled rule in New York, that trust estates pass by the usual general words in a will passing other estates, unless there be circumstances in the case to authorize the inference of a different intention in the testator. Jackson *v.* De Lancey, 13 Johns. 537.

(*a*) Co. Litt. 113, a.

Day, (*b*) it was adjudged, that where a power of leasing was given to B., to be exercised after the death of A., it could not be exercised during the life of A. Another rule is, that powers of revocation, and appointment and sale, need not be executed to the full extent of them at once; they may be exercised at different times over different parts of the estate, or over the whole estate, if not to the whole extent of the power. (*c*) Nor does an appointment by way of mortgage exhaust a power of revocation, for it is only a revocation *pro tanto*. (*d*)

(5.) *Execution need not be referred to the Power.* — The power may be executed without reciting it, or even referring to it, provided the act shows that the donee had in view the subject of the power. (*e*) In the case of wills, it has been repeatedly declared, and is now the settled rule, that in respect to the execution of a power, there must be a reference to the subject of it, or to the power itself; unless it be in a case in which the will would be inoperative, without the aid of the power, and the intention to execute the power became clear and manifest. The general rule of construction, both as to deeds and wills, is, that if there be an interest and a power existing together in the same person, over the same subject, and an act be done without a particular reference to the power, it will be applied to the interest, and not to the power. If there be any legal interest on which the deed can attach, it will not * execute a power. * 335 If an act will work two ways, the one by an interest and the other by a power, and the act be indifferent, the law will attribute it to the interest and not to the authority, for *fictio cedit veritati*. (*a*) In *Sloane* v. *Cadogan* (*b*) it was declared by the

(*b*) 13 East, 118. By the New York Revised Statutes, ii. 134, sec. 5, if a conveyance be made under a power of revocation, before the time appointed, it becomes valid from the time the power of revocation vests.

(*c*) Digges's Case, 1 Co. 173; Snape *v.* Turton, Cro. Car. 472; Bovey *v.* Smith, 1 Vern. 84; Co. Litt. 113, a.

(*d*) Perkins *v.* Walker, 1 Vern. 97.

(*e*) *Ex parte* Caswall, 1 Atk. 559; New York Revised Statutes, ii. 134, sec. 4, to the same point; Hunloke *v.* Gell, 1 Russ. & Myl. 515; [Coryell *v.* Dunton, 7 Penn. St. 530; Jones *v.* Wood, 16 Penn. St. 25, 42; Reilly *v.* Chouquette, 18 Mo. 220.]

(*a*) Sir Edward Clere's Case, 6 Co. 17, b; Holt, C. J., Parker *v.* Kett, 12 Mod. 469; Hobart, C. J., in the Commendam Case, Hob. 159, 160; Andrews *v.* Emmot, 2 Bro. C. C. 297; Standen *v.* Standen, 2 Ves. 589; Langham *v.* Nenny, 3 id. 467; Nannock *v.* Horton, 7 id. 391; [Birdsall *v.* Richards, 18 Penn. St. 256.]

(*b*) Cited in Sugden on Powers, 282.

Master of the Rolls, after a full discussion, to be settled, that a general disposition by will would not include property over which the party had only a power, unless an intention to execute the power could be inferred. A will need not contain express evidence of an intention to execute a power. If the will be made without any reference to the power, it operates as an appointment under the power, provided it cannot have operation without the power. The intent must be so clear that no other reasonable intent can be imputed to the will; and if the will does not refer to a power, or the subject of it, and if the words of the will may be satisfied without supposing an intention to execute the power, then, unless the intent to execute the power be clearly expressed, it is no execution of it. (*c*) [1]

(*c*) Bennett *v.* Aburrow, 8 Ves. 609; Bradish *v.* Gibbs, 3 Johns. Ch. 551; Blagge *v.* Miles, 1 Story, 426, 445. In this last case the English authorities are largely cited and discussed. Walker *v.* Mackie, 4 Russ. 76; Lovell *v.* Knight, 3 Sim. 275; Lempriere *v.* Valpy, 5 Sim. 108; Davies *v.* Williams, 3 Nev. & M. 821; Doe *v.* Roake, 2 Bing. 497; 5 B. & C. 720, s. c. on error. In this last case, Lord Ch. J. Best reviewed all the cases, from the great leading authority of Sir Edward Clere's case, down to the time of the decision; and he deduces the above conclusions with irresistible force. The judgment of the C. B. was reversed in the K. B., on the question of fact whether the intention was manifest. The principles of law were equally recognized in each court. This last case was carried up by writ of error to the House of Lords, and the judgment of the K. B. was affirmed, and the principles stated in the text settled. Roake *v.* Denn, 1 Dow & C. 437.

[1] *Execution of Power.* — The English law was changed by St. 1 Vict. c. 26, § 27, as stated *ante*, 333, n. (*a*), with regard to general powers to appoint "in any manner he may think proper." There are more or less similar statutes in several of the states. *In re* Wilkinson, L. R. 4 Ch. 587; Hawthorn *v.* Shedden, 3 Sm. & Giff. 293; Wilday *v.* Barnett, L. R. 6 Eq. 193. [*In re* Clark's Estate, 14 Ch. D. 422; Chandler *v.* Pocock, 15 Ch. D. 491. Under the statute cited a will speaks from the time of the death of the testator, and hence executes a power of appointment obtained subsequently to the execution of the will. Boyes *v.* Cook, 14 Ch. D. 53. See Vaux's Estate, 11 Phila. 57; Fry's Estate, ib. 305.] The above section applies to women. Bernard *v.* Minshull, H. R. V. Johns. 276, 296. The tendency of some American decisions is to adopt the later English doctrine without statute. Bolton *v.* De Peyster, 25 Barb. 539, 564; Amory *v.* Meredith, 7 Allen, 397; Willard *v.* Ware, 10 Allen, 263, 266; Bangs *v.* Smith, 98 Mass. 270. [The question is properly one of intention. Warner *v.* Conn. Mut. Life Ins. Co., 109 U. S. 357; Sewall *v.* Wilmer, 132 Mass. 131; Hutton *v.* Benkard, 92 N. Y. 295; Funk *v.* Eggleston, 92 Ill. 515; Yates *v.* Clark, 56 Miss. 212; Campbell *v.* Johnson, 65 Mo. 439. See also *In re* Teape's Trusts, 16 L. R. Eq. 442.] See Collier's Will, 40 Mo. 287, 329; White *v.* Hicks, 33 N. Y. 383, 407; and as to married women, see Shefford *v.* Acland, 23 Beav. 10; Attorney General *v.* Wilkinson, L. R. 3 Eq. 816. But the rule of the text is applied in Mory *v.* Michael, 18 Md. 227, 241; Johnson *v.*

In construing the instrument, in cases where the party has a power, and also an interest, the intention is the great * object of inquiry; and the instrument is construed to be * 336 either an appointment or a release; that is, either as an appointment of a use in execution of a power, or a conveyance of the interest, as will best effect the predominant intention of the party. (*a*) It may, indeed, operate as an appointment, and also as a conveyance, if it be so intended, though the usual practice is to keep these two purposes clearly distinct. (*b*)

(6.) *Powers of Revocation.* — In a deed executing a power, a power of revocation and new appointment may be reserved, though the deed creating the power does not authorize it; and such powers may be reserved *toties quoties*. A power to be executed by *will* is always revocable by a subsequent will; for it is in the nature of a will to be ambulatory until the testator's death. (*c*) But though the *original* power expressly authorizes the donee to appoint, and revoke his appointment from time to time, yet, if the power be executed by *deed*, it is held that there must be a power of revocation reserved in the deed, or the appointment cannot be revoked. On every execution of the power, a new power of revocation must be reserved; and a mere power of revocation in a deed *executing* the power will not authorize a limitation of new uses. (*d*) The rule arose from an anxiety to restrain the reservation of such powers of revocation, and, perhaps, from a desire to assimilate powers to conditions at common law; and we are disposed to agree with Mr. Sugden, that there is no good reason why a general power of revocation in the original deed creating the power, should not embrace all

(*a*) Cox *v.* Chamberlain, 4 Ves. 631; Roach *v.* Wadham, 6 East, 289.

(*b*) Sugden, 301. (*c*) Sugden, 321.

(*d*) Ward *v.* Lenthal, 1 Sid. 348; Hatcher *v.* Curtis, 2 Freem. 61; Hele *v.* Bond, Prec. in Ch. 474; Sugden on Powers, App. No. 2, s. c.; [Evans *v.* Saunders, 1 Drewry, 415, 654; 17 Eng. L. & Eq. 314.]

Stanton, 30 Conn. 297; [Burleigh *v.* Clough, 52 N. H. 267; Hollister *v.* Shaw, 46 Conn. 248; Bilderback *v.* Boyce, 14 S. C. 528; Towles *v.* Fisher, 77 N. C. 437; Jay *v.* Stein, 49 Ala. 514; Maryland, &c. Society *v.* Clendinen, 44 Md. 429. See Benesch *v.* Clark, 49 Md. 497; Boyd *v.* Satterwhite, 10 S. C. 45.] In Bingham's Appeal, 64 Penn. St. 345, the court even refused to apply the English rule to an English will, on a question whether it executed a power over Pennsylvania property created by a Pennsylvania will.

As to a power of revocation reserved on executing a power of appointment, see Pomfret *v.* Perring, 5 De G., M. & G. 775; Cooper *v.* Martin, L. R. 3 Ch. 47.

future execution, since it is allowed to be affected repeat-
* 337 edly by new powers of revocation, and since * a power of revocation in the *original* settlement is tantamount to a power, not only of revocation, but *of limitation of new uses;* for he that has a power to revoke, has a power to limit. (*a*) The New York Revised Statutes (*b*) have given due stability to powers that are beneficial, or in trust, by declaring that they are irrevocable, unless an authority to revoke them be granted or reserved in the instrument creating the power. It is further declared, (*c*) that where the grantor in any conveyance shall reserve to himself for his own benefit an absolute power of revocation, he shall be deemed the absolute owner of the estate, so far as the rights of creditors and purchasers are concerned. Under the check of this wise provision, preventing these latent and potent capacities from being made instruments of fraud, the statute very safely allows (*d*) the grantor, in any conveyance, to reserve to himself any power, beneficial or in trust, which he might lawfully grant to another.

(7.) *Relation back to the Deed creating the Power.* — An estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power. The party who takes under the execution of the power, takes under the authority, and under the grantor of the power, whether it applies to real or personal property, in like manner as if the power, and the instrument executing the power, had been incorporated in one instrument. (*e*) The principle that the appointee takes under the original deed was carried to the
* 338 utmost extent * in *Roach* v. *Wadham*, (*a*) a case which strikingly illustrates the whole of this doctrine, and the singularly subtle and artificial mechanism of the English settlement law. An estate was conveyed to a trustee in fee to such

(*a*) Anon., 1 Ch. Cas. 241; Colston *v.* Gardner, 2 id. 46. It may be doubted whether the case of Ward *v.* Lenthal, mentioned in the preceding note, be sufficient to warrant the doctrine, that a power of revocation in a deed executing a power will not authorize the limitation of new uses.

(*b*) I. 735, sec. 108. (*c*) Ib. i. 733, sec. 86.

(*d*) Ib. i. 735, sec. 105.

(*e*) Litt. sec. 169; Co. Litt. 113, a; Cook *v.* Duckenfield, 2 Atk. 562–567; Marlborough *v.* Godolphin, 2 Ves. 78; Middleton *v.* Crofts, 2 Atk. 650; Bradish *v.* Gibbs, 3 Johns. Ch. 550; Doolittle *v.* Lewis, 7 id. 45. [Comp. De Serre *v.* Clarke, 18 L. R. Eq. 587.]

(*a*) 6 East, 289.

uses as A. should by deed appoint, and in default of appointment to A. in fee. There was a fee farm rent reserved in the conveyance to the trustee, and A. covenanted to pay it. It was held that A. took a vested fee, liable to be devested by the execution of his power of appointment. He sold and conveyed the estate by lease and release, and also, in the same conveyance, directed and appointed the estate and use to the purchaser. It was further held, that under this conveyance with a double aspect, the purchaser took the estate by the appointment of A., and not by the conveyance from A.; and, consequently, the purchaser was not subject to the covenant for the payment of rent, though it run with the land; for he took as if the original conveyance had been made to himself, instead of being made to the trustee to uses. The rule that the estate, under the power, takes effect under the deed creating the power, applies only to certain purposes, and as between the parties; and it will not be permitted to impair the intervening rights of strangers to the power. The deed under the power must be recorded, when deeds in general are required to be recorded, equally with any other deed. (*b*) *y*[1] It does not take effect by relation, from the date of the power, so as to interfere with intervening rights. (*c*) The ancient doctrine was, that a naked power could not be barred or extinguished by disseisin, fine, or feoffment. (*d*) It was held, that if a power to sell lands be given to executors, and the heir enters * and * 339 enfeoffs B., who dies seised, yet that the executors might sell, and the vendee would be in under the will, which was paramount to the descent, and that the power was not tolled by the

(*b*) Scrafton *v.* Quincey, 2 Ves. 413.

(*c*) Lord Hardwicke, in Marlborough *v.* Godolphin, 2 Ves. 78, and in Southby *v.* Stonehouse, ib. 610.

(*d*) 1 Co. 110, 173; Edwards *v.* Slater, Hard. 410; Willis *v.* Shorral, 1 Atk. 474; 15 Hen. VII. fo. 11, b, translated in App. No. 1 to Sugden on Powers.

y[1] The law in force when a power is executed governs as to the construction of the instrument executing the power. Freme *v.* Clement, 18 Ch. D. 499. Where the power is created in one state and the donee is domiciled in another, it is said it is sufficient if the will is executed in the form required by either. Sewall *v.* Wilmer, 132 Mass. 131; Goods of Hallyburton, 1 P. & D. 90. In determining what will pass under a power, the place where it was created must be looked to. Sewall *v.* Wilmer, *supra*; Bingham's App., 64 Penn. St. 345. The true rule would seem to be that the laws of the places where the instruments are respectively executed should govern as to the form and interpretation of each, and that as to the performance the law of the place of performance should govern.

descent. (*a*) A dormant power, with such mysterious energy founded on the doctrine of relation, would operate too mischievously to be endured; and the doctrine to that extent has justly been questioned, and it would not now be permitted to destroy intervening rights, which had been created for a valuable consideration, and had duly attached upon the land without notice of the power. (*b*)

(8.) *Defective Execution aided.* — The beneficial interest which a person takes under the execution of a power, forms part of his estate, and is subject to his debts, like the rest of his property. The appointment cannot be made so as to protect the property from the debts of the appointee. (*c*) A court of chancery goes further, and holds, that where a person has a *general* power of appointment over property, and he actually exercises his power, whether by deed or will, the property appointed shall form part *of his assets*, and be subject to the claims of creditors, in preference to the claims of the appointee. The party must have executed the power, or done some act indicating an intention to execute it; for it is perfectly well settled in the English law, that though equity will, in certain cases, aid a defective execution of a power, it will not supply the total want of any execution of it. The lord keeper, as early as the case of *Lassells* * 340 * v. *Cornwallis*, (*a*) declared that where a person had a power to charge an estate for such uses as he should think fit, and he had by deed appointed it for the benefit of his children, the direction should be changed, and the fund applied for the payment of his debts. But if he wholly omitted to appoint, the court had not gone so far as to do it for him; though he thought it would be very reasonable and agreeable to equity, when cred-

(*a*) Jenk. Cent. 184, pl. 75; Bro. tit. Devise, pl. 86; Parsons, C. J., 5 Mass. 242. The seisin remains undisturbed, in the case of an authority to executors to sell land, until the authority be exercised, and goes to the heir or devisee, in the mean time subject to the power.

(*b*) Jackson *v.* Davenport, 20 Johns. 537, 550, 553. The law fixes no definite time within which an executor or administrator may apply to the testamentary court, and have real estate sold for the payment of debts. But if the application be not made within a reasonable time under the circumstances, it ought to be rejected. Jackson *v.* Robinson, 4 Wend. 436; Mooers *v.* White, 6 Johns. Ch. 360, 376–389, s. p.

(*c*) Alexander *v.* Alexander, 2 Ves. 640. The English Insolvent Acts of 41 Geo. III. and 53 Geo. III. pass to the assignee all powers which the insolvent might have executed for his own advantage.

(*a*) 2 Vern. 465; Prec. in Ch. 232, s. c.

itors were concerned. The same doctrine was afterwards repeatedly held by Lord Hardwicke. (*b*) Property, over which such a dominion was exercised by virtue of a general power, was considered an absolute property, so far as to be liable for debts; but if it be a particular power to appoint for third persons designated in the power, and not for the benefit of the donee of the power, the conclusion would be different. Sir William Grant, in *Holmes* v. *Coghill*, (*c*) and Lord Erskine, afterwards, in the same case on appeal, (*d*) were very clear and explicit in laying down the established distinction, that equity would aid the defective execution of a power, and refuse to interfere where there was no execution of it; while, at the same time, they were free to admit, that there was no good reason or justice in the distinction, and that it was raised and sustained with some violation of principle.

If the interest was to be vested in the appointer by an act to be done by himself, it ought, perhaps, to be considered his property for the benefit of his creditors; and yet the above distinction had been settled and maintained from 1668 down to that time. The creditors have no right, according to the established doctrine, to have the money raised out of the estate of a third person when the power * was not executed; and a court of equity *341 will not, by its own act, charge an estate, and supply the want of the execution of a power. This would be to destroy all distinction between a power and absolute property; and though the money which the party possessing a power has a right to raise may be considered his property, yet the party to be affected by the execution of the power can only be charged in the manner and to the extent specified at the creation of the power. The courts only assume to direct the application of the fund raised by virtue of the power, and to hold it to be assets for the payment of debts. Lord Erskine intimated, that the difficulties which had embarrassed the subject were proper for legislative interference, and that it might as well be declared, that where a power was given to dispose of property by a certain act, if the party died without doing the act, the property should still be assets.

(9.) *Equity Control over the Execution of Powers.* — The New

(*b*) Hinton *v.* Toye, 1 Atk. 465; Bainton *v.* Ward, 2 id. 172; Lord Townshend *v.* Windham, 2 Ves. 9; Pack *v.* Bathurst, 3 Atk. 269; Troughton *v.* Troughton, ib. 656.

(*c*) 7 Ves. 506.

(*d*) 12 Ves. 206; [Kennard *v.* Kennard, 8 L. R. Ch. 227.]

York Revised Statutes have wisely cleared away these difficulties, and given due and adequate relief to the creditor, by rendering the execution of the power imperative in certain cases, and making the jurisdiction in equity coextensive with the requisite relief. Thus, every special and beneficial power is made liable in equity to the claims of creditors, in the same manner as other interests that cannot be reached by an execution at law, and the execution of the power may be decreed for the benefit of the creditors entitled. (*a*) It is further declared, that every trust power (being a power in which persons, other than the grantee of the power, are entitled to the benefits resulting from the execution of it) becomes an imperative duty on the grantee, unless its execution be made to depend expressly on the will of the grantee, and the performance of it may be compelled in equity, for the benefit of the parties interested. Nor does it cease to be
* 342 imperative, * though the grantee has a right to select any, and exclude others of the persons designated as the objects of the trust. (*a*) And where a disposition under a power is directed to be made to, or among, or between several persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal proportion. But if the manner or proportion of the distribution be left to the trustees, they may allot the whole to any one or more of the persons, in exclusion of the others. (*b*) If the trustee of a power, with the right of selection, dies, leaving the power unexecuted, or if the execution of a power in trust be defective, in whole or in part, its execution is to be decreed in equity for the benefit equally of all the persons designated as objects of the trust. The execution, in whole or in part, of any trust power, may also be decreed in equity for the benefit of creditors or assignees (if the interest was assignable) of any person entitled, as one of the objects of the trust, to compel its execution. (*c*) So, purchasers for a valuable consideration, claiming under a defective execution of a power, are entitled to the same relief in equity as purchasers in any other case. It is likewise added, for greater caution, that instruments in execution of a power are equally affected by fraud, as conveyances by owners and trustees. Every power is also made

(*a*) New York Revised Statutes, i. 734, sec. 98.
(*a*) Ib. i. sec. 96, 97. (*b*) Ib. i. sec. 98, 99.
(*c*) Ib. i. sec. 100, 103, 131.

a lien or charge upon the lands which it embraces, as against creditors and purchasers in good faith, and without notice, of or from any person having an estate in such lands, from the time the instrument containing the power is recorded; and as against all other persons from the time the instrument takes effect. (*d*)

Some part of these statute provisions would seem to have changed the English equity doctrine of illusory appointments, * where there was an allotment of a nominal and not *343 of a substantial interest. They have at least rescued the law from a good deal of uncertainty on the subject, and relieved the courts of equity from that difficulty and distress of which the Master of the Rolls, in *Vanderzee* v. *Aclom*, (*a*) and Lord Eldon, in *Butcher* v. *Butcher*, (*b*) have so loudly complained, when they endeavored to ascertain the proportion of inequality that would amount to an illusory appointment. The rule at common law was, to require some allotment, however small, to each person, where the power was given to appoint to and among several persons; but the rule in equity requires a real and substantial portion to each, and a mere nominal allotment to one is deemed illusory and fraudulent. Where the distribution is left to discretion, without any prescribed rule, as *to such* of the children as the trustee should think proper, he may appoint to one only. (*c*) But if the words be, "*amongst* the children as he should think proper," each must have a share, and the doctrine of illusory appointments applies. (*d*) The distribution under the power of appointment, by the New York statute, must be equal in the one case; and, in the other, the trustee has an entire discretion in the selection of the objects, as well as to the amount of the shares to be distributed. (*e*) In respect to the imperative duty of the grantee of a trust power to execute it, the New York statute has only declared the antecedent law. Though it be an im-

(*d*) New York Revised Statutes, i. 735, 737, sec. 107, 125, 132.

(*a*) 4 Ves. 784. (*b*) 1 Ves. & B. 79.

(*c*) The Master of the Rolls, in Kemp *v.* Kemp, 5 Ves. 857.

(*d*) 4 Ves. 771; Kemp *v.* Kemp, 5 id. 849; Cook's Case, cited in Astry *v.* Astry, Prec. in Ch. 256; Thomas *v.* Thomas, 2 Vern. 513; Maddison *v.* Andrew, 1 Ves. 57.

(*e*) The English statute of 1 Wm. IV. c. 46, entitled "an act to alter and amend the law relating to illusory appointments," declares that no appointment shall be impeached in equity, on the ground that it is unsubstantial, illusory, or nominal. This puts an end to the equity jurisdiction on the subject of illusory appointments, and it applies to real as well as personal estates. [See 37 & 38 Vict. c. 37.]

mutable rule, that the non-execution of a naked power will
* 344 * never be aided, (*a*) yet, if the power be one which it is the duty of the party to execute, he is a trustee for the exercise of the power, and has no discretion whether he will or will not exercise it. Chancery adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interests of those persons for whose benefit he is called upon to execute it. This principle, according to Lord Eldon, pervaded all the cases. (*b*) The equity jurisdiction, in relieving against the defective execution of powers, is exerted in the case of a meritorious consideration in the person applying for aid; and here again the English law and New York statute are the same. The assistance is granted in favor of creditors and *bona fide* purchasers, who rest their claim upon a valuable consideration, and in favor of domestic relatives, whose claims as appointees are founded upon the meritorious considerations of marriage or blood, or where the non-execution arises from fraud. The numerous cases which regulate and prescribe the interference of chancery in aiding and correcting the defective execution of powers, and also in affording relief against the actual execution or fraudulent operation of powers, cover a vast field of discussion; but the subject would lead us too far into detail, and I must content myself with referring the student to the clear and ample digest of them in Sir Edward Sugden's elaborate treatise on the subject. (*c*) We shall conclude this head of inquiry with a brief view of a few other leading points respecting the execution of powers, and which are necessary to be noticed, in

(*a*) 2 P. Wms. 227, note; Tollet *v.* Tollet, ib. 489.

(*b*) Brown *v.* Higgs, 8 Ves. 574; Gibbs *v.* Marsh, 2 Met. 243, 251, 253; [Dominick *v.* Sayre, 3 Sandf. 555.] [It seems that a bond or covenant to execute a power in a particular way is void. Palmer *v.* Locke, 15 Ch. D. 294.]

(*c*) Sugden on Powers, 341–421. In a decision in equity since the edition of Sugden referred to, it was held that equity relieves against the defective execution of a power, only when the defect consists in the want of some circumstances required in the manner of execution, as the want of a seal, or of a sufficient number of witnesses, or where it has been executed by a deed instead of a will. Equity will reform a deed, which, by mistake of a drawer, does not effectuate the intention of the parties. Cockrell *v.* Cholmelly, 1 Russ. & M. 418. But a power to appoint *by will* is badly executed by a *deed*. 1 Story Eq. 185; Bentham *v.* Smith, 1 Cheves, Eq. (S. C.) 33; Lord Eldon, in Reid *v.* Shergold, 10 Ves. 379. And as a general rule it is said that equity will relieve against the defective execution of a power created by a party, but not against the defective execution of a power created by law. Bright *v.* Boyd, 1 Story, 478.

order not to leave the examination of the doctrine far too unfinished.

A power will enable the donee to dispose of a fee, though it contained no words of inheritance, as in the case of a power given by a testator to sell or dispose of lands; and this construction is adopted in favor of the testator's intention. (*d*) * So, * 345 a power to charge an estate, with nothing to restrain the amount, will, in equity, authorize a charge to the utmost value; and, as equivalent to it, a disposition of the estate itself, in trust to sell and divide amongst the objects. (*a*) And, on the other hand, a power to grant or appoint the land will authorize a charge upon it; and a power to sell and raise money implies a power to mortgage. (*b*) If, however, the interest be expressly indicated by the power, a different estate cannot be appointed under it; though, without positive words of restriction, a lesser estate than that authorized may be limited. (*c*) The intention of the donor of the power is the great principle that governs in the construction of powers; and in furtherance of the object in view, the courts will vary the form of executing the power, and, as the case may require, either enlarge a limited to a general power, or cut down a general power to a particular purpose. (*d*) A power to appoint to *relations* extends to all capable of taking within the statute of distributions. This seems to be the only reasonable limit that can be set to a term so indefinite. (*e*) But, on the other hand, a power to appoint to *children* will not authorize an appointment to grandchildren. This is a settled rule; and yet it naturally strikes the mind as a very strict and harsh construction. (*f*)[1]

(*d*) Liefe *v.* Saltingstone, 1 Mod. 189; The King *v.* Marquis of Stafford, 7 East, 521. See *supra*, p. 319, s. p.

(*a*) Wareham *v.* Brown, 2 Vern. 158; Long *v.* Long, 5 Ves. 445.

(*b*) Roberts *v.* Dixall, 2 Eq. Cas. Abr. 668, pl. 19; Lord Macclesfield, in Mills *v.* Banks, 3 P. Wms. 9. A power given by will to raise money out of the rents or profits includes a power to sell and mortgage, if necessary, for the purposes of the trust. Bootle *v.* Blundell, 1 Meriv. 193, 232, 233; 1 Powell on Devises, 284, note by Mr. Jarman; [Conkling *v.* Washington University, 2 Md. Ch. Dec. 497. See 331.]

(*c*) Whitlock's Case, 8 Co. 69, b; Phelps *v.* Hay, MS. App. to Sugden on Powers.

(*d*) Sugden on Powers, 452, 453; Talbot *v.* Tipper, Skinner, 427; Earl of Tankerville *v.* Coke, Mosely, 146; Lord Hinchinbroke *v.* Seymour, 1 Bro. C. C. 395; Bristow *v.* Warde, 2 Ves. Jr. 336. [But see Hale *v.* Pew, 25 Beav. 335.]

(*e*) Sugden on Powers, 514, 515; [Varrell *v.* Wendell, 20 N. H. 431.]

(*f*) The Master of the Rolls, in Alexander *v.* Alexander, 2 Ves. 642; Brudenell & J. 252; Boylan *v.* Boylan, Phil. Eq. (N. C.) 160; Willis *v.* Jenkins, 30 Ga. 167;

[1] A gift to "children" does not include grandchildren. Pride *v.* Fooks, 3 De G.

*346 *We have already seen, (*a*) that by the New York Revised Statutes, no appointment is void for excess, except so far as the appointment is excessive, and the general rule in the English law is the same. It is understood that the execution of a power may be good in part and bad in part, and that the excess only, in the execution of the power, will be void. The residue will be good when there is a complete execution of the power, and only a distinct and independent limitation unauthorizedly added, and the boundaries between the sound part and the excess are clearly distinguishable; as in the case of a power to lease for twenty-one years, and the lease be made for twenty-six years. (*b*)

v. Elwes, 1 East, 442. The general rule seems to be, that the exercise of a power in favor of a *class of persons*, as children, &c., is for the benefit of those living at the time of the appointment. Needham *v.* Smith, 4 Russ. 318. [It has been held that an appointment before the members of the class are ascertained is bad. Blight *v.* Hartnoll, 19 Ch. D. 294, 301.] Though *children*, in the ordinary sense, do not include grandchildren, yet in a will, grandchildren, and even great-grandchildren, may take by the designation of children, when necessary to effectuate a manifest intent. This is the case when the word "children" is used as coextensive with issue, or when there are no children literally to answer the description. Royle *v.* Hamilton, 4 Ves. 437; Wythe *v.* Thurlston, Ambl. 555; Cutter *v.* Doughty, 23 Wend. 522; Ruff *v.* Rutherford, 1 Bailey, Eq. 7; Hallowell *v.* Phipps, 2 Wharton, 376; Dickinson *v.* Lee, 4 Watts, 82; Mowatt *v.* Carow, 7 Paige, 328; Earl of Orford *v.* Churchill, 3 Ves. & B. 59; Phillips's Devisees *v.* Beall, 9 Dana (Ky.), 1; *vide infra*, 419. A devise "to all and every of my grandchildren who shall attain the age of twenty-four years," held void for remoteness. Newman *v.* Newman, 10 Sim. 51.

(*a*) *Vide supra*, 108.

(*b*) Peters *v.* Masham, Fitz. 156; Sir Thomas Clarke, in Alexander *v.* Alexander, 2 Ves. 640; Adams *v.* Adams, Cowp. 651; Commons *v.* Marshall, 7 Bro. P. C. 111. See also *supra*, 106, and the authorities there cited. It is a general rule, that the invalidity of any particular trust, interest, accumulation, or limitation created by will, will not destroy the trust and limitations which are otherwise valid, unless the latter are so mixed up with those that are illegal and void, that it is impossible to sustain the one without giving effect to the other. Chancellor Walworth, in Hawley *v.* James, 5 Paige, 318; Kane *v.* Gott, 24 Wend. 641, 666; [Savage *v.* Burnham, 17 N. Y. 561.] So, if a bond be taken under the common law or under a statute, with a condition in

Sheets *v.* Grubbs, 4 Met. (Ky.) 339; Osgood *v.* Lovering, 33 Me. 464. See Tucker *v.* Stites, 39 Miss. 196. The exception mentioned in the note (*f*) is confirmed by Berry *v.* Berry, 3 Giff. 134.

As to "children" meaning *legitimate* children, *vide* 414, note (*d*), and *In re* Wells' Estate, L. R. 6 Eq. 599; Paul *v.* Children, L. R. 12 Eq. 16; Heater *v.* Van Auken, 1 McCart. (N. J.) 159; [Dorin *v.* Dorin, 7 L. R. H. L. 568; *In re* Kerr's Trusts, 4 Ch. D. 600.] Illegitimate children may, however, take as *personæ designatæ*, or when the context requires it. *Re* Herbert's Trusts, 1 J. & H. 121; Holt *v.* Sindrey, L. R. 7 Eq. 170; Crook *v.* Hill, L. R. 6 Ch. 311.

4. Of the Extinguishment of Powers. — There are some subtle distinctions in the English law relative to the cases in which powers are to be deemed suspended, merged, or extinguished.

If a lease be granted out of the interest of a donee of a power appendant, it cannot be defeated by a subsequent exercise of the power. The lease does not strictly suspend its exercise; but the future operation of the power must be in subordination to the lease, and the estate created by it cannot vest in possession until the previously created lease expires. The donee of the power cannot defeat his own grant. (*c*) Nor can the donee of a power *simply collateral*, suspend or extinguish it by any act of his own. (*d*) But a total alienation of the estate extinguishes * *a power* * 347 *appendant*, or *in gross*; as if a tenant for life, with a power to grant leases in possession, conveys away his life estate, the power is gone; for the exercise of it would be derogatory to his own grant, and to the prejudice of the grantee. (*a*) Even a conveyance of the whole estate, by way of mortgage, extinguishes a power appendant or appurtenant. This is now the received doctrine, according to Mr. Sugden; (*b*) but the opinion of Lord Mansfield, in *Ren* v. *Bulkeley*, (*c*) is more just and reasonable; for why should a mortgage of the life estate, contrary to the evident intention of the parties, affect the power beyond what was necessary to give stability to the mortgage? (*d*) Whether a person having a life estate, with a power collateral or in gross to appoint, can exercise the power after having parted with his life estate, has been made a question. The better opinion would seem to be, that the power is not destroyed, for the estate parted

part good and in part bad, a recovery may be had for a breach of the good. United States *v.* Brown, Gilpin, 155; Polk *v.* Plummer, 2 Humph. (Tenn.) 500. A union of a good with a bad consideration will support a contract. Jarvis *v.* Peck, Hoff. Ch. 479.

(*c*) Goodright *v.* Cator, Doug. 477.

(*d*) 15 Hen. VII. fo. 11 b, translated in App. No. 1 to Sugden on Powers; Co. Litt. 237, a, 265, b; Digges's Case, 1 Co. 174, a; Willis *v.* Shorral, 1 Atk. 474; Sugden on Powers, 50, 67; West *v.* Barney, 1 Russ. & M. 391.

(*a*) Doug. 292. (*b*) Sugden on Powers, 57.

(*c*) Doug. 292.

(*d*) The New York Revised Statutes have placed this subject on just grounds, by declaring that the power of a tenant for life to make leases is not assignable as a separate interest, but is annexed to the estate, and passes with the conveyance of the estate, and a special exception of it extinguishes it. So, a mortgage by the donee of the power does not extinguish it or suspend it. The power is only bound by the mortgage and made subservient to it. Ib. i. 733, sec. 88–91. See also *supra*, 108.

with is not displaced by the exercise of the power; though to avoid doubt, it is usual first to appoint the estate, and then to convey. (*e*) All these various powers, except the last, may
* 348 * be extinguished by a release to one who has an estate of freehold in the land; and, as a general rule (though it has its exceptions), they are extinguished by a common recovery, fine, or feoffment; for those conveyances, according to the forcible expression of Sir Matthew Hale, "ransack the whole estate," and pass or extinguish all rights, conditions, and powers belonging to the land, as well as the land itself. (*a*)

It has also been a question of much discussion, and of some alternation of opinion, whether a power was not merged or absorbed in the fee, in the case of an estate limited to such uses as A. should appoint, *and, in default of appointment, to himself in fee.* The Master of the Rolls, in *Maundrell* v. *Maundrell*, (*b*) held that the power in such a case, followed by a limitation of the fee, must be absorbed by the fee, which includes every power. This seems to be the good sense and reason of the thing, for the separate existence of the power appears to be incompatible with the ownership of the fee. But the weight of authority is decidedly in favor of the conclusion that the power is not extinguished, and may well subsist with and qualify the fee. (*c*) I apprehend that, by the New York Revised Statutes, the power is extinguished in such a case; for it is declared, (*d*) that in all cases where an absolute power of disposition is given, *and*
* 349 *no remainder is limited on the estate * of the grantee of the power*, he takes an absolute fee; and every power of dis-

(*e*) Sugden on Powers, 62–64. In Badham *v.* Mee, 7 Bing. 695, it was held that where the husband took an estate for life under a marriage settlement, with power of appointment to sons, remainder, in default of appointment, to the sons successively in tail, and he became bankrupt, and his lands were conveyed to assignees, a subsequent appointment was void, inasmuch as the power was destroyed, and the remainder took effect.

(*a*) 1 Vent. 228; Sugden on Powers, 66, 67; Bickley *v.* Guest, 1 Russ. & M. 440. The power may be extinguished by a release under the New York Revised Statutes, i. 733, sec. 89; but the capacity to extinguish by fine or feoffment has ceased with those conveyances.

(*b*) 7 Ves. 567.

(*c*) Sir Edward Clere's Case, 6 Co. 17, b; Peacock *v.* Monk, 2 Ves. 567; Lord Eldon, on appeal, in the case of Maundrell *v.* Maundrell, Sugden on Powers, 79–93, [10 Ves. 246.] Sir Edward Sugden discusses the question upon the conflicting authorities with his usual acuteness. *Vide supra*, 51, 52.

(*d*) I. 733, sec. 83, 85.

position is deemed absolute when the grantee is enabled to dispose of the entire fee for his own benefit. This is going, and, I think, very wisely, beyond the existing English rule; for the statute here applies to every case of an absolute power of disposition, without any limitation in default of appointment; whereas the English law is, that though such a power in a will, without any prior limited interest, would give a fee, yet, in conveyances, such a limitation would confer a power merely, and not give an estate in fee. (*a*) The argument is entirely with the New York amendment, and, "in reason and good sense," as the revisers said when the bill was proposed, "there is no distinction between the absolute power of disposition and the absolute ownership. The distinction is dangerous to the rights of creditors and purchasers; and it is an affront to common sense to say, that a man has no property in that which he may sell when he chooses, and dispose of the proceeds at his pleasure."

I have now finished a laborious (though, I fear, much too inadequate) examination of the doctrine of uses, trusts, and powers. They are the foundation of those voluminous settlements to which we, in this country, are comparatively strangers, and which, in practice, run very much into details, embarrassing by the variety and complexity of their provisions. The groundwork of the operation of a family settlement is the conveyance of the fee to a grantee or releasee to uses, who is usually a stranger, and whose functions and interests are generally merely nominal. Then follow the various modified interests in the shape of future uses, which constitute the essential part of the settlement. They are usually limited to the father or husband for life, then to the wife for life, then to the eldest and other sons in succession in tail, with remainder to the daughters, and, on failure of issue, to the right heirs of the settler. The *estate is subject to *350 a variety of charges for family purposes, and acts of ownership become necessary in relation to the estate, and to the objects of the settlement. This 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

(*a*) Sugden on Powers, 96. In Benson *v.* Whittam, 5 Sim. 22, the Vice-Chancellor held that a bequest of dividends of stock to B., to enable him to assist such of the children of C. *as he might find deserving of encouragement*, was not a mere power of appointment, and that no trust was created for the children of C.

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. (*a*)

The doctrine of settlements has thus become, in England, an abstruse science, which is, in a great degree, monopolized by a select body of conveyancers, who, by means of their technical and verbose provisions, reaching to distant contingencies, have rendered themselves almost inaccessible to the skill and curiosity of the profession at large. Some of the distinguished property lawyers have acknowledged that the law of entails, in its present mitigated state, and great comparative simplicity, was even preferable to these executory limitations upon estates in fee. Settlements, with their shifting and springing uses, "obeying, at a remote period, the original impulse, and varying their phases with the change of persons and circumstances," and, with the magic wand of powers, have proved to be very complicated contrivances; and sometimes, from the want of due skill in the artist, they have become potent engines of mischief, planted in the heart of great landed estates. These domestic codes of legislation are usually applied to estates, which necessarily require, under the English law of descents, very extended and complex arrangements, and which can well bear the weight of them. They seem to * 351 be indispensable in opulent communities, to * the convenient and safe distribution of large masses of property, and to the discreet discharge of the various duties flowing from the domestic ties; and the evils are, probably, after all, greatly exaggerated by the zeal and philippics of the English political and legal reformers. (*a*)

(*a*) We have one of these settlements in the case of Hales *v.* Risley, and Lord Ch. J. Pollexfen, in that case, gives another sample of one, and says that they are almost all in that manner. Pollex. 369. In Clements *v.* Paske, 3 Doug. 384, the devise of estates in trust was for the use of the nephew for life, then to his eldest son, and, in default of such issue, to the second, third, and every other son of his nephew successively, in remainder, one after the other, and the heirs male of the bodies of such second, third, and other sons, as they should be in seniority of age and priority of birth; and in default of such male issue, then to the eldest son of another nephew, and so on with like remainders; and in default, &c., remainders to the daughters of the last nephew, and remainder over, &c. Lord Mansfield observed that the will in that case was in strict settlement, which was a form well known, and *always in the same words!*

(*a*) One of them (see the Jurist, i. 447) very extravagantly attempts to illustrate

The Revised Statutes of New York have made great alterations in the law, and some valuable improvements, which we have already noticed under the articles of estates in the expectancy, uses, trusts, and powers; and I presume I need not apologize to the American student for attracting his attention so frequently to the statute law of a particular state. The revision contains the most extensive innovation which has hitherto been the consequence of any single legislative effort upon the common law of the land; and it will deserve and receive the attention of lawyers and statesmen throughout the Union. There is much in the work to recommend it, and there is also cause for apprehension, on account of the depth to which the hand of reform has penetrated, in pursuit of latent and speculative grievances. It ought never to be forgotten that the great body of the people in every country, in their business concerns, are governed more by usages than by positive law. The learning concerning real property, which we have hitherto been considering, appears likewise to be too abstract, and too complicated, to admit, with entire safety, of the compression which has been attempted, by a brief, pithy, sententious style of composition. There is a peculiar and inherent difficulty in the application of the new and dazzling theory of codification to such intricate doctrines which lie wrapped up in principles and refinements, remote from the ordinary speculations of mankind. Brevity becomes obscurity, and a good deal of circumlocution has heretofore been indulged in all *legislative production; *352 and reservations, provisos, and exceptions have been carefully inserted, in order that the meaning of the lawgiver might be generally, and easily, and perfectly understood. This has been the uniform legislative practice in England, from the date of *Magna Charta* down to this day. The intelligence of the great body of the legislature, in any country, cannot well be brought to bear upon a dense mass of general propositions, in all their ties, relations, and dependencies, or be made to comprehend them; and the legislation by codes becomes essentially the legislation of a single individual. When the revisers proposed to abolish "all expectant estates," except such as are enumerated and defined; "and uses and trusts," except such as are specially

the jurisdiction of a court of equity over family estates placed under its protection, by applying to it the appalling inscription which Dante read over the gate leading to the infernal regions — *Lasciate ogni speranza.*

authorized and modified; and "powers as they now exist," and to substitute another system in their stead, they undoubtedly assumed a task of vast and perilous magnitude. In the discharge of their duty they have displayed great industry, intelligence, and ability; and it will not materially impair the credit to which they are entitled for the execution of the work, though it may affect the wisdom of the scheme itself, if some valuable matter should have been omitted, and a good deal of uncertainty and complexity be discovered to exist, and to call hereafter for the repeated exercise of judicial interpretation, and, perhaps, the assumption of judicial legislation. No system of law can be rendered free from such imperfections; and the extent of them will necessarily be enlarged, and the danger greatly increased, when there have been entire and radical innovations made upon the settled modifications of property, disturbing, to their very foundations, the usages and analogies of existing institutions.

LECTURE LXIII.

OF ESTATES IN REVERSION.

A REVERSION is the return of land to the grantor and his heirs, after the grant is over; (*a*) or, according to the formal definition in the New York Revised Statutes, (*b*) it is the residue of an estate left in the grantor, or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised. It necessarily assumes that the original owner has not parted with his whole estate or interest in the land; and, therefore, if he grants land in tail, or for life, or years, he has an interest in the reversion, because "he hath not departed with his whole estate." (*c*) If A. has only a possibility of reverter, as in the case of a qualified or conditional fee at common law, he has no reversion; but such a distinct interest arose, as we have already seen, (*d*) after the conditional fee at common law was, by the statute *de donis*, turned into an estate tail.

The doctrine of reversions is said, by Sir William Blackstone, (*e*) to have been plainly derived from the feudal constitution. It would have been more correct to have said, that some of the incidents attached to a reversion were of feudal growth, such as fealty, and the varying rule of descent between the cases of a reversion arising out of the * original estate, and one * 354 limited by the grant of a third person. Reversion in the general sense, as being a return of the estate to the original owner, after the limited estate carved out of it had determined, must be familiar to the laws of all nations who have admitted of private property in land. The practice of hiring land for a limited time, and paying rent to the owner of the soil (and which is one of the usual incidents to a reversion) was not only known

(*a*) Co. Litt. 142, b.
(*b*) Vol. i. 723, sec. 12.
(*c*) Co. Litt. 22, b.
(*d*) See *supra*, 10, 12.
(*e*) 2 Comm. 175.

to the Roman law, but it was regulated in the code of the ancient Hindoos. (*a*)

The reversion arises by the operation of law and not by deed or will; and it is a vested interest or estate, inasmuch as the person entitled to it has a fixed right of future enjoyment. It is an incorporeal hereditament, and may be conveyed, either in whole or in part, by grant, without livery of seisin. (*b*) A grant of the reversion of an estate, absolutely or by way of mortgage, passes the rights to rents that subsequently became due as incident to the reversion, but not the rents then in arrear. (*c*) Reversions expectant on the determination of estates for years, are immediate assets in the hands of the heir; (*d*) but the reversion expectant on the determination of an estate for life, is not immediate assets during the continuance of the life estate, and the creditor takes judgment for assets *in futuro*. (*e*) If the reversion be expectant on an estate tail, it is not assets during the continuance of the estate tail; and the reason assigned is, that the reversion is of little or no value, since it is in the power of the tenant in tail to destroy it when he pleases. (*f*) But in *Kinaston* v. *Clark*, (*g*) Lord Hardwicke considered it inaccurate to say

* 355 that such * a reversion was not assets; for there was a possibility of its becoming an estate in possession, and the creditor might take judgment against the heir, on that possibility, for assets, *quando acciderint*, and which would operate whenever the heir obtained seisin of the reversion. In the mean time, as it was admitted, the reversion could not be sold, nor the heir compelled to sell it; and when it comes to the possession of the heir, he takes it *cum onere*, subject to all leases and covenants made by the tenant in tail where he had the estate. (*a*)

The reversioner, having a vested interest in the reversion, is

(*a*) Gentoo Code, by Halhed, 153.

(*b*) Litt. sec. 567, 568; Co. Litt. ib.; Co. Litt. 49, a; Doe v. Cole, 7 B. & C. 243. Mr. Preston says it is more usual to pass a reversion by lease and release, or bargain and sale. Preston on Abstracts, ii. 85.

(*c*) Cruise's Dig. tit. 28, c. 1, sec. 65; Birch v. Wright, 1 T. R. 378; Burden v. Thayer, 3 Met. 76.

(*d*) Smith v. Angel, 1 Salk. 354; Villers v. Handley, 2 Wils. 49.

(*e*) Holt, C. J., in Kellow v. Rowden, Carth. 126; Rook v. Clealand, 1 Ld. Raym. 53.

(*f*) 1 Rol. Abr. 269, A. pl. 2; Kellow v. Rowden, Carth. 126; 3 Mod. 253, s. c.

(*g*) 2 Atk. 204; Forrest, MS., cited in Cruise's Dig. tit. Reversion, sec. 26.

(*a*) Symonds v. Cudmore, 4 Mod. 1; Shelburne v. Biddulph, 4 Bro. P. C. 594.

entitled to his action of case for an injury done to the inheritance. (*b*) He is entitled to an action on the case in the nature of waste against a stranger, while the estate is in the possession of the tenant. The injury must be of such a permanent nature as to affect the reversionary right. (*c*) The usual incidents to the reversion, under the English law, are fealty and rent. The former, in the feudal sense, does not exist any longer in this country; but the latter, which is a very * important incident, passes * 356 with a grant or assignment of the reversion. It is not inseparable, and may be severed from the reversion, and excepted out of the grant, by special words. (*a*)

(*b*) Jesser *v.* Gifford, 4 Burr. 2141; [Mott *v.* Shoolbred, 20 L. R. Eq. 22; Jones *v.* Chappell, ib. 539.] *Vide supra*, lect. 55, and New York Revised Statutes, i. 750, sec. 8. A person seised of an estate in reversion or remainder may have an action of waste or trespass for any injury done to the inheritance, notwithstanding any intervening estate for life or years. A reversioner or remainderman may also be admitted to defend as a party to suits against the tenant of the particular estate. New York Revised Statutes, ii. 339, sec. 1, 2. No recovery or judgment unduly had against the tenant of a particular estate, bars the right of the reversioner or remainderman to restitution. Ib. ii. 340, sec. 6, 7.

(*c*) Jackson *v.* Pesked, 1 Maule & S. 234; Randall *v.* Cleaveland, 6 Conn. 328. A stranger doing an injury to the premises may be prosecuted, either by the tenant or reversioner. 1 Saund. 312, note 5. An action on the case for an injury to the land may be brought by the tenant in respect of his possession, and by the reversioner in respect of his inheritance. Jesser *v.* Gifford, 4 Burr. 2141; Ripka *v.* Sergeant, 7 Watts & S. 1. But if the person who does the injury acts under the authority of the tenant, the reversioner cannot sustain an action of *trespass*. Livingston *v.* Mott, 2 Wend. 605.

(*a*) Co. Litt. 144, a, 151, a, b; [Beal *v.* Boston Car Spring Co., 125 Mass. 157.]

LECTURE LXIV.

OF A JOINT INTEREST IN ESTATES.

A JOINT interest may be had either in the title or possession of land. Two or more persons may have an interest in connection in the title to the same land, either as joint tenants or coparceners, or in the possession of the same as tenants in common.

1. **Of Joint Tenants.** — Joint tenants are persons who own lands by a joint title, created expressly by one and the same deed or will. They hold uniformly by purchase. (*a*) It is laid down in the text books as a general proposition, that the estate holden in joint tenancy must be of the same duration or nature, and quantity of interest, whether the estates of the several joint tenants be in fee or in tail, or for life or for years. (*b*) But the proposition must be taken with some explanations. Two persons may have a joint estate for life, with remainder to one of them in fee, and if he who hath the fee first dies, the survivor takes the whole estate for his life. (*c*) So, they may have an estate in joint tenancy for their lives, with several inheritances. (*d*) Lord Coke (*e*) said, that an estate of freehold, and an estate
* 358 * for years, could not stand in jointure; but he admitted that there might be two joint tenants, the one for life, and the other in fee. It is an acknowledged principle, (*a*) that where the fee is limited, by one and the same conveyance, to two persons, and to the heirs of one of them, it is a good jointure. They are, in such a case, joint tenants of a life estate, with a remainder in fee to one of them. It is another general rule, that the estates of the joint tenants must be created at one and the same time, as

(*a*) 2 Bl. Comm. 181; Litt. sec. 304.
(*b*) 2 Bl. Comm. 181; 2 Woodd. Lec. 127.
(*c*) Litt. sec. 285. (*d*) Ib. sec. 283.
(*e*) Co. Litt. 188, a.
(*a*) Wiscot's Case, 2 Co. 69; Litt. sec. 285.

well as by one and the same title. (*b*) But this rule has its exceptions, and it does not apply to the learning of uses and executory devises. If a person makes a feoffment in fee to the use of himself for life, and of such wife as he should afterwards marry, for their joint lives, he, and the wife whom he should afterwards marry, are joint tenants, though they come to their estates at several times. The estate of the wife is in abeyance until the marriage, and then it has relation back, and takes effect from the original time of creation. (*c*) So, if there be a devise or limitation, to the use of the children of A., the estate may vest in joint tenancy in one, and afterwards in other children, as they progressively are born. (*d*)

* From this thorough and intimate connection between * 359 joint tenants results the principle, that the beneficial acts of one of them respecting the estate, will enure equally to the advantage of all. (*a*) One joint tenant may distrain for rent, and appoint a bailiff for that purpose, unless the other expressly dissents. (*b*) Each of them may enter upon the land, and exercise at his pleasure every reasonable act of ownership; yet one joint tenant is liable to his companion for any waste committed upon the estate, and they are severally accountable to each other for the rents and profits of the joint estate. (*c*) Under these regula-

(*b*) 2 Bl. Comm. 181; Woodgate *v.* Unwin, 4 Sim. 129.

(*c*) Co. Litt. 188, a; 1 Co. 101; 2 Bl. Comm. 182.

(*d*) Preston on Abstracts, ii. 67. Mr. Hargrave, in note 13 to Co. Litt. 188, a, intimates, that the creation of an estate in joint tenancy, in several tenants, to commence at different times, can only be in cases of limitations by way of use, in which the estate is vested in the feoffee, till the future use comes *in esse*. But the uses may be raised by common-law conveyances, as fine or feoffment, and the limitation may be declared by devise, though it be not by way of use. The distinction was taken in Sammes's case (13 Co. 54), between a conveyance at common law and one to uses; and it was said that joint tenants must be seised to a use when they come to the estate at several times. See also Aylor *v.* Chep, Cro. J. 259; Sussex *v.* Temple, 1 Ld. Raym. 310; Oates *v.* Jackson, Strange, 1172; Stratton *v.* Best, 2 Bro. C. C. 233. Lord Thurlow, in the last case, would seem to have discarded this very technical distinction; for he declared, that whether the settlement before him was to be considered as the conveyance of a legal estate, or a deed to uses, made no difference, and the estate would be a joint tenancy, though vested at different times.

(*a*) 2 Bl. Comm. 182. (*b*) Robinson *v.* Hofman, 4 Bing. 562.

(*c*) The statutes of Westm. II. c. 22, and 4 Anne, c. 16, on this subject, have doubtless been adopted in this country, wherever the English doctrine of joint tenancy exists. Tucker's Blackstone, ii. 184, note; Laws of New York, sess. 10, c. 6, sess. 11, c. 4; Revised Statutes of Missouri, 1835, p. 37; Lomax's Digest of the Laws concerning Real Property in the United States, i. 481; Revised Statutes of New

tions, joint tenants are regarded as having one entire and connected right; and they must join and be joined, in all actions respecting the estate. (*d*)

Joint tenants are said to be seised *per my et per tout*, and each has the entire possession, as well of every parcel as of the whole. They have each (if there be two of them, for instance) an undivided moiety of the whole. (*e*) A joint tenant, in respect to his companion, is seised of the whole; but for the purposes of *360 alienation, and to forfeit, * and to lose by default in a *præcipe*, he is seised only of his undivided part or proportion. (*a*)

The doctrine of survivorship, or *jus accrescendi*, is the distinguishing incident of title by joint tenancy; and, therefore, at common law, the entire tenancy or estate, upon the death of any of the joint tenants, went to the survivors, and so on to the last survivor, who took an estate of inheritance. The whole estate or interest held in joint tenancy, whether it was an estate in fee, or for life, or for years, or was a personal chattel, passed to the last survivor, and vested in him absolutely. It passed to him free, and exempt from all charges made by the deceased cotenant. (*b*) The consequence of this doctrine is, that a joint tenant cannot devise his interest in the land; for the devise does not take effect

Jersey, 1847, p 46. The New York Revised Statutes, i. 750, sec. 9, have given not only an action of account, according to the statute of 4 Anne, but an action for money had and received, as between joint tenants and tenants in common. So, in Massachusetts, *assumpsit*, as well as account, will lie, if one joint tenant, or tenant in common, receives more than his share of the profits. Brigham *v.* Eveleth, 9 Mass. 538; [Dickinson *v.* Williams, 11 Cush. 258; Shepard *v.* Richards, 2 Gray, 424. See also Gowen *v.* Shaw, 40 Me. 56; Moses *v.* Ross, 41 id. 360; Blanton *v.* Vanzant, 2 Swan (Tenn.), 276;] Miller *v.* Miller, 7 Pick. 133. In McMurray *v.* Rawson, 3 Hill, 59, an action *of account* was brought as between partners in trade, but it was regarded as an obsolete action, difficult and dilatory, and so many impediments lay in its way, that the experiment of reviving this action will probably never again be made. Baron Alderson, in 13 M. & W. 20, said that the action of account was so inconvenient, that it has long been discontinued, and a court of equity preferred.

(*d*) Litt. sec. 311. (*e*) Litt. sec. 288; Co. Litt. 186, a.

(*a*) Co. Litt. 186, a. According to Mr. Ram, in his Outlines of Tenure and Tenancy, 149, 150, 151, the only reasonable explanation of the common phrase that a joint tenant is seised *per my et per tout*, or by the moiety or half, and by all, is that given in the text; and he says it is the only way in which it ought to be understood. Mr. Preston says to the same effect, that joint tenants have the whole for the purpose of tenure and survivorship, while each has only a particular part for the purpose of alienation. Preston on Estates, i. 136.

(*b*) Litt. sec. 280, 281, 286; Co. Litt. ib.

until after the death of the devisor; and the claim of the surviving tenant arises in the same instant with that of the devisee, and is preferred. (*c*) If a joint tenant makes a will, and he then becomes solely seised by survivorship, the will does not operate upon the title so acquired without the solemnity of republication. (*d*) The same instantaneous transit of the estate to the survivor, bars all claim of dower on behalf of the widow of the deceased joint tenant. (*e*) But the charges made by a joint tenant, *and judgments against him, will bind his *361 assignee, and him as survivor. (*a*)

The common law favored title by joint tenancy, by reason of this very right of survivorship. Its policy was averse to the division of tenures, because it tended to multiply the feudal services, and weaken the efficacy of that connection. (*b*) But in *Hawes* v. *Hawes*, (*c*) Lord Hardwicke observed, that the reason of that policy had ceased with the abolition of tenures; and he thought, that even the courts of law were no longer inclined to favor them; and at any rate, they were not favored in equity, for they were a kind of estates that made no provision for posterity. As an instance of the equity view of the subject, we find that the rule of survivorship is not applied to the case of money loaned by two or more creditors on a joint mortgage. (*d*) The right of survivorship is also rejected in all cases of partnerships, for it would operate very unjustly in such cases. (*e*) In this country, the title by joint tenancy is very much reduced in extent, and the incident of survivorship is still more extensively destroyed, except where it is proper and necessary, as in the case of titles held by trustees.

In New York, as early as 1786, estates in joint tenancy were abolished, except in executors, and other trustees, unless the estate was expressly declared, in the deed or will creating it, to pass in joint tenancy. The New York Revised Statutes (*f*) have

(*c*) Co. Litt. 185, b; 1 Blacks. 476.

(*d*) Swift *v.* Roberts, 3 Burr. 1488.

(*e*) See *supra*, 88. In Ohio, it was held that the *jus accrescendi* does not exist, to the exclusion of the right of dower, in the widow of the joint tenant first dying, and the law is the same in Virginia. 1 Revised Code, c. 98.

(*a*) Preston on Abstracts, ii. 65.

(*b*) Holt, Ch. J., in Fisher *v.* Wigg, 1 Salk. 391. (*c*) 1 Wils. 165.

(*d*) Lord Hardwicke, in Rigden *v.* Vallier, 2 Ves. 258; 3 Atk. 731; Randall *v.* Phillips, 3 Mason, 378.

(*e*) Lake *v.* Craddock, 3 P. Wms. 158.

(*f*) Vol. i. 727, sec. 44.

reënacted the provision, and with the further declaration, that every estate vested in executors or trustees, as such, shall be held in joint tenancy. The doctrine of survivorship incident to joint tenancy (excepting, I presume, estates held in trust), is
* 362 * abolished, in the states of Connecticut, Pennsylvania, (*a*) Virginia, Kentucky, Indiana, Missouri, Mississippi, Tennessee, North Carolina, and Alabama. (*b*) In the states of Maine, New Hampshire, Massachusetts, Rhode Island, Vermont, New Jersey, Michigan, Illinois, and Delaware, joint tenancy is placed under the same restrictions as in New York; and it cannot be created but by express words; and, when lawfully created, it is presumed that the common-law incidents belonging to that tenancy follow. The English law of joint tenancy does not exist at all in Ohio and Louisiana, and it exists in full force in Georgia, Mississippi, and Maryland. (*c*)

The destruction of joint tenancies, to the extent which has been stated, does not apply to conveyances to husband and wife, which, in legal construction, by reason of the unity of husband and wife, are not strictly joint tenancies, but conveyances to one person. They cannot take by moieties, but they are both seised of the entirety, and the survivor takes the whole; and, during their joint lives, neither of them can alien so as to bind the other. (*d*) If the husband be attainted, his attainder does not

(*a*) The Act of Pennsylvania, of 31st March, 1812, and the Revised Statutes of Vermont, 1839, expressly except trust estates; and the Act of Georgia, of 1784, expressly excepts the case of partners in trade.

(*b*) [Parsons *v.* Boyd, 20 Ala. 112; Dewey *v.* Lambier, 7 Cal. 347; Lowe *v.* Brooks, 23 Geo. 325.] In South Carolina, the right of survivorship in joint tenancy is not abolished. The acts of 1734, 1748, and 1791 recognize and regulate it. But the act of 1784 allowed joint tenants to devise their estates, and in that way destroy survivorship. It is understood that survivorship, in cases of joint tenancy, has since been abolished.

(*c*) Griffith's Law Register, h. t.; 1 North Carolina Revised Statutes, 258; Territorial Act of Michigan, March 2, 1821; Revised Laws of Illinois, ed. 1833, p. 130; Serjeant *v.* Steinberger, 2 Ohio, 305; Massachusetts Statute of 1785, c. 62; Mass. Revised Statutes, 1836, part 2, tit. 1, c. 59, sec. 10, 11; In the Plymouth colony, in 1643, it was enacted by the General Court, that survivorship should not apply to joint tenants, but the heirs of the joint tenant dying should take his proportion of the estate. Baylie's Historical Memoir, ii. 111; Plymouth Colony Laws, ed. 1836, p. 75. This is probably the earliest legislative interference on record with the doctrine of survivorship.

(*d*) 2 Bl. Comm. 182; Doe *v.* Parratt, 5 T. R. 652; Ross *v.* Garrison, 1 Dana, (Ky.), 87; Rogers *v.* Grider, ib. 242; Taul *v.* Campbell, 7 Yerg. 319; [Wright *v.* Saddler, 20 N. Y. 320.] See *supra*, ii. 132.

affect the right of the wife, if she survive him; (*e*) nor is such an estate, so held * by the husband and wife, affected * 363 by the statutes of partition. (*a*) If an estate be conveyed expressly in joint tenancy, to a husband and wife, and to a stranger, the latter takes a moiety, and the husband and wife, as one person, the other moiety. (*b*) But if the husband and wife had been seised of the lands as joint tenants before their marriage, they would continue joint tenants afterwards, as to that land, and the consequences of joint tenancy, such as severance, partition, and the *jus accrescendi*, would apply. (*c*) It is said, however, to be now understood, that husband and wife may, by express words, be made tenants in common by a gift to them during coverture. (*d*)

Joint tenancy may be destroyed by destroying any of its constituent unities except that of time. If A. and B. be joint tenants, and A. conveys his joint interest, being his moiety of the estate, to C., the joint tenancy is severed, and turned into a tenancy in common, as between B. and C., for they hold under different conveyances. So, if A., B., and C. were joint tenants, and A. conveyed his joint interest to D., the latter would be a tenant in common of one third, and B. and C. continue joint tenants of the other * two thirds. (*a*) The same con- * 364 sequence would follow, if one of three joint tenants was to release his share to one of his companions; there would be a

(*e*) Co. Litt. 187, b.

(*a*) Thornton *v.* Thornton, 3 Rand. (Va.) 179. Mr. Ram, in his Outlines of Tenure and Tenancy (170–174), differs from all the great property lawyers, and undertakes to establish, by able and subtle arguments, that husband and wife are joint tenants; for their tenancy by entireties is a species of joint tenancy. They are seised *per tout*, but not *per my*. In the former sense, their persons are *several*, and in the latter *one* only. They are joint tenants, and tenants by entireties, because each is seised *per tout;* and they are called tenants by entireties to distinguish them from the joint tenants seised *per my* and *per tout*. This ingenious writer has pushed the subject into unprofitable refinements.

(*b*) Litt. sec. 291; Co. Litt. 187, b; Lord Kenyon, 5 T. R. 654; Shaw *v.* Hearsey, 5 Mass. 521; Jackson *v.* Stevens, 16 Johns. 110; Thornton *v.* Thornton, 3 Rand. 179; Den *v.* Hardenbergh, 5 Halst. 42. See ii. lect. 28, sec. 1.

(*c*) Co. Litt. 187, b; Moody *v.* Moody, Amb. 649. [See further, Baillie *v.* Treharne, 17 Ch. D. 388.]

(*d*) Preston on Abstracts, ii. 41; ib. on Estates, i. 132; [Fladung *v.* Rose, 58 Md. 13; Meeker *v.* Wright, 76 N. Y. 262. In support of the general rule, see Marburg *v.* Cole, 49 Md. 402; Hulett *v.* Inlow, 57 Ind. 412; s. c. 26 Am. R. 64 and note; Bertle *v.* Nunan, 92 N. Y. 152.]

(*a*) Litt. sec. 292, 294.

tenancy in common as to that share, and the jointure would continue as to the other two parts. (*b*) The proper conveyance between joint tenants is a release; and each has the power of alienation over his *aliquot* share, and of charging it with his individual debts. (*c*) Joint tenants may also sever the tenancy voluntarily by deed, or they may compel a partition by writ of partition, or by bill in equity. It is to be presumed that the English statutes of 31 and 32 Hen. VIII. have been generally reënacted or adopted in this country, and probably with increased facilities for partition. They were reënacted in New Jersey, in 1797, and in Virginia in their revised code, (*d*) and in New York, the 6th February, 1788; and the New York Revised Statutes (*e*) have made further and more specific and detailed provisions for the partition of lands, held either in joint tenancy or in common, and when one or more of the parties shall have estates of inheritance, or for life or lives, or for years; and they have given equal jurisdiction over the subject to the courts of law and of equity. The proceeding is commenced at law by partition, and in chancery by petition or bill. (*f*) In Massachusetts and Maine, the writ of partition at the common law is not only given, but partition may be effected by petition without writ. (*g*)

(*b*) Litt. sec. 304. A sole demise of one joint tenant in ejectment severs the joint tenancy, and entitles the lessor to a recovery for his proportion. Bowyer *v.* Judge, 11 East, 288.

(*c*) Remmington *v.* Cady, 10 Conn. 44.

(*d*) Vol. i. c. 98. (*e*) Vol. ii. 315–332.

(*f*) In Connecticut, joint tenants, tenants in common or coparceners, may be compelled to partition by writ; Stat. 1838, p. 392; and in New Jersey by writ as at common law, and by bill in chancery, and by commissioners duly appointed. Revised Statutes of New Jersey, 1847. Under the New York statute, the proceeding in partition cannot be instituted but by a party who has an estate entitling him to immediate possession. Brownell *v.* Brownell, 19 Wend. 367. The wife must be made a party to bind her interest. Co. Litt. 71, a; Allinant on Part. 64. Either party is entitled as a matter of right to a partition, however inconvenient it may be. If a fair partition be impracticable by metes and bounds, the court may assign the use of the property to each tenant for alternate periods, or they may appoint a receiver, and have the profits divided in just proportion, or they may direct a sale of the premises in their discretion, as being the most easy and practicable disposition of the right of the tenants. Smith *v.* Smith, 1 Hoff. Ch. 506.

(*g*) Mussey *v.* Sanborn, 15 Mass. 155; Cook *v.* Allen, 2 id. 462; Act of Maine, 1821. The petition in Massachusetts may be addressed to the Court of Common Pleas, or the Supreme Judicial Court. The Probate Court may also award partition as between heirs and devisees. The course of proceeding on petition is minutely

The jurisdiction of chancery in awarding partition is well established in England, by a long series of decisions; and it has been found, by experience, to be a jurisdiction of great public convenience. (*h*) But a court of equity does not interfere unless the title be clear, and never where the title is denied or suspicious, until the party seeking a partition * has had an * 365 opportunity to try his title at law. (*a*) The same principle

detailed. That mode cannot be maintained by one who has only a remainder or reversion, nor can a tenant for any term under thirty years maintain the petition against a tenant of the freehold. After the return of the commissioners who make a partition is confirmed, the judgment is that the partition be effectual forever, and mortgages and other liens as against part owners fasten on their assigned shares. Mass. Revised Statutes, 1836, part 3, tit. 3, c. 103. In Connecticut, New Jersey, Ohio, Illinois, and Georgia, and probably in most of the other states, partition of lands in joint tenancy, tenancy in common or coparcenary, may be effected by petition to the courts of law. And in Connecticut, the Court of Probate has jurisdiction to order partition in the case of minors, and to order a sale of the real estates of minors for reasonable cause. Statutes of Connecticut, 1838, pp. 331, 392; Statutes of Ohio, 1831, p. 254; Revised Laws of Illinois, 1833; Prince's Digest of the Statutes of Georgia, ed. 1837, p. 541. In Indiana, courts of law and equity have concurrent jurisdiction in partition. Statute, 1831. This is probably the case in all the states where courts of equity are established. A very easy mode of partition, by petition to the Circuit Court, is provided in Missouri. Revised Statutes, 1835. New Jersey, in 1797, embodied the substance of the English statutes of 31 and 32 Hen. VIII. It was the ancient doctrine under the statutes of Hen. VIII. that no persons could be made parties to a writ of partition, or be affected by it, but such as were entitled to the present possession of their shares in severalty; they must be joint tenants and tenants in common in their own or their wives' right, or tenants for life and years. This is still the law in New Jersey. Stevens *v.* Enders, 1 Green, 271. But the statute provisions in some parts of this country make the operation of the partition more extensive. By the New York statute (New York Revised Statutes, ii. 318, 319, 322, sec. 5, 6, 15, 35), tenants by the curtesy, tenants in dower, if the dower has not been admeasured, and persons entitled to the reversion or remainder, after the termination of any particular estate, and every person, who, by any contingency contained in any devise, grant, or otherwise, may be entitled to any beneficial interest therein, whether in possession or otherwise, may be made parties to the partition. In Maine, the owner of an equity of redemption in possession, and one interested in the estate, and having a right of entry, though out of possession, may have a writ of partition. Call *v.* Barker, 3 Fairf. 320. So, in the bill reported by the revisers of the Pennsylvania Code, in January, 1835, every remainderman or reversioner may be made a codefendant with the tenant of the particular estate. The statute provisions on the subject in this country are distinguished for the extent and minuteness of their regulation.

(*h*) Harg. note 23 to Co. Litt. lib. 3; Calmady *v.* Calmady, 2 Ves. Jr. 570; Agar *v.* Fairfax, 17 Ves. 533; Baring *v.* Nash, 1 Ves. & B. 551. In England, by statute of 3 & 4 Wm. IV. c. 27, the writ of partition is abolished, and the only mode of enforcing a partition is by bill in equity.

(*a*) Bishop of Ely *v.* Kenrick, Bunb. 322; Cartright *v.* Pultney, 2 Atk. 380; Bliman *v.* Brown, 2 Vern. 232.

has been acted upon in the courts of equity in this country. (*b*) The New York Revised Statutes (*c*) have prescribed to the courts of law and the Court of Chancery, in respect to partition, that whenever there shall be a denial of cotenancy, an issue shall be formed, and submitted to a jury to try the fact; and the respective rights of the parties are to be ascertained and settled, before partition be made, or a sale directed.

A final judgment or decree, upon a partition at law, under the New York Revised Statutes, binds all parties named in the proceedings, and having at the time any interest in the premises divided, as owners in fee, or as tenants for years; or as entitled to the reversion, remainder, or inheritance, after the termination of any particular estate; or as having a contingent interest therein, or an interest in any undivided share of the premises, as tenants for years, for life, by the curtesy, or in dower. (*d*) But the judgment does not affect persons having claims as tenants in dower, by the curtesy, or life, in the whole of the premises subject to the partition. (*e*) It is likewise provided, in respect to

(*b*) Wilkin *v.* Wilkin, 1 Johns. Ch. 111; Phelps *v.* Green, 3 id. 302; [Straughan *v.* Wright,] 4 Rand. 493; Martin *v.* Smith, Harper, Eq. (S. C.) 106. In proceedings by petition for a partition of lands held in common, the application must show a *seisin and actual possession*. A disseisin, or an adverse possession, destroys the common possession, and bars a suit for a partition, so long as the ouster continues. Clapp *v.* Bromagham, 9 Cowen, 530; [Adams *v.* Ames Iron Co., 24 Conn. 230.]

(*c*) Vol. ii. 320, sec. 18; ib. 329, sec. 79. [See Groves *v.* Groves, 3 Sneed, 187.]

(*d*) A judgment in partition establishes the title and concludes the parties. Clapp *v.* Bromagham, 9 Cowen, 569; Mills *v.* Witherington, 2 Dev. & Bat. 434. There may be a partition of a mere equitable estate. Hitchcock *v.* Skinner, 1 Hoff. Ch. 21.

(*e*) New York Revised Statutes, ii. 322, sec. 35, 36; ib. 330, sec. 84. In cases of actual partition, and if the husband be alive, the wife need not be a party to the suit in partition, and her inchoate right of dower will attach upon that part of the premises which shall be set off to him in severalty. Her right of dower cannot in any case be barred by a decree in a partition suit to which she was not a party; but if she be a party, the dower may be assigned to her in severalty, and if a sale of the premises be decreed, it would seem to be the opinion of Chancellor Walworth, that her contingent right of dower would be barred by the sale, and the purchaser will obtain a perfect title discharged of the claim of the dower. Wilkinson *v.* Parish, 3 Paige, 653. I presume, however, that in such a case some provision would be made out of the proceeds of the sale for the eventual consummation of her dower. If her contingent right of dower be thus barred by a sale without her consent, it must arise from the operation of the proceedings in partition as authorized by the New York Revised Statutes, ii. 218, sec. 5, 6; ib. 323, sec. 88, 39; ib. 325, 326, sec. 50–54. In Jackson *v.* Edwards, 7 Paige, 386; s. c. 22 Wend. 498, it was held that in proceeding in partition, the wife's inchoate right of dower, whether she be an infant or adult, in the undivided share of her husband, would (she being a party to the proceeding) be devested

the exercise of equity jurisdiction, in the case of partition, that if it should appear that equal partition cannot be made without prejudice to the rights and interests of some of the parties, the court may decree compensation to be made by one party to the other, for equality of partition, *according to the *366 equity of the case. (*a*) This is the rule in equity, independent of any statute provision, when equality of partition cannot otherwise be made. (*b*)

2. **Coparceners.** — An estate in *coparcenary* always arises from descent. At common law, it took place when a man died seised of an estate of inheritance, and left no male issue, but two or more daughters, or other female representatives in a remoter degree. In this case, they all inherited equally as coheirs in the same degree, or in unequal proportions, as coheirs in different degrees. (*c*) They have distinct estates, with a right to the possession in common, and each has a power of alienation over her particular share. Coparceners, in like manner as joint tenants, may release to each other, and if one of them conveys to a third person, the alienee and the other coparceners will be tenants in common, though the remaining coparceners, as between themselves, will continue to hold in coparcenary. (*d*)

Coparceners resemble joint tenants in having the same unities

by a sale under a judgment or decree, so as to protect the purchaser under the sale. All future estates, vested or contingent, may be sold under a judgment or decree in partition, and the court will ascertain and protect the value of the dower or other future and contingent estates thus affected by the judgment or decree, and order it to be deducted from the proceeds of the sales. And if some of the tenants have made improvements on the common lands, they are entitled to their full shares of the land as it would be estimated without them. In Jackson *v.* Edwards, above cited, it was left a doubtful question in the court of errors, whether the inchoate right of dower in lands sold under a decree in partition, would be barred in law by the sale. If practicable, the shares allotted to them should include their improvements, and if not, and the improvements in whole or in part are allotted to others, allowance ought to be made for them. Borah *v.* Archers, 7 Dana (Ky.), 177; Hitchcock *v.* Skinner, 1 Hoff. Ch. 21.

(*a*) New York Revised Statutes, ii. 330, sec. 83.

(*b*) Clarendon *v.* Hornby, 1 P. Wms. 446. In Pennsylvania, on partition of an intestate's estate under a decree of the orphan's court, the eldest son and his alienee are entitled to the first choice of the estate at a valuation, when it cannot be advantageously divided among the heirs. A right of choice is given to the sons successively, and their lineal descendants, by statute of 1832. Ragan's Estate, 7 Watts, 488.

(*c*) Litt. sec. 241, 242.

(*d*) Preston on Estates, i. 138.

of title, interest, and possession. (*e*) The seisin of one coparcener is generally the seisin of the others; and the possession of one is the possession of all, except in cases of actual ouster. But they differ from joint tenants in other respects in a most material degree. They are said to be seised like joint tenants *ver my et per tout;* and yet each parcener has a divisible interest; and the doctrine of survivorship does not apply to them. The shares of the partners descend severally to their respective heirs. They may sever their possession, and dissolve the estate in coparcenary, by consent or by writ of partition at common law. The common-law learning of partition, in respect to parceners, is displayed at large by Lord Coke. (*f*) He calls it a * 367 "cunning learning;" and it is replete with * subtle distinctions and antiquated erudition. The statute of 8 and 9 Wm. III. c. 31, prescribed an easier method of carrying on the proceedings on a writ of partition than that which was used at common law; and this, or a still simpler method, without the expense of a writ of partition, has been generally adopted in this country. By the New York Revised Statutes, (*a*) persons who take by descent under the statute, if there be more than one person entitled, take as tenants in common, in proportion to their respective rights; and it is only in very remote cases, which can scarcely ever arise, that the rules of the common-law doctrine of descent can apply. As estates descend in every state to all the children equally, there is no substantial difference left between coparceners and tenants in common. The title inherited by more persons than one, is, in some of the states, expressly declared to be tenancy in common, as in New York and New Jersey: and where it is not so declared, the effect is the same; and the technical distinction between coparcenary and estates in common may be considered as essentially extinguished in the United States. (*b*)

(*e*) Parceners have the same remedy in equity for an account as against each other for their share of rents and profits, as joint tenants and tenants in common, though they are not mentioned in the statute of 8 and 4 Anne. This results from the equity cases prior to the statute, and the manifest reason of the thing. 1 Eq. Cas. Abr. tit. Account, A. 1, note; Drury *v.* Drury, 1 Rep. in Chan. 49; O'Bannon *v.* Roberts, 2 Dana, 54.

(*f*) Co. Litt. tit. Parceners, 163–175. (*a*) I. 753, sec. 17.

(*b*) In Virginia, the statute of descents calls all the heirs, male as well as female, parceners.

3. **Tenants in Common.** — Tenants in common are persons who hold by unity of possession; and they may hold by several and distinct titles, or by title derived at the same time, by the same deed or descent. In this respect the American law differs from the English common law. This tenancy, according to the common law, is created by deed or will, or by change of title from joint tenancy or coparcenary, or it arises in many cases by construction of law. (*c*) In this country, it may be created by descent, as well as by deed or will; and whether the estate be created by act of the party or by descent, in either case tenants in common are deemed to *have several and dis- *368 tinct freeholds; for that circumstance is a leading characteristic of tenancy in common. Each tenant is considered to be solely or severally seised of his share. As estates in joint tenancy are so much discouraged by the statute laws of this country, and the doctrine of survivorship, in so many of the states, exploded, even where joint tenancy, with its other unimportant incidents, may continue to exist, the many questions in the books, arising upon the construction of the words of a deed or will, operating to create the one or the other tenancy, become comparatively unimportant.

The conveyance of the undivided share of an estate in common is made in like manner as if the tenant in common was seised of the entirety. (*a*) But one joint tenant, or tenant in common, cannot convey a distinct portion of the estate by metes and bounds, so as to prejudice his cotenants or their assignees, even though it may bind him by way of estoppel. As against the cotenants, such a deed is inoperative and void. (*b*) If tenants in

(*c*) Litt. sec. 292, 294, 298, 302; 2 Bl. Comm. 192; Preston on Abstracts, ii. 75, 76.

(*a*) Preston on Abstracts, ii. 77; [Green *v.* Arnold, 11 R. I. 364.]

(*b*) Bartlett *v.* Harlow, 12 Mass. 348; Peabody *v.* Minot, 24 Pick. 329; Duncan *v.* Sylvester, 24 Me. 482; Mitchell *v.* Hazen, 4 Conn. 495; Griswold *v.* Johnson, 5 id. 363; Jewett *v.* Stockton, 8 Yerg. 492; [Johnson *v.* Stevens, 7 Cush. 431; Scott *v.* State, 1 Sneed, 629; Great Falls Co. *v.* Worster, 15 N. H. 412, 449.] In Lessee of White *v.* Sayre, 2 Ohio, 110, the majority of the court held that a tenant in common could lawfully convey *a part* of his undivided estate by specific bounds; but it was admitted that the point was attended with considerable difficulty, by reason of the injurious consequences of such a sale to the cotenant; and Judge Burnet, who dissented, went at large into the question. The decision in Duncan *v.* Sylvester directly overrules this case. So again, in E. Prentiss's Case, 7 Ohio, pt. 2, p. 129, the law was considered to be settled in Ohio, that a tenant in common could convey a part of his

common join in a lease, it is, in judgment of law, the distinct lease of each of them; for they are separately seised, and there is no privity of estate between them. They may enfeoff or convey to each other, the same as if they dealt with a stranger. (*c*) They are deemed to be seised *per my*, but not *per tout;* and, consequently, they must sue separately in actions that savor of the realty. But they join in actions relating to some entire
* 369 and indivisible thing, and in actions of trespass * relating to the possession, and in debt for rent, though not in an avowry for rent. (*a*) The ancient law raised this very artificial distinction, that tenants in common might deliver seisin to each other, but they could not convey to each other by release. A joint tenant could not enfeoff his companion, because they were both actually seised, but for that very reason they might release to each other; whereas, on the one hand, tenants in common might enfeoff each other, but they could not release to each other, because they were not jointly seised. (*b*) Nothing contributes more to perplex and obscure the law of real property than such idle and unprofitable refinements.

The incidents to an estate in common are similar to those applicable to joint estates. The owners can compel each other, by the like process of law, to a partition, and they are liable to each other for waste, and they are bound to account to each other for a due share of the profits of the estate in common. (*c*)

undivided interest in the whole land, or his whole undivided interest in a part of the land. *x*[1]

(*c*) Bro. tit. Feoffment, pl. 45; Heatherly *v.* Weston, 2 Wils. 232.

(*a*) Litt. sec. 311, 314; Co. Litt. ib.; Rehoboth *v.* Hunt, 1 Pick. 224; Decker *v.* Livingston, 15 Johns. 479. [See Stevenson *v.* Cofferin, 20 N. H. 150; Webber *v.* Merrill, 34 N. H. 202; Tucker *v.* Campbell, 36 Me. 346; Wall *v.* Hinds, 4 Gray, 256; Tripp *v.* Riley, 15 Barb. 333; Marshall *v.* Moseley, 21 N. Y. 280.]

(*b*) Bro. tit. Feoffment, pl. 45; Butler's note, 80, to Co. Litt. 193, a; [Rector *v.* Waugh, 17 Mo. 13, 28.]

(*c*) The action of waste was given as between joint tenants and tenants in com-

x[1] The better law seems to be that a cotenant may convey his own interest with, and perhaps also without, the assent of his cotenants, and that a deed by metes and bounds operates to convey the grantor's interest in the part conveyed. Hartford, &c. Ore Co. *v.* Miller, 41 Conn. 112; Goodwin *v.* Keney, 49 Conn. 563; Worthington *v.* Staunton, 16 W. Va. 208; Lyman *v.* Railroad, 58 N. H. 384; Crook *v.* Vandevoort, 18 Neb. 505. But such a conveyance will neither operate to convey the title nor to destroy any other rights of the grantor's cotenants. Tainter *v.* Cole, 120 Mass. 162; Marks *v.* Sewall, ib. 174; Sewell *v.* Holland, 61 Ga. 608. See further, Earles *v.* Meaders, 1 Baxt. 248; Stevens *v.* Town of Norfolk, 46 Conn. 227.

The mere occupation of the premises by one joint tenant, or tenant in common, would not, of itself, at common law, have entitled his cotenant to call him to an account. He must have stood in the light of a bailiff or receiver, in order to be rendered responsible. (*d*) But the statute of 4 Anne, c. 16, rendered joint tenants and tenants in common liable in account as bailiffs for receiving more than their just share; and this provision was reënacted in New York, in 1788, and is now incorporated into the Revised Statutes. (*e*) It is to be presumed, from the reasonableness of the provision, that it has been introduced, in substance, into the general law of this country. (*f*) *y*[1]

*The possession of one tenant in common is the possession of the others, and the taking of the whole profits by one does not amount to an ouster of his companions. But if one actually ousts the other, or affords, by his acts, sufficient ground for a jury to presume an ouster, the one that is ousted will be driven to his action of ejectment. (*a*) *y*[1] So, one tenant in common *370

mon, by the statute of West. II., c. 22, and this is the statute law in New York (New York Revised Statutes, ii. 334), and is doubtless either the statute or the received common law in every part of the United States. [Shiels *v.* Stark, 14 Geo. 429.] A court of equity will likewise interfere by injunction to prevent destructive or malicious waste by either party. Twort *v.* Twort, 16 Ves. 128. As a general rule, one cotenant is not responsible to another for permissive waste, except in the special cases of contribution for repairs. But if one tenant in common suffers the common property to be destroyed by his negligence, he is answerable to his cotenants for their proportions of the loss. Chesley *v.* Thompson, 8 N. H. 9; [Jacobs *v.* Seward, 5 L. R. H. L. 464; Balch *v.* Jones, 61 Cal. 234; Shepard *v.* Pettit, 30 Minn. 119.] Tenants in common may make partition by parol, if accompanied with livery of seisin. Anders *v.* Anders, 2 Dev. (N. C.) 532; Jackson *v.* Harder, 4 Johns. 202; Folger *v.* Mitchell, 3 Pick. 399; [Workman *v.* Guthrie, 29 Penn. St. 495.] [But not a sale. Spencer & Newbold's App., 80 Penn. St. 317.]

(*d*) Co. Litt. 200, b; [Woolever *v.* Knapp, 18 Barb. 265; Huff *v.* McDonald, 22 Geo. 181, 169.] (*e*) I. 750, sec. 9.

(*f*) See Jones *v.* Harraden, 9 Mass. 544; Brigham *v.* Eveleth, lb. 588; Revised Statutes of Missouri, 1835, p. 37; Elmer's (N. J.) Digest, 4. [See 359, n. (*c*).]

(*a*) Co. Litt. 199, b; Fairclaim *v.* Shackleton, 5 Burr. 2604; Doe *v.* Prosser, Cowp.

y[1] The statute does not enable tenants who permit a cotenant to occupy and use the property without objection to recover for such use and occupation beyond the amount received as rent or profits from third persons. Kean *v.* Connelly, 25 Minn. 222; Howard *v.* Throckmorton, 59 Cal. 79; Reynolds *v.* Wilmeth, 45 Iowa, 698; Everts *v.* Beach, 31 Mich. 136; Bird *v.* Bird, 15 Fla. 424; Jones *v.* Nassey, 14 S. C. 292. See Job *v.* Potton, 20 L. R. Eq. 84. In Virginia the occupying tenant is liable to his cotenant for the reasonable rental value of the latter's share. White *v.* Stuart, 76 Va. 546. See also Edsall *v.* Merrill, 37 N. J. Eq. 114; Buckelew *v.* Snedeker, 27 N. J. Eq. 82.

y[1] Open and unequivocal acts of exclu-

cannot bring an action of trespass against another for entry upon, and enjoyment of, the common property, nor sue him to recover the documents relative to the joint estate. If, however, one tenant occupies a particular part of the premises by agreement, and his cotenant disturbs him in his occupation, he becomes a trespasser. (*b*) The growing crop put in by one tenant in common, who took possession exclusively without contract, on partition made while the crop is growing, goes in severalty, as the property of each. (*c*)

One joint tenant, or tenant in common, can compel the others to unite in the expense of necessary reparations to a house or mill belonging to them; though the rule is limited to those parts of common property, and does not apply to the case of fences enclosing wood or arable lands. The writ *de reparatione facienda* lay, at common law, in such cases, when one tenant was willing to repair, and the others would not. (*d*) y^2 In Massachusetts, it is

217; Peaceable *v.* Read, 1 East, 568; Doe *v.* Bird, 11 East, 49. If one tenant in possession retains the whole and denies the title of his cotenant to any part of the land, it amounts to an ouster. [See Wilson *v.* Collishaw, 13 Penn. St. 276; Peck *v.* Ward, 18 id. 506; Keyser *v.* Evans, 30 id. 507; Small *v.* Clifford, 38 Me. 213; Young *v.* Adams, 14 B. Mon. 127; Challefoux *v.* Ducharme, 4 Wis. 554; Goewey *v.* Urig, 18 Ill. 238; Manchester *v.* Doddridge, 3 Ind. 360; Corbin *v.* Cannon, 31 Miss. 570; Hannon *v.* Hannah, 9 Gratt. 146.]

(*b*) Keay *v.* Goodwin, 16 Mass. 1; Clowes *v.* Hawley, 12 Johns. 484; [Wait *v.* Richardson, 33 Vt. 190.] So, if one tenant in common sells trees growing on the land, and receives payment, he may be sued in *assumpsit* by his cotenant. Miller *v.* Miller, 7 Pick. 133.

(*c*) Calhoun *v.* Curtis, 4 Met. 413.

(*d*) F. N. B. 127, a, 162, b; Co. Litt. 54, b, 200, b; Bowles's Case, 11 Co. 82, b; Anderson *v.* Greble, 1 Ash. 136; Carver *v.* Miller, 4 Mass. 559. It has been suggested

sive ownership are necessary to constitute a disseisin of one cotenant by another. Boggess *v.* Meredith, 16 W. Va. 1; Ball *v.* Palmer, 81 Ill. 370; Campau *v.* Campau, 44 Mich. 31; Millard *v.* McMullin, 68 N. Y. 345; Gale *v.* Hines, 17 Fla. 773. Assuming to convey the entire estate to a third person has been held sufficient. Kinney *v.* Slattery, 51 Iowa, 353. See Hume *v.* Long, 53 Iowa, 299. But see Caldwell *v.* Neeley, 81 N. C. 114. A disseising cotenant has been considered liable to his cotenant for the rental value of the premises irrespective of actual profits, and not to be entitled to any compensation for improvements. Austin *v.* Barrett, 44 Iowa, 488.

y^2 The action only lies when the repairs were necessary to prevent the premises from going to ruin. Leigh *v.* Dickeson, 12 Q. B. D. 194; Beaty *v.* Bordwell, 91 Penn. St. 438; Alexander *v.* Ellison, 79 Ky. 148. That a cotenant who pays taxes or removes incumbrances is entitled to be reimbursed, see Weare *v.* Van Meter, 42 Iowa, 128; Wilton *v.* Tazwell, 86 Ill. 29; Allen *v.* Poole, 54 Miss. 323. As to the right to an allowance for

doubted whether this rule applies in that state to mills; and it is, at least, so far equitably modified by statute, that if one part owner of a mill repairs against the consent of his partners, he must look to the profits for his indemnity. (*e*) To sustain the action, there must be a request to join in the reparation, and a refusal, and the expenditures must * have been previously * 371 made. (*a*) The doctrine of contribution, in such cases,

by a very respectable writer on this subject, that one tenant in common might, in an action of *assumpsit* for money laid out and expended, sue his cotenant who had received his share of the profits, for his share of expenditures in necessary repairs on the implied contract to refund. Gibbons on the Law of Dilapidations, p. 101. In South Carolina, it was held, in Thompson *v.* Bostick, 1 McMullan, Eq. 75, and in Hancock *v.* Day, ib. 69, 298, and in Holt *v.* Robertson, ib. 475, that a cotenant in common is only chargeable to his associate for the rent which the premises were capable of producing at the time he took possession, and not for the enhanced rent which the land was capable of producing by his improvements, for the improvements are made by him at his own expense, and are not chargeable upon his cotenant, except under special circumstances. [Thurston *v.* Dickinson, 2 Rich. Eq. 317; Taylor *v.* Baldwin, 10 Barb. 582, 626. But see Young *v.* Polack, 3 Cal. 208.] In Loring *v.* Bacon, 4 Mass. 575, the question was learnedly discussed, whether A., who owned a chamber in a house, and repaired the roof, could compel B., who owned the cellar, to contribute, and the court held that he could not, as the parties had distinct dwelling-houses. Cheeseborough *v.* Green, 10 Conn. 318, s. p. The French code is very special in its regulations on this subject. Each proprietor of his own room is bound to keep it in repair, and the main walls and the roof are kept in repair at the joint and ratable expense of all the proprietors. Code Civil, art. 664.

(*e*) Carver *v.* Miller, 4 Mass. 559. By the Massachusetts Revised Statutes, 1836, pp. 682, 683, the greater part of the proprietors in interest of mills or dams, which need reparation, may cause the same to be done, at the expense of all, in proportion to their respective interests, after a call, on due notice, of a meeting of all of them. Every mortgagee in possession, and tenant in tail, of any part of a mill, are deemed proprietors, and the guardian may represent the interest of his ward, and the husband that of his wife, and the apportionment of the expense as between tenant and reversioner, is to be in a ratio to the value of their respective interests. [See Buck *v.* Spofford, 31 Me. 34.]

(*a*) Jackson, J., in Doane *v.* Badger, 12 Mass. 70; Mumford *v.* Brown, 6 Cowen, 475. And if the mill be destroyed by the negligence of one tenant in common, the others may have their indemnity by a special action on the case. Chesley *v.* Thompson, 3 N. H. 9. In Pennsylvania, the commissioners appointed to revise the civil code, made provision in a bill by them reported in January, 1835, for enforcing contribution in specified cases, and particularly in proceedings for the purpose of repairing, maintaining, or preserving any common property, when the court shall be satisfied of the necessity thereof. Contribution rests on the principle that payment by A. has removed a common burden from him and B., and that by the payment a common

improvements in case of a partition, see Conrad *v.* Starr, 50 Iowa, 470, 478, and cases cited; Scaife *v.* Thomson, 15 S. C. 387. See also Bridgford *v.* Barbour, 80 Ky. 529. But a suit for contribution will not lie. Walter *v.* Greenwood, 29 Minn. 87.

rests on the principle, that where parties stand in *æquali jure*, equality of burden becomes equity. (*b*) But the necessity of the rule does not press with the like overbearing force that it does in many other cases arising out of the law of vicinage; for the cotenant who wishes to repair beyond the inclination or ability of his companion, has his easy and prompt remedy, by procuring a partition or sale of the common property. (*c*)

benefit has been received. Screven *v.* Joyner, 1 Hill, Ch. (S. C.) 260. In New Hampshire, it is provided by statute, that joint tenants, and tenants in common of mills, may be compelled to contribute, in proportion to their interests therein, to necessary repairs to the mill, milldam, and flume, and a rebuilding may, under some circumstances, be considered a repair. Bellows *v.* Dewey, 9 N. H. 278.

(*b*) Sir William Harbert's Case, 3 Co. 11, b; Bro. Abr. tit. Suite and Contribution; Eyre, Ch. B., in Deering *v.* Earl of Winchelsea, 2 Bos. & P. 270; s. c. 1 Cox, 318; Dig. 17. 2. 52. 10; Voet ad Pand. h. t., sec. 13; Campbell *v.* Mesier, 4 Johns. Ch. 334; Fletcher *v.* Grover, 11 N. H. 369.

(*c*) The rule in Louisiana is, that joint owners must contribute ratably to useful expenses incurred on the property, by a joint owner having the management of it, when no opposition on their part has been made to such expenses. Percy *v.* Millaudon, 18 Martin (La.), 616. One tenant in common, before partition, cannot purchase in an outstanding title or incumbrance on the joint estate for his exclusive benefit, and use it against his cotenant. The purchase enures in equity to the common benefit, and the purchaser is entitled to contribution. [Davis *v.* King, 87 Penn. St. 261; Boskowitz *v.* Davis, 12 Nev. 446; Davis *v.* Givens, 71 Mo. 94; Austin *v.* Barrett, 44 Iowa, 488. See Alexander *v.* Sully, 50 Iowa, 192; Rippetoe *v.* Dwyer, 49 Tex. 498.] So, also, one surety, having a counter security, is bound to apply it to the benefit of his cosurety, equally with himself. Field *v.* Pelot, 1 McMullan, Eq. (S. C.) 370. The principle rests on the privity between the parties, and the fidelity and good faith which the connection implies. Van Horne *v.* Fonda, 5 Johns. Ch. 407; Lee *v.* Fox, 6 Dana, 176; Sneed *v.* Atherton, ib. 278, 281. It is adjudged that a cosurety is not bound to go into equity for contribution. He has his remedy by *assumpsit*, and he may recover according to the number of the sureties, without reference to the number of the principals. Kemp *v.* Finden, 12 M. & W. 421; Bachelder *v.* Fiske, 17 Mass. 464. The case of Venable *v.* Beauchamp, 3 Dana, 325, 328, adopts and applies the principle to the tenants after the partition, on account of the warranty, express or implied, annexed to the partition as between the parties in relation to the title, and each party is thereby estopped from asserting any adverse claim to any parcel of the land allotted to another. There appears to be great force and justice in this latter decision. But the principle does not apply, after the tenants in common have been evicted under an adverse title, and each of them are then at liberty to buy the lost land for his own exclusive benefit. Coleman *v.* Coleman, 3 Dana, 403; [Reinboth *v.* Zerbe Run Improvement Co., 29 Penn. St. 139.] Mr. Justice Story, in Flagg *v.* Mann, 2 Sumner, 520–524, adopts and enforces the principles contained in Van Horne *v.* Fonda, above mentioned, and he says it stands approved of equally by the Roman law, the general recognition of continental Europe, and the actual jurisprudence of England and America.

Persons placed in the situation of trust and confidence with respect to the subject of a purchase, cannot retain the purchase for their own benefit, but they hold it in

trust. This rule of equity is not limited in its application to such persons as trustees, guardians, executors, or solicitors, but it is one of universal application, affecting all persons who come within the principle, which is that no party can be permitted to purchase an interest, where he had a duty to perform inconsistent with the character of a purchaser. Lord Manners, in Nesbitt *v.* Tredennick, 1 Ball & B. 46; Greenlaw *v.* King, by Lord Cottenham, 1841; Van Epps *v.* Van Epps, 9 Paige, 237, by Chancellor Walworth; Tanner *v.* Elworthy, by Lord Langdale, Master of the Rolls, 4 Beav. 487; Dickinson *v.* Codwise, by Assistant V. Ch., in 1 Sandf. Ch. 214; [Page *v.* Naglee, 6 Cal. 241.] The above principle is indubitably established by those learned chancellors, and is founded on the clearest and most refined equity and justice.

LECTURE LXV.

OF TITLE BY DESCENT.

WE have already considered the nature of real property, the different quantities of interest which may be had in it, the conditions on which it is held, and the character and variety of joint ownership in land. I now proceed to treat of title to real property, and of the several ways in which that title may be acquired and transferred.

To constitute a perfect title, there must be the union of actual possession, the right of possession, and the right of property. (*a*) These several constituent parts of title may be divided and distributed among several persons, so that one of them may have the possession, another the right of possession, and the third the right of property. Unless they all be united in one and the same party, there cannot be that consolidated right, that *jus duplicatum*, or the *droit droit*, or the *jus proprietatis et possessionis*, which, according to the ancient English law, formed a complete title. (*b*)

All the modes of acquiring title to land are reducible to title by descent and by purchase, or, according to the better distribution of Mr. Hargrave, into title by act or operation of law, and title by purchase, or by the act or agreement of the par-
*374 ties. (*c*) Whether the agreement be founded upon *a

(*a*) 2 Bl. Comm. 199.

(*b*) Bracton, lib. 2, fo. 32, b, lib. 5, fo. 372, b; Co. Litt. 266, a. The ancient doctrine of *remitter* applies when a person has the *jus proprietatis* in lands, but is out of possession, and the freehold is *cast upon him* by some subsequent and defective title during infancy, or coverture, or by descent, and he enters under that title. In that case he is remitted, by operation of law, to his better title, and the defeasible estate is annulled. 3 Bl. Comm. 19, 190. Littleton has a whole chapter on this title, and Coke has added a copious commentary. Co. Litt. 348.

(*c*) Titles by curtesy and in dower, arising by operation of law upon the death of the wife or husband, as the case may be, seem to fall properly under the head of title by descent. See Co. Litt. 18, b, and n. 106. The learned author of the article Alienage, in the American Law Magazine for October, 1843, has referred to authorities in

valuable consideration, or be the result of a free and voluntary gift, the property thereby acquired is still, in the eye of the law, a purchase. (*a*) I shall treat of each of these sources of title in their order; and it will be the object of the present lecture to examine the doctrine of descents, which has always formed a prominent and very interesting title in every code of civil jurisprudence.

Descent, or hereditary possession, is the title whereby a person, on the death of his ancestor, acquires his estate by right of representation as his heir. (*b*) The English law of descent is governed by a number of rules, or canons of inheritance, which have been established for ages, and have regulated the transmission of the estate from the ancestor to the heir, in so clear and decided a manner as to preclude all uncertainty as to the course which the descent is to take. But, in the United States, the English common law of descents, in its most essential features, has been universally rejected, and each state has established a law of descent for itself. The laws of the individual states may agree in their great outlines, but they differ exceedingly in the details. There is no entire, though there is an essential, uniformity on this subject; and the observation of a great master of this title in American law (*c*) is rather too strong, when he says, that "this nation may be said to have no general law of descents, which probably has not fallen to the lot of any other civilized country." (*d*) I shall

favor of the proposition, and particularly to the strong case of Pemberton *v.* Hicks, 1 Binney, 1.

(*a*) Co. Litt. 18, a, b; Harg. ib. n. 106.

(*b*) 2 Bl. Comm. 201.

(*c*) Reeve's Treatise on the Law of Descents, pref.

(*d*) The law of descent in the provinces of France, before the revolution of 1789, was exceedingly various, and far exceeded that in the several American states. In the southern provinces (*Pays de droit écrit*), the succession to intestates was generally according to the 118th novel of Justinian, to all the children, male and female, equally. But in the other provinces (*pays coutumiers*), there was much difference, even in the lineal line. In the *nouveau coutumier de France, et des Provinces, connues sous le nom des Gaules*, it was stated that the customs amounted to five hundred and forty-seven. In some the eldest son took the entire estate. In most of the provinces he was allowed advantages more or less considerable. In some the married daughters were excluded; in others unmarried daughters, as against male children. In the collateral line, the modifications and diversities of succession were infinite. The decrees of the constituent assembly of the 15th March, 1790, and 8th April, 1791, first abolished the rights of primogeniture and preference for males; and, after a distressing series of changes, retrospective decrees, confusion, and injustice, the French law of succession was permanently regulated by the Napoleon Code. Prior to this consummation of their civil

not attempt to define and explain all the variations and shades of differences between the regulations of descent in the different states. This has been already done to our hand, with great fulness of illustration, in the work of Chief Justice Reeve, to which I have alluded; and it will be sufficient for the purpose of the present essay, to state those leading principles of the law of descent in the United States, which are of the most general application.

* 375 *** 1. Lineals in Equal Degrees.** — The first rule of inheritance is, that if a person owning real estate dies seised, or as owner, without devising the same, the estate shall descend to his lawful descendants in the direct line of lineal descent; and if there be but one person, then to him or her alone, and if more than one person, and all of equal degree of consanguinity to the ancestor, then the inheritance shall descend to the several persons as tenants in common, in equal parts, however remote from the intestate the common degree of consanguinity may be.

This rule is in favor of the equal claims of the descending line, in the same degree, without distinction of sex, and to the exclusion of all other claimants. Thus, if A. dies, owning real estate, and leaves, for instance, two sons and a daughter, or, instead of children, leaves only two or more grandchildren, or two or more great-grandchildren, these persons being his lineal descendants, and all of equal degree of consanguinity to the common ancestor, that is, being all of them either his children, or grandchildren, or great-grandchildren, they will partake equally of the inheritance as tenants in common. This rule of descent was prescribed by the statute of New York, of the 23d February, 1786; and it has been adopted by the New York Revised Statutes. (*a*) It prevails in all the United States, with this variation, that in South Carolina the widow takes one third of the estate in fee, and in Georgia she takes a child's share in fee, if there be any children, and if none, she then takes a moiety of the estate. In Massachusetts,

code, A. C. Guichard published a grave and sensible treatise, and one that was historical, analytical, and critical, on the revolutionary law of successions. See his *Dissertation sur le Régime actuel des Successions*, published at Paris, according to the republican calendar, *Nivôse An.* 5. So, also, in the third year of the Republic, C. Vermiel, published at Paris, under the title of *Code des Successions*, a collection of Decrees. *Sur les Successions, Testamens, Donations, Substitutions, Partages et autres actes civiles qui y ont rapport.*

(*a*) Vol. i. 751, sec. 1, 2; ib. 753, sec. 17; ib. 754, sec. 19.

the statute law of descents applies only to estates whereof the ancestor died seised in fee simple or for the life of another, and the descent of estates tail (which are left as they stood at common law) is limited to the eldest male heir. (*b*) In Rhode Island, New Jersey, (*c*) North and South Carolina, Tennessee, and Louisiana, the claimants take, in all cases, *per stirpes*, though standing in the same degree. In Alabama, the descendants of children also take *per stirpes*, and in Tennessee the male issue is preferred to the female in the descent of real property. (*d*)

(*b*) Statute, 1791, c. 60; Revised Statutes, 1836, p. 413; Corbin *v.* Healey, 20 Pick. 514.

(*c*) The act of New Jersey of 1817 is not clearly expressed in respect to the rights of the lineal descendants, but I have assumed the construction to be, that *representation* prevails after children, or in the second class of descendants.

(*d*) Statute Laws of Tennessee, ed. 1836, pp. 247, 248; Lewis *v.* Claiborne, 5 Yerg. 369; Toulmin's Dig. 885; Act of Georgia of December 26, 1826; Massachusetts Revised Statutes, 1836; North Carolina Revised Statutes, 1837, tit. Descents; Aikin's Alabama Dig. 2d ed. p. 128. The Massachusetts Revised Statutes of 1836 have this further provision, that if any surviving child dies under age, and not having been married, his estate, *so inherited*, shall descend to the other children of the same parent, and the issue of any of them dead, by right of representation; if all the other children be dead, then to their issue equally, if of the same degree; otherwise, by representation. The ordinance of Congress of 13th July, 1787, for the government of the northwestern territory, provided that the estates within the territory, of persons dying intestate, should go to the children and the descendants of a deceased child in equal parts; the descendants of a deceased child or grandchildren to take the parent's share in equal parts; and when there were no children or descendants, then the estates should go in equal parts to the next of kin in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate should have, in equal parts among them, their deceased parent's share: and that there should in no case be a distinction between kindred of the whole and half blood; saving in all cases, to the widow of the intestate, her third part of the real estate for life. But this law relative to descents was to be subject to future legislative alteration, though it is presumed to be still the general law of descent in all those states and districts comprising what, in 1787, was the territory of the United States northwest of the river Ohio, except in the instances hereinafter mentioned. See further, Reeve's Law of Descents, *passim*; Griffith's Law Register, under the head of each state, No. 6; Civil Code of Louisiana, Nos. 891, 898; Act of Rhode Island concerning Descents, passed January, 1822; Stent *v.* M'Leod, 2 M'Cord, Ch. 354. In several of the colonies, before the Revolution, the English law of primogeniture prevailed. It prevailed in Rhode Island until the year 1770; and in New York, New Jersey, Virginia, the two Carolinas, and Georgia, until the Revolution; and in Maryland until 1715. In Massachusetts, Connecticut, and Delaware, the eldest son had only a double portion, and this continued in Connecticut until 1792, when the law giving the eldest son a double portion was repealed. In Pennsylvania, by the law of 1683, the law of primogeniture was abolished, but the act still gave the eldest son a double portion; Chalmers's Annals, 649; and so the law in Pennsylvania continued until 1794. The Act of Massachusetts, in 1692, did the same. 2 Hutchinson's Hist. 66. In the Abstract of the Laws of New

* 376 * The transmission of property by hereditary descent, from the parent to his children, is the dictate of the natural affections; and Dr. Taylor holds it to be the general direction of Providence.[1] It encourages paternal improvements, cherishes filial loyalty, cements domestic society; and nature and policy have equally concurred to introduce and maintain this primary rule of inheritance, in the laws and usages of all civilized nations. But the distribution among the children has varied greatly in different countries; and no two nations seem to have agreed in the same precise course of hereditary descent; and they have very rarely concurred, as we have done, in establishing the natural equality that seems to belong to lineal descendants standing in equal degree. A good deal of importance was attached to the claims of primogeniture in the patriarchal ages; and the first-born son was the earliest companion of his father, and the natural substitute for the want of a paternal guardian to the younger children. The law of Moses gave the eldest son a double portion, and excluded the daughters entirely from the inheritance, so long as there were sons, and descendants of sons; and when the inheritance went to the daughters in equal portions, in default of sons, they were obliged to marry in the * 377 * family of their father's tribe, in order to keep the inheritance within it. (*a*) In the Gentoo code, all the sons were admitted, with an extra portion to the eldest, under certain cir-

England, a code digested by the Rev. Mr. Cotton, and published in 1655, it was ordered that inheritances, as well as personal estates, should descend to the next of kin, assigning a double portion to the eldest son. Hutchinson's State Papers, 168. The old New England law spoke of this double portion as being "according to the law of nature, and the dignity of birthright." Mass. Hist. Collections, v. 178. So, in the province of New Brunswick, under the colonial statute of 26 Geo. III., the heir at law of the intestate takes a double portion, and the remainder of the estate is distributed equally among the other children of the intestate or their representatives, including children of the half blood. The double portion is not confined to the lineal heir, but extends to the heir at law among collaterals, as to a brother. Thompson *v.* Allanshaw, Kerr (N. B.), 84.

(*a*) Numb. c. 27, and c. 36; Deut. c. 21, v. 17; Selden, De Success. in bona defunct. ad leges Ebr. c. 12; Jones's Comm. on Isæus, 177; Hale's Hist. Com. Law, xi. By the Jewish institutions, lands sold, with the exception of houses within the walled cities, were, on the return of every fiftieth year, to revert to the seller, or his representatives. The year of jubilee served to reintegrate families and their possessions; and the policy was calculated to give equality and stability to family influence. Lev. c. 25.

[1] See note at beginning of Lect. lxvii., *post*, 441; also 406, n. 1.

cumstances, and no attention was paid to the daughters, according to the usual and barbarous policy of the Asiatics. (*b*) The institutions of the Arabs excluded females from the right of succession; but Mahomet abolished this law, and ordained that females should have a determined part of what their parents and kinsmen left, allowing a double portion to the males. (*c*) The law of succession at Athens resembled, in some respects, that of the Jews; but the male issue took equally, and were preferred to females; and if there were no sons, then the estate went to the husbands of the daughters. (*d*) Nothing can be conceived more cruel, says Sir William Jones, (*e*) than the state of vassalage in which women were kept by the polished Athenians. The husband who took the estate from the wife, might bequeath the wife herself, like part of his estate, to any man whom he chose for his successor. At Rome, the law of succession underwent frequent vicissitudes. The law of the twelve tables admitted equally male and female children to * the succession. (*a*) The *378 middle jurisprudence under the prætors departed from this

(*b*) Gentoo Code, by Halhed, 24; Jones's Institutes of Hindu Law, c. 9, art. 17.

(*c*) Jones's Comm. on Isæus, 178. The right of primogeniture was unknown to the equal spirit of the early Greek institutions, and movables were divided among the children, and if none, then among the nearest relations on the father's side. Gillies's Hist. of Greece, i. 70.

(*d*) Jones's Prefatory Discourse to his Translation of Isæus. Sir William Jones says, that, at Athens, the family and heritage were desolate when the last occupier left no son by nature or adoption to perform holy rites at his tomb; and he suggests that the preservation of names might have been one reason for the preference given to males in the Attic laws of succession. [*Post*, 406, n. 1.]

(*e*) Comm. on the Pleadings of Isæus, 175, 176.

(*a*) Sir Matthew Hale (Hist. of the Common Law, xi.) says that the twelve tables excluded females from inheriting. The broken and obscure text of the twelve tables is not explicit; *Ast si intestato moritur cui suus heres nec exstabit, agnatus proximus familiam habeto.* 5th Table, c. 2. But the general current of authority is in favor of the equal admission of the children, whether male or female. Jones's Comm. on Isæus; Pothier's Comm. on the Fragments of the Twelve Tables, 102, prefixed to his Pandectæ Justinianeæ, i.; Montesquieu's Esprit des Loix, liv. 27, c. i. The children and the descendants who lived under the power of the father, were called *sui heredes;* the other nearest relations on the male side were called *agnati*, and they were always preferred to the *cognati*, or relations on the mother's side, in order to prevent the estate from passing into another family. It was immaterial, says Montesquieu, whether the *sui heredes*, or the *agnati*, were male or female. Professor Hugo originally maintained that females were, under the early Roman law, excluded from the succession of the estate of intestates; but he acknowledges that he had since abandoned that opinion, though it was countenanced by strong analogies. History of the Roman Law, sec. 115, note 2.

simplicity, and fettered the inheritance of females. The Voconian law declared women incapable of inheriting; but, in the time of Cicero, the prætors extended or restrained the Voconian law at pleasure. It was gradually relaxed under the Emperors Claudius and Marcus Antoninus, (*b*) until at last the Emperor Justinian, in his 118th novel, destroyed all preference among the males, and all distinction between the sexes in respect to the law of descent, and admitted males and females to an equality in the right of succession, and preferred lineal descendants to collateral relations. (*c*) The regulations of the novel bore a striking, though not an entirely exact resemblance, to the first rule of inheritance prevailing in our American law.

* 379 * The rule in this country, with the exceptions which have been stated, admits the lineal descendants to an equal portion of the inheritance, if they all stand in equal degree to the common ancestor. The law of Justinian adhered strictly to the doctrine of representation, and gave to the grandchildren, and other remoter descendants, though all the claimants were standing in equal degrees, the portion only that their parents would have taken, if living. This was adhering, in all cases, to the doctrine of representation *per stirpes;* and the states of Rhode Island, New Jersey, North and South Carolina, and Louisiana, have followed, in this respect, the rule of the civil law. Thus if A. dies leaving three grandchildren, two of them by B., a son, who is dead, and one of them by C., a daughter, who is dead, these three grandchildren, standing all in equal degree of consanguinity to the ancestor, would take equally under the above rule. But by the novel of Justinian, they would take only their father's share; and, consequently, one grandchild would take half the estate, and the other two grandchildren the other half.

The Roman law had some singular provisions on the subject of descent, which have insinuated themselves into the law of successions of the continental nations of Europe. The term "heir," in the civil law, applied equally to him who took by will and by descent. It held, by a strange fiction in the law, that the heir

(*b*) Inst. lib. 3, tit. 4.

(*c*) The chapter in the Spirit of Laws, b. 27, on the origin and revolutions of the Roman law of succession, develops that branch of their jurisprudence, as Mr. Butler has truly observed, with the greatest precision and perspicuity.

was the same person as the ancestor, *eadem persona cum defuncto.* The estate, instead of being changed by the descent, was deemed to continue in the heir, who succeeded to the person, and place, and estate of the ancestor, and to all his rights and obligations. The heir is, therefore, under the civil law, said to represent the moral person of the intestate. (*a*) His substitution to the ancestor was a kind of continual succession, similar to that which we apply to a corporation. The creditor could come upon the heir, not only to the extent of the assets, but to all the other property of the heir. To relieve himself from * the oppres- * 380 sion of the charge of responsibility for all the debts of the ancestor, whether he had or had not assets, the heir was not bound to assume the place of heir, if he had not intermeddled with the estate; and the prætor allowed him a year to deliberate whether he would accept or renounce the inheritance. (*a*) There was no fixed and invariable justice in the civil law, relative to the heir, until Justinian allowed him to protect himself from responsibility beyond the assets descended, by giving him the benefit of an inventory. (*b*) As some compensation for these onerous duties thrown upon the heir, the ancestor could not disinherit him as to one fourth of the estate; and that part of it was called the Falcidian portion. (*c*)

(*a*) Toullier, Droit Civil Français, iv. 63; [*post*, 441, n. 1.]

(*a*) Inst. 2. 19. 2; Dig. 29. 2. 11; Butler's note, 77, to Co. Litt. lib. 3, sec. 5, note 3.

(*b*) Code, lib. 6, tit. 30, c. 22, sec. 2, 3, 4. The Scottish law was the same as the Roman law prior to the code, until the statute of 1695 mitigated its harshness, by adopting the regulation of the Roman law, enabling the heir to relieve himself from an unlimited responsibility, by entering upon the estate *cum beneficio inventarii.* 1 Bell's Comm. 662, 711. In Louisiana, which follows the civil law on many subjects, the heir is obliged to pay the debts of the ancestor, if he accepts the succession unconditionally, and not as beneficiary heir under the benefit of an inventory. Civil Code, Nos. 878, 879.

Mr. Butler runs an interesting parallel, with his usual erudition, between the Roman and the feudal jurisprudence, on the subject of the succession of the heir Note 77 to Co. Litt. lib. 2, sec. 5, n. 3, 4, 5.

(*c*) See Code Civil, Nos. 739, 740, 745, as to the doctrine of representation in the descending line; and see ib. Nos. 774, 793–802, as to the duties and privileges of the heir. See also Nouveau Style des Notaires de Paris, cited by Ch. J. Parker, in 5 Pick. 74, as a practical exposition of the code in relation to successions. M. Toullier (Droit Civil Français, iv. 62, note) says that the compilers of the French Code upon successions have principally followed Pothier, and availed themselves greatly of his sage reflections. Toullier has written an entire volume upon the copious theme of the law of descent; and he has been greatly indebted, as he admits, to the treatise of M. Chabot, whom he speaks of in the highest terms, as a learned author, employed by the government to make a report upon the law of successions. The treatise of

The French law of descent has followed the novel of Justinian, and the obligations and the privileges of the heir are essen-
* 381 tially the same as in the Roman law. The law of equal * partition throughout France is of revolutionary growth, and it has been in operation nearly forty years. If the heir accepts the succession purely and simply, he assumes all the obligations of the ancestor; but if he accepts under the benefit of an inventory, he is chargeable only with the ancestral debts to the extent of the assets. The law of Holland is equally borrowed from the civil law, in respect to the equality of descent among the descendants, and in respect to the character and duties, the privileges and obligations of the heir. (*a*) The equal partition which prevailed in the Roman law among all the children, prevails also in the law of Scotland, in the succession of movables; but the feudal policy of primogeniture has been introduced as to land. The heir is the exclusive successor to the land, and the other nearest of kin the exclusive successors to the movables. A great privilege is, however, conferred by the Scotch law upon the heir at law of an intestate estate, being also one of the next of kin, of allowing him to throw the heritable estate into a common stock with the movables, and to demand, as one of the next of kin, his share, on an equal partition of the joint, real, and movable estate with his brothers and sisters. This is termed his right to collate the succession; and it applies, though the real estate to which the heir succeeds be situated in another country, provided he
* 382 claims his share of the personal estate * under the law of Scotland. (*a*) In Denmark, by an ordinance, in 1769,

Le Brun, on successions, is also frequently cited; and the extraordinary extent of research, and minuteness and accuracy of detail of the French lawyers, on this as well as on other subjects of property, cannot but excite, in the breast of every lover of the science of jurisprudence, the highest respect and admiration. They write like practical men, with remarkable simplicity, sound judgment, and pure morals, and with cultivated and elegant taste.

(*a*) Van Leeuwen's Comm. on the Roman-Dutch Law, b. 3, c. 10, 11, 12. Institutes of the Laws of Holland, by Van der Linden, translated by J. Henry, Esq., 1828, pp. 150, 151, 158.

(*a*) Bell's Comm. on the Laws of Scotland, i. 100, 101, 103; Bell's Principles of the Law of Scotland, sec. 1910–1913. In Balfour *v.* Scott (cited in 5 Ves. 760, 2 Ves. & B. 131, and Robertson on Personal Succession, c. 8, sec. 2), it was held that where the intestate, domiciled in England, left real estate in Scotland, the heir, being one of the next of kin, was entitled to his share of the personal estate, without being obliged to collate the real estate, or bring it into a mass, according to the law of Scotland. This was not the English law.

primogeniture gave a title to a moiety of the estate, and no more; and the other moiety was to be distributed equally among the other children and their descendants. In Spain, lands are equally distributed among the children of the deceased proprietor, excepting the cases in which they are fettered by an entail. As this is uniformly the case with the possessions of the grandees, who, before the Spanish revolution, in 1808, engrossed more than half the landed property of the kingdom, and as the lands of the clergy are inalienable, the law of equal partition is comparatively of very little consequence.

The preference of males to females, and the right of primogeniture among the males, is the established and ancient rule of descent in the English common law. (*b*) The right of primogeniture was derived from the martial policy of the feudal system, after it had attained solidity and maturity. It is supposed to have been unknown, or not in use, among the ancient Germans or the Anglo-Saxons, prior to the Norman Conquest. They admitted all the sons equally to the inheritance; but the weight of authority is, that females were most generally excluded, even in the primitive ages of the feudal law. (*c*) When the feudal system became firmly established, it was an important object to preserve the feud entire, and the feudal services undivided, and to keep up a succession of tenants who were competent, by their age and sex, to render the military *services annexed to their *383 grants. The eldest son was the one that first became able to perform the duties of the tenure, and he was, consequently, preferred in the order of succession. Females were totally excluded, not only from their inability to perform the feudal engagements, but because they might, by marriage, transfer the possession of the feud to strangers and enemies. (*a*)

(*b*) Bracton, lib. 2, fo. 69, a.

(*c*) Tacitus, de Mor. Ger. c. 20; Feud. lib. 1, tit. 8. Si quis igitur decesserit, filiis et filiabus superstitibus, succedunt tantum filii æqualiter. Hale's Hist. of the Common Law, ii. 94, 95, 98; Sullivan on Feudal Law, sec. 14; Dalrymple's Essay on Feudal Property, 165; Wright on Tenures, 31. Mr. Spence, in his Inquiry into the Origin of the Laws and Political Institutions of Modern Europe, 393, 394, shows, by reference to the laws of the barbarian nations of German origin, and particularly to the laws of the Thuringians, Ripuarians, and Salic Franks, that males excluded females from the succession. There were, however, exceptions to the general rule in some of the barbarian codes, and females were not universally excluded from partaking of the inheritance. [See 441, n. 1.]

(*a*) Feud. lib. 1, tit. 8; De Successione Feudi; Wright on Tenures, 174, 178;

But these common-law doctrines of descent are considered to be incompatible with that equality of right, and that universal participation in civil privileges, which it is the constitutional policy of this country to preserve and inculcate. The reasons which led to the introduction of the law of primogeniture, and preference of males, ceased to operate upon the decline and fall of the feudal system; and those stern features of aristocracy are now vindicated by English statesmen upon totally different principles. They are not only deemed essential to the stability of the hereditary orders, but they are zealously defended in an economical point of view, as being favorable to the agriculture, wealth, and prosperity of the nation, by preventing the evils of an interminable subdivision of landed estates. It is contended, that the breaking up of farms into small parcels, and the gradual subdivision of these parcels into smaller and still smaller patches, on the descent to every succeeding generation, introduces a redundant and starving population, destitute alike of the means and of the enterprise requisite to better their condition. The appeal is boldly and
* 384 constantly made to the wretched condition * of the agriculture and agricultural improvement of France, and particularly of the province of Normandy, under the action of the new system of equal partition. It is declared to be an enemy to all enterprising and permanent improvements in the cultivation of the soil and employment of machinery; to all social comfort and independence, as well as to the costly erections of art and embellishments of taste. (*a*) On the other hand, Dr. Smith, the

Dalrymple, 163–166; 2 Bl. Comm. 215; Sullivan on Feudal Law, sec. 14. Mr. Reeves, in his History of the English Law, i. 40, 41, says that the right of primogeniture was quite feeble even so low down as the reign of Hen. I., and it was not solidly fixed until the reign of Hen. II. But it was not even then fixed as to lands held in free socage, according to Glanville, b. 7, c. 8, provided the lands had been *antiquitus divisa*. Wilkins, in his Leges Anglo-Saxonicæ, ed. 1721, p. 226, states that the first notice which we have of the English law of primogeniture, is in the laws of Hen. I. Primo patris feudem primogenitus filius habeat.

(*a*) See Edinburgh Review, xl. 360–375, which refers to the agricultural tours of Arthur Young, James P. Cobbett, and Mr. Birkbeck. Such has been the rapid progress of the French law of descent, that, in 1837, France was parcelled out among more than ten millions of landed proprietors. M. De Tocqueville alludes to its wonderful, if not portentous effects, in France. The law of equal distribution of land, he observes, strikes at the root of landed property, and rapidly disperses families and fortunes. It overthrows in its course the walls of our dwellings, and the landmarks of our fields. De la Démocratie en Amérique, t. l. pp. 81, 82. Arthur Young had travelled over France before the French revolution, and he then made strong and

author of the Wealth of Nations, severely condemns the policy of primogeniture, as being contrary to the real interests of a numerous family, though very fit to support the pride of family distinctions. (*b*) The Marquis Garnier, the French translator of that work, is also a decided advocate for the justice and policy of the principle of equal partition; and the Baron De Staël Holstein is of the same opinion, even in an economical point of view. He considers the equal division of estates much more favorable to the wealth and happiness of society, than the opposite system. (*c*)

There are very great evils, undoubtedly, in the subdivision of estates, when it is carried to extremes, and property divided into portions not large enough for the comfortable support of a family. The policy of the measure will depend upon circumstances, and is to be considered in reference to the state of society, the genius of the government, * the character of the people, *385 the amount of cultivated land, the extent of territory, and the means and the inducements to emigrate from one part of the country to another. Without undertaking to form an opinion as to the policy of primogeniture under the monarchical governments and crowded population of England, Ireland, and France, it would be very unfounded to suppose that the evils of the equal partition of estates have been seriously felt in the United States, or that they have borne any proportion to the great advantages of the policy, or that such evils are to be anticipated for generations to come. The extraordinary extent of our unsettled territories, the abundance of uncultivated land in the market, and the constant stream of emigration from the Atlantic to the interior states, operates sufficiently to keep paternal inheritances unbroken. The tendency of these causes, as experience in the

striking objections to the minute division of little farms among all the children in those provinces where feudal tenures did not abound. The consequence was, excessive population, beggary, and misery. Young's Travels in France, in 1787 and 1788, ii. c. 12. He supposed that more than one third of the kingdom was occupied by very small farms, cultivated by the owner; and the facts, observations, and reflections contained in his various travels in France, England, and Ireland, went very strongly to prove that large farms, and sufficient capital to manage them, were most conducive to general improvement, independence, prosperity, and happiness. On the other hand, we have the authority of Varro and Pliny, that large tracts of land in the hands of overgrown slave proprietors, and left uncultivated, for purposes of luxury, or wretchedly cultivated by slave labor, destroyed the prosperity and strength of ancient Italy. Latifundia perdidere Italiam.

(*b*) Wealth of Nations, i. 382. (*c*) See N. A. Review, xxvi. art. 8.

eastern states would seem to confirm, is rather to enlarge than to abridge them; and if the inheritance will not bear partition without injury to the parties in interest, the eldest son, in some of the states, is allowed to elect to take the whole estate to himself, on paying to the other heirs an equivalent to their shares in money, and on his refusal, the same privilege is allowed to the other sons successively. (*a*)

By the common law, the ancestor from whom the inheritance was taken by descent, must have had *actual seisin*, or seisin *in deed*, of the lands, either by his own entry, or by the possession of his or his ancestor's lessee for years, or by being in the receipt of rent from the lessee of the freehold, in order to transmit it to his heir. The heir, to be entitled to take in that character, must be the nearest male heir of the whole blood to the person who was last actually seised of the freehold. This maxim of the law of England has subsisted from the earliest ages, and appears in Bracton, Britton, and Fleta. It is this seisin which makes
* 386 a person the *stirps* or stock * from which all future inheritance by right of blood is derived. The maxim of the common law was, that *non jus sed seisina facit stipitem.* If, therefore, the heir, on whom the inheritance had been cast by descent, dies before he has acquired the requisite seisin, his ancestor, and not himself, becomes the person last seised of the inheritance, and to whom the claimants must make themselves heirs. (*a*) The rule was derived from the doctrine of the feudal law, which required that whoever claimed by descent should make himself to be the heir of the first purchaser; and the seisin of the last possessor from whom he claimed as his heir of the whole blood, was con-

(*a*) Dorsey's Laws of Maryland, i. 749. See 6 Harr. & J. 156, 258; Statutes of Connecticut, 1838, p. 235; Statute of Pennsylvania, 1832; Revised Statutes of Vermont, 1839, p. 296. Civil Code of Louisiana, of 1808, directed a sale of inheritances which could not be conveniently divided among the heirs. 18 La. 354. In an able essay on the division of estates by M. Passy, in the Revue de Législation et de Jurisprudence, noticed in the American Jurist for October, 1841 (xxvi. 85), it is observed, that the laws of succession have no power to confine individual properties within uniform limits; and that inequality of property is created and maintained by the constant operation of causes, not in the power of legislative provisions to destroy.

(*a*) Litt. sec. 8; Co. Litt. 11, b; Hale's Hist. Com. Law, c. 11; 2 Bl. Comm. 209; Goodtitle *v.* Newman, 3 Wils. 516; 1 Sim. & Stu. 260. *Seisin in deed* is actual possession of the freehold, and *seisin in law* is a legal right to such possession. A *constructive* seisin in deed is said to be, for all legal purposes, equivalent to an actual seisin. Green *v.* Liter, 8 Cranch, 244-249.

sidered as presumptive evidence of his being of the blood of the first purchaser. It supplied the difficulty of investigating a descent from a distant stock through a line of succession, become dim by the lapse of ages. (*b*)

There are reasonable qualifications in the English law to the universality of this rule. If the ancestor acquired the estate by purchase, he might, in some cases, transmit it to his heirs without having had actual seisin; or if, upon an exchange of lands, one party had entered, and the other had not, and died before entry, his heir would still take by descent, for he could not take in any other capacity. (*c*) It is likewise the rule in equity, that if a person be entitled to a real estate by contract, and dies before it be conveyed, his equitable title descends to his heir. (*d*) The possession of a tenant for years is the possession of the person entitled to the freehold; (*e*) so that one who has a reversion or remainder in fee expectant upon the determination of a term for years, is in the actual seisin of his estate, for the possession of the termor is in law that of the remainderman or reversioner. There may also be a seisin of a remainder, or reversion expectant upon a freehold estate. (*f*) The seisin or possession of one parcener or tenant in common is the seisin and possession of the other. So, also, the possession of a guardian in socage is the possession of his infant ward, and sufficient to constitute

(*b*) Reeves's Hist. of the English Law, ii. 318. By the English statute of 3 & 4 Wm. IV. c. 106, descent is to be traced from the *purchaser*, and the person last entitled to the lands is to be considered the purchaser, unless it be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered the purchaser, unless it be proved that he also inherited the same. The last person from whom the lands were inherited shall in every case be considered the purchaser, unless it be proved that he inherited the same.

(*c*) Shelley's Case, 1 Co. 98, a, b, by Coke, who argued for the defendant, in whose favor judgment was rendered.

(*d*) Potter *v.* Potter, 1 Ves. 437.

(*e*) Co. Litt. 15, a.

(*f*) Cook *v.* Hammond, 4 Mason, 489; Plowden, 191; Vanderheyden *v.* Crandall, 2 Denio, 23. But the reversion or remainder in fee, expectant on a present freehold estate, will not, during the continuance of such freehold estate, pass by descent from a person to whom the title thereto had vested by *descent* as a new stock of inheritance, unless some act of ownership had been exercised by the owner over such expectant estate, and which the law would regard as equivalent to an actual seisin of a present estate of inheritance, though it would be otherwise if the future estate was acquired by purchase. Vanderheyden *v.* Crandall, 2 Denio, 24, 25; [and see Wendell *v.* Crandall, 1 Comst. 491.]

* 387 * the technical *possessio fratris*, and transmit the inheritance to the sister of the whole blood. (*a*)

If the estate be out in a freehold lease when the father dies, then there is not such a possession in the son as to create the *possessio fratris*. The tenancy for life in a third person suspends the descent, unless the son enters in his lifetime, or receives rent after the expiration of the life estate. It is a well settled rule of the common law, that if the person owning the remainder or reversion expectant upon the determination of a freehold estate, dies during the continuance of the particular estate, the remainder or reversion does not descend to his heir, because he never had a seisin to render him the stock or *terminus* of an inheritance. The intervention of the estate of freehold between the possession and the absolute fee prevents the owner of the fee from becoming the stock of inheritance, if he dies during the continuance of the life estate. The estate will descend to the person who is heir to him who created the freehold estate, provided the remainder or reversion descends from him; or if the expectant estate had been *purchased*, then he must make himself heir to the first purchaser of such remainder or reversion at the time when it comes into possession. The purchaser becomes a new stock of descent, and on his death the estate passes directly to his heir at law. He takes the inheritance, though he may be a stranger to all the mesne reversioners and remaindermen, through whom the inheritance had devolved. (*b*) This severe rule of the common law is so strictly enforced that it will, in some cases, admit the half, to the exclusion of the whole blood. (*c*) Should the person entitled in remainder or reversion exercise an act of ownership over it, as by conveying it for his own life, it would be an alteration of the estate sufficient to create in

* 388 him a new stock * or root of inheritance. It would be deemed equal to an entry upon a descent. (*a*)

(*a*) Litt. sec. 8; Co. Litt. 15, a; Goodtitle *v.* Newman, 3 Wils. 516; Doe *v.* Keen, 7 T. R. 386. In Doe *v.* Thomas, 4 Scott, N. R. 449, it was held that if an infant devisee in fee died before entry, or actual seisin or possession, she had still such a *seisin in law* as enabled her heir to take the devised premises from her by descent. This was quite a relaxation of the old rule of the common law.

(*b*) Co. Litt. 15, a; Doe *v.* Hutton, 3 Bos. & P. 643, 655; Ratcliff's Case, 3 Co. 41, b, 42, a; Kellow *v.* Rowden, 3 Mod. 253.

(*c*) Co. Litt. 15, a.

(*a*) Co. Litt. 15, a; ib. 191, b; Stringer *v.* New, 9 Mod. 368.

The rule of the common law existed in New York, under the statute of descents of 1786; and the heir was to deduce his title from the person dying seised. It had been repeatedly held, that during the existence of a life estate, the heir on whom the reversion or remainder was cast, subject to the life estate, was not so seised as to constitute him the *possessio fratris* or *stirps* of descent, if he died pending the life estate; and the person claiming as heir must claim from a previous ancestor last actually seised. (*b*) If the estate in fee had been acquired *by descent*, it was necessary that there should have been an entry to gain a seisin *in deed*, to enable the owner to transmit it to his heir; and, therefore, if the heir, on whom the inheritance had been cast by descent, died before entry, his ancestor, and not himself, became the person last seised, and from whom the title as heir was to be deduced. If, however, the ancestor acquired the estate *by purchase*, he was, in many cases, allowed to transmit the estate to his heirs, though he had not had actual seisin in himself. But the New York Revised Statutes (*c*) have wisely altered the pre-existing law on this subject; and they have extended the title by descent generally to all the real estate owned by the ancestor at his death; and they include in the descent every interest and right, legal and equitable, in lands, tenements, and hereditaments, either seised or possessed by the intestate, or *to which he was in any manner entitled*, with the exception of leases for years and estates for the life of another person. The Massachusetts, Virginia, North Carolina, and the Tennessee law of descent reach equally to every interest in fee in real estate. The Massachusetts statute extends to every such interest for the life of another, and the North Carolina and Tennessee statutes to every right, title, or interest in the estate. (*d*) This completely abolishes the English maxim, that *seisina facit stipitem*. So, likewise, in Rhode

(*b*) Jackson *v.* Hendricks, 3 Johns. Cas. 214; Bates *v.* Shraeder, 18 Johns. 260; Jackson *v.* Hilton, 16 id. 96.

(*c*) I. 751, sec. 1; ib. 754, sec. 27.

(*d*) Massachusetts Revised Statutes, 1836; Acts of North Carolina and of Tennessee, of 1784, c. 22; Guion *v.* Burton, Meigs, 565. Act of Virginia, October, 1785. Judge Lomax considers the common-law rule, *seisina facit stipitem*, as abrogated in Virginia by that statute. See his Digest of the Laws of Real Property, i. 594. This work is in three volumes, and it applies as well to the laws respecting real property in the United States as in Virginia. The work is upon the model of Cruise's Digest, and it may well be recommended as a valuable addition to the lawyer's library.

Island, Connecticut, New Jersey, Pennsylvania, Delaware, South Carolina, Georgia, and Ohio, and probably in other states, the real and personal estates of intestates are distributed among the heirs, without any reference or regard to the actual seisin of the ancestor. Reversions and remainders vested by descent in an intestate, pass to his heirs in like manner as if he had been seised in possession; and no distinction is admitted in descents
* 389 between estates in possession and * in reversion. (*a*) In the states of Maryland and North Carolina, the doctrine of the *possessio fratris* would seem still to exist. (*b*)

Though posthumous descendants inherit equally as if they had been born in the lifetime of the intestate, and had survived him, the inheritance descends, in the mean time, to the heir *in esse* at the death of the intestate. It was declared, by Lord Ch. J. De Grey, in the case of *Goodtitle* v. *Newman*, (*c*) on the authority of a case in the Year Books, of 9 Hen. VI. 25, a, that the posthumous heir was not entitled to the profits of the estate before his birth, because the entry of the presumptive heir was lawful. This rule does not apply to posthumous children who take remainders, under the statute of 10 and 11 Wm. III. They must take the intermediate profits, says Lord Hardwicke, for they are to take in the same manner as if born in the lifetime of the father. (*d*) This construction of Lord Hardwicke applies to the New York Revised Statutes; for it is declared, that posthumous descendants shall, *in all cases, inherit in the same manner* as if born in the lifetime of the intestate. The provision in the laws of some of the other states, such as Rhode Island,
* 390 New Jersey, Pennsylvania, * and Missouri, would seem

(*a*) Reeve on Descents, 377–379; 1 Hill, Ch. (S. C.) 269; [Thompson *v.* Sandford, 13 Geo. 238;] Cook *v.* Hammond, 4 Mason, 467; Hillhouse *v.* Chester, 3 Day, 166; Gardner *v.* Collins, 2 Peters, 59; Tucker's Bl. Comm. ii.; Appendix, note B. The doctrine of the common law was fully, ably, and learnedly discussed by counsel in the last three cases above mentioned.

(*b*) 2 Peters, 625; Griffith's Law Register, tit. N. C. No. 6; Reeve on Descents, 377. The English real property commissioners, in their first report to parliament, in May, 1829, objected to the rule that *seisina facit stipitem;* and they recommended an alteration of the rule, so far as that the inheritance should pass to the heir of the person last seised of, or *entitled to the estate or interest*, to be taken by inheritance. By the statute of 3 & 4 Wm. IV. c. 27, no descent cast or discontinuance tolls or defeats any right of entry for the recovery of land.

(*c*) 8 Wils. 516.

(*d*) Basset *v.* Basset, 3 Atk. 203.

to be to the same effect, and admit of the same construction. (*a*)

2. Lineals in Unequal Degrees. — The second rule of the descent is, that if a person dying seised, or as owner of land, leaves lawful issue of different degrees of consanguinity, the inheritance shall descend to the children and grandchildren of the ancestor, if any be living, and to the issue of such children or grandchildren as shall be dead, and so on to the remotest degree, as tenants in common. But such grandchildren and their descendants shall inherit only such share as their parents respectively would have inherited if living.

The rule is thus declared in the New York Revised Statutes, and it probably is to be found in the laws of every state in the Union. (*b*) The rule applies to every case where the descendants of the intestate, entitled to share in the inheritance, shall be of unequal degrees of consanguinity to the intestate. Those who are in the nearest degree take the shares which would have descended to them, had the descendants in the same degree, who are dead, leaving issue, been living; and the issue of the descendants who are dead, respectively, take the share which their parents, if living, would have received. It may be illustrated by the following example: A. dies seised of land, and leaves B., a son, living, and D. and E., two grandsons, of C., a son who is dead. Here B., the son, and D. and E., the two grandsons, stand in different degrees of consanguinity; and B. will, therefore, under this second rule, be entitled to one half of the estate, and D. and E. to the other half, as tenants in common. Or suppose A. should leave not only B., a son living, and D. and E., two grandsons by C., who is dead, but also F. and G., two great-grandsons, by H., a daughter of C., who is also dead. Here would be descendants, living in three different * degrees of consanguinity, viz.: a son, two grandsons, *391 and two great-grandsons. The consequence would be, that B., the son, would take one half of the estate; D. and E., the grandsons, would take two thirds of the other half; and F.

(*a*) New York Revised Statutes, ii. 754, sec. 18; Griffith's Law Register, under the head of each state, No. 6. [See further, Catholic Benefit Assn. *v.* Firnane, 50 Mich. 82.]

(*b*) New York Revised Statutes, i. 751, sec. 3, 4; Mass. Revised Statutes, 1836; Griffith's Law Register, *passim*; Ordinance of Congress of 13th July, 1787; Kentucky Statutes, 1785, 1797.

and G., the great-grandsons, would take the remaining third of one half, and all would possess as tenants in common. Had they all been in equal degree, that is, had all of them been either sons, grandsons, or great-grandsons, they would, under the first rule, have inherited the estate in equal portions, which is termed inheriting *per capita*. So that, when heirs are all in equal degree, they inherit *per capita*, or equal portions, and when they are in different degrees, they inherit *per stirpes*, or such portion only as their immediate ancestor would have inherited if living. Inheritance *per stirpes* is admitted when *representation* becomes necessary to prevent the exclusion of persons in a remoter degree; as, for instance, when there is left a son, and children of a deceased son, and a brother, and children of a deceased brother. But when they are in equal degree, as all, for instance, being grandsons, representation is not necessary, and would occasion an unequal distribution of the estate; and they accordingly inherit *per capita*. This is the rule which prevails throughout the United States, with the exceptions, already noticed, of Rhode Island, New Jersey, North Carolina, South Carolina, Alabama, and Louisiana; and it agrees with the general rule of law in the distribution of personal property. (*a*) The law of descent, in respect to real and personal property, bears, in this respect, a striking resemblance to the civil law, as contained in the 118th novel of the Emperor Justinian. (*b*)

The rule of inheritance *per stirpes* is rigidly adhered to in the English law of descent of real estates. Parceners,
* 392 * in one single instance, do inherit *per capita*, but this is where the claimants stand not only in equal degree, but are entitled in their own right, as daughters or sisters of the common ancestor. They never take *per capita* when they claim the land *jure representationis;* and, therefore, if a man hath two daughters, and they both die in his lifetime, the eldest leaving three, and the youngest one daughter, these four granddaughters, though in equal degree, yet claiming by right of representation, they inherit *per stirpes*, and the one of them takes as large a por-

(*a*) See ii. 425, of this work. The rule is comprehensively and clearly stated in the Virginia Law of Descents, of 1792. Revised Code of Virginia, i. 237.

(*b*) The distinctive character of succession *per stirpes* and *per capita*, and the grounds on which they severally rest, is exceedingly well explained by Vinnius, in his Commentary upon the Institutes, lib. 3, tit. 1, n. 6.

tion as the other three. (*a*) The civil law, in this as well as in other cases respecting the succession to the property of intestates, went upon more equitable principles, but still it went not to the extent that our law has proceeded. Like the English law, it rigidly adhered to the doctrine of inheritance *per stirpes*, that is, representation took place *in infinitum* in the right line descending; but, with respect to collaterals, it permitted it, as we have done, only when necessary to prevent the exclusion of claimants in a remoter degree. (*b*) Thus, for example, by the civil law, as well as by the general American law of descents and of distributions already mentioned, a brother and a nephew took *per stirpes*, but nephews alone took *per capita*. (*c*)

3. **Parents.** — A third canon of inheritance, which prevails to a considerable extent in this country, is, that if the owner of * lands dies without lawful descendants, leaving * 393 parents, the inheritance shall ascend to them, either first to the father and next to the mother, or jointly, under certain qualifications.

(1.) *Of the Father.* — The estate goes to the father, in such a case, unless it came to the intestate on the part of the mother, and then it passes to her, or the maternal kindred; and this is according to the rule in the states of Maine, New Hampshire, Rhode Island, New York, (*a*) Kentucky, and Virginia. In Ver-

(*a*) 2 Wood. Lec. 115.

(*b*) Inst. 3. 1. 6; Novel, 118; 2 Bl. Comm. 217.

(*c*) Louisiana is here, also, an exception to the general rule in this country; and representation applies, in the collateral line, to brothers and sisters, and their descendants, whether they stand in equal or unequal degrees. Civil Code of Louisiana, No. 893. The Code Napoleon, from whence the law of descents in Louisiana, in the descending and collateral lines, was taken, adheres in this case (see No. 742) to the rule of representation; and I apprehend the doctrine of representation is also preserved in these collateral cases in North and South Carolina, Alabama, and Rhode Island, notwithstanding the descendants in the collateral line may stand in equal degrees.

(*a*) New York Revised Statutes, i. 751, sec. 5; ib. 753, sec. 12. The rule in New York, according to the 5th section of the Revised Statutes above cited, and the amendments thereto, by statute of the 20th April, 1830, is, that if the intestate dies, without lawful descendants, leaving a father, the inheritance descends to him, unless it came to the intestate on the part of his mother, and she be living. But if she be dead, the estate so descending on her part shall go to the father for life, and then to the brothers and sisters of the intestate, and their descendants, according to the law of inheritance by collateral relatives; if there be no such brothers or sisters, or their descendants, living, the inheritance descends to the father in fee. [See Brown *v.* Burlingham, 5 Sandf. 418.]

mont, the widow, in default of issue, takes one half of the estate, and the father the other half. (*b*) In Massachusetts (*c*) and in Arkansas, the estate descends in all cases to the father, if the intestate leaves no lawful descendants. In Georgia, the widow of the intestate takes a moiety, if there be no children; and the other moiety, or the whole, if there be no widow, goes to the father only, as one of the next of kin with the brothers and sisters, for the statute makes them equal of kin for the purpose of inheritance. (*d*) In Maryland, if the estate was acquired by descent, it goes to the parent or kindred in the paternal or maternal line from which it descended. If otherwise, it goes to the father only in default of issue, and of brothers and sisters of the whole and of the half blood. In New Jersey, brothers and sisters of the whole blood, and their children, take the inheritance in default of lineal heirs, in preference to the parents, or either of them. But in default of such brothers and sisters, and their issue, the estate descends to the father in fee simple, and, if no father, to the mother for life, and, after her death, to the brothers and sisters of the half blood. (*e*) The rule in Mississippi is essentially the same, except that the mother in the above case takes a fee, and the half blood take equally with the whole blood, unless they be kindred in the same degree, and then the whole blood are preferred. (*f*) In Louisiana, the father and mother succeed equally as next of kin to a moiety of the estate of the child dying intestate and without issue. The other moiety goes to the brothers and sisters and their descendants. If only one of the

* 394 parents * survives, that parent takes one fourth; and it seems that such parent is a forced heir for the one fourth of the estate, and that the child cannot dispose of it by will. (*a*) The rule in Indiana resembles very much that in Louisiana; for, in default of issue, the father, or, if he be dead, the mother, takes one half of the estate, and the other half is equally divided among the brothers and sisters, or their descendants. If no parents, the brothers and sisters, or their descendants, take the whole. If none

(*b*) Revised Statutes of Vermont, 1839, p. 293.

(*c*) Massachusetts Revised Statutes, 1836.

(*d*) Hotchkiss's Codification of the Statute Law of Georgia, 1845.

(*e*) Elmer's Digest, 130, 131; R. S. of New Jersey, 1847, tit. 10, c. 2.

(*f*) Revised Code of Mississippi, 1824, p. 41; [Hulme *v.* Montgomery, 31 Miss. 105.]

(*a*) Civil Code of Louisiana, Nos. 899, 907; Cole *v.* Cole, 19 Martin, 414.

of them, and the parents be living, then the whole estate goes to the father, or, if dead, to the mother. (*b*) In Illinois, in default of issue and their descendants, the estate goes as follows: the whole personal estate and one half of the real estate to the widow, and the residue, or the whole, if there be no widow, to the parents, brothers and sisters, and their descendants, in equal parts; and if only one of the parents be living, that parent takes as survivor a double portion. If there be no widow, or parent, or brothers, or sisters, or their descendants, then the estate descends in equal parts to the next of kin in equal degree, computing by the rules of the civil law. (*c*) In Maryland, if the intestate dies without issue, the father succeeds, and if no father, then the estate goes to the brothers and sisters of the blood of the father and their representatives, and if none, then to the grandfather and his descendants; and if that line fails, then in like manner to the mother and her descendants and maternal ancestors. The delineations are specific and minute. (*d*) In Pennsylvania, the father and mother take jointly for life, and for the life of the survivor, and if there be no issue, or brothers, or sisters, or descendants of the whole blood, the father and mother, if both be living, and if not, the survivor, takes an estate in fee. (*e*) In Missouri, the parents take equally with the brothers and sisters of the intestate. In South Carolina, by the act of 1797, in default of issue, or widow (who takes a third or moiety, or two third parts of the estate, as the case may be), the father, or if dead, the mother, takes the estate, real and personal, in conjunction with the brothers and sisters, in equal shares. (*f*) In Connecticut, Ohio, North Carolina, Tennessee, Mississippi, and Alabama, the father takes only in default of brothers and sisters. (*g*) In Delaware, the parents

(*b*) Revised Statutes of Indiana, 1838, p. 237; [Ramsey *v.* Ramsey, 7 Ind. 607.]

(*c*) Revised Laws of Illinois, ed. 1833, p. 625.

(*d*) Dorsey's Laws of Maryland, i. 745.

(*e*) Act of April 8, 1833; Purdon's Dig. 550, 551.

(*f*) Watson *v.* Hill, 1 M'Cord, 161. But by the statute of 1791 (*vide supra*, p. 29) *the husband* surviving his wife takes, under the statute of distributions of South Carolina, the same share of her real estate that she would have taken of his estate if she had survived.

(*g*) In Alabama, the widow takes a moiety in dower, if there be no lineal descendants. Aikin's Dig. 2d ed. 129. She takes, in Missouri, in that case, one half of the real and personal estate absolutely. In Ohio, in default of lineal descendants, the estate passes to the brothers and sisters of the intestate of the *whole blood*, and their representatives; and in default of the whole blood, the estate passes to the brothers

are postponed to the brothers and sisters, and their descendants; and in default of brothers and sisters, the estate is distributed equally "to every of the next of kindred of the intestate, who are in equal degree." I do not know what construction has been given to the statute on this subject in Delaware; but the *next of kindred to the intestate*, I presume, must be the parents, if living. They are nearer of kin than brothers and sisters; but the statute having given brothers and sisters the preference, and then, in default of them, to the next of kindred *to the intestate*, it would seem, that the claim of the parents as next of kin reassumes its force, and that both father and mother jointly must be entitled to the inheritance. In North Carolina, the parents, or the survivor of them, take for life only, in default of issue, and of brothers and sisters; and in New Jersey, if there be no lawful issue, nor a brother or sister of the whole blood, or their lawful issue, the father takes the inheritance in fee; unless it came to the person last seised from the mother by descent, devise, or gift, in which case it descends as if the person dying seised had survived his father. (*h*)

* 395 * The admission of the father to the inheritance of his children dying intestate, and without lineal descendants, is an innovation, and a very great improvement upon the English common-law doctrine of descents. The total exclusion of parents, and all lineal ancestors, in such a case, is said to be peculiar to the English law, and to the laws of other nations, which have

and sisters, and their descendants of the *half blood*. Statute Laws of Ohio, 1831, p. 253. If there be no brothers or sisters of the half blood, or their representatives, the estate descends to the father, and, if he be dead, to the mother. Ib. [See Doe *v.* Considine, 6 Wall. 458; Curren *v.* Taylor, 19 Ohio, 36.] In Connecticut, the parents are preferred to the half blood in the above case. Revised Statutes of Connecticut, 1821, p. 207; ib. 1838, p. 235. In Tennessee, under the statutes of 1784, the estate in default of issue, and brothers and sisters, and their issue, vests in fee in the parent from whom derived; or if the estate was acquired by the intestate, then it vests in the father in fee, if living; and if not, then it descends to the mother for life, and then to the heirs of the intestate on the part of the father; and in default thereof, to the heirs on the part of the mother. Lands acquired by *descent from the father*, do not even vest in the mother for life, but go to the collateral relations on the father's side. 2 Yerg. 115; Roberts *v.* Jackson, 4 Yerg. 308; Hoover *v.* Gregory, 10 id. 444; Statute Laws of Tennessee, ed. 1836, p. 249.

(*h*) Griffith's Law Register; Elmer's N. J. Dig. 130; Reeve's Treatise on the Law of Descents; Statutes of the several States, published by John Anthon, Esq., as an Appendix, or third volume, to Sheppard's Touchstone; New York Revised Statutes; North Carolina Revised Statutes, 1837, p. 237.

been deduced from the feudal policy. (*a*) Sir Martin Wright has labored to vindicate the English rule on the feudal theory, by a train of artificial and technical reasoning, which has no manner of foundation in the principles of justice. So far as the feud was presumed to be *antiquum aut paternum*, it was deemed to have passed already through the father; and, therefore, he could not succeed. It would be repugnant to the fiction; and the rights of the father, as it seems, must be sacrificed to sustain it. The heir was also bound to show himself entitled by a regular course of descent from the first feudatory or purchaser; and the best evidence of that which the case afforded, was to prove that he was heir of the whole blood to the person last seised. (*b*) The very artificial

(*a*) By the Saxon Laws, however, upon the death of the son without issue, the father inherited. Laws of Hen. I. c. 70, and by the Spanish law (and which constitutes the law of Texas), in default of lineal descendants, the parents, and, in default of parents, the grandparents, equally on the part of the father and the mother, succeed to the estate, and collaterals do not take until failure of the ascending line. Institutions of the Civil Law of Spain, by Asso & Manuel, b. 2, tit. 4, c. 3; White's new Recopilacion of the Laws of Spain and the Indies, Phil. 1839, p. 116, in which is incorporated the Institutes of Asso & Manuel, and the laws of Coahuila and Texas.

(*b*) Wright on Tenures, 179–185. Sir William Blackstone (Comm. ii. 211–212) has followed implicitly the reasoning of Sir Martin Wright; and he charges Sir Edward Coke with having adopted the quaint reasoning of Bracton, who "regulates," as he says, "the descent of lands according to the laws of gravitation." This reflection on the good sense and taste of Coke and Bracton appears to me to be utterly unmerited and groundless.

Bracton, after speaking of the descent of the fee to the lineal and collateral heirs, adds: Descendit itaque jus quasi ponderosum quid cadens deorsum recta linea vel transversali, et nunquam reascendit ea via qua descendit. A latere tamen ascendit alicui propter defectum hæredum inferius provenientium. Bracton, lib. 2, c. 29, sec. 1. Lord Coke (Co. Litt. 11, a), after quoting the maxim in Littleton, that inheritances may lineally descend, but not ascend, barely cites the passage in Bracton, to prove that lineal ascent, in the right line, is prohibited, and not in the collateral. He also refers to Radcliff's Case (3 Co. 40), where some reasons are assigned for excluding the lineal ascent, and the law of gravity is not one of them. The words of Glanville (lib. 7, c. 1) are to the same effect, *hæreditas naturaliter descendit, nunquam naturaliter ascendit*. This is clearly the course and dictate of nature. It is alluded to in one of the Epistles of St. Paul (2 Cor. xii. 14), and it was frequently and pathetically inculcated in the classical as well as in the juridical compositions of the ancients. Taylor's Elements of the Civil Law, 540–542. The ascent to parents is up stream, and against the natural order of succession. Bracton admits the ascent in collateral cases, which shows that he did not consider descent "regulated" by any dark conceit. The "laws of gravitation" were unknown when Bracton wrote. He merely alluded to the descent of falling bodies by way of illustration; and it was a beautiful and impressive allusion, worthy of the polished taste of Bracton and the grave learning of Coke.

The new English statute of descents, of 8 & 4 Wm. IV. c. 106, has essentially

* 396 * nature and absurd results of the English rule are strikingly illustrated by the well known case stated by Littleton, (*a*) that though the father never can be heir to his son, for the inheritance never can ascend, and the uncle, or father's brother, though in a remoter degree, will have the preference; yet, if the uncle should die intestate without issue, the father, as heir to the uncle, may succeed to the inheritance of his son; for, says Littleton, he cometh to the land by collateral descent, and not by lineal ascent. So, it has been held, that if either parent stood in the relation of cousin to the son, they would inherit in that character, though not as father or mother. (*b*)

By the Jewish law, on failure of issue, the father succeeded to the son. (*c*) And by the Roman law, on failure of

* 397 * lineal descendants, the parents, or lineal ascendants, succeeded in conjunction with the brothers and sisters of the intestate, to his inheritance. (*a*) It was, however, a fixed principle in the civil law, that collaterals could never exclude ascendants, even in the remotest degree; and no collaterals, beyond brothers' and sisters' children, could share, in any degree, the estate with ascendants. (*b*) But the succession of parents, in the ascending line, was regarded by the civil law as *luctuosa hæreditas*, or *tristis successio;* and the natural order of mortality was held to be disturbed. (*c*) The Napoleon code, (*d*) in imitation

altered the common-law canon of descent. It admits the ascending line to the succession on failure of the descending line, and before a resort to collaterals. Thus the father succeeds as heir to the inheritance before brothers and sisters, and the grandfather before uncles and aunts. Paternal ancestors and their descendants were to have preference over maternal ancestors and their descendants, and male paternal and maternal ancestors are preferred to female.

(*a*) Litt. sec. 8.

(*b*) Eastwood *v.* Vincke, 2 P. Wms. 613. By the law of Hen. I., in default of children, the estate descended *to the parents;* and, in default of parents, to the brothers and sisters; and in default of them, to uncles and aunts; but with a preference throughout to the male line. L. L. Hen. I. c. 70. See Wilkins's Leges Anglo-Saxonicæ.

(*c*) Jones's Comm. on Isæus, 181; Selden, de success. ad Leges Ebræ. in bona defunct. c. 12.

(*a*) Novel, 118, c. 2.

(*b*) Taylor's Elements of the Civil Law, 542.

(*c*) Inst. 3. 3. 2; Code, 6. 25. 9. We have a striking allusion to this sentiment of nature, in the address of the provisional government of Paris to the French nation, on the 6th of April, 1814, when the imperial sceptre was falling from the hands of Napo-

(*d*) Sec. 746, 747, 748, 751.

of the rule in the civil law, gives to the parents of a child dying without issue a moiety of his estate, and to the brothers and sisters the other moiety. Toullier (*e*) justifies the ascent of the inheritance to parents in default of issue, as being laid on the foundations of natural law equally with lineal descent; and he severely arraigns, as unjust and dangerous, the theory of Montesquieu, (*f*) who refers the whole right of succession in the descending, as well as in the ascending line, solely and exclusively to positive institution. Montesquieu is not singular, for Archdeacon Paley refers the right of succession entirely to the law of the land. (*g*) The elder text writers on public law have generally placed the claim of children to the inheritance of their parents on the law of * nature, and the claims of parents *398 to the child's estate on failure of issue, as partaking of the same reason, though in an inferior degree. But Grotius admits that the law of succession in its modifications has exceedingly varied in different countries and ages, and that the law of nature is not of precise and absolute obligation on this subject. (*a*)

(2.) *Of the Mother.* — If the inheritance came to the intestate on the part of the mother, though his father survive him; or if he does not survive him, and the mother survives, and there be a brother or sister, or their descendants, the mother takes an estate for life only; and if there be no brother or sister, or their issue, or father, she takes the inheritance in fee. (*b*)

This is the rule in New York, (*c*) and in Pennsylvania the mother, in default of issue, takes a life interest in the real estate jointly with the father, or solely for life if she survives him. And in default of issue, and brothers and sisters, and their descendants

leon. They exhorted the nation to restore the ancient monarchy, and look for the return of peace and the pacific arts, so *that the French youth might no longer be cut off by arms before they had strength to bear them; and the order of nature no longer be interrupted,* and that *parents might hope to die before their children.*

(*e*) Droit Civil Français, iv. sec. 124, 126, note.

(*f*) L'Esprit des Loix, liv. 26, c. 6.

(*g*) Principles of Philosophy, b. 3, pt. 1, c. 4.

(*a*) Grotius, de Jure B. & P. b. 2, c. 7, sec. 5, 11; Puff. Droit des Gens, par Barb. 4, 11, 13.

(*b*) In Arkansas, if there be no children, or father, the mother takes the estate. By the act of New York, of May 13, 1845, if the deceased leave a mother and no child, or descendant, or father, brother, sister, or their representatives, the mother takes a moiety of the estate if there be a widow, and the whole if there be none.

(*c*) New York Revised Statutes, i. 752, sec. 6.

of the *whole* blood, the real estate descends in fee to the father and mother, if both be living, and, if not, to the survivor. (*d*) In New Jersey, the mother takes a life estate, if the intestate dies without issue, or brother or sister of the whole blood, or their issue, or father; (*e*) and in North Carolina, she takes with the father, or as survivor, an estate for life only, in default of issue, and in default of brothers and sisters. She takes no other estate in Tennessee, nor even that estate, unless in default of a father. (*f*) On the other hand, in Illinois and Louisiana, she is received on the most favorable terms; and, in default of issue, she takes equally a portion of the inheritance with the father; being, in Louisiana, a moiety of the estate between them, and, in Illinois, as I should apprehend, the parent or parents take the whole estate as next of kin. In Georgia, the widow of the intestate takes a child's *399 share of the estate; and if no issue, then she takes *a moiety. If no widow, issue, or father, the mother takes an equal share, as one of the next of kin, with the brothers and sisters. The mother, in Vermont, takes equally with the brothers and sisters of the intestate. On default of issue and widow (for she takes half of the estate), and father, and brothers, and sisters, the mother takes the whole estate as next of kin. (*a*) The law of Maine and New Hampshire is nearly similar, but with this variation, that the mother takes equally with the brothers and sisters, and they all take alike, and the widow of the intestate is confined to her common-law dower. In Massachusetts, Rhode Island, Connecticut, Ohio, Delaware, Maryland, Alabama, and Mississippi, the mother takes the inheritance in default of issue, and of brothers and sisters and father. But if there be brothers and sisters, then, by the laws of Massachusetts, Rhode Island, Virginia, Kentucky, and South Carolina, in default of issue and father, the mother shares equally with the brothers and sisters,

(*d*) Act of April 8, 1833; Purdon's Dig. 550, 551. But in the case of Maffit *v.* Clark, 6 Watts & S. 258, the father died intestate, leaving two daughters infants, who died unmarried and without issue, leaving a mother, it was held, that the brothers of the father took the estate, by descent, under the act of 1833, and not the mother.

(*e*) Act of 1838; Elmer's Dig. 131; R. S. of New Jersey, 1847.

(*f*) In Tennessee, under the statutes of 1784, lands acquired by descent from the father do not, upon the death of the child, intestate, and without issue, or brother or sister, vest in the mother for life, but go to the uncles and aunts on the father's side. Her life estate by inheritance from her issue is confined to lands acquired by such issue, and when the child leaves no father living. *Vide supra*, 394, n. 2.

(*a*) Revised Statutes of Vermont, 1839, p. 292.

and their descendants; and in Missouri, she shares equally with them and the father, though he be living; and, in Connecticut, she shares equally with the father; and, in Indiana, she takes two shares instead of one.

In the ancient Attic laws of succession, the inheritance of an intestate without issue went to the collateral kindred on the father's side, with a uniform preference of males; and it did not descend to the kindred on the mother's side, until the relations in the paternal line, to the degree of second cousins, had failed. The mother, at Athens, as well as at Jerusalem, was excluded from the inheritance of her son. This appears from the speech of Isæus on the estate of Hagnias. Among the Jews, in default of issue, the father succeeded to the estate of the son, excluding the mother and collaterals. (*b*) The decemviral law at Rome, and
* which seems, in this instance, says Sir William Jones, to *400
have been borrowed from that of Solon, excluded mothers from the right of succession to their children. This rigor was sometimes mitigated by the lenity of the prætors. Relief was promoted by the Senatus consultum Tertullianum, in the time of Hadrian, and completed, with some restrictions, by the Justinianean code. (*a*)

The great diversity of opinion and policy among different nations, as to the succession of parents, and which appears so strongly in our American codes, is very strikingly illustrated in the jurisprudence of Holland. In South Holland, the inheritance, in default of issue, ascends to the parents, *in case they are both alive.* But if only one of them survives (and it is immaterial which of them), the survivor is wholly excluded, because there is a *separation of the bed.* On the other hand, in North Holland, the surviving parent divides the estates with the brothers and sisters of the deceased, whether they be of the full or half blood; and if there be no brother or sister, the surviving parent takes the whole. (*b*)

(*b*) Mater et cognatio materna a successione exclusa penitus. Selden, de Success. ad Leges Ebræ. in bona defunct. c. 12. Lord Ch. J. Holt, in Blackborough *v.* Davis, 1 P. Wms. 52, says that this was according to the construction of the Jewish doctors upon the 27th chapter of Numbers; and it is so stated in Selden, ib. c. 12. See also Antiquities of the Jewish Republic, by Thomas Lewis, iii. 824.

(*a*) Jones's Isæus, Pref. Discourse; his Commentary on Isæus, 183, &c.; Novel, 118, c. 2.

(*b*) Van der Linden's Institutes of the Laws of Holland, by J. Henry, Esq., 159, [i., c. 10, sec. 2.]

4. **Brothers and Sisters.** — If the intestate dies without issue or parents, the estate goes to his brothers and sisters, and their representatives. If there be several such relatives, and all of equal degree of consanguinity to the intestate, the inheritance descends to them in equal parts, however remote from the intestate the common degree of consanguinity may be. If they all be brothers and sisters, or nephews and nieces, they inherit equally; but if some be dead leaving issue, and others living, then those who are living take the share they would have taken if all had been living, and the descendants of those who are dead inherit only the share which their parents would have received if living.

*401 The rule applies to other direct lineal descendants of brothers and sisters, and * the taking *per capita* when they stand in equal degree, and taking *per stirpes* when they stand in different degrees of consanguinity to the common ancestor, prevails as to collaterals, to the remotest degree, equally as in the descent to lineal heirs. (*a*)

The succession of collaterals, in default of lineal heirs, in the descending and ascending lines, has existed among all nations who had any pretensions to civility and science, though under different modifications, and with diversified extent. In this fourth rule (and which is the rule in New York), (*b*) the ascending line, after parents, is postponed to the collateral line of brothers and sisters. The rule I have stated is perhaps universally the rule in this country, that brothers and sisters are preferred, in the order of succession, to grandparents, though the latter stand in an equal degree of kindred. (*c*) This is by analogy to the rule of distribution of the personal estate of intestates, as settled in the civil and in the English law. But there are very considerable differences in the laws of the several states, when the next of kin, in this

(*a*) Pond *v.* Bergh, 10 Paige, 140.

(*b*) New York Revised Statutes, i. 752, sec. 7, 8, 9, 10. The law of descent, in New York, is on this point altered and improved; for it appears that by the law of 1786, nephews and nieces took *per stirpes* in all cases. Jackson *v.* Thurman, 6 Johns. 322.

(*c*) By the Civil Code of Louisiana, art. 908, and in Arkansas, if a person dies leaving no descendants, nor father nor mother, his brothers and sisters, or their descendants, inherit the whole succession, *to the exclusion of the ascendants*, and other collaterals. The old Civil Code of Louisiana was different; since, according to that code, before collateral relations could set up a claim to the inheritance, they must have shown *that the relations in the ascending line had ceased to exist*. Hooter's Heirs *v.* Tippet, 12 Martin (La.), 390; Bernardine *v.* L'Espinasse, 18 id. 94.

collateral line, are nephews and nieces, and the claims of uncles and aunts to share with them are interposed. The direct lineal line of descendants from brothers and sisters, however remote they may be, take exclusively and by representation, under the rule in New York, so long as any of that line exist. But this is not the case in many of the United States; and the rule is, therefore, * to be received with this qualification, that in *402 most of the states, nephews and nieces, and their descendants, take as there stated, but they do not take exclusively. In Massachusetts, if there be no lineal descendants, nor father, the estate descends in equal shares to the brothers and sisters and mother, and to the children of any deceased brother or sister by right of representation; but if there be no brother or sister living, the estate descends to the mother in exclusion of the issue, if any, of deceased brothers or sisters. (*a*) Uncles and aunts take equally with the nephews and nieces, as being of equal kin, in the states of New Hampshire, Vermont, and North Carolina. But nephews and nieces take in exclusion of them, though they be all of equal consanguinity to the intestate, in the states of Maine, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Ohio, Indiana, Illinois, Kentucky, Virginia, (*b*) Tennessee, South Carolina, Georgia, Alabama, Louisiana, Mississippi, and Missouri. I draw this conclusion, because the inheritance appears to be given, in those states, to the brothers and sisters, and *their descendants or children*, before recurrence is had to a distinct branch of the grandparents' stock. The principle on which the rule is founded is, that collateral kindred, claiming through the nearest ancestor, are to be preferred to the collateral kindred, claiming through a common ancestor more remote. The claim of the nephew is through the intestate's father, and of the uncle, through the intestate's grandfather.

In several of the states, as in Maine, New Hampshire, Vermont, Rhode Island, Connecticut, Pennsylvania, Maryland, Georgia, and Mississippi, there is no representation among collaterals, after brothers' and sisters' children; (*c*) nor in Delaware, after brothers

(*a*) Massachusetts Revised Statutes, 1836.

(*b*) Davis *v.* Rowe, 6 Rand. 355. In this case, the Virginia Act of Descents, of 1785, and its analogy to the principles and rules of the English statute of distribution of the personal estate of intestates, and the rules of the civil law from whence it was borrowed, are examined with great industry and legal erudition.

(*c*) This was also formerly the case in New York, under the statute of descents of

and sisters' grandchildren; nor in Alabama and Mississippi, after the descendants of brothers and sisters; and in some of the states, as in New Jersey, there does not appear to be any positive provision for the case. In Louisiana, representation is admitted in the collateral line in favor of the children and descendants of the brothers and sisters of the deceased. (*d*) In North Caro-
*403 lina, the claimants take **per stirpes*, in every case, even though the claimants all stand in equal degree of consanguinity to the common ancestor, and so do the descendants of brothers and sisters by the law of descent in Alabama.[1]

The distinction between the claims of the whole and of the half blood becomes of constant application in cases of a collateral succession to real estates; and there is a wide difference in the laws of the several states in relation to that distinction. The half blood was, until lately, entirely excluded by the English law, on the very artificial rule of evidence, that the person who is of the whole blood to the person last seised, affords the best presumptive proof that he is of the blood of the first feudatory or purchaser. (*a*) Our

1786. In Maine, the intestate died without leaving issue or parents, but leaving a child of a deceased brother, and the grandchildren of another brother deceased, and it was held that the child took the estate, and the grandchildren were not entitled to a distributive share of the estate because the statute in that state was equivalent in its effects to the legal provision in the English statute of distribution, that there should be no representation among collaterals beyond brothers' and sisters' children. Quinby *v.* Higgins, 14 Me. 309.

(*d*) Civil Code, art. 893. But representation, for the purpose of inheritance does not extend to the children of first cousins of the deceased. Ratcliff *v.* Ratcliff, 19 Martin, 335.

(*a*) 2 Bl. Comm. 228–231. The rule of the English common law is, that the heir claiming by collateral descent must be the nearest collateral heir of the whole blood of the person last seised on the part of the ancestor through whom the estate descended. Leach, V. C., in Hawkins *v.* Shewen, 1 Sim. & Stu. 260. And the descent between two brothers was held to be an *immediate* descent, and therefore title might be made by one brother or his representative *to* or *through* another, without mentioning their common ancestor. 2 Bl. Comm. 226. But in 1833, by the statute of 3 and 4 Wm. IV. c. 106, the distinction between the whole and the half blood in the descent of real property, and between brothers, is in a great measure abolished. The half blood are to succeed to the inheritance next after any relation in the same degree of the whole blood and his issue, where the common ancestor shall be a male; and next after the common ancestor, where such ancestor shall be a female. And no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent.

[1] [Clement *v.* Cauble, 2 Jones, Eq. (N. C.) 82; Stallworth *v.* Stallworth, 29 Ala. 76.] As to half blood, see 406, n. 1.

American laws of descent would seem to be founded on more reasonable principles. The English rule of evidence may be well fitted to the case to which it is applied; but the necessity or policy of searching out the first purchaser is to be questioned, so long as the last owner of the estate, and the proximity of blood to him, are ascertained. In Maine, New Hampshire, Vermont, Massachusetts,* (*b*) Rhode Island, (*c*) New York, (*d*) Illinois, North Carolina, (*e*) Maryland, and Tennessee, (*f*) there seems to be no essential distinction left between the whole and the half blood. They are equally of the blood of the intestate. But in the states of Connecticut, New Jersey, Pennsylvania, Delaware, Ohio, Indiana, Maryland, (*g*) * Virginia, (*a*) Kentucky, *404

(*b*) Mass. Revised Statutes, 1836; Revised Statutes of Vermont, 1839, p. 292; [Hatch *v.* Hatch, 21 Vt. 450; Prescott *v.* Carr, 9 Fost. (29 N. H.) 453.]

(*c*) Gardner *v.* Collins, 2 Peters, 58; 3 Mason, 398, s. c.

(*d*) New York Revised Statutes, i. 753, sec. 15; [Brown *v.* Burlingham, 5 Sandf. 418; Beebee *v.* Griffing, 14 N. Y. 235; Valentine *v.* Wetherill, 31 Barb. 655.]

(*e*) Act of 1808; North Carolina Dig. p. 237; North Carolina Revised Statutes, 1837.

(*f*) It was the object of the act of 1784, adopted in Tennessee, to preserve real estate derived by descent, in the blood of the transmitting ancestor, and the whole and half blood of such ancestor take equally. Butler *v.* King, 2 Yerg. 115; [Nesbit *v.* Bryan, 1 Swan, 468.] In Nichol *v.* Dupree, 7 Yerg. 415, the claims of the half blood, under the statutes of 1784 and 1797, were extensively discussed, and they were considered as equally entitled under the law of descents in Tennessee, with the whole blood. Statute Laws of Tennessee, ed. 1836, pp. 248, 249, 250; [Deadrick *v.* Armour, 10 Humph. 588.]

(*g*) In Maryland, the whole and half blood take equally ancestral estates; but if the intestate acquired the estate by purchase, in contradistinction to title by descent, brothers and sisters of the whole blood have the preference. This was by the statute of 1786. Hall *v.* Jacobs, 4 Harr. & J. 245; Maxwell *v.* Seney, 5 id. 23. See also Dorsey's Laws of Maryland, i. 746, ed. 1840. The ordinance of Congress, of 13th July, 1787, for the government of the northwest territory (and which territory now includes the states of Ohio, Indiana, Illinois, Michigan, &c.), provided, in the law of descents, that there should in no case be a distinction between kindred of the whole and half blood. But a distinction would appear to have been subsequently created by statute in Ohio and Indiana. [Cliver *v.* Sanders, 8 Ohio St. 501.] See *supra*, p. 394, and Griffith's Register, and Revised Statutes of Indiana, 1838, p. 237. In Clark *v.* Sprague, 5 Blackf. (Ind.) 412, it was adjudged, that, under the act of 1831, the words *brothers and sisters* included as well brothers and sisters of the half as of the whole blood in the case of intestate estates, both of real and personal estate. The subsequent Indiana statutes of 1838 and 1843, on the subject of descents, contain provisions in favor of the half blood.

(*a*) In Virginia, collaterals of the half blood take half portions, unless all the collaterals be of the half blood, and then they take whole portions. Revised Code of Virginia, i. 237.

South Carolina, (*b*) Georgia, Alabama, (*c*) Mississippi, (*d*) Missouri, and Louisiana, (*e*) there is a preference (though more or less extensive in different states) given, by the law of descendants, to the whole blood. The half blood is only postponed, or its share diminished, and nowhere is it totally excluded. (*f*)

There is a difference, also, in the laws of the several states, between the succession to estates which the intestate had acquired in the course of descent, or by purchase. If the inheritance was ancestral, and came to the intestate by gift, devise, or descent, it passes to the kindred who are of the blood of the ancestor from whom it came, whether it be in the paternal or maternal line, so as to exclude the relations in the adverse line until the other line be exhausted. This is the rule in Rhode Island, Connec-
* 405 ticut, New York, (*g*) New Jersey, (*h*) * Ohio, Virginia,

(*b*) Lawson *v.* Perdriaux, 1 M'Cord, 456. [See Driskell *v.* Hanks, 18 B. Mon. 855, 864; Perry *v.* Logan, 5 Rich. Eq. 202.] In North Carolina, under the act of 1808, on failure of lineal descendants, the inheritance transmitted by descent or devise from an ancestor (grandfather) goes to the next collateral relation of the person last seised who was of the blood of such ancestor, though a cousin, rather than to a half brother, *ex parte materna*, for he was not of the blood of the ancestor. Felton *v.* Billups, 2 Dev. & Batt. 308.

(*c*) Kindred of the whole blood preferred to kindred of the half blood in the same degree. No other difference. Digest of Laws of Alabama, 885. In Georgia, by act of 12th December, 1784, if a person dies without issue, leaving no brothers or sisters in the paternal line, a preference seems to be given to the half blood in the maternal line. But in the paternal line brothers and sisters of the whole and half blood inherit equally. Prince's Digest of the Laws of Georgia, ed. 1837, p. 223; University *v.* Brown, 1 Ired. Law, 387.

(*d*) Fatheree *v.* Fatheree, Walker (Miss.), 311; Rev. Code of Mississippi, 1824, p. 41.

(*e*) Civil Code of Louisiana, No. 909; Revised Statutes of Missouri, 1835, p. 223. Under the present Civil Code of Louisiana, promulgated in 1825, brothers and sisters of the whole blood do not exclude those of the half blood from the inheritance.

(*f*) In Pennsylvania, by act of 8th April, 1833, and in New Jersey, by act of 1838, the half blood succeeded by descent, in default of issue, brothers and sisters of the whole blood, and their descendants and parents. Purdon's Dig. ed. 1837, p. 551, sec. 6; Elmer's Dig. 131; R. S. of N. J. 1847. In such a case, sisters of the half blood take to the exclusion of the more remote kindred of the whole blood. The word *blood*, in its natural and technical sense, includes the half blood. Baker *v.* Chalfant, 5 Wharton, 477. In Alabama, there is no other distinction between the whole and the half blood, except that kindred of the whole blood, in *equal degree* with the half blood, are preferred. Aikin's Dig. 2d ed. p. 129.

(*g*) New York Revised Statutes, i. 752, 753, sec. 10, 11, 12, 15. The words in the

(*h*) In Den *v.* Jones & Searing, 3 Halst. 340, the half blood of the person dying seised was held entitled to inherit an ancestral estate; because he was of the half blood of the person dying seised, as well as of the blood of the ancestor from whom the lands came.

Tennessee, and North Carolina. The distinction does not appear as a positive institution in many other states, as in Maine, New Hampshire, Vermont, Massachusetts, Pennsylvania, Georgia, Alabama, Mississippi, and Missouri. (*a*) The estate, as I presume,

laws of the several states regulating the descent of ancestral inheritances require that the heir should be *of the blood* of the ancestor. This would, in the ordinary sense of the words, admit the half blood, for they may be *of the blood* of the *ancestor*, though only of the half blood to the *intestate*. But the statute of Pennsylvania has been understood to exclude the half blood in that case; and this construction arises from the wording of the estate; and Ch. J. Reeve says it is peculiar to Pennsylvania. Reeve's Law of Descents, 382. The statute of Connecticut says simply *of the blood* of the ancestor. The New York Revised Statutes have adopted the same rule; and in that solitary instance excluded the *half blood*, as not being *of the blood* of the ancestor. The 15th section referred to is not susceptible of any other construction. The learned author of the treatise of descents was mistaken in supposing, when he wrote, that the law of Pennsylvania was *peculiar*. The law of New York, of 1786, then in force, had the same peculiarity, and it has been continued. So, also, in cases to which the rules of the state do not extend, the canons of inheritance at common law still apply; and in these two respects the exclusion of the half blood continues to exist in the law of New York. In Ohio, the statute, in regulating the descent of *ancestral estates*, gives the estate, in default of lineal descendants, to the brothers and sisters of the intestate, *who may be of the blood of the ancestor, whether they be of the whole or the half blood*. But the statute further adds, that, in default of such brothers and sisters, and if the ancestor from whom the estate came by gift be living, the estate shall ascend to him, and if not living, then to his brothers and sisters, or their representatives; and in default thereof, then to the brothers and sisters of the intestate *of the half blood*, and their representatives, though such brothers and sisters *be not of the blood of the ancestors*; and if all these fail, then to the next of kin of the intestate, *of the blood of the ancestor*. Statutes of Ohio, 1831, p. 252. The statutes of Ohio relative to descents and the distribution of personal estates intended, say the court in Brewster *v.* Benedict, 14 Ohio, 385, to divide the property of which a man might die seised, into two classes, to wit, such as came to him in the regular course of descent, or may have been devised or conveyed to him by gift, but which he would have inherited had there been no such devise or gift; and, secondly, such as he may have acquired by his own industry, or by devise or deed of gift, from a person from whom he would not have inherited in the regular line. In the first class of cases, the blood of a person from whom the estate came is to be regarded in the distribution, and in the last case, the blood of the intestate.

(*a*) In 1807, lands in Missouri did not descend to brothers and sisters of the half blood. 1 Mo. 694. By the Statutes of Descents in Mississippi, of March 12, 1803, and revised and amended February 10, 1806, and November 26, 1821, if there be no children of the intestate, or descendant of them, nor brother, nor sister, nor the descendants of them, nor father or mother living, the land descends in equal parts to the next of kin to the intestate, in equal degree, computing by the rules of the civil law. The construction which has been given to the words *next of kin* in the above statute, excludes the operation of the common law, in relation to the subject of paternal and maternal inheritance, and gives, for instance, the estate to the maternal aunt, as being next of kin, to the exclusion of a paternal great-uncle more remote, though the estate was acquired by descent in the paternal line. Doe *ex dem.* Hickey

descends in those states, with some qualifications, in the same path of descent, whether it came from the paternal or maternal ancestors, or was acquired by purchase.

The English law requires the claimant of the inheritance to be heir to the person last seised, and of the blood of the first purchaser, and of the whole blood of the person last seised. It gives a universal preference in collateral inheritances, as far as relates to the first purchaser, to the paternal over the maternal line; and this English doctrine is founded on the technical rule *406 already alluded to, that it is *necessary the heir should show himself to be descended from the first purchaser, or afford the best presumptive evidence which the case admits of the fact. (a) The American law of descents does not go on the principle of searching out the first purchaser through the mists of the past generations, except the estate be ancestral, and then it stops at the last purchaser in the ancestral line. Its general object is to continue the estate in the family of the intestate; and in effecting it, to pay due regard to the claims of the successive branches of that family, and principally to the loud and paramount claim of proximity of blood *to the intestate.*

Prior to the novels of Justinian, the civil law admitted the half

v. Eggleston, in the Mississippi Court of Errors and Appeals. In Pennsylvania, by act of 8th April, 1833, the next of kin take the real as well as personal estate of the intestate in all cases not expressly provided by the act, without regard to the ancestor or other relation from whom such estate may have come. But the statute in preceding sections (sec. 4, 5, 6, 9) gave a preference to the whole blood over the half blood in the descent of *real* estate, where the intestate left brothers and sisters, or either, or their representatives of the whole blood. Purdon's Dig. 552, sec. 11. In the case of Bevan *v.* Taylor, 7 Serg. & R. 397, prior to the statute of 1833, the court went upon the ground that if there was no brother, or sister, or father, the estate acquired from the father went to the relations on the part of the father, in exclusion of the relations on the part of the mother; because they were not of the blood of the ancestor from whom the estate came.

In Indiana, when the estate is derived by descent from the paternal line, and there be living a brother or sister of the intestate, the maternal line take only a half portion, and so *vice versa.* Revised Statutes of Indiana, 1838, p. 237. I wish to be understood to speak on the subject of these minuter regulations with a degree of distrust. The rules concerning collateral succession in the several states are quite complex, and they are exceedingly various and different from each other in their minuter shades. The laws on this, as on many other subjects, are not constant, but exposed to the restless love of change, which seems to be inherent in American policy, both as to constitutions and laws.

(a) *Vide post,* 412, for amendments in the law of descents, by the statute of 3 and 4 Wm. IV. c. 106.

blood to the inheritance equally with the whole blood; but the novel, or ordinance of Justinian, changed the Roman law, and admitted the half blood only upon failure of the whole blood. (*b*) The laws of all countries, and of our own in particular, are so different from each other on the subject, that they seem to have been the result of accident or caprice, rather than the dictate of principle. There seems to be no very strong general principle (though, no doubt, the feelings of nature might interpose some powerful appeals in particular cases) why the half blood should be admitted equally to the inheritance of the ancestor, which he acquired by purchase, and excluded from that which he acquired by descent, devise, or gift, from some remoter ancestor, in whose blood they do not equally partake. If the ancestor was lawfully seised in fee, why should the course of descent be varied according to the source from which his title proceeded, or the manner of his procuring it? If the rule of inheritance had required no examination beyond the title of the intestate, and the proximity of blood to him, there would have been more certainty and simplicity introduced into our law of descents.[1]

(*b*) Inst. 3. 3. 5; Novel, 118, c. 3.

[1] *Half blood.* — M. Fustel de Coulanges, in his work entitled La Cité Antique, shows that there was a very widespread belief among the early Arian races, that the dead had a kind of posthumous existence, which was, however, dependent upon their receiving proper funeral rites, and being allowed to share at stated intervals in a funeral repast. According to him, the whole structure of ancient society is based upon this fact. It was of the utmost importance for a man to have children, in order that his own funeral rites and repasts might not be neglected. If none were born to him, he adopted one for this paramount reason, and with the same legal effects as if the child were his own. From this source sprung the artificial structure of the ancient family, and the importance of *agnation* as distinguished from *cognation*. The latter is the modern blood relationship; the former springs from membership of the same family, or subjection to the same *patria potestas*. When a woman married, she left the family in which she was born, and adopted the rights and was taken into the family of her husband. A woman, therefore, was the end of a line of agnatic relationship. Either she did not marry, or, if she had children, they were of her husband's family. It is in agnation, according to Sir Henry Maine, that the explanation of the exclusion of the half blood is to be sought. The Custumier of Normandy confined the rule to brothers by the same mother, but not by the same father. Such half brothers would belong to different families, and could have no claim to the same inheritance. The greater extent given to the rule in England was because the judges had no clew to its principle. Maine's Ancient Law, c. 5, 1st ed. 151. See Troplong, de l'Influence du Christianisme sur le Droit Civil des Romains, 3d ed., 21, and pt. 2, c. xi.; esp. 340; Laferrière, Hist. du Droit Franc., iii. 521.

*407 *5. **Grandparents.** — In default of lineal descendants, and parents, and brothers and sisters, and their descendants, the inheritance ascends to the grandparents of the intestate, or to the survivor of them.

This is not the rule that has recently been declared in New York, (*a*) for that excludes, in all cases, the grandparents from the succession, and the direct lineal ascending line stops with the father. The grandparents are equally excluded in New Jersey and North Carolina; and in Missouri the grandparents lose their preference as nearest of kin, but they are admitted into the next degree, and take equally with uncles and aunts. In New Jersey, in default of issue, and brothers and sisters of the whole and half blood, and their issue, and parents, and *there be several persons, all of equal degree of consanguinity to the intestate*, the estate descends to them as tenants in common. (*b*) The grandparents take the estate before uncles and aunts, in most of the United States, as being nearer of kin to the intestate, according to the computation of the civil law; and, therefore, I lay it down as a general rule in the American law of descent. I apprehend it to be the rule in the states of Maine, New Hampshire, Vermont, Massachusetts, (*c*) Rhode Island, Connecticut, Pennsylvania, Delaware, Mary-
*408 land, Ohio, (*d*) Illinois, South Carolina, Georgia, *Alabama, Mississippi, and Louisiana. (*a*) In Virginia, in default of issue, parents, brothers and sisters, and their descend-

(*a*) New York Revised Statutes, i. 572, sec. 10.

(*b*) Act of New Jersey, 1838; Elmer's Dig. 131. This would seem, from the breadth of the language, to reach uncles and aunts, and exclude grandparents.

(*c*) [Kelsey *v.* Hardy, 20 N. H. 479.] In Massachusetts, grandparents take before the *descendants* of brothers and sisters, as being nearer of kin. Revised Statutes, 1836. So it must be in every state where the estate descends to the next of kin after brothers and sisters, and there be no saving of their descendants. The Massachusetts and Alabama law of descents saves the necessity of any further special provisions after a default of issue, parents, brothers and sisters, and their descendants, by declaring, as a general rule, that the estate shall then descend to the next of kin in equal degree, and that the degrees of kindred shall be computed according to the rules of the civil law. Mass. Revised Statutes, 1836, pt. 2, tit. 2, c. 61, sec. 1, 5; Aikin's Alabama Dig. 2d ed. p. 129. This is a clear, simple rule, well settled, and saves the trouble of all further entangled investigations.

(*d*) In Ohio, if the father and mother be dead, the estate passes to the next of kin to, and of, the blood of the intestate. Statutes of Ohio, 1831, p. 253.

(*a*) In Arkansas, in default of issue, and parents, brothers and sisters, and their descendants, the estate descends to the grandfather, grandmother, uncles and aunts, and their descendants, in equal parts. Arkansas, R. S. c. 49.

ants, one moiety of the estate goes to the paternal, and the other to the maternal kindred, as follows: first to the grandfather, and next to the grandmother, and uncles and aunts, on the same side, and their descendants. (*b*) This is also the rule in Kentucky, by the statute of 1785 and 1796. In Indiana, in default of issue, and parents, and brothers and sisters, and their descendants, all the *personal* estate, and two thirds of the real estate, descends to the widow, and if dead, leaving children by a previous marriage, they take half of the estate, real and personal, and the residue; or if there be no widow, or her children, then the whole descends, one half to the paternal, and the other half to the maternal kindred, giving, in either case, preference to the grandfather, and next to the grandmother, and, in default of either, to uncles and aunts, and their descendants. (*c*) In Rhode Island, if there be no grandfather, then the estate goes to the grandmother, and uncles and aunts on the same side, and their descendants, or such of them as exist. The rule is the same as that existing under the English statute of distribution of personal estates, by which it has been repeatedly held, (*d*) that the grandmother took the personal estate in preference to uncles and aunts, as nearer of kin. The analogies of the law would have been preserved, and, perhaps, the justice of the case better promoted, if, in the New York Revised Statutes, remodelling the law of descents, the claim of kindred on the part of the grandparent had not been rejected.

6. **Uncles and Aunts.** — In default of lineal descendants, and parents, and brothers and sisters, and their descendants, and grandparents, the inheritance goes to the brothers and sisters equally, of both the parents of the intestate, and their descendants. If all stand in equal degree of consanguinity to the intestate, they take *per capita;* and if in unequal degrees, they take *per stirpes.*

This is the rule declared in New York, with the exception of the grandparents; (*e*) and I presume it may be considered, with some slight variations in particular instances, as a general

(*b*) Revised Code of Virginia, ed. 1814, i. 236.

(*c*) Revised Statutes of Indiana, 1838, p. 237.

(*d*) Blackborough *v.* Davis, 1 P. Wms. 41; Woodroffe *v.* Wickworth, Prec. in Ch. 527.

(*e*) New York Revised Statutes, i. 752, sec. 10; ib. 753, sec. 13; [Parish *v.* Ward, 28 Barb. 328.]

*409 rule throughout the United States. (*f*) It is confined, * in New York, to cases in which the inheritance had not come to the intestate on the part of either of his parents. The rule is controlled in that, as in some other states, by the following rule.

7. **Ex Parte Paterna et Materna.** — If the inheritance came to the intestate on the part of his father, then the brothers and sisters of the father, and their descendants, shall have preference; and, in default of them, the estate shall descend to the brothers and sisters of the mother, and their descendants. But if the inheritance came to the intestate on the part of his mother, then her brothers and sisters, and their descendants, have the preference; and in default of them, the brothers and sisters on the father's side, and their descendants, take.

This rule is so declared in the New York Revised Statutes; (*a*) and the adoption of the same distinction in several of the states, and the omission of it in others, has been already sufficiently shown, in discussing the merits of the fourth rule of inheritance. (*b*)

8. **Next of Kin.** — On failure of heirs, under the preceding rules, the inheritance descends to the remaining next of kin to the intestate, according to the rules in the English statute of dis-

(*f*) In Rhode Island, in default of grandparents, and uncles and aunts, and their descendants, the estate goes to the great-grandfathers; and if none, then to the great-grandmothers, and the brothers and sisters of the grandparents, and their descendants. See Statute of Descents, January, 1822. In Louisiana, representation only takes place in favor of lineal descendants, and the descendants of brothers and sisters; and in the ascending line, the nearest ancestor in degree excludes the more remote. Civil Code, Nos. 892, 893. And in the case of a default of heirs to the extent stated in the text, the inheritance goes to the collateral relations; and in that case, he who is nearest in degree excludes all the others; and if there be several in the same degree, they take *per capita*. Ib. No. 910.

(*a*) Vol. i. 752, sec. 10, 11, 12. At common law, says the vice-chancellor, in Torrey *v.* Shaw, 3 Edw. Ch. 356, the words *ex parte materna* apply to a descendible estate, when it is a question of inheritance among collaterals on the father's or mother's side. But, under the construction given to the New York Revised Statutes, if the point be as to property acquired by purchase, and the party last seised dies without issue or lineal descendants, the heirs on the father's side are preferred, and those *ex parte materna* do not take until the father's side are extinct. If the estate comes to the person last seised by descent, and no act has changed it, the descent goes to the blood of the first purchaser, so that if the property came by descent from or through the mother, it will descend *ex parte materna*.

(*b*) *Vide supra*, 405; ib. n. (*a*). [See Oliver *v.* Vance, 34 Ark. 564; Note to Bailey *v.* Ross, 32 N. J. Eq. 544.]

tribution of the personal estate, subject to the doctrine in the preceding rules in the different states, as to the half blood, and as to ancestral estates, and as to the equality of distribution. (*c*)

This rule is of very prevalent application in the several states. But there are some peculiarities in the local laws of descent, which extend their influence to this ultimate rule. Thus, in North Carolina, in the descent of acquired estates, the collateral need only to be the nearest relation of the person last seised; but in descended estates, he must be of the blood of the first purchaser; (*d*) and the rules of consanguinity are ascertained, not by the rules of the civil law as applied under the statute of distribution, but by the rule of the common * law in its *410 application to descent. (*a*) In South Carolina, the widow, under this last rule, will take a moiety, or two thirds of the inheritance, according to circumstances. In Rhode Island, Virginia, Kentucky, and Maryland, the inheritance, in default of heirs under the preceding rules, continues to ascend to the great-grandfathers, and, in default of them, to the great-grandmothers, and to the brothers and sisters of them respectively, and their descendants. If there be no kindred on either side, the estate goes, in Rhode Island, New Jersey, Virginia, Kentucky, and Ohio, to the husband or wife of the intestate, or their next of kin, if dead. In Indiana, the estate, in default of issue, and parents, and brothers and sisters, and their descendants, and grandparents, and uncles and aunts in the paternal line, and their descendants, great-grandparents and great uncles and aunts, and their descendants, the whole estate, real and personal, descends to the widow, or, if dead, to her children by a former marriage, and in default, then to the state, for the use of common schools. (*b*) In Alabama, in default of children and their descendants, and brothers and sisters, and their descendants, and father and mother, the

(*c*) In Michigan, by act of March 12, 1827, when the lineal line fails, the estate goes to the next of kin in equal degree, and those who represent them, computing by the rules of the civil law; and there is no representation among collaterals beyond brothers' and sisters' children. But if the intestate leaves no issue or wife, the mother takes equally with the brothers and sisters.

(*d*) Bell *v.* Dozier, 1 Dev. (N. C.) 333.

(*a*) North Carolina Revised Statutes, 1837, i. 237.

(*b*) Revised Statutes of Indiana, 1838, p. 238. In Arkansas, if there be no children or their descendants, or father, mother, or their descendants, or any paternal or maternal kindred, capable of inheriting, the whole real and personal estate goes to the wife. R. S. c. 49.

next of kin computed by the rules of the civil law, take equally. (*c*) In Louisiana, the direct lineal ascending line, after failure of brothers and sisters, and their descendants, is first to be exhausted, before the estate passes to the other collateral relations. The ascendants take according to proximity to the intestate; so that the grandfather will exclude the great-grandfather. The ascendants in the paternal and maternal lines, in the same degree, take equally. (*d*)

New York forms, also, a distinguished exception to this last rule of inheritance; for, in all cases not within the seven preceding rules, the inheritance descends according to the course of the common law. (*e*)

The common-law rules of descent were the law of the colony and the state of New York, down to 1782. The law was then altered; and the statute altering it was reënacted in an improved state, in 1786. (*f*) The law still required the heir to be heir to the person dying seised; and the inheritance descended, 1. To the lawful issue, standing in equal degree, in equal parts: 2. To his lawful issue, and their descendants, in different degrees, according to the right of representation: 3. To the father: 4. To brothers and sisters: 5. To the children of brothers and sisters. The right of primogeniture and preference of males was, in these cases, superseded. In all cases of descent beyond *411 *those five cases, the common law was left to govern.

The Revised Statutes, as we have seen, have carried the innovation much further; and the estate descends under the principle of equality of distribution: 6. To the descendants of brothers' and sisters' children to the remotest degree: 7. To the brothers and sisters of the father of the intestate, and their descendants; and then to the brothers and sisters of the mother of the intestate, and their descendants, or to the brothers and sisters of both father and mother of the intestate, and their descendants, according to the various ways in which the estate may have been acquired. It is a matter of some surprise, that

(*c*) Digest of Laws of Alabama, 885.

(*d*) Civil Code of Louisiana, art. 901–904. The law of succession in Louisiana is taken almost literally from the Code Napoleon.

(*e*) New York Revised Statutes, i. 753, sec. 16.

(*f*) The first act was passed the 12th July, 1782; and the second act was passed on the 23d February, 1786. See 1 Revised Laws of 1813, p. 52. See also Jackson *v.* Howe, 14 Johns. 405.

the Revised Statutes of New York did not proceed, and, in cases not provided for, follow the example of the law of descents in most of the states of the Union, and direct the inheritance to descend to the next collateral kindred, to be ascertained, as in the statute of distribution of the personal estate of intestates, by the rules of the civil law. Instead of that, we have retained in New York, in these remote cases, the solitary example of the application of the stern doctrine and rules of the common law. But, except for the sake of uniformity, it is, perhaps, not material, in cases under this last rule, which of the provisions is to govern. The claims of such remote collaterals are not likely to occur very often; and as the stream of the natural affections, so remote from the object, must flow cool and languid, natural sentiments and feelings have very little concern with the question.

The distinguishing rules of the common-law doctrine of descent are the converse of those in this country. They consist of the following principles of law, viz.: preference of males to females; primogeniture among the males; the inheritance shall never lineally ascend; the exclusion of the half blood; the strict adherence to the doctrine of succession, *per stirpes;* the collateral heir of the person last seised, to be his next collateral kinsman of the whole blood; and kindred derived from the blood of the male ancestors, however remote, to be preferred to kindred *from the blood of the female ancestors, however near, *412 unless the land came from a female ancestor. (*a*) These rules are of feudal growth; and, taken together, they appear to be partial, unnatural, and harsh in their principles and operation, especially when we have just parted with the discussion of our own more reasonable and liberal doctrine of descent. Sir Matthew Hale, however, was of a very different opinion. (*b*) He was well acquainted with the Roman law of distribution of real and personal estates, which we, in this country, have closely followed; and yet he singles out the law of descent, and couples it with trial by jury, as being two titles, equally showing, by their excellence, a very visible superiority of the laws of England above all other laws. So natural and so powerful is the impression of education and habit, in favor of the long established institutions of one's own country. (*c*)

(*a*) 2 Bl. Comm. c. 14. (*b*) Hale's History of the Common Law, ii. 74.

(*c*) The English law of inheritance underwent some amendments by the statute of

There are some other rules and regulations on the subject of descents, of which it would be proper to make mention before we close our examination of this title.

1. **Posthumous Children.** — Posthumous children, as has been already mentioned, inherit, in all cases, in like manner as if they were born in the lifetime of the intestate, and had survived him. This is the universal rule in this country. (*d*) It is equally the acknowledged principle in the English law; and, for all the beneficial purposes of heirship, a child *en ventre sa mère* is considered as absolutely born. (*e*)

2. **Computation of Degrees.** — In the mode of computing the degrees of consanguinity, the civil law, which is generally followed in this country upon that point, begins with the intestate, and ascends from him to a common ancestor, and descends from that ancestor to the next heir, reckoning a degree for
* 413 * each person, as well in the ascending as descending lines. According to this rule of computation, the father of the

3 and 4 Wm. IV. c. 106. It declared that descent should always be traced from the purchaser, and the person last entitled should be considered the purchaser, unless he acquired the land by descent, and then the person from whom he inherited was to be considered the purchaser. And if land be devised to the heir, he shall take as devisee and not by descent; and when a person takes by purchase under a limitation by deed to the heirs of the ancestor, or under a similar limitation by will, the descent shall be traced as if such ancestor was the purchaser; brother or sister shall trace descent through their parents; lineal ancestor may be heir to his issue, in preference to collateral persons claiming through him, that is, for instance, the father before the brother; no maternal ancestors, or their descendants, to inherit until all the paternal ancestors and their descendants have failed; male paternal and maternal ancestors and descendants to be preferred to female; persons related by the half blood may inherit, and the place of a relation by the half blood in order of inheritance, to be next after the relation in the same degree of the whole blood and his issue, where the common ancestor is a male, and next after the common ancestor, where a female.

(*d*) New York Revised Statutes, i. 754, sec. 18; New Jersey Revised Statutes, 1847, p. 340. So, if a future estate be limited to heirs, issue or children, posthumous children take in the same manner as if living at the death of their parent. Ib. 725, sec. 30; Griffith's Register, h. t., and the statute laws of the several states. Mass. Revised Statutes of 1836. This was not the law in Virginia until 1840, and then, by statute, posthumous children were restored to their full right of inheritance as children. Lomax's Digest, i. 600, 601. In Tennessee and New Jersey, if a posthumous child be neither provided for nor disinherited by will, but only pretermitted, he takes his share of the estate. Statute of Tennessee, 1836, p. 250; Revised Statutes, New Jersey, 1847.

(*e*) Statute 9 and 10 Wm. III. c. 16; Doe *v.* Clarke, 2 H. Bl. 399; [Pearson *v.* Carlton, 18 S. C. 47.]

intestate stands in the first degree, his brother in the second, and his brother's children in the third. Or, the grandfather stands in the second degree, the uncle in the third, the cousins in the fourth, and so on in a series of genealogical order. In the canon law, which is also the rule of the common law, in tracing title by descent, the common ancestor is the *terminus a quo*. The several degrees of kindred are deduced from him. By this method of computation, the brother of A. is related to him in the first degree instead of being in the second, according to the civil law; for he is but one degree removed from the common ancestor. The uncle is related to A. in the second degree. for though the uncle be but one degree from the common ancestor, yet A. is removed two degrees from the grandfather, who is the common ancestor. (*a*)

3. **Bastards.** — Under the English law, illegitimate children cannot take by descent, for they have not, in contemplation of law, inheritable blood. (*b*) Nor can they transmit by descent except to their own offspring, for they have no other heirs. The New York Revised Statutes (*c*) have continued the rule of the English law, denying to children and relatives who are illegitimate the capacity to take by descent. But the estate of an illegitimate intestate may descend to his mother; and if she be dead, to his relatives on the part of the mother, the same as if he had been legitimate. (*d*)

This introduction of a provision into the law of descents in New York in favor of the mother of bastards, falls short of the extent of the provision in relation to them in some of the other states. In the states of Maine, (*e*) New Hampshire, Massachusetts, (*f*) New Jersey, Pennsylvania, Delaware, South

(*a*) 2 Bl. Comm. 206, 224, 504.

(*b*) The heir must be born *after the actual marriage of his father and mother*, in order to enable him to inherit real estate in England as heir. Though a person born in Scotland before marriage becomes by the law of Scotland legitimate upon the subsequent marriage of his parents, he still cannot take real estate in England as heir. Doe *v.* Vardill, 6 Bing. N. C. 385; [Smith *v.* Kelly, 23 Miss. 167; *ante*, ii. 209, n.(*a*).]

(*c*) Vol. i. 753, sec. 14; ib. 754, sec. 19.

(*d*) By the act of New York of May 13, 1845, if the illegitimate has left a mother and no child, descendant or widow, the mother takes the whole estate.

(*e*) By statute in Maine, in 1838, c. 338, an illegitimate child is deemed heir to the person adjudged to be the putative father, or who in writing acknowledges himself to be such, and he is in all cases an heir to his mother. [Hunt *v.* Hunt, 37 Me. 333.]

(*f*) Cooley *v.* Dewey, 4 Pick. 93. But, in 1828, the law in Massachusetts was so

*414 Carolina, Georgia, Alabama, *and Mississippi, bastards are placed generally under the disabilities of the English common law; though, in several of these states, as we noticed in a former volume, (*a*) bastards may be rendered legitimate by the subsequent marriage of their parents. In the states of Vermont, Rhode Island, Virginia, Kentucky, (*b*) Ohio, Indiana, and Missouri, bastards can inherit from, and transmit to, their mothers, real and personal estates. (*c*) The principle prevails, also, in Connecticut, Illinois, Maryland, North Carolina, Tennessee, and Louisiana, with some modifications. Thus, it has been adjudged in Connecticut, that illegitimates are to be deemed children within the purview of the statute of distributions, and, consequently, that they can take their share of the mother's real and personal estate, equally as if they were legitimate. (*d*) It is not

far altered as to allow an illegitimate child to inherit immediately from the mother. He is now the lawful heir to his mother, but he cannot claim, as representing her, any part of the estate of her kindred, lineal or collateral. If he dies intestate without lawful issue, his estate descends to his mother. And if the parents intermarry, and have other children, and the father acknowledges him as his child, the Revised Statutes of 1836 declare that such child shall be considered as legitimate to all intents and purposes, except that he shall not be allowed to claim, as representing either of his parents, any part of the estate of any of their kindred, either lineal or collateral. Massachusetts Revised Statutes of 1836, p. 414.

(*a*) Vol. ii. 209. [That a child rendered legitimate by the law of its domicile is legitimate everywhere, see Miller *v.* Miller, 91 N. Y. 315.]

(*b*) In Virginia, Kentucky, and Missouri, by statute, bastards can take real estate by descent from or through the mother, and transmit the same to their line as descendants, in like manner as if they were legitimates. [Jackson *v.* Collins, 16 B. Mon. 214.] [So, also, now in Pennsylvania. Jane Neil's App., 92 Penn. St. 193; Woltemate's App., 86 Penn. St. 219.] But the statute gives them no capacity to take an inheritance from, or transmit one to, their collateral kindred. [But see Hepburn *v.* Dundas, 13 Gratt. 219;] [Jackson *v.* Jackson, 78 Ky. 390.] In Georgia, illegitimate children may inherit from their mother, and from one another. [So, also, in Rhode Island. Briggs *v.* Greene, 10 R. I. 493.] In Vermont, by statute (Revised Statutes of Vermont, 1839, p. 292), bastards are capable of inheriting and transmitting inheritances on the part of the mother; and under this statute it is held that one illegitimate child can inherit to another illegitimate child by the same mother, equally as if it were a legitimate child. Town of Burlington *v.* Fosby, 6 Vt. 83.

(*c*) The Indiana statute does not say that the mother can inherit from her bastard son; it only says he inherits from her as a legitimate child, and that if the putative father marries the mother, and acknowledges himself to be father of the child, it is then to be deemed legitimate. Revised Statutes of Indiana, 1838, p. 238.

(*d*) Heath *v.* White, 5 Conn. 228. [See, especially, Dickinson's App., 42 Conn. 491, where the subject is fully discussed.] This decision is not relished in the case of Cooley *v.* Dewey, 4 Pick. 93, because it extends the word *children*, in the statute of distributions, beyond its settled meaning in the English statute, and in those in American statutes which are a transcript of that part of it. In respect to wills, the rule of

said in the Connecticut case, that bastards can transmit an estate by descent beyond the permission in the English law; and, in the absence of any positive provision in the case, it is to be presumed they cannot. They can, however, be heirs to each other through the mother, *jure representationis*. (*e*) In Maryland, by the act of 1825, ch. 156, illegitimate children, and their issue, are declared capable in law to take and inherit real and personal estate from their mother, and from each other, and from the descendants of each other, in like manner as if born in lawful wedlock. (*f*) In North Carolina, bastards inherit to their mothers, if there be no legitimate child; and bastard brothers and sisters inherit to each other, if one of them dies intestate and without issue. The mother is excluded. (*g*) The rule in Illinois and Tennessee goes as far as that in North Carolina in respect to the capacity of bastards to inherit to their mother. (*h*)

* In Louisiana, the recognition of the rights of natural or * 415 illegitimate children is (with the exception of those whose father is unknown, or the offspring of adulterous or incestuous connections) carried beyond any other example in the United States. If they have been duly acknowledged, they inherit from the mother, if she has no lawful issue; they inherit from the

construction is, that *prima facie* illegitimate children do not take under the description of children; and there must be evidence to be collected from the will itself, or extrinsically, to show affirmatively that the testator intended that his illegitimate children should take, or they will not be included. Wilkinson *v.* Adam, 1 Ves. & B. 422; Swaine *v.* Kennerley, ib 469; Beachcroft *v.* Beachcroft, 1 Madd. 430; Shearman *v.* Angel, Bailey, Eq. 351; Collins *v.* Hoxie, 9 Paige, 88; [Durrant *v.* Friend, 11 Eng. L. & Eq 2; 21 Law J. N. S. Ch. 353; Owen *v.* Bryant, 2 De G., M. & G. 697.] [See Estate of Wardell, 57 Cal. 484.] In Bagley *v.* Mollard, 1 Russ. & My. 581, the Master of the Rolls declared, that illegitimate children cannot take under the general description in a will of *children*, provided there be legitimate children to be included. This was laying down the rule with unqualified rigor, and going beyond the more just and liberal construction declared by some of the common-law judges, in the case of Wilkinson *v.* Adam, and by the Vice-Chancellor, in Beachcroft *v.* Beachcroft. [*In re* Wells' Estate, L. R. 6 Eq. 599. See 345, n. 1.]

(*e*) Brown *v.* Dye, 2 Root, 280.

(*f*) See Brewer *v.* Blougher, 14 Peters, 178, on the construction of the Maryland statute.

(*g*) Flintham *v.* Holder, 1 Dev. Eq. 345, Statute of 1799; North Carolina Revised Statutes, 1837, p. 237.

(*h*) Bastards are enabled, in North Carolina, to inherit the real estate whereof the putative father might die seised, provided he petitioned a court of justice for the purpose, and showed that he had intermarried with the mother, or that she was dead, and obtained an order for the legitimation of the child. 1 North Carolina Revised Statutes, 1837, p. 92.

father, likewise, if he leaves no wife or lawful heir. The father and mother inherit equally from their illegitimate offspring; and in default of parents, and ascendants and descendants, the estate goes to the natural brothers and sisters of the bastard and to their descendants. (*a*)

The laws of different nations have been as various and as changeable as those in the United States on this painful but interesting subject. By the Roman law, as declared by Justinian, the mother succeeded to the estate of her illegitimate children; and those children could take by descent from her; and they also took a certain portion of their father's estate. There was a distinction between natural children who were the offspring of a concubine, and the spurious brood of a common prostitute; and while the law granted to the latter the necessaries of life only, the former were entitled to succeed to a sixth part of the inheritance of the father. (*b*) The French law, before the revolution, was in many parts of the kingdom as austere as that of the English common law; and the bastard could neither take nor transmit by inheritance, except to his own lawful children. (*c*)

*416 In June, 1793, in the midst of a total * revolution in government, morals, and law, bastards, duly recognized, were admitted to all the rights of lawful children. But the Napoleon code checked this extreme innovation, and natural children were declared not to be heirs, strictly speaking; but they were admitted, when duly acknowledged, to succeed to the entire estate of both the parents who died without lawful heirs, and to ratable portions of the estate, even if there were such heirs. If the child dies without issue, his estate devolves to the father and mother who have acknowledged him. (*a*) The French law,

(*a*) Civil Code of Louisiana, art. 912–917; Laclotte *v.* Labarre, 11 La. 179; [Nolasco *v.* Lurty, 13 La. An. 100.]

(*b*) Inst. 3. 3. 7; ib. 3. 4. 3; Code, 6. 57. 6; Novel, 18. 5. 5; Gibbon's Hist. viii. 67, 68.

(*c*) Domat, tit. Successions, pt. 2, sec. 12; ib. b. 1, tit. 1, sec. 2, art. 8; ib. b. 2, tit. 2, sec. 1, art. 10; D'Aguesseau, Dissert. sur les Bastards, Œuvres, vii. 381; Pothier, Traité des Successions, art. 3, sec. 3. This was not, however, the universal rule, for in some of the provinces of France, they followed the more indulgent provisions of the Roman law. Répertoire de Jurisprudence, par Merlin, tit. Bâtards. Bastards, as we have already seen (see *supra*, ii. 208), were legitimated, under the civil law, by the subsequent marriage of the parents; and this was the ancient law of the duchy of Normandy. Grand Coustumier, c. 27.

(*a*) Code Napoleon, art. 723, 756, 757, 758, 765.

in imitation of the Roman, distinguishes between two classes of bastards; and while it allows to the child of an adulterous and incestuous intercourse only a bare subsistence, the other and more fortunate class of illegitimates are entitled to the succession, to the qualified extent which is stated. The new dispositions in the code are so imperfect, that M. Toullier says they have led to a great many controversies and jarring decisions in tribunals. (*b*)

In Holland, bastards inherit from the mother; and they can transmit by descent to their own children, and, in default of them, to the next of kin on the mother's side. (*c*)

*When the statute law of New York was recently *417 revised, and the law of succession on this point altered, it might have been as well to have rendered illegitimate children capable of succeeding to the estate of the mother in default of lawful issue. The alteration only goes to enable the mother, and her relations, to succeed to the child's intestate estate. If a discrimination was to be made, and the right of descent granted to one party only, then surely the provision should have been directly the reverse, on the plain principle that the child is innocent, and the mother guilty of the disgrace attached to its birth. The parents are chargeable with the disabilities and discredit which they communicate to their offspring; and the doctrine has extensively prevailed, that the law ought not to confer upon such

(*b*) Toullier's Droit Civil Français, iv. sec. 248–270. He gives detail of some of those controverted points.

(*c*) Institutes of the Laws of Holland, by Van der Linden, translated by Henry, b. 1, c. 10, sec. 3; Commentaries of Van Leeuwen, b. 1, c. 7, § 4, b. 3, c. 12, § 4. It is stated by Van Leeuwen, that anciently, illegitimate children were reputed, in Holland and Germany, to be so disgraced as to be excluded from all honorable office, and even to be incompetent witnesses against persons of legitimate birth. Heineccius wrote a dissertation entitled, De Levis Notæ Macula, and he has treated the subject with his usual exuberance of learning. He agrees with Thomasius, in opposition to Gothofredus, that natural children were not branded at Rome, even with light disgrace, *nec levi nota insigniti;* but he admits that the rule is different in Germany. They are excluded from the inheritance, and bear the mark of disgrace; *semper levi nota adspersi fuisse videntur.* Heineccius then enters into an eulogium on this branch of German jurisprudence, and, with the zeal of a patriot, undertakes to show, even from Tacitus downwards, that no nation surpassed the Germans in the value which they set upon the virtue of chastity. Heineccii Opera, ii. Exercitatio 7, sec. 32, 34. In 1771, the King of Denmark declared, by ordinance, that illegitimate birth should no longer be considered a dishonor, and bastards were placed on an equality with children born in wedlock, in regard to ecclesiastical rights and employments in the church. Dodsley's Ann. Reg. for 1771, p. 128.

parents, by its active assistance, the benefits of their child's estate. The claim for the interposition of the law in favor of the mother and her kindred, and especially in favor of the putative father, is held, by high authority, to be destitute of any foundation in public policy. (*a*)

4. Advancement to a Child. — There is generally, in the statute laws of the several states, a provision relative to real and personal estates, similar to that which exists in the English statute of distribution, * concerning an advancement to a child.

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If any child of the intestate has been advanced by him by settlement, either out of the real or personal estate, or both, equal or superior to the amount in value of the share of such child which would be due from the real and personal estate if no such advancement had been made, then such child and his descendants are excluded from any share in the real or personal estate of the intestate. But if such advancement be not equal, then the child and his descendants are entitled to receive from the real or personal estate sufficient to make up the deficiency, and no more. The maintenance and education of a child, or the gift of money, without a view to a portion or settlement in life, is not deemed an advancement. An advancement of money or property to a child is *prima facie* an advancement, though it may be shown that it was intended as a gift, and not an advancement. (*a*) *y*[1]

(*a*) See the remarks of Ch. J. Parker, in 4 Pick. 95. Lord C. B. Gilbert places the exclusion of bastards from the feudal succession on high and lofty principles of honor and morality. "The lords would not be served by any persons that had that stain on their legitimation, nor suffer such immoralities in their several clans." Gilbert on Tenures, 20.

(*a*) Mitchell *v.* Mitchell, 8 Ala. 414. [See, as to what constitutes an advancement, Riddle's Estate, 19 Penn. St. 431; High's Appeal, 21 id. 283; Lawson's Appeal, 23

y[1] Whether property transferred to a child by a parent is to be considered a loan, a gift, or an advancement is a question of intention, with a presumption, at least when the amount of property transferred is substantial, that it was intended as an advancement. Graves *v.* Spedden, 46 Md. 527; Watkins *v.* Young, 31 Gratt. 84; Storey's App., 83 Penn. St. 89; Melvin *v.* Bullard, 82 N. C. 33; Holliday *v.* Wingfield, 59 Ga. 206. See Rains *v.* Hays, 6 Lea, 303. And where so agreed, the advance will operate to bar any further claim by the heir. Kershaw *v.* Kershaw, 102 Ill. 307. Advancements are to be valued as of the time they come into possession and enjoyment. Stevenson *v.* Martin, 11 Bush, 485; Ray *v.* Loper, 65 Mo. 470; Rickenbacker *v.* Zimmerman, 10 S. C. 110. The doctrine applies only in case of intestacy, and is now founded wholly on statute. Marshall *v.* Rench, 3 Del. Ch. 239.

This is the provision as declared in the New York Revised Statutes, (*b*) and it agrees in substance with that in the statute laws of the other states. (*c*) The basis of the whole is the provision in the statute of distribution of 22 and 23 Charles II., though there are a few shades of difference in the local regulations on the subject. (*d*) The statutes in Maine, Vermont, and Massachusetts have mentioned the requisite evidence of the advancement; and it is to consist of a declaration to that effect in the gift or grant of the parent, or of a charge in writing to that effect by the intestate, or of an acknowledgment in writing by the child. The provision in those states, and in Kentucky, applies equally to grandchildren; whereas the language of the provision is generally, in the other states, like that in the statute of distribution, confined to an advancement to the child of the parent. (*e*) It is declared in New York, that every estate or interest given by a parent to a *descendant*, by virtue of a beneficial power, or of a power in trust, with a right of selection, shall be deemed an advancement. (*f*) In New Jersey, the statute uses the word *issue*, which is a word of *more *419 extensive import than the word *child;* though children, as well as issue, may stand, in a collective sense, for grandchildren, when the justice or reason of the case requires it. (*a*) It

id. 85; Springer's Appeal, 29 id. 208; Brown *v.* Burke, 22 Geo. 574; Lawrence *v.* Mitchell, 3 Jones' Law, 190; Proseus *v.* McIntyre, 5 Barb. 424; Vaden *v.* Hance, 1 Head, 300; Ison *v.* Ison, 5 Rich. Eq. 15; Sherwood *v.* Smith, 23 Conn. 516; Weatherhead *v.* Field, 26 Vt. 665; Hook *v.* Hook, 13 B. Mon. 526; Arnold *v.* Barrow, 2 P. & H. 1.]

(*b*) Vol. i. 754, sec. 23, 24, 25, 26; ib. ii. 97, sec. 76, 77, 78.

(*c*) Mass. Revised Statutes, 1836, pt. 2, tit. 2, c. 61; [Hartwell *v.* Rice, 1 Gray, 587;] Purdon's Penn. Dig. 552; Elmer's N. J. Dig. 130; North Carolina Revised Statutes, 1837, i. 236; Revised Statutes of Vermont, 1839, p. 293; Alabama Statute, Clay's Digest, 197, § 25.

(*d*) Edwards *v.* Freeman, 2 P. Wms. 435; Weyland *v.* Weyland, 2 Atk. 635; Barber *v.* Taylor's Heirs, 9 Dana, 85.

(*e*) In Pennsylvania, as the question of advancement depends upon the intention of the parent, it is held that the declarations of the parent at the time, or the admissions of the child, at the time or afterwards, are evidence of it. Daniel King's Estate, 6 Wharton, 870; [Christy's Appeal, 1 Grant's Cases, 369.]

(*f*) New York Revised Statutes, i. 737, sec. 127. In Ohio, the provision applies when any child or its issue has been thus advanced. Statutes of Ohio, 1831.

(*a*) Wyth *v.* Blackman, 1 Ves. Sen. 196; Royle *v.* Hamilton, 4 Ves. 437; Dickinson *v.* Lee, 4 Watts, 82. The statute of North Carolina, of 1784, speaks of *son* or *daughter* having such advances. And in Vermont, by statute, the word *issue*, as applied

would have been better, however, if the statutes on this subject had been explicit, and not have imposed upon courts the necessity of extending, by construction and equity, the meaning of the word "child," so as to exclude a grandchild who should come unreasonably to claim his distributive share, when he had already been sufficiently settled by advancement. (*b*)

In some of the states, as in Virginia, Kentucky, Alabama, and Missouri, there is a special provision, that the child who has received his advancement in real or personal estate may elect to throw the amount of the advancement into the common stock, and take his share of the estate descended, or his distributive share of the personal estate, as the case may be; and this is said to be bringing the advancement into *hotchpot*, (*c*) and it is a proceeding which resembles the *collatio bonorum* (*d*) in the civil law. I do not find this privilege of election conceded by the laws of

to the descent of estates, included all the lawful, lineal descendants of the ancestor. Revised Statutes of Vermont, 1839, p. 53.

(*b*) In England, provision as to advancements and portions applies only to an actual *intestacy* of the parent. No collation takes place, if there be a will, although there be a surplus undisposed of by such will. Walton *v.* Walton, 14 Ves. 323. It seems doubtful whether that be the operation of the Revised Statutes in New York, in consequence of a variation in the language of the statute. In speaking of advancements, in relation to the distribution of personal estates, the word *deceased* is substituted for intestate, whereas, in speaking of it in relation to the descent of the real estate, the word *intestate* is retained. New York Revised Statutes, i. 754; ii. 97, *ubi supra;* Hawley *v.* James, [5 Paige, 450, 451.] In Thompson *v.* Carmichael, 4 N. Y. Legal Observer, p. 134, [3 Sandf. Ch. 120,] the Assistant V.-Ch. decreed that advancement into *hotchpot* related to a total intestacy only, and did not apply where there was a will disposing of a part of the property of the intestate, either real or personal.

(*c*) Statutes of Virginia, 1785 [Knight *v.* Oliver, 12 Gratt. 83], and of Kentucky, in 1796, 1797, 1830; Barber *v.* Taylor's Heirs, 9 Dana, 85; Nelson *v.* Bush, ib. 105; Aikin's Alabama Dig. 2d ed. 155; [Andrews *v.* Hall, 15 Ala. 85. And see Daves *v.* Haywood, 1 Jones, Eq. 253; Philips *v.* McLaughlin, 26 Miss. 592; Jackson *v.* Jackson, 28 id. 674; Grattan *v.* Grattan, 18 Ill. 167.]

(*d*) Dig. 37. 6. 1. In Louisiana, this return of property to the mass of the succession is termed *collation*, and it takes place unless the advancement was declared not to be subject to the collation. The application and exercise of this right of collation forms the subject of minute regulation. Civil Code of Louisiana, art. 1305, 1367; Destrehan *v.* Destrehan, 16 Martin, 557. The whole doctrine of collation is founded principally on the equality which the law requires in the distribution of estates among heirs. In Virginia, by statute, in 1785, real estate was to be brought into *hotchpot* only with real estate, and personal estate only with personal; but the law was changed in that respect, by statute, in 1819. 3 Rand. 559. In Alabama, if the child refuses to bring his advancement into *hotchpot*, he thereby relinquishes all interest in the estate as a distributee. 4 Ala. 123. This is, no doubt, the general rule on the subject.

the other states, to the child who has been advanced; and there is nothing which would appear to render the privilege of any consequence.

5. **Marshalling Assets.** — An estate by descent renders the heir liable for the debts of his ancestor, to the value of the property descended, and he holds the lands subject to the payment of the ancestor's debts. (*e*) By the hard and unjust rule of the common law, land *descended or devised, was not liable *420 to simple contract debts of the ancestor or testator; nor was the heir bound even by a specialty, unless he was expressly named. (*a*) But in New York and in other states, (*b*) the rule has been altered; and by a provision in the New York act of 1786, and continued in the subsequent revisions, heirs are rendered liable for the debts of the ancestor by simple contract, as well as by specialty, and whether specially named or not, to the extent of the assets descended, on condition that the personal estate of the ancestor shall be insufficient, and shall have been previously exhausted. This condition does not apply, when the debt is, by the will of the ancestor, charged expressly and exclusively upon the real estate descended to the heirs, or directed to be paid out of the real estate descended, before resorting to the personal estate. (*c*) It is further provided, that whenever any real estate subject to a mortgage executed by the ancestor or testator, shall descend to the heirs, or pass to a devisee, the mortgage shall be satisfied out of such estate, without resort-

(*e*) Watkins *v.* Holman, 16 Peters, 25; [compare Wilson *v.* Wilson, 13 Barb. 252, with Vansyckle *v.* Richardson, 13 Ill. 171;] [Cutright *v.* Stanford, 81 Ill. 240. See further, Draper *v.* Barnes, 12 R. I. 156; Ryan's Adm. *v.* McLeod, 32 Gratt. 367.]

(*a*) 3 Bl. Comm. 430; Co. Litt. 209, a. [See Hendricks *v.* Keesee, 32 Ark. 714.]

(*b*) The New Jersey statute of 1797, and in that of 1847, has the same improvement as that of New York. Elmer's Dig. 232; R. S. New Jersey, 1847, p. 83.

(*c*) New York Revised Statutes, ii. 452, sec. 32, 33, 34, 35. The judgment against an heir or devisee is a bar to a suit against the executor or administrator for the same debt or demand, unless an execution against the heir or devisee be returned unsatisfied, or there be no sufficient lands descended or devised. And if there be a judgment against the heir or devisee for a debt or legacy expressly charged on the estate descended or devised, it is an absolute bar to any subsequent suit against the executor or administrator, for the same debt or legacy. New York Revised Statutes, ii. 114, sec. 7, 8. In Pierce *v.* Alsop, decided by the V. Ch. of the 3d circuit, January, 1846, it was adjudged, that the equitable right of the creditor of the ancestor to enforce his claim against lands descended to the heir, must be in strict conformity to the provisions of the Revised Statutes. New York Legal Observer, January, 1846, [3 Barb. Ch. 184.]

ing to the executor or administrator, unless there be an express direction in the will to the contrary. (*d*)

The general rule of the English and American law is, that the personal estate is the primary fund for the discharge of the debts, and is to be first applied and exhausted, even to the payment of debts with which the real estate is charged by mortgage; for the mortgage is understood to be merely a collateral security * 421 * for the personal obligation. (*a*) The order of marshalling assets in equity towards the payment of debts, is to apply, 1. The general personal estate; 2. Estates specially devised for the payment of debts; 3. Estates descended; 4. Estates devised, though generally charged with the payment of debts. It requires express words, or the manifest intent of a testator, to disturb this order. (*b*) On the other hand, there is a material distinction between debts originally contracted by the testator or intestate, and those contracted by another; and, therefore, if a

(*d*) New York Revised Statutes, i. 749, sec. 4; [Johnson *v.* Corbett, 11 Paige, 265;] [Mount *v.* Van Ness, 33 N. J. Eq. 262.] In England, by the statute of 3 and 4 Wm. IV. c. 105, freehold estates, not charged by will, are now made assets in equity for the payment of simple contract and specialty debts; and the heir or devisee is made liable as in the case of specialty debts; but the creditors by specialty are to have priority.

(*a*) Harg. & Butler's Co. Litt. 208, b, note 106; Howel *v.* Price, 1 P. Wms. 291, and the learned note of Mr. Cox; King *v.* King, 3 id. 358; 3 Johns. Ch. 357; 9 Serg. & R. 73; Garnett *v.* Macon, 6 Call, 308; Massachusetts Revised Statutes, 1836, pt. 2, tit. 3, c. 62, sec. 16. The mere charge by will of a secondary fund with the payment of debts, does not exempt the primary fund, unless it plainly appears to have been the testator's intention to exonerate it for the benefit of some legatee. Lowndes on Legacies, 329. Even if the testator's intent to exonerate the residuary fund for the benefit of a legatee be manifest, yet, by the lapse of a residuary bequest, or when it cannot take effect from any other cause, the residuary fund is restored to its primary liability for the payment of debts. Waring *v.* Ward, 5 Ves. 670; Noel *v.* Lord Henley, 7 Price, 241; Hawley *v.* James, 5 Paige, 318. But if the personal fund has passed into other hands than the personal representatives, the creditor may not be bound to pursue it further in difficult cases, or wait the result of controversies, and the Court of Chancery will proceed to decree directly against the land. Corbet *v.* Johnson, 1 Brock. 77; Murdock *v.* Hunter, ib. 135.

(*b*) Stephenson *v.* Heathcote, 1 Eden, 38; Lord Inchiquin *v.* French, 1 Cox, 1; Webb *v.* Jones, ib. 245; Bootle *v.* Blundell, 1 Meriv. 193; Barnewell *v.* Lord Cawdor, 3 Madd. 453; Watson *v.* Brickwood, 9 Ves. 447; [Ion *v.* Ashton, 28 Beav. 379;] Livingston *v.* Newkirk, 3 Johns. Ch. 312; Livingston *v.* Livingston, ib. 148; Stroud *v.* Barnett, 3 Dana, 394; Ram on Assets, c. 30, p. 247, Philad. ed.; Warley *v.* Warley, Bailey, Eq. 397; New York Revised Statutes, ii. 452, sec. 33, 455, sec. 56; Schermerhorn *v.* Barhydt, 9 Paige, 29, 49; Chase *v.* Lockerman, 11 Gill & J. 185. The bequest of personal estate does not exempt it from its liability to exonerate the real estate, unless a clear intention to that effect appears on the face of the will. 12 Price, 324.

person purchases an estate subject to a mortgage, and dies, *his personal estate*, as between him and his personal representatives, shall not be applied to the exoneration of the land, unless there be strong and decided proof, that in taking the incumbered estate, he meant to take upon himself the mortgage debt as a personal debt of his own. (*c*) The provision mentioned in the preceding page from the New York Revised Statutes was an alteration of the antecedent rule, and makes a mortgage debt fall primarily upon the real estate. (*d*)

I assume that the rule prevails generally in the United States, that the lands descended to the heirs are liable to the debts of the ancestor equally, in all cases, with the *personal *422 estate. (*a*) In Massachusetts, the personal estate is first to be applied, and the land resorted to upon a deficiency of personal assets. (*b*) This is probably the case in other states, in which the real and personal estate is placed as assets under the control of the personal representatives. In Pennsylvania, the lands are

(*c*) Cumberland *v.* Codrington, 3 Johns. Ch. 229; [Andrews *v.* Bishop, 5 Allen, 490.]

(*d*) It is not easy to perceive the necessity or policy of thus interfering with, and reversing the rule of equity as to mortgage debts, which had been known and settled for ages; and especially as the Revised Statutes, as to all other debts, retain and enforce the rule that the personal estate is the primary fund. The symmetry of the law, on this point, is thus destroyed; and a reason suggested by the revisers, in their report of the bill, was that the existing "rule of law was unknown to the generality of our citizens."

If there arises a question under the law of different countries, as to particular debts, whether they are properly payable out of the personal estate, or are chargeable upon the real estate of the deceased, the rule is, that the law of the domicile of the deceased will govern in cases of intestacy; and, in cases of testacy, the intention of the testator. Anon., 9 Mod. 66; Story on the Conflict of Laws, [§ 528.]

(*a*) It has been stated, that the common-law rule prevails still in Virginia, and perhaps in Kentucky; but everywhere else in the United States the equitable rule seems to have been adopted, that, on failure of personal assets, the real estate in the hands of heirs and devisees is liable for debts as extensively as the personal. The common-law rule has been altered by statute. Griffith's Register, *passim;* Mass. Revised Statutes, 1836. In Massachusetts, to sustain a suit against the heir, it must appear that administration had been taken out on the estate of the deceased, and that the demand was not due, and no cause of action accrued until the term of four years had expired from the grant of administration, and that the suit was brought within one year after the cause of action accrued. Stat. 1788, c. 66; Revised Statutes, 448, sec. 14; Hall *v.* Bumstead, 20 Pick. 2. In New York, no suit lies against heirs or devisees of any real estate, to charge them with a debt of the testator or intestate, within three years from the time of granting letters testamentary or of administration upon the estate. New York Revised Statutes, ii. 109, sec. 53.

(*b*) 3 Mass. 527, 536; 4 id. 358; Mass. Revised Statutes, 1836.

treated as personal assets; and the creditor who sues the executor may sell the land in the hands of the heirs, without making them parties. This is complained of by high authority in that state, as contrary to the plainest principles of justice. (*c*) In New Hampshire, the heir is not liable on the covenant of his ancestor, while a remedy remains against the personal representatives, inasmuch as all the estate, real and personal, of the ancestor, in the hands of the executor or administrator, is liable for his debts. (*d*)

(*c*) Gibson, J., 13 Serg. & R. 14. By the statute of Pennsylvania of 4th April, 1797, debts of the ancestor not secured by mortgage, judgment, recognizance, or other record, do not remain a lien on lands longer than seven years after the debtor's death, unless a suit be brought within seven years, or the statement of the debt filed in the prothonotary's office. Judgment on a suit brought afterwards cannot affect the lands in the hands of the heir, or of the person under him. Kerper *v.* Hoch, 1 Watts, 9; Quigley *v.* Beatty, 4 Watts, 13.

(*d*) Hutchinson *v.* Stiles, 3 N. H. 404. So, in Tennessee, the lands in the hands of the heir cannot be sold on a judgment against the ancestor, until the personal estate is exhausted. Boyd *v.* Armstrong, 1 Yerg. 40. The Massachusetts Revised Statutes of 1836, pt. 2, tit. 3, c. 62, make ample provision for the marshalling of assets as against heirs, devisees, and legatees, when a part of the real estate is wanting for the payment of debts, or when one or more of the persons who ought to contribute become insolvent. It is the application by statute of the principles of courts of equity in marshalling assets and enforcing contributions in the cases of estates descended or devised, or when one of the parties bound to contribute becomes insolvent. Hays *v.* Jackson, 6 Mass. 149; Livingston *v.* Livingston, 3 Johns. Ch. 148; Livingston *v.* Newkirk, ib. 312. In respect to the distribution of assets in equity for the payment of debts, it is to be observed that a creditor may go into chancery against executors and administrators for the discovery and distribution of assets; and after the usual *decree to account* in a suit by one or more creditors, the decree is for the benefit of all the creditors, and is in the nature of a judgment for all. They are all entitled, and should have notice to come in and prove their debts before the master, and they will be paid ratably without preferences, after the judgment creditors are satisfied, and creditors suing at law will in the mean time be stayed by injunction, and not allowed to disturb the ratable and equal distribution of the assets in chancery. Morrice *v.* Bank of England, Cases temp. Talbot, 217; 4 Bro. P. C. 287; Paxton *v.* Douglas, 8 Ves. 520; Clarke *v.* Earl of Ormonde, Jacobs, 108; Thompson *v.* Brown, 4 Johns. Ch. 619. So, also, a suit against the heir and decree for a sale enures for the benefit of all the creditors against the heir, and draws the entire distribution of the assets of the heir into chancery. Martin *v.* Martin, 1 Ves. Sen. 211. The same rule applies in the case of a devise to trustees to pay debts, or to a charge on land for the payment of debts. The estate becomes a trust estate for the purpose, and as the assets are placed under the jurisdiction of chancery, to be distributed as equitable assets, suits at law by creditors for the purpose of gaining a preference, will be enjoined. Benson *v.* Leroy, 4 Johns. Ch. 651; Helm *v.* Darby, 3 Dana, 186; Stroud *v.* Barnett, ib. 391. Executors pay in their own wrong after decree for administration. Mitchelson *v.* Piper, 8 Sim. 64.

LECTURE LXVI.

OF TITLE BY ESCHEAT, BY FORFEITURE, AND BY EXECUTION.

TITLE to land is usually distributed under the heads of *descent* and *purchase*, the one title being acquired by operation of law, and the other by the act of agreement of the party. (*a*) But titles by escheat and forfeiture are also acquired by the mere act of law; and Mr. Hargrave thinks that the proper general division of title to estates would have been by *purchase*, and *by act of law*, the latter including equally descent, escheat, and forfeiture. Our American authors (*b*) have added an additional title, and one unknown in the English common law, and which they treat separately. It is *title by execution;* and I shall take notice of it in regular order.

1. **Of Title by Escheat.** — This title, in the English law, was one of the fruits and consequences of feudal tenure. When the blood of the last person seised became extinct, and the title of the tenant in fee failed, from want of heirs, or by some other means, the land resulted back, or reverted to the original grantor, or lord of the fee, from whom it proceeded, or to his descendants or successors. All escheats, under the English law, are declared to be strictly feudal, and to import *the *424 extinction of tenure. (*a*) The opinions given in the great case of *Burgess* v. *Wheate* (*b*) concur in this view of the doctrine of escheat; and in that case it was held to be the rule, that if lands were held in trust, and the *cestui que trust* died without heirs, the lands did not escheat to the crown, but the trustee, being *in esse* and in the legal seisin of the land, took

(*a*) Litt. sec. 12; Co. Litt. ib. note, 106.

(*b*) Ch. J. Swift, in his Digest of the Laws of Connecticut; and Mr. Dane, in his Abridgment of American Law.

(*a*) Wright on Tenures, 115–117; 2 Bl. Comm. 244, 245.

(*b*) 1 Wm. Bl. 123; s. c. 1 Eden, 177; [Beale *v.* Symonds, 16 Beav. 406, 412; Davall *v.* New River Co., 3 De G. & Sm. 394; Taylor *v.* Haggarth, 14 Sim. 8.]

the land discharged of the trust, and bound as owner for the feudal services. But, as the feudal tenures do not exist in this country, there are no private persons who succeed to the inheritance by escheat; and the state steps in the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction. It is a general principle in the American law, and which, I presume, is everywhere declared and asserted, that when the title to land fails from defect of the heirs or devisees, it necessarily reverts or escheats to the people, as forming part of the common stock to which the whole community is entitled. (*c*) Whenever the owner dies intestate, without leaving any inheritable blood, or if the relations whom he leaves are aliens, there is a failure of competent heirs, and the lands vest immediately in the state by operation of law. (*d*) No inquest of office is requisite in such cases; (*e*) and

(*c*) New York Revised Statutes, i. 282, tit. 12; ib. 718, sec. 1, 2, 3; Swift's Digest, i. 156; Rhode Island Statutes of 1768 and 1822; Tucker's Blackstone, ii. 244, 245, note; Statute of Pennsylvania, 29th September, 1787; 5 Binney, 375; Dane's Abr. iii. 140, sec. 24; ib. iv. 538; Mass. Revised Statutes of 1836; Statute Laws of Ohio, 1831, p. 253; of Alabama, 1811, 1818, p. 288; of Illinois, ed. 1833; of Georgia, Prince's Dig. 2d ed. 198; of New Jersey, 1828, Elmer's Digest; of Mississippi, Revised Code of 1824; Revised Statutes of Missouri, 1835. The law of Alabama says that the real and personal estates of persons dying intestate, and leaving no lawful heirs *within the limits of the United States*, shall escheat. The words, as they stand, want explanation to render their operation just or liberal. Mr. Dane says that the New England colonies of Massachusetts and Plymouth very early passed laws for vesting in the colony all lands escheating for want of heirs, on the ground that the colony was the sovereign who made the original grant. In Maryland, before the revolution, lands were liable to escheat to the lord proprietary of the province; and since that era, the state, as to lands of the proprietary, stands in his place under an act of confiscation, and the lands remaining, of course, subject to escheat, and the state takes the land, whether the owner dying without heirs had the legal or only the equitable estate as *cestui que trust*. See Harr. & M'Henry, Index, tit. Escheat, *passim*; Ringgold *v.* Malott, 1 Harr. & J. 299; Matthews *v.* Ward, 10 Gill & J. 443. By the Napoleon Code, Nos. 723, 755, in default of lawful heirs, the property passes to the natural children; and for want of them, to the surviving husband or wife; and for want of them, to the state; and kindred beyond the twelfth degree do not succeed. The statute of North Carolina resembles the Napoleon Code in this respect, that if the husband dies intestate, and without leaving any person to claim as heir, the widow takes the estate as heir. North Carolina Revised Statutes, 1837, 237. Similar provision in Mass. Rev. St. Supp. 1849, c. 87.

(*d*) The People *v.* Conklin, 2 Hill, 67. [See further, Bradley *v.* Dwight, 62 How. Pr. 300; The State *v.* Meyer, 63 Ind. 33. Aliens are allowed in some states to inherit by state law. The right is also conferred upon some aliens by virtue of United States treaties. Baker *v.* Shy, 9 Heisk. 85; Hauenstein *v.* Lynham, 28 Gratt. 62.]

(*e*) 4 Co. 58, a; Comyns's Digest, tit. Prerogative, D. 70; [Farrar *v.* Dean, 24 Mo.

by the New York Revised Statutes, (*f*) the *attorney *425
general is required to bring an action of ejectment, whenever he shall have reason to suspect that the people have title to lands by escheat.

In the Roman law, there was an officer appointed in the character of escheator, whose duty it was to assert the right of the emperor to the *hereditas jacens*, or *caduca*, when the owner left no heirs or legatee to take it. (*a*) That property should, in such cases, vest in the public, and be at the disposal of the government, is the universal law of civilized society. (*b*) It was, as early as the age of Bracton, regarded as a part of the *jus gentium* — *ubi non apparet dominus rei, quæ olim fuerunt inventoris, de jure naturali, jam efficiuntur principis de jure gentium.* (*c*) It is a principle which lies at the foundations of the right of property, that if the ownership becomes vacant, the right must necessarily subside into the whole community, in whom it was originally vested when society first assumed the elements of order and subordination. (*d*) In New York, all escheated lands, when held by the state or its grantee, are declared to be subject to the same trusts, incumbrances, charges, rents, and services to which they would have been subject had they descended. (*e*) This provision was intended to guard against a very inequitable rule of the common law, that if the king took lands by escheat, he was not sub-

16; Colgan *v.* McKeon, 4 Zabr. 566. But see People *v.* Folsom, 5 Cal. 373;] [The State *v.* Ruder, 5 Neb. 203; Reid *v.* The State, 74 Ind. 252; Sands *v.* Lynham, 27 Gratt. 291.]

(*f*) Vol. i. 3d ed. 323.

(*a*) Code, 10. 10. 1. In Pennsylvania and Mississippi there is an officer appointed to take charge of escheated estates, termed escheator general. Purdon's Digest, 842; Revised Code of Mississippi, 1824. There are similar officers charged with escheats in the other states.

(*b*) Domat, pt. 2, b. 1, tit. 1, sec. 4, art. 6, sec. 13, art. 4; Van der Linden's Institutes, by Henry, b. 1, c. 10, sec. 8; Code Napoleon, sec. 723. [As to the manner in which private persons may obtain right in escheated land from the state, see Armstrong *v.* Bittinger, 47 Md. 103.]

(*c*) Bracton, lib. 1, c. 12, sec. 10.

(*d*) This was the case with the ancient Germans, when their institutions were studied by Cæsar and Tacitus. They had not then any private property in land; it was vested in the community or tribe. Cæsar de Bell. Gall. lib. 4, c. 1; Tacit. de Mor. Germ. c. 26. [See 441, n. 1.]

(*e*) New York Revised Statutes, 3d ed. ii. sec. 2; Farmer's Loan and Trust Co. *v.* The People, 1 Sandf. Ch. 139. But at common law the king took the lands escheated by reason of *alienage*, free from all incumbrances. Assistant V. Ch. Sandford, 1 Sandf. 141.

ject to the trusts to which the escheated lands were previously liable. (*f*) The statutes of 39 and 40 Geo. III. c. 88, 47 Geo. III. c. 24, 59 Geo. III. c. 94, mitigated the rule, by the division which enabled the king, by warrant or grant, to direct the
*426 execution of the trust. In the * case of *Sir George Sands*, (*a*) Hale, Ch. B., and Turner, B., held that there could be no escheat of a trust; and in case of the death of the *cestui que trust* without heirs, the trustee would hold, discharged of the trust. The opinion in England is understood to be, that upon the escheat of the legal estate, the lord will hold the estate free from the claims of the *cestui que trust*. The statutes I have referred to are calculated to check the operation of such an unreasonable principle. (*b*)

2. **Of Title by Forfeiture.** — The English writers carefully distinguish between escheat to the chief lord of the fee, and forfeiture to the crown. The one was a consequence of the feudal connection, the other was anterior to it, and inflicted upon a principle of public policy. (*c*) But while the chief lord of the fee is none other than the same community which has been injured by the crime, there is no essential distinction between escheat for treason and forfeiture for treason. The law of forfeiture went, indeed, upon feudal principles, beyond the law of escheat. It extinguished, and blotted out forever, all the inheritable quality of the vassal's blood, so that the sons could not inherit, either to him, or to any ancestor, through their attainted father. He was rendered incapable, not only of inheriting or transmitting his own property by descent, but he obstructed the descent of

(*f*) 3 Harg. Co. Litt. 13, n. 7; Pimb's Case, Moore, 196.

(*a*) 8 Ch. 33.

(*b*) The statute of 4 and 5 Wm. IV. c. 23, went further, and declared that when a trustee of lands died without an heir, the court of chancery may appoint a trustee to act for the party beneficially interested. The New York Revised Statutes, 3d ed. ii. 2, has a like provision, and no interest in lands or chattels, vested in trust or by way of mortgage, and not beneficially in the trustee or mortgagee, shall escheat or be forfeited by the attainder of the trustee or mortgagee. The escheats spoken of in the text relate exclusively to land, movables never escheated in the technical sense; and if the owner died intestate and left no lawful representatives, the personal estate in England remained at the disposition of the crown. In this country it must vest in the state, and so the statute law in some of the states has specially provided. The subject is well discussed in the case of The Commonwealth *v.* Blanton, 2 B. Mon. 393. [The death of a trustee may cause escheat if the trust purpose has been accomplished. Commonwealth *v.* Naile, 88 Penn. St. 429.]

(*c*) Wright on Tenures, 117, 118.

lands to his posterity, in all cases in which they were obliged to derive their title through him from any more remote ancestor. The forfeiture of the estate is very much reduced in this country, and the corruption of blood is universally abolished. (*d*) In New York, forfeiture of property for crimes is confined to the case of a conviction for treason; and, by a law of the colony of Massachusetts, *as early as 1641, escheats and *427 forfeitures upon the death of the ancestor, "natural, unnatural, casual, or *judicial*," were abolished forever. (*a*)

It is a rule of law, that the state, on taking lands by escheat, and even by forfeiture, takes the title which the party had, and none other. It is taken in the plight and extent by which he held it; and the estate of a remainderman is not destroyed or devested by the forfeiture of the particular estate. (*b*)

Besides the forfeiture of property to the state, for the conviction of crimes, estate less than a fee may be forfeited to the party entitled to the residuary interest by a breach of duty in the owner of the particular estate. If a tenant for life or years, by feoffment, fine, or recovery, conveys a greater estate than he is by law entitled to do, he then, under the English law, forfeits his estate to the person next entitled in remainder or reversion; for he puts an end to his original interest; and the act tends, in its nature, to devest the expectant estate in remainder or reversion. The same consequences followed whenever the vassal, by any act whatever, was, in the eye of the feudal law, guilty of an act of disloyalty, and a renunciation of the feudal connection. (*c*) But a conveyance by deed, of things lying in grant, or conveyances by release, and bargain and sale, under the statute of uses, do not work a forfeiture; for they convey no greater interest than what the party lawfully owns, and is entitled to convey. Such forfeitures by the tenants of particular estates have become obsolete in this country; and the *just and rational *428

(*d*) New York Revised Statutes, i. 284, sec. 1; ib. ii. 701, sec. 22. [Forfeiture for treason and felony was abolished in England by Stat. 33 and 34 Vict. c. 23.]

(*a*) Dane's Abr. v. 4. Mr. Dane says that forfeiture of estates for crimes is scarcely known to our American laws. Ib. 11.

(*b*) Case of Captain Gordon, Foster's Crown Law, 95; Borland *v.* Dean, 4 Mason, 174; Dalrymple on Feudal Property, c. 4, pp. 145–154, gives an interesting history of the law of forfeiture in Scotland, and the gradual conformity, on the point in the text, between the Scotch and English law.

(*c*) Wright on Tenures, 208; Co. Litt. 251, a, b.

principle prevails, that the conveyance by the tenant operates only upon the interest which he possessed, and does not affect the persons seised of ulterior interests. An act of assembly in Pennsylvania gave to all deeds and conveyances of land, proved or acknowledged, and recorded, *the same force and effect, as to possession, seisin, and title, as deeds of feoffment with livery;* and yet it has been held, (*a*) that such a deed worked no forfeiture, on the common-law doctrine of alienation by tenants for life or years. In Massachusetts it has, however, been decided, that a conveyance in fee by a tenant for life, by bargain and sale, was a forfeiture of his estate to those in remainder or reversion. (*b*) But though the correctness of the decision might be questioned, the case has now become unimportant, for the statute law of Massachusetts, as well as of other states, gives to the conveyance of a tenant for life or years no greater operation than what his interest entitled him to give it. (*c*) And it was a well established principle of the common law, that if a condition on which an estate for life or years depended, be broken for non-payment, yet the lessor might waive the forfeiture by the subsequent acceptance of rent, or by bringing an assize, or making a distress to recover it. (*d*)

There are other causes of forfeiture, as for waste, and for breaches of conditions in leases, grants, and conveyances, which have been sufficiently considered in the former part of this volume. I shall, therefore, proceed to treat: —

3. **Of Title by Execution.** — This species of title owes its introduction to modern statutes, and it was unknown to the common law. The remedy given to the judgment creditor by the English law was a sequestration of the profits of the land by writ of *levari facias*, or the possession of a moiety of the lands by
*429 *the writ of *elegit*, and, in certain cases, of the whole of it by *extent*. In all these cases, the creditor holds the land

(*a*) M'Kee *v.* Prout, 3 Dallas, 486.

(*b*) Commonwealth *v.* Welcome, cited in 5 Dane's Abr. 13, sec. 7. The extraordinary industry and great experience of the author of the Abridgment and Digest of American Law (vol. v., x., xi.) was not able to lead him to any case in our American courts, in which there had been a forfeiture of the estate of a tenant for life or years, by reason of a breach of duty as tenant, by way of plea, or default upon record.

(*c*) *Vide supra*, 83.

(*d*) Co. Litt. 211, b.; Pennant's Case, 3 Co. 64; Goodright *v.* Davids, Cowp. 803.

in trust until the debt is discharged by the receipt of the rents and profits. y^1 This limited remedy against the real estate of the debtor was not deemed sufficient security to British creditors, in its application to the American colonies; and the statute of 5 Geo. II. c. 7, was passed, in the year 1732, for their relief. It made lands, hereditaments, and real estate, within the English colonies, chargeable with debts, and subject to the like process of execution as personal estate. Lands were dealt with on execution precisely as personal property, and it was, consequently, the practice in some of the states, and particularly in New York, before and even since the American Revolution, down to the year 1786, to consider lands as assets in the hands of executors and administrators, and to sell them as such. This was also the practice in Pennsylvania, Maryland, Georgia, New Jersey, New Hampshire, and Massachusetts, and probably in the other New England states. (*a*) In the case of *Wilson* v. *Watson*, (*b*) it was declared, in the Circuit Court of the United States for Pennsylvania, that lands might not only be seized and sold on execution at law as chattels, but that, if the defendant in the judgment died, the judgment might be revived by *scire facias* against the executor, and the lands of the testator taken in execution and sold, if there be a deficiency of personal assets. In South Carolina, the lands of an intestate, under the rule and practices introduced by the statute of 5 Geo. II., are sold under an execution obtained against the administrator, though the heir be no party to the proceeding. (*c*) But though the statute of Geo.

(*a*) Shippen, President, in Graff *v.* Smith, 1 Dallas, 483; 8 Gill & J. 65; Telfair *v.* Stead's Executors, 2 Cranch, 407; Ewing, C. J., in Warwick *v.* Hunt, 6 Halst. 1; Daniels *v.* Ellison, 3 N. H. 279; Gore *v.* Brazier, 3 Mass. 523; Dane's Abr. v. 20; Statute of Massachusetts, 1783, c. 82. The practice still continues in Pennsylvania. 1 Watts, 414.

(*b*) 1 Peters, C. C. 269.

(*c*) Martin *v.* Latta, 4 M'Cord, 128; D'Urphey *v.* Nelson, ib. 129, note. In North Carolina, the act of Geo. II., and the state act of 1777, gave the *fi. fa.* against the lands of the debtor. The act of 1784 gave it against the lands of a deceased debtor in the hands of his heir or devisee, upon a judgment against his executor or administrator in certain cases; but it prescribed a *scire facias* against the heirs and devisees. 1 Dev. Eq. [N. C.] 515. In East New Jersey, it was declared by law, in 1682, among the early acts of the General Assembly, that no man's land should be sold without his consent, though the profits of it might be extended. But shortly afterwards, the

y^1 See *Ex parte* Abbott, 15 Ch. D. 447; Freedman's Sav. & Trust Co. *v.* Earle, Hatton *v.* Haywood, 9 L. R. Ch. 229; 110 U. S. 710.

*430 *II. introduced the sale of real estate on execution throughout the colonies, that statute was not the entire origin of the practice; for, in Massachusetts, as early as 1696, and in Pennsylvania, as early as 1700 and 1706, lands were, by colonial statutes, rendered liable to sale on execution for debt. (*a*)

The practice of selling real estate under certain checks and modifications, created to prevent abuse and hardship, has been continued, and become permanently established. The general regulation, and one prevalent in most of the states, is to require the creditor to resort, in the first instance, to the personal estate, as the proper and primary fund, and to look only to the real estate after the personal estate shall have been exhausted *431 and found insufficient. (*b*) *In New York, until within

law provided that the lands of the debtor should be appraised, and the sheriff was to deliver possession; and if not redeemed in six weeks, the lands were to belong to the plaintiff, in fee, at the price of the valuation. Leaming and Spicer's Collections, 235, 253.

(*a*) Province act of Massachusetts, 1696, cited in 5 Dana's Abr. 28, note; Province acts of Pennsylvania, 1700 and 1706. See also 1 Dallas, 483; 6 Binney, 145; Brackenridge's Law Miscellanies, 208.

(*b*) See, for instance, New York Revised Statutes, ii. 367; Statutes of Ohio, 1831, p. 101; of Indiana, 1838, p. 276; Purdon's Penn. Dig. 369; Revised Statutes of Connecticut, 1821, pp. 36, 56; ib. ed. 1839, pp. 62, 63; act of Tennessee, 1794, c. 1, sec. 23. This was also a provision in the original charter of King John. Magna Charta, c. 5. But this duty of the officer, though neglected, will not affect the purchaser of land at sheriff's sale. He is not bound to show that the debtor had not personal property to satisfy the judgment. Frakes *v.* Brown, 2 Blackf. (Ind.) 295. So, in Connecticut, it would seem, notwithstanding the statute language, that real estate may be attached, though there be personal property sufficient to satisfy the demand. Isham *v.* Downer, 8 Conn. 282; Spencer *v.* Champion, 13 id. 11. [See Smith *v.* Randall, 6 Cal. 47.] And in Illinois, by statute of 27th February, 1841, personal property, and the land on which the defendant resides, are to be last taken on execution. This rule arises from the infant state of the country, in which the settler's domestic and farming goods and chattels, and the ground he has recently cleared and settled on, become vastly more necessary to him than his wild lands. The execution in chancery, which was originally by process *in personam*, or by sequestration of the estate, was, in New York, by statute, sess. 25, c. 15, made analogous to an execution at law, by authorizing the chancellor to enforce performance of the decree by execution against the body, or goods and chattels of the defendant, and, in default thereof, against the lands and tenements, and to be executed as at law. This power was continued by the New York Revised Statutes, ii. 182, 183, and every final decree becomes a lien on lands from the docketing thereof, and goods and chattels are bound only by actual levy on execution. In Kentucky, a delivery of a *fieri facias* to the sheriff creates a lien upon the goods of the debtor. Savage *v.* Best, 3 How. 111. In North Carolina, by act of 1787, decrees in chancery for money are enforced by execution against the body, or

a few years past, the rule was, to sell the real estate absolutely at auction, upon due notice, without any previous appraisement, and without any subsequent right of redemption; and the sheriff executed a deed to the purchaser, which by relation vested

the goods and chattels, lands and tenements, in like manner as at law. In the Roman law, the chattels were first to be resorted to, and the land was seized and eventually sold, provided the movables of the debtor were found to be insufficient to satisfy the debt. Dig. 42. 1. 15. 2 and 8; Code, 8, 34. Though the personal property of the debtor is to be first resorted to and sold, there has been difficulty in reaching, by execution, moneys invested in stock and other choses in action. A mere chose in action is not at law the subject of a *fi. fa.* 6 Harr. & J. 264; 2 Ired. (N. C.) 129. A mere right in personal property, without possession, and held adversely, cannot be sold on execution. Carlos *v.* Ansley, 8 Ala. 900. A mortgagee's interest cannot be sold on execution. See *supra*, 166, note. The court of chancery has assisted the judgment creditor at law, where the money had been fraudulently invested, or in trust for the debtor. But a judgment must first be shown in order to reach land, and an execution issued and returned *nulla bona*, in order to reach personal estate by the assistance of chancery (Brinkerhoff *v.* Brown, 4 Johns. Ch. 671; M'Dermutt *v.* Strong, ib. 687; Ballentine *v.* Beall, 3 Scam. 203; 3 Litt. 12; Moore *v.* Young, 1 Dana, 516), unless the debtor is deceased (Thompson *v.* Brown, 4 Johns. Ch. 619), or except the fund is accessible only by the aid of chancery. Marshall, C. J., in Russell *v.* Clark, 7 Cranch, 89. See also Taylor *v.* Jones, 2 Atk. 600; Bayard *v.* Hoffman, 4 Johns. Ch. 450; Spader *v.* Davis, 5 id. 280; 20 Johns. 554, s. c. But while the remedy by *ca. sa.* existed, and the creditor had the debtor's body in execution, the ancillary remedy in chancery was suspended. Stilwell *v.* Van Epps, 1 Paige, 615. According to the English doctrine, as now understood, the Court of Chancery will not go further than to apply equitable claims to the satisfaction of judgments at law; and it will not apply a debt due from A., as the debtor of B., to discharge a judgment of C. against B. Otley *v.* Lines, 7 Price (Exch.), 274. By the New York Revised Statutes, ii. 173, sec. 38, the court of chancery is authorized to apply, in satisfaction of debts at law, *debts due to the defendant*, after an execution at law has been returned *nulla bona*. This just and reasonable power is conformable to the rule of the Scotch law, under which money due to the debtor may be attached and appropriated to the payment of its debts. 1 Bell's Comm. 6. The statute laws of Ohio, of Kentucky, and of Pennsylvania, have conferred the same power. See *supra*, ii. 444. To protect personal property from being *fraudulently* withdrawn from the operation of judgments, it is a principle of law that a sale and transfer of it *for the purpose* of preventing a judgment creditor from appropriating it on execution, is deemed an act done *mala fide*, and void as to such creditor. Streeper *v.* Eckart, 2 Wharton, 302. But in Wood *v.* Dixie, [7 Q. B. 892,] it was held that an agreement or assignment of property, with an *intent* to defeat an execution creditor, is not of itself fraudulent, if the assignment was in other respects complete. *Sed quære?*

If a creditor purchase his debtor's property in satisfaction of his own and other creditors, with [and also?] a large surplus, to the exclusion of other creditors whose suits are pending, it is fraud. Peck *v.* Land, 2 Kelly (Ga.), 1. In New York, the unearned salary or perquisites of an office are not reached in chancery by a creditor's bill. It only reaches the salary and perquisites of the office earned and due at the time of filing the bill. McCoun *v.* Dorsheimer, 1 Clarke [Ch. N. Y.], 144; Browning *v.* Bettis, 8 Paige, 568.

the defendant's title in the purchaser from the time of the sale. The deed connected with the sale operated by way of execution of a statute power to pass the defendant's title. This is the practice in respect to sales of land on execution by the marshals, under the authority of the courts of the United States, by the act of Congress of May 7, 1800; and this would appear to be the practice still, in the states of New Jersey, Maryland, North Carolina, Tennessee, South Carolina, Georgia, Alabama, Louisiana, and Missouri. (*a*) But sales of land on execution had been attended with so much oppressive speculation upon the necessities of the debtor, that the legislature of New York, a few years past, provided some powerful but not unreasonable checks upon the peremptory and sweeping desolation of an execution at law. These provisions are essentially continued; and it is now provided by the New York Revised Statutes, that the real estate of the debtor may be sold on execution, either at law or in chancery, in default of goods and chattels, on six weeks' notice, and in separate parcels, if required by the owner. (*b*) A certificate of the

(*a*) Griffith's Register, h. t. No. 3; Elmer's Digest, 486; Davidson *v.* Frew, 3 Dev. (N. C.) 3; 1 North Carolina Revised Statutes, 1837, p. 265; Childress *v.* Allin, 17 La. 37; Statute Laws of Tennessee, 1836, pp. 292, 293; Boring *v.* Lemmon, 5 Harr. & J. 225; Barney *v.* Patterson, 6 id. 204; Remington *v.* Linthicum, 14 Peters, 84; Estep *v.* Weems, 6 Gill & J. 303; Revised Laws of Missouri, 1835, pp. 258, 259; Prince's Dig. of Laws of Georgia, 1837; Huggins *v.* Ketchum, 4 Dev. & Batt. 414. In Alabama, their execution law is taken from the Virginia and Kentucky statutes, which give the *fi. fa.*, *ca. sa.*, and *elegit*. If the *elegit* be sued out, the defendant may elect the moiety of his lands to be extended. But the sheriff also sells land on execution under the *fi. fa.* and *venditioni exponas*. Aikin's Dig. of Alabama Statutes, 2d ed. 162, 163, and see *post*, 434; Ware *v.* Bradford, 2 Ala. 676. In North Carolina, it is left unsettled whether the *elegit* may still be sued out. 3 Dev. [N. C.] 161; 4 id. 133. The better opinion is, that it was done away since the statute of Geo. II. See *infra*, 436, *in notis*.

(*b*) New York Revised Statutes, ii. 183, sec. 104; ib. 363, sec. 2; ib. 367, sec. 24; ib. 368, sec. 34; ib. 369, sec. 38. In Tennessee, under the act of 1799, if the defendant be in actual possession, the sheriff must give him twenty days' notice in writing of the time and place of sale, and if the defendant be not in possession, the sheriff must advertise the sale in a public paper three different times, or the sale will be absolutely void. Trott and M'Broom *v.* M'Gavock, 1 Yerg. 469. Equivalent information will do. 5 id. 215; Lloyd *v.* Anglin, 7 id. 428. But in Minor *v.* President, &c. of Natchez, 4 Smedes & M. 602, it was held, after great discussion, that the departure of the sheriff from the mode of advertising pointed out by statute would not violate the title of a *bona fide* purchaser at the sale. Irregularities of a sheriff in conducting a sale of real or personal estate under execution, will not vitiate the title of such a purchaser. [Anderson *v* Clark, 2 Swan, 156; Oakey *v.* Aiken, 12 La. An. 11; Brace *v.* Shaw, 16 B. Mon. 43; Cunningham *v.* Cassidy, 17 N. Y. 276; Brooks *v.* Rooney,

sale is to be delivered by the officer to the purchaser, and another certificate filed in the clerk's office of the county within ten days; and redemption of the land sold may be made by the debtor, or his representative, within one year, on paying the amount of the bid, with ten per cent interest. Any joint tenant, or tenant in common, may redeem his ratable share of the land by paying a due proportion of the purchase-money. On default of the debtor, any creditor, by judgment at law, or decree in equity, and in his own right, or as a trustee, within three months after the expiration of the year, may *redeem the land, on paying *432 the purchase-money, with seven per cent interest. So, any other judgment creditor may redeem from such prior creditor, on refunding his purchase-money with interest, and also the amount due on his judgment or decree, if the same be a prior lien on the land. The redemption is allowed to be carried further, and is given to a third or any other creditor, who may redeem from the creditor standing prior to him, on the same terms. But all these subsequent redemptions must be within the fifteen months from the time of the sale; for the officer is then to execute a deed to the person entitled, and the title so acquired becomes absolute in law. (*a*) The deed, when executed, will be good by relation, and cover the intervening period from the sale. (*b*) This is the case as to the enrolment of a bargain and sale in England, within the six months. (*c*) The filing of the officer's certificate is equivalent to a deed taken and recorded,

11 Ga. 423; Newton *v.* State Bank, 14 Ark. 9. But see Kennedy *v.* Duncklee, 1 Gray, 65.] See *infra*, 433, (*a*), s. p. C. J. Sharkey, in his able opinion in the preceding case, referred to decisions in 4 Rand. 427; 8 Mass. 326; 4 Wheaton, 503; 4 Wend. 462; 2 Bibb, 401; 1 Nott & M'Cord, 11; 3 Murphy, 364, to the s. p. In Davis *v.* Abbott, 3 Iredell (N. C.), 137, the sheriff may sell on execution by the acre, provided the land be previously surveyed and the locality of the acres described. So, in chattels, he may sell by the parcel.

(*a*) New York Revised Statutes, ii. 370–374. The regulations respecting the sale of lands on execution are too minute to be more particularly detailed, and they reach from sec. 24, p. 367, to sec. 67, p. 374. The law in Illinois, as to the sale of lands on execution, and the right of redemption by the debtor, and on his default by a judgment creditor, is essentially the same with that of New York. Revised Laws of Illinois, ed. 1833, p. 374. These statute provisions cannot lawfully affect the remedy on contracts existing when the contract was made. They can only legally apply to mortgages and other contracts made after the statutes were passed. *Vide infra*, 434, (*a*), (*b*), (*c*).

(*b*) Dobson *v.* Murphy, 1 Dev. & Batt. (N. C.) 586, s. p.

(*c*) Preston on Abstracts, iii. 90; Shep. Touchstone, 226.

so far as respects the purchaser's security from any intervening claim, other than the right of redemption. (*d*)

The right to sell real estate on execution reaches reversionary interests, and they are bound by the judgment. (*e*) But in many of the states, the lands, after being taken by execution, are to be duly appraised by commissioners, or a sheriff's inquest, and set off, and possession delivered to the creditor in the execution, by metes and bounds; and they operate as a conveyance of the debtor's title, and a payment on the judgment to the amount of the valuation. The return of the officer when recorded passes the title. (*f*) The debtor is likewise allowed a reasonable time to redeem, on paying the appraised value, with lawful interest.

This is the case in Maine, New Hampshire, Vermont, and * 433 Massachusetts; (*g*) * and the debtor is allowed a year to

(*d*) Whether *rights of entry*, which are not assignable at common law, can be sold on execution, seems not to be definitely settled in this country; though the language of the courts is in favor of the capacity of the execution to reach them, as a part of the real estate. Woodworth, J., in Jackson *v.* Varick, 7 Cowen, 238, 244; Thompson, J., in Inglis *v.* Trustees of the Sailor's Snug Harbor, 3 Peters, 131. This construction is, however, questioned by Judge Story. Ib. 177. Rights of entry may be taken and sold on execution in Tennessee and Massachusetts. Bumpas *v.* Gregory, 8 Yerg. 46. See note (*g*), next page, and note (*d*), *supra*, 308.

(*e*) Burton *v.* Smith, 13 Peters, 464.

(*f*) Gore *v.* Brazier, 3 Mass. 523. It was said in Phelps *v.* Parks, 4 Vt. 488, that the *levy* by virtue of the execution conveyed the title, but the latter case of Swift *v.* Cobb, 10 Vt. 283, holds the language in the text. [Williams *v.* Downing, 18 Penn. St. 60. But see Brooks *v.* Kendall, 25 Vt. 528.] It is essential to a *levy* of personal property that the officer should have the power to take possession. Actual seizure or manual caption is not absolutely essential. [Barker *v.* Binninger, 14 N. Y. 270.] But the goods must not only be under the view of the officer, but within his power and subject to his control. Bryan *v.* Strait, 1 Dudley (S. C.), 19; Hubbard, J., 4 Met. 147; [Brown *v.* Pratt, 4 Wis. 513.] *Seizure*, say the court, in Goubeau *v.* N. O. & N. R. R., 6 Rob. (La.) 345, of personal property by an officer, is taking actual possession. A levy on land is a specific assertion by the sheriff, on the execution of his legal authority to sell it. Butler, J., 3 Hill (S. C.), 292. In the execution of a *fi. fa.* the sheriff cannot forcibly enter the dwelling-house of the defendant, and if he does, he has no right to remove the goods. Curtis *v.* Hubbard, 4 Hill (N. Y.), 437. The sheriff cannot sell land without a valid levy or seizure. Waters *v.* Duvall, 11 Gill & J. 37. But in Wood *v.* Colvin, 5 Hill (N. Y.), 228, it was declared, that as judgments are made liens on land, no formal *levy*, or inventory, or seizure, is requisite. The receipt of the execution to sell amounts to a levy, and anything more formal would be an idle ceremony.

(*g*) In Massachusetts, the statute of 1783, c. 57, taken from a provincial statute, made the fee of the real estate of the debtor liable to be attached and taken on execution, and appraised and set off to the creditor; and if the estate could not be set out by metes and bounds, then the rents might be taken. By the Massachusetts Revised

redeem, except in Vermont, where it is only six months. In Rhode Island and Connecticut, the previous appraisement is requisite; and the levy and assignment of the lands to the creditor at the appraised value, carries the title when the execution is returned and recorded; and there is no time allowed to redeem.(*a*) There are special and peculiar regulations on this subject in several of the states. In Pennsylvania and Delaware, the lands are to be appraised; and if the inquest finds that the rents and profits for seven years will discharge the debt, the lands are then *extended* by the writ of *liberari facias*, and possession given to the creditor, as practised upon the *elegit* in England; but if not so found, the lands are to be sold without redemption. (*b*) The lands are not

Statutes of 1836, pt. 2, tit. 5, c. 73, the mode of taking lands on execution for debt is specially detailed. So it is, also, in the Revised Statutes of Vermont, 1839, pp. 241, 243, and the provisions are essentially the same. In Massachusetts, all real estate of the debtor, including lands fraudulently sold by him, and rights of entry and equities of redemption, may be so taken. Upon the levy being made, the sheriff causes the value of the land to be appraised by three appraisers, and then possession delivered to the creditor at the sum appraised, and the execution and appraisement are returned to the clerk's office and recorded. The inchoate right of the debtor's wife to dower, and the amount of mortgage incumbrances, are to be deducted from the appraised value of the land. The defendant has one year to redeem on due payment; and if he makes default, the title becomes absolute in the creditor.

(*a*) Dane's Abr. v. 22, 25; Swift's Digest, i. 154, 155; Griffith's Register; Booth *v.* Booth, 7 Conn. 350; Statutes of Connecticut, 1838, p. 64; Spencer *v.* Champion, 13 Conn. 11.

(*b*) Purdon's Penn. Dig. 373, 375; 8 Harr. (Del.) 483. In Pennsylvania, by statute, 1842, when personal property is taken on execution, the sheriff summons three freeholders to appraise, and the valuation is to be annexed to the writ, and if the sale amounts to two thirds only of the appraised value, it is to be stayed for a year on due security, &c. In Fretz *v.* Heller, 2 Watts & S. 397, it was held, that under a *venditioni exponas*, the sheriff is bound to sell the whole interest of the debtor in the land, without reservation or restriction. It has been adjudged, under the Pennsylvania statute, that an estate for life, belonging to the debtor, is not within the statute; and it may be sold on execution without an inquest on its value. Howell *v.* Woolfort, 2 Dallas, 75. So, if the property be woodland, 1 Rawle, 96, the parties may by consent waive the inquisition, and have the lands sold on *fieri facias* without it. Overton *v.* Tozer, 7 Watts, 331. In Roland *v.* Barkley, 1 Brock. 356, it was held to be the settled practice in Virginia, that the officer who executes the *elegit* does not put the creditor in actual possession of the land, but gives him only a legal possession, which he must enforce by ejectment. It is, however, so reasonable a jurisdiction, that the court which causes land to be sold by its judicial process should complete the sale by putting the purchaser in possession, that the court of chancery will, in such cases, cause possession to be delivered to the purchaser by writ of assistance. Kershaw *v.* Thompson, 4 Johns. Ch. 609; Hart *v.* Linsday, 1 Walker, Ch. (Mich.) 144; Garretson *v.* Cole, 1 Harr. & J. 370; and judges have intimated (Buller, J., 8 T. R. 298; Livingston, J., 1 Johns. 44), that the sheriff might do the same on *fieri facias*. But I apprehend that

to be sold, in Ohio, under the amount of two thirds of the previously appraised value thereof, except in sales for taxes, or against officers for moneys collected. Their real value in cash is to be first appraised by an inquest of three freeholders summoned by the sheriff upon levying the execution, and if two thirds of the appraised value is sufficient to satisfy the execution, the judgment ceases to be a lien on the residue to the prejudice of *bona fide* judgment creditors. (*c*) In Kentucky, by the statute of 1827, on a sale of real estate on execution at law, the land must be previously appraised, and the statute authorizes a redemption at any time in twelve months, unless the land brings two thirds of its appraised value. But the necessity of this valuation does not apply to lands sold under a decree in chancery. (*d*) In Indiana, the sheriff first offers for sale the rents and profits of the land for seven years, and if they will not sell for a sufficient sum to satisfy the execution, the fee simple is sold to the highest bidder. (*e*)

In Mississippi and Louisiana, if the lands do not bring, or
* 434 the creditor will not take them at two thirds * of the appraised value, there is a delay and check imposed upon a peremptory sale, on the interposition of security. (*a*) In Illinois,

this is not the practice recognized by courts of law. In Pennsylvania, the vendee at sheriff's sale, or the grantee of such vendee, may obtain possession by summary process before two justices of the peace, on giving three months' notice to quit. Brown *v.* Gray, 5 Watts, 17; Purdon's Digest, 381.

(*c*) Acts of Ohio, 1831. In Lessee of Allen *v.* Parish, 3 Ohio, 187, it was held that if the lands be sold without such previous appraisement, it will not affect the title of the *bona fide* purchaser. Though the sale be only of an equity of redemption, yet the valuation must be of the *entire estate*, and of *its real value in money*, and the sale cannot be for a sum short of two thirds of that value, though the sheriff's deed will convey only the interest of the judgment debtor. Baird *v.* Kirtland, 8 Ohio, 22.

(*d*) Blakey *v.* Abert, 1 Dana, 185.

(*e*) Revised Statutes of Indiana, 1838, p. 276.

(*a*) In Mississippi, the sheriff, on execution, summons three freeholders to certify on oath the value of the lands and other property seized, and if it will not sell for two thirds of the appraised value, the property is then to be sold at auction to the highest bidder, on a credit of one year on bond, with good security. Laws of Mississippi, ed. 1839, p. 511. Sales under chancery decrees are on six months' credit. Ib. 846. But by statute of 21st of February, 1840, if the property on sheriff's sale on execution does not bring two thirds of the valuation under the valuation law, the sheriff returns the facts without a sale, and, after the expiration of twelve months, further process issues and the sheriff re-advertises the land and makes an absolute sale. McGehe *v.* Handley, 5 How. (Miss.) 625. One of the judges of the court (Mr. Justice Clayton), in Pickens *v.* Marlow, 2 Smedes & M. 437, held that the Mississippi valuation law was, as to contracts made before its passage, unconstitutional, and I

the land could not formerly be sold under two thirds of the appraised value; but according to the statute law of Illinois in 1825, lands are sold on execution at vendue to the highest bidder, after the same shall have been valued or appraised by three freeholders, though the lands are to be sold to the highest bidder, without regard to such valuation or appraisement, but they are in that case sold subject to the right of redemption by the debtor within a year, on paying the amount of the bid and ten per cent interest thereon. In 1841 the law was again altered in Illinois, and the appraisement by three householders of real or personal property, or both levied on execution, was required, and the property was not to be struck off on the sheriff's sale, unless two thirds of the amount of such valuation should be paid for. The valuation was to have reference to the cash value. (*b*) In Michigan, by statute in 1841, no real or personal estate can be sold by foreclosure of mortgage, or on execution, until the same shall have been appraised, and then for not less than two thirds of its appraised value. The creditor and debtor each to select an appraiser, and they or the officer the third appraiser. Property sold under this provision, not subject to redemption. The Circuit Court of the United States for Michigan, in October, 1841, adopted and enforced this provision as being a rule of property in that state. On the 17th of February, 1842, a further and different provision was made in Michigan as to the disposition of lands on execution. No real estate was thereafter to be sold by execution or on judicial process. If personal property sufficient for the demand could not be found, or be not tendered by the defendant, the sheriff, on execution, was to levy on the real estate, and the same was to be appraised by three disinterested freeholders at the just cash value, having reference to prior existing liens, and the interest of the defendant therein. The sheriff was to set out by metes and bounds to the creditor, land at two thirds of its appraised value, to pay the amount of the execution and charges. If the creditor within ten days accepts the same at two thirds of the appraised value in payment, the sheriff, unless the defendant

am now (1846) informed by the same high authority, that the whole series of valuation laws in Mississippi have been repealed.

(*b*) Act of Illinois, February 27, 1841. The obstruction to execution on civil process in Illinois was still further enforced by a stay law in the winter of 1842–3, and such laws were becoming prevalent in the states.

or mortgagor redeems the land within six months from the appraisement, by paying the money at which the real estate was set off, with interest at ten per cent, is to cause the process and proceedings to be returned and recorded in the register's office of the county, and the title thereupon vests absolutely in the creditor. But if he refuses to accept the land as appraised in payment *pro tanto*, the levy is held to be discharged, and the creditor to pay the costs of the levy and appraisal. This act applies to foreclosures of mortgages in chancery, or by advertisement under a power of sale, except as to future mortgages in chancery, or by advertisement under a power of sale, except as to future mortgages wherein the parties shall expressly covenant that the act shall not apply. (*c*) In Tennessee, lands were liable originally to unconditional sale by execution, but, by act of 1820, a redemption of lands sold on execution or upon foreclosure of mortgages, was allowed to the debtor and to his other creditors, within two years, upon payment of the amount of the bid, and ten per cent interest thereon, and all lawful charges. (*d*) But

(*c*) These laws are induced, no doubt, from the loss of credit, and of a sound paper currency, and the depression of business and prices, producing a general distress, but they are very bad, and are violations of the Constitution of the United States. See i. 419, 420. The like national distress caused the government of ancient Rome, in the year of the city 408, to make land and cattle a tender in payment of debts at a certain fixed value. Arnold's Hist. of Rome, ii. 73. Mr. Justice Bronson, in 3 Hill, 469, spoke severely against the enactments of stop and exemption laws, the New York Insolvent Act of 1811, and the insolvent branch of the late Bankrupt Act of the United States, as unjust and impolitic, destroying the rights of creditors, and introducing a lax morality in relation to the payment of debts. And the Supreme Court of the United States, in the case of Bronson *v.* Kinzie, 1 How. 311, in a great degree overset the stop laws of the states, by declaring that the mortgaged premises in that case should be sold at auction to the highest bidder, absolutely without redemption, under the law of Illinois of February, 1841, and without any previous valuation or amount of bid according to the law of Illinois of February 27, 1841. Both these statutes in reference to the then existing contracts were declared to be unconstitutional. The decision of the court was pronounced by Ch. J. Taney, in an opinion distinguished for its clearness, simplicity, and irresistible logic. The doctrine of the court in Bronson *v.* Kinzie, was referred to and confirmed in McCracken *v.* Hayward, 2 How. 608, and the valuation law of the State of Illinois, checking perpetually sales on execution, was again declared to be unconstitutional and void. So, also, in the case of The Lancaster Savings Institution *v.* Peigart, before President Lewis, at Lancaster, Pennsylvania, April, 1844, the act of Pennsylvania of 16th July, 1842, allowing a stay of execution on mortgages for one year, if the property does not bring two thirds of its appraised value, was held to be unconstitutional, as to mortgages prior to the act.

(*d*) Griffith's Register, tit. Tennessee, No. 42; Act of 1820; Yerger's Reports, *passim*.

no creditor, unless he be a judgment creditor, is entitled to redeem lands sold on execution or under a deed of trust. So, if the party entitled to redeem lands sold on execution or under a mortgage, induces a purchaser to buy, under an assurance that he would not redeem, he will not be permitted in equity to redeem. (*e*) Virginia is an exception to the general practice of selling land on execution. The English process of *elegit* and *extent* are used; but in special cases the lands are sold, as in the case of judgments in favor of the commonwealth against public debtors. (*f*)

In those states in which the sheriff sells the land, instead of extending it to the creditor, he executes a deed to the purchaser; (*g*) and it is held, that the sheriff's sale is within the statute of frauds, and requires a deed or note in writing of the sale, signed by the sheriff. (*h*) In some of the states, as, for

(*e*) Woods *v.* McGavock, 10 Yerg. 133.

(*f*) 1 Robinson's Practice, 540, 587, 588.

(*g*) In Kentucky, the purchaser at a sheriff's sale acquires no right of entry until he obtains the sheriff's deed. 8 Dana, 167. In Louisiana, the statute requires that the judgment on which execution issues should be recited in the deed of sale given by the sheriff; and it has been declared that the omission of that recital prevents the transfer of the title to the buyer; and that a deed from the sheriff is essential to the title. Dufour *v.* Camfranc, 11 Martin, 607; Durnford *v.* Degruys, 8 id. 222; Childress *v.* Allin, 17 La. 37. In Ohio, the sheriff executes a deed of conveyance to the purchaser, after the court shall have confirmed the sale upon a return of it, and no reversal of the judgment affects the purchaser's title. Statutes of Ohio, 1831. In all judicial sales whatever, there is no warranty of title, and the rule of *caveat emptor* applies. 2 Bailey (S. C.), 480. This principle applies as well to a judicial sale of chattels as of land. The sheriff sells only the debtor's property in the thing, whatever it may be. Freeman *v.* Caldwell, 10 Watts, 9; England *v.* Clark, 4 Scam. 486; [Bostick *v.* Winton, 1 Sneed, 524; Homesly *v.* Hogue, 4 Jones, 481.] The sheriff's return to a *fi. fa.* of the levy and sale is conclusive of satisfaction, even though the purchaser's title to the land or chattel should prove defective. Ib. The purchaser on execution is not affected, though the execution be subsequently quashed. Doe *v.* Snyder, 3 How. (Miss.) 66. Not even if the judgment was paid, provided no satisfaction appeared on record, and he was a purchaser without notice. Jackson *v.* Cadwell, 1 Cowen, 622. But the purchaser must show a judgment warranting the execution, and the execution and sale and sheriff's deed. Jennings *v.* Stafford, 1 Ired. (N. C.) 404; Blanchard *v.* Blanchard, 3 id. 105; Duncan *v.* Duncan, 3 id. 317; Seechrist *v.* Baskin, 7 Watts & S. 403. The *sheriff* himself need only show an *execution* of a court having competent jurisdiction. Walworth, Ch., in 16 Wend. [430]; Jackson *v.* Hobson, 4 Scam. 412. A purchaser of land at a sheriff's sale must show a *judgment* as well as execution to warrant it. Hinman *v.* Pope, 1 Gilm. (Ill.) 131; [Sullivan *v.* Davis, 4 Cal. 291. But see Hardin *v.* Cheek, 3 Jones, 135; Hamilton *v.* Moreland, 15 Ga. 343.]

(*h*) Simonds *v.* Catlin, 2 Caines, 61; Jackson *v.* Catlin, 2 Johns. 248; s. c. 8 id. 520; Barney *v.* Patterson, 6 Harr. & J. 182; Ennis *v.* Waller, 8 Blackf. (Ind.) 472; Estep

instance, in Ohio, North Carolina, Georgia, Alabama, Mississippi, and Missouri, the sales are required to be at the court house of the county, and in Louisiana at the seat of justice of the parish, and on the plantation, if the sale be in the country. In the New England states, with the exception of Rhode Island, the sheriff's official return of the proceedings under the execution, constitutes the title of the creditor, as does the sheriff's return of the inquisition upon the *elegit* in England; (*i*) and no deed is executed, for the title rests upon matter of record. In New York, every judgment and final decree are a lien on the real estate of the debtor from the docketing of the same, and affect * 435 equally * his after acquired lands, with the exception of mortgages taken at the time of purchasing the after acquired lands, for the security of the purchase-money. (*a*) But judgments and decrees cease to be a charge on the lands as against purchases in good faith, and as against subsequent incumbrances, from and after ten years from the docketing of the same, (*b*) and all judgments in any court of New York or of the

v. Weems, 6 Gill & J. 303. The New York Revised Statutes, ii. 374, require a regular conveyance from the sheriff; and this is the law in North Carolina, 4 Dev. (N. C.) 153; and in Delaware, 1 Harr. 465; and in Georgia, R. M. Charlton, 326; and in Pennsylvania, Purdon's Dig. 379.

(*i*) Den *v.* Abingdon, Doug. 473.

(*a*) The lien of judgments, as a lien upon real estates, and which is so prevalent in the United States, was adopted from the English statute of 4 and 5 W. and M. c. 20, and which has been improved by the statute of 1 and 2 Vict. c. 110, requiring a memorandum of the judgment to be entered in a book in alphabetical order, and a fresh memorandum thereof to be made after five years from the first entry. A debtor after verdict and before judgment may lawfully give a preference to a creditor by conveying real estate to him in satisfaction of a *bona fide* debt, and thus prevent the lien of the judgment, provided the lands be purchased by the creditor free from any fraudulent intent. Waterbury *v.* Sturtevant, 18 Wend. 353.

(*b*) New York Revised Statutes, ii. 182, sec. 96, 97; ib. 359, sec. 3, 4. Judgments and decrees, says the statute, are a charge upon, and bind, "the lands, tenements, real estate, and chattels real" of the defendant. But a court of chancery will protect the equitable rights of third persons against the legal lien of a judgment, provided those rights existed at the time of the judgment. Keirsted *v.* Avery, 4 Paige, 1; [Lounsbury *v.* Purdy, 11 Barb. 490.] x^1 Under the old English law the interest of a

x^1 Thus, in Morsell *v.* First Nat. Bank, 91 U. S. 357, it was held that a judgment was not a lien in the District of Columbia upon real estate, which at the time judgment was rendered had been conveyed in trust to pay debts. But in Freedman's Sav. & Trust Co *v.* Earle, 110 U. S. 710, it was held that a creditor of such judgment debtor could file a bill in equity for an account of the trust and to have the surplus applied to the judgment lien, and thereby acquire a lien subject only to the trust. The subject of judgment liens is considered at some length in these cases.

United States within the state of New York, are presumed to be satisfied after twenty years from the signing and filing of the record; and the presumption can only be repelled by a written acknowledgment of indebtedness, or by proof of payment of part within the twenty years. In every other case the lapse of time is conclusive. (*c*) There is a great diversity of practice in the different states on this point. In the eastern states, as Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, and Vermont, the judgment is no lien, and the lands are not bound until execution issued; but as a substitute for this apparent want of due protection to the creditor, the land may be attached, in the first instance, on mesne process, and that creates *a valid* lien. (*d*) In Kentucky, lands are only bound, like chattels, from

tenant for years was not bound by judgment (Fleetwood's Case, 8 Co. 171), and this seems to be still the law in Pennsylvania. Krause's Appeal, 2 Wharton, 398.

(*c*) New York Revised Statutes, ii. 301.

(*d*) In Connecticut, the attachment on mesne process binds the estate, real and personal, as against any other creditor or *bona fide* purchaser, provided the service be duly completed and returned. Statutes of Conn. 1838, p. 43. This is a general rule on such attachments in New England and elsewhere. Hubbard *v.* Hamilton Bank, 7 Met. 340; Wallace *v.* M'Connell, 13 Peters, 136. Notice to the defendant constitutes the commencement of a suit on a writ of attachment against real estate. Sanford *v.* Dick, 17 Conn. 213. In Tyrell *v.* Rountree, 1 M'Lean, 95, an attachment levied on lands in Tennessee fixes a lien from the time of the levy. In Maine and Massachusetts, the officer making an attachment of real estate on mesne process must file an attested copy of the return in the office of the clerk for the county, and it is to be entered by the clerk in a book, in order to make it a lien. See Revised Statutes of Massachusetts. It is understood that the attaching creditor acquires no interest in the property. His right is to have it forthcoming to satisfy the execution. The property remains in the custody of the law. The sheriff has a special property to protect it, but the general property is not changed. The sheriff may deliver it to a bailee to keep at his own risk. Shaw, C. J., in Grant *v.* Lyman, 4 Met. 476. So in Perkins *v.* Norvell, 6 Humph. 151, it was held that an attachment created a lien on the real estate of the debtor, but did not devest his title. In Connecticut, the officer must leave a copy of the writ, and a description of the land attached, in the town clerk's office, within seven days thereafter, or the lands will not be bound against other creditors and *bona fide* purchasers; nor will the lien, created by the attachment, be preserved, unless execution within sixty days after judgment be served on the personal, and within four months after judgment, on the real estate. Statutes of Connecticut, ib. In Vermont, the lien on real estate, created by the due service and return of the original process of attachment continues for five calendar months after the rendition of final judgment, and no longer. Revised Statutes of Vermont, 1839, p. 182. In North Carolina, the levy of an attachment upon lands, consummated by a subsequent judgment and sale on execution, creates a lien as against a subsequent judgment creditor, though his was the prior judgment. Den *v.* Carson, 4 Dev. & Batt. 388. The lien has relation back to the time of the levy so as to defeat a sale made afterwards by the defendant. Den *v.* Ketchum, ib. 414. This is the general rule in

the delivery of the execution. (*e*) In Louisiana, a judgment is a lien, not by being docketed, but by being registered with the recorder of mortgages. (*f*) In Pennsylvania, the judgment is a lien from the signing of the judgment, on the lands owned at the time by the debtor; (*g*) though the lien ceases, by the act of 4th April, 1797, which provision was reënacted in 1834, (*h*) after seven years on judgments *inter vivos*, unless revived by *scire facias*, and judgments at the death of a decedent bind the estate for five years, though not revived by *scire facias*, and they do not bind after acquired lands until the execution has issued. This distinction is established by the decision in *Colhoun* v. *Snider*, (*i*) in which the antiquity and authority of the rule of the English common law, that a judgment binds after
* 436 acquired lands, has been ably questioned, * though I think not successfully shaken. In Virginia, by the Revised Act of 1819, (*a*) executions bind the real estate of the defendant from the time they are levied; and if the debtor be actually seised, yet during the existence of the right of the plaintiff to take out an *elegit*, the judgment is regarded as a lien, though

Illinois, where the New England law on this subject prevails. If the attachment be without personal service, the judgment is *in rem;* if with it, the judgment is *in personam* also. Martin *v.* Dryden, 1 Gilm. 188. The New England rule is, that perishable personal property, and live stock, in certain cases, attached on mesne process for debt, may be appraised and sold, and the proceeds held to abide the judgment. To make a valid attachment of land, the officer need not enter upon it or see it. The return that it is attached is sufficient. But on attachment of personal property he must take possession of the goods. Perrin *v.* Leverett, 18 Mass. 128; Taylor *v.* Mixter, 11 Pick. 341. This proceeding has some analogy to the laws of Spain, as formerly in force at New Orleans, by which, when a creditor proves his demand, and satisfies the judge that the debtor is wasting his goods, or that there is danger they may be destroyed or removed before judgment, the judge orders the property to be sequestered, unless the debtor gives surety to the creditor to abide the judgment of the court. 1 Martin, 79; 2 id. 89.

(*e*) Bank of the United States *v.* Tyler, 4 Peters, 366; Million *v.* Riley, 1 Dana, 360; Revised Code of Mississippi, 1824, p. 197; Digest of the Laws of Mississippi, by Alden and Van Hoesen, 1839, p. 420. This was also the case in Mississippi, according to the statutes referred to, but it is now understood that lands and chattels are, by the statute of 1824, bound by the judgment from the time of its rendition. 4 How. 12.

(*f*) Hanna *v.* His Creditors, 12 Martin, 32.

(*g*) The judgment is a lien upon the defendant's equitable title, founded upon articles of agreement. Episcopal Academy *v.* Frieze, 2 Watts, 16.

(*h*) Purdon's Dig. 393.

(*i*) 6 Binney, 135.

(*a*) 1 Revised Code, c. 134, sec. 10.

there is no statute in Virginia expressly making judgments a lien. (*b*) By the Revised Statutes of Illinois, published in 1833, a judgment is declared to be a lien on real estate for the period of seven years. In North Carolina, it has been held, that the lands were bound from the judgment, provided the creditor sues out an *elegit;* but they are only bound by execution if the creditor sells the land by *fieri facias.* (*c*) The judgment becomes a lien in the

(*b*) Burton *v.* Smith, 13 Peters, 464.

(*c*) Jones *v.* Edmonds, 2 Murph. 43. The *fi. fa.* is now the uniform process to sell lands, and the *elegit* is abandoned. The case in Murphey is shaken in Ricks *v.* Blount, 4 Dev. [N. C.] 133. It was admitted that at common law, or at least from the statute of West. 2, a judgment was a lien on land so long as an *elegit* could be sued out, and the writ displaced all alienations posterior to the judgment, and all extents under junior judgments. But in Den *v.* Hill, 1 Hayw. (N. C.) 72, 95, it was decided, that the purchaser under a junior judgment had preference, if he was the first purchaser, even over the *elegit* on the prior judgment. This seems to be now the established law, and was a consequence of the statute of 5 Geo. II. giving the *fi. fa.* against lands. It was said again, in 1 Dev. & Batt. 502, as late as 1836, that the statute of 29 Chas. II. c. 2, sec. 16, was never in force in North Carolina, and that executions were governed by the common law, and bound property from the teste, until the statute of 1828 made executions from a justice's court bind only from the levy. This was intended to protect the intermediate purchaser, but if the defendant after the teste and before the levy, died, the goods were bound in the hands of the executor or administrator, and the officer might go on and levy. It is further held, in that state (Dobson *v.* Murphy, 1 Dev. & Batt. 586), that a purchaser on execution must show a judgment warranting the execution, or no title will pass, though it was understood that under the English law, the purchaser, if a stranger, was not obliged to show a judgment, but only the execution. I apprehend that in New York, also, the purchaser on execution does not acquire a valid title, if there be no judgment to warrant it. Revised Statutes, ii. 375. But it has been often decided that a *bona fide* purchaser under a decree or judgment, may, if the court had jurisdiction, hold the property so purchased, notwithstanding a subsequent reversal for error, of the judgment or decree. Goodyere *v.* Ince, Cro. Jac. 246; Yelv. 179, s. c., and the note thereto of Mr. Metcalf, the learned editor of the American edition. Dater *v.* Troy, T. & R. R. Co., 2 Hill, 629; Robertson, C. J., Clary *v.* Marshall, 4 Dana, 98; Shackleford *v.* Hunt, 4 B. Mon. 263. But this would not be the case if the judgment or decree was not merely erroneous but void. The distinction taken in Ohio is, that on a sale of lands on execution to a stranger to the judgment, the owner, on reversal of the judgment, must pursue the fruits of the sale in the hands of his antagonist; but where the mortgagee is the purchaser under a judicial decree, afterwards reversed, and continues owner until such reversal, the mortgagor is entitled to redeem the land. Hubbel *v.* Broadwell, 8 Ohio, 120. In Virginia, the lien, as in England, is a consequence of a right to sue out an *elegit.* There is no statute which expressly makes a judgment a lien upon the lands of the debtor; but during the existence of a right to sue out an *elegit*, the lien is universally acknowledged. It is not suspended by suing out a *fieri facias*, but it continues pending the proceedings on such a writ, and it has relation to the first day of the term, in equity as well as at law. Coutts *v.* Walker, 2 Leigh, 268; Coleman *v.* Cocke, 6 Rand. 618; United States *v.* Morrison, 4 Peters, 124.

states of New Jersey, (*d*) Delaware, Maryland, Indiana, (*e*)
* 437 Ohio, (*f*) Missouri, Tennessee, (*g*) South Carolina, * Geor-

(*d*) In New Jersey, the judgment operates as a lien upon the real estate from the time of the actual entry of it on the minutes or records of the court. But if there be two or more judgments against the same defendant, a junior judgment creditor will gain the preference, and be entitled to be first satisfied, by causing an execution upon it to be first delivered to the sheriff. Reeves *v.* Johnson, 7 Halst. 29. On a sale on execution, the sheriff executes at once a deed to the purchaser. 1 Green (N. J.). 135.

(*e*) Judgments cease to be liens on real estate, in Indiana, after ten years, unless revived by *scire facias*. Statutes of 1825.

(*f*) In Ohio, judgments have always been a lien on real estate, and lands have been liable to be sold on execution, under certain restrictions. The purchaser takes the title as held by the debtor, subject to prior existing liens. Riddle *v.* Bryan, 5 Ohio, 55. But by statute, in 1824, it was provided, that if execution was not sued out on the judgment, and levied within a year, without due excuse, the judgment should not operate as a lien to the prejudice of any other *bona fide* judgment creditor. McCormick *v.* Alexander, 2 Ohio, 65; Earnfit *v.* Winans, 3 id. 135. The same provision was reënacted in 1831, and is in force to this time. As between the judgment creditor and the judgment debtor, the lien is perpetual. Norton *v.* Beaver, 5 Ohio, 178. The lien relates back to the first day of the term in which the judgment is entered. Urbanna Bank *v.* Baldwin, 3 id. 65. But the judgment does not bind an equitable interest in the land. See a learned note of the reporter, Mr. Wilcox, in 10 Ohio, 74, in which all the distinctions relative to judgment liens in Ohio are fully stated. In Shuee *v.* Ferguson, 3 Ohio, 136, it was decided, that to take the prior lien out of the statute, the levy must have been made within the year on the *property in question*. See, also, Thompson *v.* Atherton, 6 Ohio, 30. If not, then all the judgments stand on an equal footing, and the first levy thereafter will have the preference. The lien of a judgment in Ohio does not attach to after acquired lands, so as to affect the rights of a *bona fide* purchaser. Roads *v.* Symmes, 1 Ohio, 313; Stiles *ex dem.* Miller *v.* Murphy, 4 id. 92. Judgments standing five years without execution become dormant, and the lien ceases. The lien on lands within the county where the judgment was rendered, exists from the first day of the term, and on all other lands within the state from the levy on them. Statutes of Ohio, 1831.

(*g*) The lien of the judgment may be lost, in Tennessee, by the act of the judgment creditor, so as to let in a younger judgment creditor. The lien in that state is only raised by construction of law; and if the plaintiff, by contract with the debtor, delays execution for six months, for instance, he loses his lien as against a junior creditor. Porter *v.* Cocke, Peck (Tenn.), 30. The lien operates from the date of the judgment, if the lands be sold within a year thereafter, but if there be no levy made within a year after the judgment rendered, the lien ceases as to subsequent purchasers. Statute Laws of Tennessee, 1836, p. 419; Miller *v.* Estill, 8 Yerg. 452; Greenway *v.* Cannon, 8 Humph 177. See further, as to judgment liens in Tennessee, the learned discussion of Chancellor Haywood, Peck, App. 1-11. In Murfree *v.* Carmack, in Tennessee, 4 Yerg. 270, it was adjudged, that the judgment was a lien on the land from the day and precise time it was rendered, and in absence of proof of that precise time, a mortgage by the defendant, executed on the same day in which the judgment was rendered, being an equal title, would have a priority. It was shown, in that case, by the able and learned argument of Carmack, that judgment liens on land did not exist at common law, nor until the statute of West. 2, 13 Ed. I., which gave the *elegit*,

gia, Alabama, and Louisiana. (*a*) The lien, after all, amounts only to a security against subsequent purchasers and incumbrancers; for, as the Master of the Rolls said, in *Brace* v. *Duchess of Marlborough*, (*b*) it was neither *jus in re* nor *jus ad rem;* the judgment creditor gets no estate in the land, and though he should release all his right to the land, he might afterwards extend it by execution. (*c*)

and subjected real estate to the payment of debts; and as judgments were entered generally of the term, and as the term was considered in law as one day, and by intendment (Holt, C. J., 8 Salk. 212; 1 Wils. 89, arg.), judgments related to the commencement of the term, the lien which the courts deduced from the statute giving the *elegit*, necessarily attached on the first day of the term. So the law continued until the statute of 29 Chas. II. directed a date to be given to the judgment when signed, and the lien was shifted and fixed to that date. That statute would seem not to have been adopted in Tennessee, as we have seen in a preceding note that it was not in North Carolina, and executions bind personal property from their teste. Coffee *v.* Wray, 8 Yerg. 464. In England judgments relate to the first day of the term as against volunteers and persons taking with notice, though that fiction is taken away by statute as to *bona fide* purchasers.

(*a*) In South Carolina, a decree in equity for the payment of money constitutes a lien on land similar to that of a judgment at law; and under a statute in 1785, the real and personal estate of the defendant under such a decree is liable to be sold on execution by a writ in the nature of a *fi. fa.* Blake *v.* Heyward, 1 Bailey (Eq.), 208. In Georgia, the judgment creates a lien on all the property of the debtor, and it is constructive notice to all the world, and it is indefinite in duration until satisfied, or lost, or displaced by the act of the party. Forsyth *v.* Marbury, R. M. Charlton, 324, 326, 327.

(*b*) 2 P. Wms. 491.

(*c*) Story [Johnson,] J., in Conard *v.* Atlantic Ins. Company, 1 Peters, 453, s. P. The principle upon which the court of chancery interferes to enforce a lien, in respect to real estate, is that there is a judgment creating a lien on the estate recognized in equity; and in respect to personal estate, that there were a previous judgment and execution satisfied. Brinkerhoff *v.* Brown, 4 Johns. Ch. 677; Perry *v.* Nixon, 1 Hill, Eq. (S. C.) 336; M'Nairy *v.* Eastland, 10 Yerg. 310. A judgment is binding upon trust and equitable estates, as well as on legal estates, and the lien may be asserted in chancery, except as against *bona fide* purchasers without notice. 3 Preston on [Abstracts], 326; Sugden on Vendors, 9th ed. 616; Chapron *v.* Cassaday, 3 Humph. 661. The judgments in the federal courts, within the district of New York, are liens upon real property, in the like manner as judgments of the state courts, and to the extent of the local jurisdiction of the court. See *supra*, i. 248, note; ib. 342, note. The lien exists in Pennsylvania district (1 Peters, C. C. 195), and in Maryland (5 Peters, 358), and probably in other states, to the extent of state judgments. By the New York Revised Statutes, ii. 557, sec. 38–46, judgments in the federal courts within the state are to be transcribed and docketed by the clerks of the Supreme Court of the state, in books to be provided for the purpose, for the public inspection and security. In Pennsylvania, a judicial sale devests all liens, definite and certain in their amount, whether general or specific, except in peculiar cases, and with the exception of prior mortgages; and the proceeds are to be fairly and faithfully applied to the discharge of liens, according to priority. By the sale, the money is substituted for the land. This

In New York, the interest of a person holding a contract for the purchase of land, is not bound by a judgment or decree, and is not to be sold on execution. The remedy by the creditor against such an equitable interest residing in his debtor, is by a bill in chancery; and the interest may be sold under a decree for that purpose, or transferred to the creditor in such manner and upon such terms as to the court shall seem just, and most conducive to the interest of the parties. (*d*) So the creditor who holds a debt secured by mortgage, cannot sell the equity of redemption on judgment and execution at law. His remedy is upon the mortgage in chancery. (*e*) But where lands are held by A. for

is also the case in Delaware; a sheriff's sale discharges all prior judgment liens, and the proceeds are applied to judgments in the order of their preference. Farmers' Bank *v.* Wallace, 3 Harr. 370; Finney *v.* Pennsylvania, 1 Penn. 240; M'Grew *v.* M'Lanahan, ib. 44; M'Lanahan *v.* Wyant, ib. 96; ib. 113; Milliken *v.* Kendig, 2 id. 477; Willard *v.* Norris, 2 Rawle, 56; Miller *v.* Musselman, 6 Wharton, 357; Bantleon *v.* Smith, 2 Binney, 146; Reed *v.* Reed, 1 Watts & S. 235; Custer *v.* Detterer, 3 id. 28; Presbyterian Corporation *v.* Wallace, 3 Rawle, 109. In this last case, the rule in Pennsylvania is applied, as well to a prior incumbrance by mortgage as to a prior incumbrance by judgment. See also Leib *v.* Bean, 1 Ash. 207, and Mode's Appeal, 6 Watts & S. 280. The judicial sale discharged the lien of a prior mortgage for the payment of money, and turned a mortgage round on the fund in the sheriff's hands, though the purchaser might agree, even by parol, to buy the land subject to the mortgage, and equity would hold him to his bargain. But by the act of 6th April, 1830, the lien of prior mortgages was restored, and not to be destroyed or affected by any judicial sale. Purdon's Dig. 886. Arrears of rent recoverable by distress are not payable out of the proceeds of a sheriff's sale for a mortgage debt. Sands *v.* Smith, 3 Watts & S. 1.

(*d*) New York Revised Statutes, i. 744, sec. 4, 5, 6; Grosvenor *v.* Allen, 9 Paige, 77. It had heretofore been held (Jackson *v.* Scott, 18 Johns. 94; Jackson *v.* Parker, 9 Cowen, 73), that a person *in possession*, under a contract for the purchase of land, had a real estate, bound by judgment and liable to be sold on execution. It was an equitable interest, coupled with possession. But the words of the statute are broad enough to reach that case; and it could not probably be withdrawn from the statute, and those former decisions restored, unless the possession rested upon some specific agreement for a limited time, giving to the possession the interest and character of a chattel real. As to sales on execution of equities of redemption, see *supra*, p. 160. In the State of Maine, by statute of 1829, c. 431, the interest of a debtor in a contract for the purchase of land, is liable to attachment at the instance of a creditor. [See Haynes *v.* Baker, 5 Ohio St. 253; Vierheller's Appeal, 24 Penn. St. 105; Patterson's Estate, 25 Id. 71.] Previous to the New York Revised Statutes, the equitable interest of a judgment debtor in lands was, *in equity*, subject to the lien of the judgment at law, except as to *bona fide* purchasers without notice. In England, by the statute of 1 and 2 Vict. c. 110, sec. 11, 13, a docketed judgment is made a charge upon the equitable as well as upon the legal interest of the judgment debtor in lands; except as to purchasers for valuable consideration without notice.

(*e*) New York Revised Statutes, ii. 368, sec. 81.

the use of B. as a resulting trust, they may be sold on execution at law against B. This was by the statute of 29 Charles II. c. 3, and the practice doubtless prevails throughout this country. (*f*) In North Carolina, the equity of redemption in lands and tenements is made by statute, liable to be sold by execution at law.

*When we consider how reluctantly and cautiously real *438 property in England has been subjected to the process of execution, and how reasonable it is that provision should be made, as well on account of the interests of creditors as of the condition of the debtor, against precipitancy, and sacrifices, and iron-hearted speculation at sheriffs' sales, there will appear to be no just ground to complain of this branch of our American remedial jurisprudence. But the legislation in several of the states since the year 1837 has carried the restraints on the creditor's common-law rights on execution against property to an extent injurious to the rights of property, the obligation of contracts, and the dictates of a just and enlightened policy. The statutes alluded to have been noticed in the preceding pages, and they make essentially real estate a legal tender, which the creditor does not want and cannot use, instead of money, which is the only legal tender known to the constitution, and is in business concerns the common standard of value and medium of exchange.

It may be here observed, as a general rule applicable to sales, that when a trustee of any description, or any person acting as agent for others, sells a trust estate, and becomes himself interested, either directly or indirectly, in the purchase, the *cestui que trust* is entitled, as of course, in his election, to acquiesce in the sale, or to have the property reëxposed to sale, under the direction of the court, and to be put up at the price bid by the trustee; and it makes no difference in the application of the rule, that the sale was at public auction *bona fide*, and for a fair price. A person cannot act as agent for another, and become himself the buyer. He cannot be both buyer and seller at the same time, or connect his own interest in his dealings as an agent or trustee for another. It is incompatible with the fiduciary relation. Emptor emit quam

(*f*) Foote *v.* Colvin, 3 Johns. 222; Guthrie *v.* Gardner, 19 Wend. 414. The lien of a judgment does not attach in equity upon the mere legal title, but upon the resulting trust which is subject to execution at law. Ells *v.* Tousley, 1 Paige, 280; Thomas *v.* Walker, 6 Humph. 93.

minimo potest; venditor vendit, quam maximo potest. (*a*) The rule is founded on the danger of imposition and the presumption of the existence of fraud, inaccessible to the eye of the court. The policy of the rule is to shut the door against temptation, and which, in the cases in which such a relationship exists, is deemed to be of itself sufficient to create the disqualification. This principle, like most others, may be subject to some qualification in its application to particular cases, but as a general rule, it appears to be well settled in the English (*b*) and in our American jurisprudence. (*c*)

(*a*) See Story on Agency [§§ 9, 210–214,] where the doctrine is shown to exist in full force in the civil law, as well as in the English and American jurisprudence. See also Lomax's Digest of the Laws respecting Real Property, i. 255–259. [Gillett *v.* Peppercorne, 3 Beav. 78.]

(*b*) Holt *v.* Holt, 1 Ch. Cas. 190; Keech *v.* Sandford, 2 Eq. Cas. Abr. 741; Davison *v.* Gardner, in 1744, cited in Sugden's Law of Vendors, 436; Whelpdale *v.* Cookson, 1 Ves. Sr. 9; 5 Ves. 682, s. c.; Fox *v.* Mackreth, 2 Bro. C. C. 400; 2 Cox, 320, s. c.; Campbell *v.* Walker, 5 Ves. 678; 13 id. 600; *Ex parte* Lacy, 6 id. 625; *Ex parte* Hughes, ib. 617; *Ex parte* James, 8 id. 337; Coles *v.* Trecothick, 9 id. 234; *Ex parte* Bennett, 10 id. 385; Morse *v.* Royal, 12 id. 355; Lowther *v.* Lowther, 13 id. 95; York Buildings Company *v.* Mackenzie, 8 Bro. P. C. by Tomlins, App.; Downes *v.* Grazebrook, 3 Meriv. 200.

(*c*) Davoue *v.* Fanning, 2 Johns. Ch. 252; Perry *v.* Dixon, 4 Desaus. (S. C.) Eq. 504, note; Butler *v.* Haskell, ib. 654; *Ex parte* Wiggins, 1 Hill, Ch. (S. C.) 354; 4 Rand. 199, 204, 205; Davis *v.* Simpson, 5 Harr. & J. 147; Boyd *v.* Hawkins, 2 Dev. Eq. 207; Scott *v.* Freeland, 7 Smedes & M. 409; Lessee of Lazarus *v.* Bryson, 3 Binney, 54; Tilghman, C. J., 4 id. 43; Campbell *v.* Penn. L. Ins. Company, 2 Wharton, 53; 1 Ash. 307; Brackenridge *v.* Holland, 2 Blackf. (Ind.) 377; Wade *v.* Pettibone, 11 Ohio, 57; Armstrong *v.* Huston, 8 id. 552; Bohart *v.* Atkinson, 14 id. 228; Thorp *v.* McCullum, 1 Gilm. (Ill.) 614; Mills *v.* Goodsell, 5 Conn. 475; Story, J., in 1 Mason, 345; Lovell *v.* Briggs, 2 N. H. 218; Currier *v.* Green, ib. 225; [Gardner *v.* Ogden, 22 N. Y. 327; Cumberland Co. *v.* Sherman, 30 Barb. 553; Hoffman Co. *v.* Cumberland Co., 16 Md. 456; Moore *v.* Maudlebaum, 8 Mich. 433; Stewart *v.* Rutherford, 4 Jones (N. C.), 483; Bellamy *v.* Bellamy, 6 Florida, 62, 115; Price *v.* Evans, 26 Mo. 30; Charles *v.* Dubose, 29 Ala. 367; Wiswall *v.* Stewart, 32 id. 433;] Michoud *v.* Girod, 4 How. 503, 556. In this last case the court, in the opinion delivered by Mr. Justice Wayne, gave a strong sanction to the doctrine in the text relative to the fiduciary relations. The same sound doctrine was also well known to the civil law. Dig. 18. 1. 34. 7; ib. 18. 1. 46; ib. 26. 8. 5. 2. See also the Spanish Partidas, 4, 5, 5. The New York Revised Statutes, ii. 370, 546, have specially provided, as declaratory of the general rule, that no officer selling on execution shall be concerned directly or indirectly as a purchaser; while a mortgagee is allowed to purchase at a sale at auction under a power in his mortgage. In England, a mortgagee is allowed to bid under an order in chancery for the sale of a mortgage estate. *Ex parte* Marsh, 1 Ch. 148. So, the English rule in equity is, that a creditor taking out execution may become a purchaser of property seized under it, for it is the sheriff and not the creditor who sells. Stratford *v.* Twynam, Jacob, 418. But in Fisk *v.* Sarber, 6 Watts

If the personal estate of a testator and intestate be insufficient to pay his debts, the executor or administrator, as the case may be, is authorized to mortgage, lease, or sell so much of the real estate as shall be requisite to pay the debts. This is done in the several states under the direction of the Court of Probates, or other court having testamentary jurisdiction; and the title so conveyed to the purchaser will vest in him all the right and interest which belonged to the testator or intestate, at the time of his death. The proceedings, in such cases, depend upon local laws; and in New York, Massachusetts, New Jersey, Georgia, Illinois, and Mississippi, for instance, they are specially detailed in the

& S. 18, it was adjudged, after a most thorough and elaborate examination of the doctrine of sales and purchases by a person in his fiduciary character, that a trustee is not only prohibited from purchasing the trust estate during the existence of the trust, but that the trust subsists for certain essential purposes, notwithstanding the property is in the hands of a judicial officer, and that a trustee who becomes a purchaser, *even at a judicial sale*, takes the estate clothed with the same trusts as before the sale, and is accountable as such for the profits. The mere exchange of trust property by the trustee, under a valid power in trust, is not an alienation of the estate of the *cestui que trust*. The land taken in exchange is, for every beneficial purpose of the trust, the same estate. Hawley *v.* James, 5 Paige, 318. Judge Tucker (2 Bl. Comm. by Tucker, tit. Trusts) lays down the rule in broad terms, and in opposition to some *dicta* in the Virginia courts, that executors, agents, commissioners of sales, sheriffs, auctioneers, attorneys, and all persons in fiduciary characters are incapable of purchasing the trust subject at sales made by themselves, or under their authority or direction. The Supreme Judicial Court of Massachusetts, in Arnold *v.* Brown, 24 Pick. 96, lays down the rule in the same broad terms. The general principle extends so far, that if a trustee, mortgagee, tenant for life or purchaser, gets an advantage by being in possession, or behind the back of the party interested, and purchases in an outstanding title or incumbrance, he shall not use it to his own benefit, and the annoyance of him under whose title he entered, but shall be considered as holding it *in trust*. Morgan *v.* Boone, 4 Mon. (Ky.) 297; s. p. 4 Dana, 94. [See Burhans *v.* Van Zandt, 7 Barb. 91.] So, if a surety compounds a debt, and takes an assignment of it to himself, he can only claim against the principal the amount actually paid. Reed *v.* Norris, 2 My. & Cr. 361. With respect to sales by executors, if not made collusively, the purchaser is not bound to see to the application of the purchase-money. Scott *v.* Tyler, Dickens, 725; Tyrrell *v.* Morris, 1 Dev. & Batt. Eq. 561. Nor is the purchaser so bound where a trust is defined, and the purchase-money is to be invested in trusts at leisure. Wormley *v.* Wormley, 8 Wheaton, 422. The Supreme Court of the United States, in Jenkins *v.* Pye, 12 Peters, 241, were not disposed to adopt the broad principle that a voluntary deed from an adult child to her parent was *prima facie* void. There must be evidence of undue influence exercised by the parent, and operating on the hopes or fears of the child, or some other ingredient, showing that the act was not perfectly free and voluntary.

Revised Statutes, with cautious provisions to guard against irregularity and abuse. (*d*) The interest of the deceased
*439 *in contracts for the purchase of land, may equally be sold for the like purpose; and provision is made in the statute laws of the states on the subject, for the specific performance of the contracts under the direction of the surrogate, upon terms safe and just to all parties. (*a*) The sale of the real estate of the testator or intestate, by the executor or administrator, under the orders of the orphans', or surrogate's or testamentary court, will, in several of the states, apply to the estate left by the debtor at his decease, and avoid all mesne conveyances since his death. (*b*) But the cases require that the executor should apply within a reasonable time for an order to sell the real estate, or he will not be permitted to interfere with the intermediate and *bona fide* alienation by the heir. The statute in New Jersey, passed in 1825, requires the order for the sale to be obtained by the executor or administrator *within one year* after the death

(*d*) New York Revised Statutes, ii. 99–118; ib. 220. See also Statutes of Connecticut of 1830; Revised Statutes of Massachusetts, 1836, tit. 5, c. 71; Statutes of Ohio, 1831, pp. 236, 246; Revised Laws of Illinois, ed. 1833, pp. 644–648; Statutes of Delaware, 1833, c. 256; Laws of Alabama, 327, 347; Civil Code of Louisiana; Revised Code of Mississippi, 1824, pp. 56, 57; McCoy *v.* Nichols, 4 How. (Miss.) 31; Statute in New Hampshire of July 2, 1822; Hotchkiss's Code of Statute Laws of Georgia, p. 482; Revised Statutes of New Jersey, 1847, p. 346. In Louisiana, the curators of vacant successions sell the immovable as well as movable estate, under the orders of the Court of Probates, which has exclusive jurisdiction over the estates of deceased persons, and their settlement. The purchaser takes the title, under such sale *free of all incumbrances;* and the mortgagee is compelled to enforce his lien on the proceeds in the hands of the curator. Vignaud *v.* Tonnacourt, 12 Martin (La.), 229; Lafon *v.* Phillips, 14 id. 225; De Ende *v.* Moore, ib. 336. The sale reaches all the property of which the deceased had any right or claim, and it reaches even to litigious rights. Seymour *v.* Bourgeat, 12 La. 123. So a debtor may transfer to his creditor a litigious right. Early *v.* Black, ib. 205.

(*a*) New York Revised Statutes, ii. sec. 66–75; Purdon's Penn. Dig. 164.

(*b*) Mooers *v.* White, 6 Johns. Ch. 381–389; Hays *v.* Jackson, 6 Mass. 149; Scott *v.* Hancock, 13 id. 162; Warrick *v.* Hunt, 6 Halst. 1. In Tennessee, by the statute of 1827, when the personal estate is exhausted, the administrator, or any creditor for himself and others, may file a bill to subject the real estate to the payment of the debts, and the proceeds of the sale will be ratably distributed, and all creditors are entitled to come in, and equity will enjoin in the mean time all but judgment creditors from proceeding at law. Dulles *v.* Read, 6 Yerg. 53. The doctrine in the case of Thompson *v.* Brown, 4 Johns. Ch. 619, is to the same effect, and so is the English law. Morrice *v.* The Bank of England, Cases temp. Talbot, 218; 4 Bro. P. C. 287; Clarke *v.* Earl of Ormonde, Jacob, 108.

of the testator or intestate, in order to affect the intermediate alienation of the heir or devisee. (*c*)

(*c*) Sales of lands by public officers for taxes, depend upon local statutes, and the specific directions must be strictly pursued. Thus, for instance, a sale of land for taxes, in Ohio, is not valid, unless the record of the advertisement of the list of delinquents for four weeks, between 1st of October and 1st of December, be recorded in the auditor's office, as the law requires. Kellogg *v.* M'Laughlin, 8 Ohio, 114.

LECTURE LXVII.

OF TITLE BY DEED.

A PURCHASE, in the ordinary and popular acceptation of the term, is the transmission of property from one person to another, by their voluntary act and agreement, founded on a valuable consideration. But, in judgment of law, it is the acquisition of land by any lawful act of the party, in contradistinction to acquisition by operation of law; and it includes title by deed, title by matter of record, and title by devise. (*a*)

1. Of the History of the Law of Alienation.[1] — The alienation of property is among the earliest suggestions flowing from its exist-

(*a*) Litt. sec. 12; Co. Litt. ib. Neither tenancy by curtesy or in dower are titles by purchase, for they are estates arising by act of law. See *supra*, 873. Dr. Clarke says, that the purchase of the cave of Machpelah by the patriarch Abraham, as recorded in Genesis, c. xxiii. 16, is the earliest account on record of the purchase of land.

[1] *Village Communities.* — The village communities which are still to be seen in India, as well as in Russia, and other of the remoter portions of Europe, are the type of an institution once common throughout the Aryan world, and which flourished in England so late that it served as a model for some New England townships. When the different nomads who peopled Europe had become partially agricultural, and their modes of life more settled, they still had to change the area of cultivation from time to time, in order to give a period of rest to land which had become exhausted. The tribal organization was kept up, and a new distribution of lands was necessary with every change. Quorum plaustra vagas rite trahunt domos. . . . Nec cultura placet longior annua. Hor. l. iii. ode 24; Æsch. Prom. 709. Neque quisquam agri modum certum aut fines proprios habet; sed magistratus ac principes in annos singulos gentibus cognationibusque hominum, qui una coierunt, quantum eis et quo loco visum est, attribuunt agri; atque anno post alio transire cogunt. Cæsar de Bello Gallico, vi. c. 22; cf. ib. iv. c. 1. The most important passage is that in c. 26 of the Germany of Tacitus, but its meaning is much disputed. E. Nasse in Contemporary Review, xix. 741, 742, 744. Compare Nasse's Agricultural Community of the Middle Ages, published by the Cobden Club, 1st ed. 20, 21; Rev. des Deux M. c. 507 *et seq.* Even when migrations had come to an end the same necessity continued in the absence of a system of manuring and intensive

ence. The capacity to dispose of it becomes material to the purposes of social life, as soon as property is rendered secure and

agriculture. In Cæsar's time, the change of occupation seems to have been made by collective bodies. In that of Tacitus, the villages had become stationary, but the individual holdings shifted within the village limits. The desired periodical rest was brought about by dividing the whole arable land into several strips or fields, usually three in number, and by letting one lie fallow while the others were cultivated. The two strips for the time being under tillage were distributed among the free males. The details of the method of distribution in the Teutonic tribes are in dispute. In some modern communities rank is regarded; in others, only the number of working hands. Rev. des Deux Mondes, c. 509 *et seq.*, 523; Nasse, Ag. Com. 12, 50, 52; Maine's Village Communities, 81; Fleta, 2, 72, §§ 4, 5. The same crop was raised on the whole strip, under a compulsory rule of rotation, which in England generally devoted one strip to wheat, another to oats or beans, and a third to fallow. The latter was used for pasturage. Nasse, Ag. Com. 5; Maine, Vill. Comm. 79, 80. The separate lots were not fenced, but only the whole strip under cultivation; and even this enclosure was not permanent, but was thrown down when the crops were gathered. There were further the common woodland and pasture which were everywhere the undivided property of the community. In England, a grass-growing country, the meadow land was an important feature. Cont. Rev. xix. 740; Nasse, Ag Comm. 16–20, 27. These commons are thought to correspond to the *ager publicus* of Rome, Rev. des Deux M. c. 521; Mommsen's Hist. of Rome, i., and have been supposed to be the folkland of the Anglo-Saxons. But it has been generally agreed by later authors that the folkland was the land which belonged to the whole nation, and over which the king had special powers, and even the power to grant it with the consent of the Witan. Cont. Rev. xix. 740; Nasse, Ag. Comm. 29; Kemble, Cod. Dip. i. Int. 104; Allen, Royal Prerog. ed. 1849, 148–153; Spence, Eq. i. 8. This also has been thought to correspond to the Roman *ager publicus*. Freeman, Eng. Const. 133. Bookland was simply the term applied to the private property of the king or of any other person, when such property came to be recognized.

Origin of Property in Land. — In the most primitive type of the village community, individual property in land seems to be unknown. Even the abodes are of slight structure or movable, — as in the passage cited above from Horace, and confirmed by other evidence, — or the members inhabit a huge common dwelling; and their customary rights are personal to them as working hands. See the interesting examples collected by M. E. de Laveleye in the Revue des Deux Mondes for the first of July, August, and September, 1872; c. 521, ci. 54. But the Teutonic communities had dwellings separately enclosed, and permanently appropriated to the families which occupied them respectively. The houses were built near together, and constituted what has been called the mark of the township — and these, it has been conjectured, constituted the first permanent property in land known to the Germans. Systems of Land Tenure in Various Countries. Published by the Cobden Club. Morier's Essay, 286; Allen, Royal Prerog. 131, 201; Nasse, Ag. Comm. 15, 17. *x*[1] In like manner the Roman family

x[1] In Maine's "Early Hist. of Institutions," p. 120, it is said, "It may now, however, be laid down without rashness that property in land, as known to communities of the Aryan race, has had a twofold origin. It has arisen partly from the disentangle-

valuable, in the progress of nations, from a state of turbulence and rudeness, to order and refinement. The power of alienation

had its *heredium*, or *ager privatus*, which was private property from an early period, although, as has been remarked, the most ancient form of conveyance, the *mancipatio*, could not have originally applied to land, because that does not admit of manual delivery. Rev. des Deux M. c. 521. There seems to have been a marked distinction between the community of the fields, and the "immunity" of the house and curtilage, in Greece, Rome, and the German township alike. The principle that every man's house is his castle, *Nullus infra positos temere inquirere præsumat*, (Morier, 287; Rev. des Deux M. c. 508; Papers of Jurid. Soc. ii. 411,) should be compared with the sacredness of the Greek and Roman enclosure as explained by Fustel de Coulanges in his Cité Antique, 35, 160, and illustrated by the story of Romulus and Remus, and the similar phenomenon which Sir H. Maine has remarked in India. Maine, Vill. Comm. 113, 114. The universal tendency of the communities to disintegrate with the growth of personal ambition and weakening of family ties has been well described by M. de Laveleye in the articles above referred to. The separate ownership of the house lots has been mentioned already. The lots in the arable mark also seem to have been permanently enclosed and owned in severalty as a general rule, although not always, from a comparatively early time in England and Germany. Indeed, the extent to which the arable land was common is not clearly known from the evidence, although it was not held permanently at first. Cont. Rev. xix. 741. See Maine, Vill. Comm. 98; Rev. des Deux M. c. 531; Cooke on Inclosures, 4th ed. 50. But the older system prevailed much later with regard to meadow land, and may be recognized, modified by the notion of individual ownership, in the movable fee simple of Lord Coke, in which the number of acres only is certain, but the particular acres uncertain, and which may be conveyed by livery of seisin of the acres allotted for the time being, the charter of feoffment being of so many acres in such a meadow, generally, without bounding them. Co. Lit. 4, a, 48, b; Nasse, Ag Comm. 24; Maine, Vill. Comm. 98, 86; Rev. des Deux M. c. 531. See Wms. R. P. App. C. on Dunraven *v.* Llewellyn. We are told by Mr. Palfrey that the General Court of Plymouth Colony "assigned lands for cultivation and for permanent possession, and apportioned from year to year the common meadow ground for

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ment of the individual rights of the kindred or tribesmen from the collective rights of the family or tribe, and partly from the growth and transmutation of the sovereignty of the tribal chief." To the latter influence is attributed "some well-marked characteristics of military or knightly tenures," and to the former "the principal rules of non-noble holdings." But it is maintained by Mr. Ross, in his "Early History of Landholding among the Germans," that private property existed before the holdings in common, which are the basis of the more commonly accepted theory of the origin of property in land. See also an extract from an essay of M. Fustel de Coulanges, quoted at page 217 of the work last cited. But the view stated in the note is that which has been generally accepted. Stubbs's Const. Hist. of England, vol. i. c. 1; Digby's Hist. of the Law of Real Property, c. 1, sec. 1; Morgan's Ancient Society, Part IV.; Maine's Early Hist. of Institutions, *passim*; Anglo-Saxon Law, *passim*. See Digby's History, also, for the best account of the development of the law of real property subsequent to that treated of in the note.

is a necessary consequence of ownership, and it is founded on natural right. (*b*) It is stated, by very respectable authorities,

(*b*) Inst. 2. 1. 40; Grotius, de Jure Belli et Pacis, lib. 2, c. 6, n. 1. It may be here observed, in entering upon this important title, that it is a settled rule of law, that not only the capacity of persons to convey or devise real estate and the right to inherit, but also the forms and solemnities requisite to pass the title, must be in conformity with the local law of the country in which the land is situated. *Vide supra*, ii. 67, 429, and *infra*, iv. 513. See also Coppin *v.* Coppin, 2 P. Wms. 293; Robinson *v.* Bland, 2 Burr. 1079; Abbott, C. J., in Doe *v.* Vardill, 5 B. & C. 438; Dundas *v.* Dundas, 2 Dow & Clark, 349; Scott *v.* Allnutt, ib. 409; Cutter *v.* Davenport, 1 Pick. 86; United States *v.* Crosby, 7 Cranch, 115; Kerr *v.* Moon, 9 Wheaton, 565; M'Cormick *v.* Sullivant, 10 id. 192, 202. Mr. Justice Story, in his Commentaries on the Conflict of Laws, §§ 424–445, has examined at length the various and contradictory opinions, and idle discussions and difficulties of the foreign jurists, on the subject of the capacity and incapacity of persons to convey real property situated in a country in which the owner had not his domicile. His conclusions on the subject are just and accurate, and as to the general principle stated in this note, he has sustained it by a reference to the soundest authorities, both foreign and domestic.

mowing," Palfrey's Hist. of N. E. i. 348; see ii. id. 13; and the writer is informed that this periodical apportionment of certain meadows still exists in some parts of Massachusetts.

The Manorial System. — The question how the English manor arose out of the mark which has been described, must not be confounded with that of the origin of the feudal system. The latter is now thought to have resulted from the union of the system of personal service, described by Tacitus (Germ. c. 13, 14), and that of benefices or grants of land as a reward for services, for want of any other means of recompense. It arose in German states which had been Roman provinces, and was only introduced into England after it had been completely developed. Cont. Rev. xix. 748, 749. Compare Systems of Land Tenure, *supra*, Campbell's Essay, 152. The analogy of the *agri limitrophi* held by the Roman veterans upon the Rhine and the Danube has been often mentioned. But less importance seems to be attributed to the influence of the Roman law now than formerly. It is, however, possible that it early gave a definiteness to feudal relations which they might not otherwise have possessed. *Ante*, iii. 489 *et seq.*; Rev. des Deux M. c. 529 *et seq.*; Stubbs's Doc. Illust. of Eng. Hist. 14; Freeman's Growth of the Eng. Const. 48; Morier, 291; Maine, Vill. Comm. 132, 147; Spence, Eq. i. 29.

The growth of the manor was much earlier. When individual property in land is recognized, inequality is sure to follow, from causes which need not be dwelt upon. The next step is when the great owners become landlords. M. Nasse, the highest authority with regard to the English agricultural communities, observes that a distinction between paramount ownership of land and the usufruct of it on payment of rent or for service performed is found in classic antiquity, and in widely separated nations. It appears in the earliest records of the Anglo-Saxons and even in the account of the German serfs given by Tacitus (Germ. c. 25). It was necessarily so, for a great man whose business was fighting could not farm his own land; and as cultivation by free day laborers was unknown when there was no commercial intercourse and no sale for produce, the only method of farming was by domestic serfs or tenants who paid rent in labor or products of the soil. The relation between the owner

that in the time of the Anglo-Saxons, lands were alienable either by deed or by will. When conveyed by charter or deed, they

and the cultivators, although principally an economic one, was not merely so. The owner had a jurisdiction over the dependent landholders for redressing misdemeanors and nuisances and for settling their disputes of property. And it is a noticeable thing that the different parcels of land in course of time had impressed upon them the status of their occupants, so that the jurisdiction was exercised by the lord over the peasants by reason of their respectively occupying the principal house and the inferior holdings. The legal and economic unit thus constituted existed, we are told, long before the Norman conquest, with social gradations, with defined services, with the distinction of inland and outland, which reappeared as *terra dominica* and *terra tenentum*. The Normans introduced the word *manor*, but not the thing. Cont. Rev. xix. 746–748, 745; Nasse, Ag. Com. 12, 32 *et seq.* See also Laferrière, Hist. du Droit Franc., ii. 157 *et seq.*; Morier, 288, 290; Rev. des Deux M. c. 530; 1 Palg. Eng. Comm. 633; 7 Am. Law Rev. 52, and Bracton, 26, 67, there cited. Compare Spence, Eq. i. c. 18 and Add. note. [See Essay on the Anglo-Saxon Land Law, 88 *et seq.*, in Anglo-Saxon Law; Digby, Hist. of the Law of R. P. Ch. I. sec. II. § 3.]

It is thought that the manors are in some instances the successors of ancient village communities; or in other cases that they originated in settlements modelled on those communities. Maine, Vill. Comm. 135, 138. One of the principal differences between the community and the manor was that the common mark became the lord's waste which he claimed and ultimately obtained the right to enclose, so far as the pasture rights of the commoners were not damaged thereby. Nasse, Ag. Com. 29, 30, 58, 68; St. of Merton, 20 H. III. c. 4; St. Westm. 2d, 13 Ed. I. c. 46; Allen's Royal Prerog. 135 *et seq.*; Rev. des Deux M. c. 535; Freeman's Eng. Const. 133. The litigation mentioned by Nasse has been compared with the struggles against the usurpation of the *ager publicus* at Rome. Rev. des Deux M. c. 521. A second change was that the members of the community who formerly acknowledged no superior (Rev. des Deux M. c. 532; Morier, 292), have become the lord's tenants, the freeholders of the manor. Maine, Vill. Comm. 137. The strongest reason for these changes was an economical one. Although they took place in England before the Conquest, in many instances the communities were encouraged as late as the beginning of the feudal times, because they were liable for their dues *in solidum*, and so gave better security. Rev. des Deux M. ci. 54. But as the wastes were narrowed by encroachments and cultivation until the allodial owner had little left to support him except his lot in the arable mark, while his expenses meantime had grown, he found it for his advantage to surrender his *dominium directum*, and with it the incident of being a full member of the political community, to a superior lord who assumed his liabilities, and returned to him the *dominium utile* upon one or another tenure. Allen, 135, and note X. 212; Morier, 292.

Descent. — The families which were the units of the Aryan tribe, even in their nomad condition, had their separate possessions when we first read of them in Germany and England, and it has been shown that the individual ownership of land is of later development than the distinction between the property of the family and that of the tribe. M'Lennan on Primitive Marriage, 282; cf. Allen, Roy. Prerog. 201. The bond of union between the members of a community was their supposed descent from a common ancestor. Rev. des Deux M. c. 517. When a

were distinguished by the name of *boc* or *bookland*, and the other kind of land, called *folcland*, was held and conveyed with-

member of what seems to be a community of the most primitive type dies, his share in the common stock goes to the other members, not by succession, but, as it is said, *jure non decrescendi*. Rev. des Deux M. ci. 46, 59. Cf. Lehuër. Inst. Car. l. i. c. 5, 6.

The continuity of the family is a natural fact, and its enjoyment of the property which it holds apart from the tribe is not affected by the death of its temporary head. The transition, if there was one, by which the Roman *paterfamilias* became owner, did not of itself make any change in the devolution of property. The Roman heir took immediately and as of right under a title which was inchoate in the life of his ancestor. The XII. Tables speak of *sui heredes*, that is, heirs of themselves or their own property. D. 28. 2. 11; Gaii Inst. 2. 157; D. 38. 16. 14. The heir assumed the family rights and obligations as his ancestor left them, and as if there had been no change, just as in fact there would have been none, when the management only was succeeded to, and the ownership remained in the family. The inheritance continued the *persona* of the deceased, D. 41. 1. 34; 41. 3. 40; 43. 24. 13, § 5; and when the heir assumed it, he had his action in respect of injuries previously committed, D. 43. 24. 13, § 5. Plato, Laws, xi. 6.

It may be conjectured that possessions became permanent in the lesser family groups which composed the Teutonic community, in the same way that they did in the Roman families and in the community itself. Descent came first and the power of testamentary disposition afterward, as at Rome. Heredes successoresque sui cuique liberi et nullum testamentum. Tac. Germ. c. 20. Kemble, Cod. Dip., i. Int. 108, says that wills were probably introduced into England by Augustine from Rome. When the house-lots were permanently occupied, the same persons were recognized as owners for the time being who were recognized as entitled to a share in the common fields. These, as has been said, were the adult free males of the family. And when the permanent family possessions became an inheritance, the method of devolution was not changed, and we have the famous text of the Salic law. De Terra vero nulla in muliere hereditas est, sed ad virilem sexum qui fratres fuerint tota terra perteneat. About a century later, A. D. 574, the edict of Chilperic admitted daughters or sisters also to the inheritance in default of sons or brothers, and women are not excluded by the folk-laws collected at a later date than the Salic. x^2

Alienation. — Privity of Title. — With regard to alienation it should be observed that in the period of the communities sale to a stranger, if permitted at all, was only allowed by the consent of the commune, or subject to the right of the vendor's family to take back the land on restoring the purchase-money; and in a pure community it would seem that the only thing that could be sold was the vendor's membership, as in the passage cited from Elphinstone's Hist. of Ind. i. 126, in Maine's Anc. L. c. 8, Amer. ed. 255. "The pur-

x^2 It is maintained by Morgan, in his "Ancient Society," that descent was originally traced entirely through females, as prior to the institution of the family it was in many cases impossible to ascertain the father of a child, and that the pressure of the desire of the males to have their property descend to their own children, as it became more and more possible to ascertain them, induced a change in the rule, so that descent came to be traced through males. See Morgan's Ancient Society, c. 14, and *passim*.

*442 out writing. (c) But this notion of the *free disposition of the land among the Saxons must be understood in a very qualified sense; and the *jus disponendi*, even at that day,

(c) Wright on Tenures, 154, note; Reeves's Hist. of the English Law, i. 5, 10, 11; Spelman on Feuds, c. 5; ib. on Deeds and Charters, b. 7, c. 1; 2 Bl. Comm. 90.

chaser steps exactly into his place, and takes up all his obligations." Rev. des Deux M. c. 517, 522, ci. 46, 47; Campbell, 170, 171. Land, however, had become devisable and alienable (Allen, Roy. Prerog. 149, 213; Kemble, Cod. Int.) when the feudal system introduced another difficulty. The holding of land was only one incident of a complex personal relation. Freeman on the English Const. 48. Substitution of another party on either side, without the other's consent, was unlawful for obvious reasons. But the Roman law afforded an analogy by which the heir might assume the aggregate of his ancestor's rights and duties without a breach of continuity. From whatever cause, hereditary services with a hereditary recompense became common, as will be seen in the usual form of grant occurring in the Abbreviatio Placitorum. Inter tenentem et dominum semper tenet et stat homagium quamdiu heredes ex utraque parte extiterint, et quamdiu tenens tenementum tenuerit in dominico vel servitio quod obligationem homagii inducit. Bract. 81, b. So the grant might be to one and those whom he might constitute his heirs. Surtees, Soc. Pub. 1864, ii. 88, *circa* A. D. 1190. Even in the communities and manors, callings and offices tended to become hereditary; particular lots were permanently attributed to them, and, as has been said, services originally personal afterwards came to be, like easements of rents, due on one side and claimed on the other in respect of the occupation of particular parcels of land. This tendency survived feudalism. Thus we read in Bracton (f. 26, 67), that a freeman may hold villein land, rendering villein services, and still remain free, since he renders them *ratione villenagii et nom ratione personæ suæ*, that is, by reason of his holding the land, and not by reason of his general condition. So, as we have just seen, he speaks of the *tenementum quod obligationem homagii inducit*. The land in the beginning was the incident of the services. The services are now the incident of the land. In Y. B. 42 Ed. III. 3, a judge explains why a particular covenant ran with the land and bound the assign, that *l'acquitance chiet sur le terre et nient sur le person*. As the services lost their personal character, assignments of the land to which they had attached were permitted by mentioning assigns as well as heirs in the original grant. The substitution of the heir to the personal relation of his ancestor suggested the legal theory or fiction by which a stranger might be substituted in like manner. Bracton speaks of assigns as *quasi heredes licet re vera heredes non sunt*. (17, b.) It has been suggested by the editor elsewhere that the notion of privity of title sprang up in this way. 7 Am. Law Rev. 49–53. See Gaius, iv. 85; iii. 83, 84. If the feudal assign came in like an heir under the *persona* of his immediate grantor, it becomes intelligible why he should be allowed to add his period of adverse user to that of his grantor to make out a prescriptive right. (Cf. Just. Inst. 2. 6, §§ 12, 13, commented on, 7 Am. L. R. 53.) The same consideration would seem to explain a number of other doctrines mentioned in the article referred to, including some of the subsisting differences between the law of real and personal property. See further, Dasent's Burnt Njal, ii. 210, 246, and Y. B. cited as to covenants, 480, n. 1. As to distinct *personæ* of one man, D. 16. 2. 16; and 29. 1. 17, § 1, and 7 Am. L. R., *supra*; [*post*, 480, n. 1 and y[1].]

was subject, as it is and ought to be in every country and in every stage of society, to the restraints and modifications suggested by convenience, and dictated by civil institutions. (*a*) It was reserved, however, to the feudal policy, to impose restraints upon the enjoyment and circulation of landed property, to an extent then unprecedented in the annals of Europe. There were checks (though they were comparatively inconsiderable) in favor of the heir, upon the alienation of land, among the Jews, (*b*) Greeks, and Romans. The feudal restrictions were vastly heavier, and founded on different policy. They arose partly in favor of the heir of the tenant; for the law of feuds would not allow the vassal to alien the paternal feud, even with the consent of the lord, without the consent of the heirs of the paternal line. (*c*)

But the restraint arose principally from favor to the lord of the fee. He was considered as having a strong interest in the abilities and fidelity of his vassal; and it was deemed to be a great hardship, and repugnant to the entire genius of the feudal system, to allow the land which the chieftain had given to one family, to pass without his consent, into the possession of another, and to be transferred, perhaps, to an enemy, or at least to a person not well qualified to perform the feudal engagements. The restrictions were perfectly in accordance with the doctrine of feuds, and proper and expedient in reference to that system, and to that system only. The whole feudal establishment proved itself eventually to be *inconsistent with a civilized and pacific *443 state of society; and wherever freedom, commerce, and the arts penetrated and shed their benign influence, the feudal fabric was gradually undermined, and all its proud and stately columns were successively prostrated in the dust.

(*a*) The alienation of *bocland* was prohibited by a law of Alfred, if it descended from one's ancestors, and the ancestor had imposed that condition. LL. Alfred, c. 37; Lombard's Arch. 31. Sir Henry Spelman says that *bocland* was hereditary, and could not be conveyed from the heir without his consent, though that restriction was finally removed; nor could it be devised by will. It was the *folcland* that was alienable and devisable, and was in the nature of allodial property. Spelman's Glossary, *voce Bocland* and *Folcland*. Mr. Spence (Equitable Jurisdiction of the Court of Chancery, i. 8, 9) says that *folcland* was left by the Saxons without specific appropriation and subject to future appropriations, and that it might be considered as fiscal domains. He says it was the *bocland* in the Saxon times that was allodial, and might be freely disposed by gift, sale, or will. Ib. 20, 21.

(*b*) See *supra*, 377, 378, and the notes, ib.

(*c*) Feud. lib. 2, tit. 39.

The history of the gradual decline of the feudal restraints in England, upon alienation, from the reign of Henry I., when the earliest innovations were made upon them, down to the final recovery of the full and free exercise of the right of disposition, forms an interesting view of the progress of society. Some notice of this subject was taken in a former volume; (*a*) and though the feudal restrictions upon alienations never followed the emigration of our ancestors across the Atlantic, we may well pause a moment upon this ancient learning. Our sympathies are naturally excited, in a review of the subtle contrivances, the resolute struggles, the undiverted perseverance, and final and complete success which accompanied the efforts of the English nation, in the early periods of their history, to break down the stern policy of feudal despotism, and to regain the use and control of their own property, as being one of the inherent rights of mankind.

The first step taken in mitigation of the rigors of the law of feuds, and in favor of voluntary alienations, was the countenance given to the practice of subinfeudations. They were calculated to elude the restraint upon alienation, and consisted in carving out portions of the fief to be held of the vassal by the same tenure with which he held of the chief lord of the fee. The alienation prohibited by the feudal law, all over Europe, was the substitution of a new feudatory in the place of the old one; but subinfeudation was a feoffment by the tenant to hold of himself. The purchaser became his vassal, and the vendor still continued liable to the chief lord for all the feudal obligations.

Subinfeudations were encouraged by the subordinate feu-
*444 datories, because they contributed to their own *power and independence; but they were found to be injurious to the fruits of tenure, such as reliefs, marriage, and wardships, belonging to the paramount lords. Alienation first became prevalent in cities and boroughs, where the title to lands and houses was chiefly allodial, and where the genius of commerce dictated and impelled a more free and liberal circulation of property. The crusades had an indirect, but powerful influence upon alienation of land; as those who engaged in that wild and romantic enterprise ceased to place any value upon the inheritances which they were obliged to leave behind them. A law of Henry I. relaxed the restraint as to purchased lands, while it retained it as to those

(*a*) Vol. iii. lec. 53.

which were ancestral. (*a*) In the time of Glanville, (*b*) considerable relaxations as to the disposition of real property acquired by purchase, were tolerated. Conditional fees had been introduced by the policy of individuals, to impose further restraints upon alienation; but the tendency of public opinion in its favor induced the courts of justice, which had partaken of the same spirit, to give to conditional fees a construction inconsistent with their original intention. This led the feudal aristocracy to procure from Parliament the statute *de donis* of 13 Edw. I., which was intended to check the judicial construction, that had, in a great degree, discharged the conditional fee from the limitation imposed by the grant. Under that statute, fees conditional were changed into estates tail; and the contrivance which was afterwards resorted to and adopted by the courts, to elude the entailment and defeat the policy of the statute, by means of the fiction of a common recovery, has been already alluded to in a former part of the present volume.

The statute of *Quia Emptores*, 18 Edw. I., finally and permanently established the free right of alienation by the sub-vassal, without the lord's consent; but it broke down subinfeudations, which had already been checked by *magna* * *charta;* *445 and it declared that the grantee should not hold the land of his immediate feoffor, but of the chief lord of the fee, of whom the grantor himself held it. The importance of that provision to the feudal lord was the cause of its being enacted *ad instantiam magnatum regni*, as the statute itself admits. The power of involuntary alienation, by rendering the land answerable by attachment for debt, was created by the statute of Westm. 2, 13 Edw. I. c. 18, which granted the *elegit;* and by the statutes merchant or staple, of 13 Edw. I. and 27 Edw. III., which gave the *extent*. These provisions were called for by the growing commercial spirit of the nation. To these we may add the statute of 1 Edw. III., taking away the forfeiture or alienation by the king's tenants *in capite*, and substituting a reasonable fine in its place (and which, Lord Coke says, (*a*) was only an exposition of *magna charta*); and this gave us a condensed view of the progress of the common-law right of alienation from a state of servitude to freedom. (*b*)

(*a*) Lombard's Arch. 203. (*b*) Lib. 7, c. 1. (*a*) 2 Inst. 66.

(*b*) These successive periods in the progress of the law of alienation may be found

* 446 *** 2. Of the Purchase of Pretended Titles.** — Every citizen of the United States is capable of taking and holding lands by descent, devise, or purchase; and every person capable of holding lands, except idiots, persons of unsound mind, and infants, and seised of, or entitled to any estate or interest in land, may alien the same at his pleasure, under the regulations prescribed by law. This is a principle declared in the New York Revised Statutes, (*a*) and I presume it is the general doctrine throughout the United States. In no other part of the civilized world is land made such an article of commerce, and of such incessant circulation; though it is said that in England, houses and lands have now become common means of investment, and circulate from owner to owner with unusual and startling rapidity. There is one check to the power of alienation of a right or interest in land, taken from the statute of 32 Hen. VIII. c. 9, against selling pretended titles; and a pretended title, within the purview of the common law, is where one person lays claim to land, of which another is in possession, holding adversely to the claim. (*b*) Every grant of land, except as a release, is void as an act of

fully and distinctly stated in detached parts of Reeves's History of the English Law; but a more entire and better view of the history of the English law of alienation is to be seen in Sullivan's Historical Treatise on the Feudal Laws, sec. 15, 16, and in Dalrymple's Essays on Feudal Property, c. 3. The latter unites with it a history of the recovery of the right of alienation in Scotland. "Of old," says Lord Stair, "alienations of land for money were very rare in Scotland, or the contracting of considerable debts; there were then known no legal execution for debt against lands or heritable rights, but only against movables by the brief of distress or poinding; but after the statute of the year 1469, if the debtor had not movable goods, but lands, the sheriff was to sell the land to the avail of the debt, and pay the creditor, and to be redeemable within seven years; and if he could not find a buyer, he was to appraise the lands by thirteen persons of the best and worthiest in the shire, and assign to the creditor lands to the avail of the sum." Lord Stair's Institutions, by More, ii. 404, 405. There were other provisions, and subsequently modified, and which it is not necessary here to pursue. The subject of alienation of land is also sketched by Sir William Blackstone, in his Commentaries (ii. 287–290), with his usual felicity of execution; and it is lightly touched in Millar's Historical View of the English Government, a work of great sagacity and justness of reflection, but destitute of true precision and accuracy in detail. Thus, on the very point before us, he only says, in relation to the Anglo-Saxon times, that "no person was understood to have a right of squandering his fortune to the prejudice of his nearest relations." This is loose in the extreme; and yet for this passage he refers to a law of Alfred, which gives us the exact and a far different regulation, and which law was mentioned in a preceding note, 442, n. (*a*).

(*a*) Vol. i. 719, sec. 8, 9, 10.

(*b*) Mountague, C. J., in Partridge *v.* Strange, 1 Plowd. 88, a.

maintenance, if at the time the lands are in the actual possession of another person, claiming under a title adverse to that of the grantor. (*c*) This principle, it is believed and assumed, prevails very generally in the jurisprudence of this country, and it has always been received as a settled law in New York, and it has been incorporated into the Revised Statutes. (*d*) But even in such a case, the claimant is allowed, by the statute, to execute a valid mortgage of the lands, which has preference, from the time of recording it, over subsequent judgments and mortgages, and binds the lands from the time of recovering possession. (*e*)

*The ancient policy which prohibited the sale of pre- *447
tended titles, and held the conveyance to a third person of lands held adversely at the time to be an act of maintenance, was founded upon a state of society which does not exist in this country. A right of entry was not assignable at common law, because, said Lord Coke, (*a*) "under color thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed." (*b*) The repeated statutes which were passed, in the reigns of Edw. I. and Edw. III., against champerty and maintenance, arose from the embarrass-

(*c*) Litt. sec. 347.

(*d*) Vol. i. 739, sec. 147, 148. To constitute a *possession adverse*, so far as to bar a recovery, or to avoid a deed subsequently executed by the true owner, the party setting up the adverse possession must, in making his entry upon the land, have acted *bona fide*. Livingston *v.* Peru Iron Company, 9 Wendell, 511. Adverse possession requisite to constitute a bar to the assertion of a legal title by the owner, must be "an actual, continued, visible, notorious, distinct, and hostile *possession*." Mr. Justice Duncan, in Hawk *v.* Senseman, 6 Serg. & R. 21. This definition, says Mr. Wallace, in his note to the case of Taylor *v.* Horde, in Smith's Leading Cases, Law Library, N. S. XXVIII., is conceived with singular completeness and accuracy. See, to the same point, Coburn *v.* Hollis, 3 Met. 125; Kent, C. J., in Jackson *v.* Schoonmaker, 2 Johns. 230; Tilton *v.* Hunter, 24 Me. 32; [Lane *v.* Gould, 10 Barb. 254; Howard *v.* Howard, 17 id. 663; Sherwood *v.* Waller, 20 Conn. 262.] The possession of tenant for life is not adverse to the remainderman, and the latter may sell. Grout *v.* Townsend, 2 Hill, 554.

(*e*) The sheriff's sale on execution of lands of the defendant held adversely is valid, for judicial or official sales are not within the policy of the champerty law, but the purchaser under the execution cannot sell while the lands are so held, for it would be an act of champerty. Frizzle *v.* Veach, 1 Dana, 216; Violett *v.* Violett, 2 id. 325; Jarrett *v.* Tomlinson, 3 Watts & S. 114; [McGill *v.* Doe, 9 Ind. 306; Hanna *v.* Renfro, 32 Miss. 125.]

(*a*) Co. Litt. 214, a. So, a contract by an attorney, to carry on a suit, on the principle of *no purchase no pay*, or for *part of the things sued for*, has been held not to be valid in law. Livingston *v.* Cornell, 2 Martin (La.), 281.

(*b*) Rights of entry were made alienable by deed, 8 and 9 Vict. c. 106.

ments which attended the administration of justice in those turbulent times, from dangerous influence and oppression of men in power. (*c*) The statute of 32 Hen. VIII. imposed a forfeiture upon the seller of the whole value of the lands sold, and the same penalty upon the buyer also, if he purchased knowingly. This severe statute was reënacted literally in New York, in 1788; and in Virginia, in 1786, and in North Carolina, in their Revised Statutes, 1837; (*d*) but the penal provisions are altered by the New York Revised Statutes, (*e*) which have abolished the forfeiture, and made it a misdemeanor for any person to buy or sell, or make or take a promise or covenant to convey, unless the grantor, or those by whom he claims, shall have been in possession of the land, or of the reversion or remainder thereof, or of the rents and profits, for the space of a year preceding. The provision does not apply to a mortgage of the lands, nor to a release of the same to the person in lawful possession. (*f*) It seems to be unnecessarily harsh; but it is to be observed, that it was a principle conformable to the whole genius and policy of the common law, that the grantor, in a conveyance of land (unless in the case of a mere release to the party in possession), * 448 should have in him, at the time, a * right of possession.

A feoffment was void without livery of seisin; and without possession a man could not make livery of seisin. (*a*) This principle is not peculiar to the English law; it was a fundamental

(*c*) Champerty is a bargain between the plaintiff or defendant and a third person, to divide the land or matter in dispute between them, if they prevail, and the champertor to carry on the suit at his own expense. Maintenance is a kindred offence and is an officious intermeddling in a suit that does not belong to one, by assisting either party to prosecute or defend it. 4 Bl. Comm. 134; 20 Johns. 892. Those statutes are founded upon a principle common to the laws of all well governed countries, that no encouragement should be given to litigation, by the introduction of parties to enforce those rights which others are not disposed to enforce.

(*d*) Vol. i. 260.

(*e*) Vol. ii. 691, sec. 6, 7. In Ohio, knowingly selling and conveying land without having any legal or equitable title, founded on a written contract, devise, descent, or deed, with intent to defraud the purchaser, is a fraud, and the party doing it is liable to imprisonment in the penitentiary at hard labor. Statutes of Ohio, 1831, p. 142.

(*f*) It has been held in Kentucky, that though a person enters on land tortiously, and, while in possession, obtains a release of the outstanding title, it is not an offence against the Champerty Act, if there was no collusion with the grantee. Adams *v.* Buford, 6 Dana, 406.

(*a*) Perkins, sec. 220.

doctrine of the law of feuds on the continent of Europe. No feud could be created or transferred without investiture, or putting the tenant into possession; and delivery of possession is still requisite, in Holland and Germany, to the transfer of real property. (*b*) It seems to be the general sense and usage of mankind, that the transfer of real property should not be valid, unless the grantor hath the capacity, as well as the intention, to deliver possession. Sir William Blackstone says, (*c*) that it prevails in the codes of "all well governed nations;" for possession is an essential part of title and dominion over property. As the conveyance in such a case is a mere nullity, and has no operation, the title continues in the grantor, so as to enable him to maintain an ejectment upon it; and the void deed cannot be set up by a third person to the prejudice of his title. (*d*) But as between the parties to the deed, it might operate by way of estoppel, and bar the grantor. The deed is good, and passes the title as between the grantor and grantee. (*e*) This is the language of the old authorities, even as to a deed founded on champerty or maintenance. (*f*)

The doctrine that a conveyance by a party out of possession and with an adverse possession against him, is void, prevails equally in Connecticut, Massachusetts, Vermont, Maryland, Virginia, North Carolina, (*g*) Tennessee, (*h*) Kentucky, Mississippi, Alabama, Indiana, and probably in most of the other states. (*i*) *In some states, such as New Hampshire, *449

(*b*) Feudum sine investitura nullo modo constitui potest; investitura proprie dicitur possessio. Feudorum, lib. 1, tit. 25, lib. 2, tit. 2; Voet, Com. ad. Pand. lib. 41, tit. 1, sec. 88.

(*c*) Comm. ii. 311.

(*d*) Williams *v.* Jackson, 5 Johns. 489; Wolcot *v.* Knight, 6 Mass. 418; Brinley *v.* Whiting, 5 Pick. 348.

(*e*) Livingston *v.* Proseus, 2 Hill, 526.

(*f*) Bro. tit. Feoffments, pl. 19; Fitzherbert, J., in 27 Hen. VIII. fo. 23, b, 24, a; Co. Litt. 369; Beaumond, J., in Cro. Eliz. 445; Hawk. b. 1, c. 86, sec. 3; Jackson *v.* Demont, 9 Johns. 55; s. p. 9 Wend. 516.

(*g*) Hoppiss *v.* Eskridge, 2 Ired. Eq. (N. C.) 54; Revised Statutes of North Carolina, i. 260.

(*h*) Statute Laws of Tennessee, 1821, c. 66, and 1836, p. 143.

(*i*) [Chapman *v.* Holding, 60 Ala. 522; Bernstein *v.* Humes, ib. 582.] In Michigan, the purchaser of land in possession of a third person, with knowledge of that fact, takes it subject to all equities between the vendor and the possessor. Rood *v.* Chapin, 1 Walker, Ch. 79, and if there exists an adverse possession, no title passes. Godfroy *v.* Disbrow, 1 Walker, Ch. 260. In Connecticut, by the Colony Act of 1727,

Pennsylvania, Ohio, Illinois, Missouri, and Louisiana, the doctrine does not exist; and a conveyance by a disseisee would seem to be good, and pass to the third person all his right of possession, and of property, whatever it might be. (*a*)

It is the settled doctrine in England and in New York, and probably in most of the other states, that the purchase of land pending a suit concerning it, is champerty; and the purchase is

the seller forfeits half the value of the land; and by the Revised Statutes of 1821, and of 1838, the forfeiture is continued, and applies as well to the buyer as to the seller. In Kentucky, by the Champerty Act of 1824, every conveyance or contract for the sale of land held adversely, unless in consummation of a previous *bona fide* lawful sale, or executory contract of sale, is void, and the preëxisting title of the vendor is not impaired. Wash *v.* McBrayer, 1 Dana, 566; Redman *v.* Sanders, 2 id. 68; Cardwell *v.* Sprigg, 7 id. 36; Cardwell *v.* Sprigg, 1 B. Mon. 371; [Kinsolving *v.* Pierce, 18 B. Mon. 782.] In Massachusetts, the penalty in the statute of 32 Hen. VIII. has never been adopted, though the principle of the common law is assumed that such a conveyance is void. 5 Pick. 348. In Indiana, such a conveyance is held void at common law. Fite *v.* Doe, 1 Blackf. 127; yet the statute of Hen. VIII. is held to be in affirmance of the common law. 2 McLean, 380. *Vide supra*, 438, as to sales of litigious rights in Louisiana; Revised Laws of Illinois, 1833, p. 130; Revised Statutes of Missouri, 1835; Bledsoe *v.* Doe, 4 How. (Miss.) 13; Dexter *v.* Nelson, 6 Ala. 68; [Middleton *v.* Arnolds, 13 Gratt. 489; Williams *v.* Council, 4 Jones (N. C.), 206. See Bowie *v.* Brahe, 8 Duer, 85; Carrington *v.* Goddin, 13 Gratt. 587.]

(*a*) [Roberts *v.* Cooper, 20 How. 467; Wright *v.* Meek, 3 Greene (Iowa), 472; Cain *v.* Monroe, 23 Geo. 82;] Hadduck *v.* Wilmarth, 5 N. H. 181; Whittemore *v.* Bean, 6 id. 50; Stoever *v.* Whitman, 6 Binney, 420; Cresson *v.* Miller, 2 Watts, 272; Lessee of Hall *v.* Ashby, 9 Ohio, 96; Willis *v.* Watson, 4 Scam. 64; Willard *v.* Twitchell, 1 N. H. 177; [Vancourt *v.* Moore, 26 Mo. 92.] The act of Tennessee of 1805 allowed the person having right or title, to convey lands held adversely at the time; but the act of 1821, c. 66, reënacted the champerty statute of 32 Hen. VIII., so far as to declare all such conveyances void. Whiteside *v.* Martin, 7 Yerg. 384. It was held in Kentucky, in M'Connell *v.* Brown, 5 Mon. 478, that the lands of a defendant were not liable to execution, under the act of 1798, whilst in the adverse possession of another. Then came the act of 1828, and afterwards the case of Frizzle *v.* Veach, 1 Dana, 211, in which it was held that, under the last act, the lands of the defendant, though in the adverse possession of another, were subject to levy and sale on execution, and that the champerty doctrine, and Champerty Act of 1824, did not apply. The Kentucky act of 1824, against maintenance and champerty (and the latter is held to be the most odious species of maintenance, and void at common law), declared that all contracts to undertake to carry on any suit, or to recover any right or title to land held adversely, in consideration of having *part or profit out of the thing in contest*, was unlawful, and the parties thereto forfeited all claim and right to the land, so far as to protect the occupant. Smith *v.* Paxton, 4 Dana, 393, 394; [Davis *v.* Sharron, 15 B. Mon. 64.] A conveyance of land by one not in possession, and held adversely at the time, is void by the act of 1824 against champerty. Baley *v.* Deakins, 5 B. Mon. 161. The statute against buying and selling pretended titles does not prohibit the sale and purchase of equitable titles. It does not apply to trust estates. It means legal and not equitable titles. Lord Eldon, in Wood *v.* Griffith, 1 Swanst. 55, 56; Allen *v.* Smith, 1 Leigh (Va.), 231; Baker *v.* Whiting, 3 Sumner, 476.

void, if made with a knowledge of the suit, and not in consummation of a previous bargain. (*b*) The statutes of Westm. 1,

(*b*) M. 8 Edw. IV. 13, b; 50 Ass. pl. 2; Fitz. tit. Champerty, pl. 15; Mowse *v.* Weavor, Moore, 655; Hawk. P. C. b. 1, c. 84, tit. Champerty; 2 Co. Inst. 563, 564; Jackson *v.* Ketchum, 8 Johns. 479; Louisiana Code, art. 2428. [But see Jenkins *v.* Jones, 9 Q. B. D. 128, as to the effect of Stat. 8 and 9 Vict. c. 106, making rights of entry assignable.] In Sims *v.* Cross, 10 Yerg. 460, it was held that the Champerty Act of that state (and the same rule of construction applies to the same statute provision elsewhere) did not apply to a conveyance in fulfilment of a *bona fide* contract made prior to any adverse possession. Mr. Dane says there is no statute on the subject in Massachusetts, but that champerty is an offence in that state at common law. Dane's Abr. vi. 741, sec. 41. The old common-law offence of champerty, [it] is said, never existed in Delaware. See 3 Harr. (Del.) 139; Bayard *v.* McLane, where the doctrine of champerty and maintenance is laboriously and learnedly discussed. But in Ohio, though there be no statute against champerty or maintenance, they are held to be offences at common law, and the contracts void. Weakly *v.* Hall, 13 Ohio, 167. The old cases on maintenance, said Lord Ch. B. Abinger, are exploded. Parties may lawfully enter into an agreement to maintain and defend each other, in a matter in which they believe their interests to be identical. Maintenance now means where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions or to make defences which they have no right to make. Findon *v.* Parker, 11 M. & W. 679, 682; [Ram Coomar Coondoo *v.* Chunder Canto Mookerjee, 2 App. Cas. 186.] If a person has an equitable interest in the title in dispute, as where the second mortgagee brings in the first mortgage pending the suit, it is not champerty in the modern mitigated sense of it. Hunter *v.* Daniel, 4 Hare, 420. [See also Williams *v.* Fowle, 132 Mass. 385.] Though exceptions to the earlier doctrine against champerty have greatly multiplied, and the severity of the old rule liberally considered and mitigated, yet it is still an offence suspiciously to intermeddle with another's litigation without any personal interest or affinity to the parties. Lathrop *v.* Amherst Bank, 9 Met. 489. Purchasing an interest in the thing in dispute, with the object of maintaining and taking part in the litigation, is still champerty and an offence. Tindal, C. J., in Stanley *v.* Jones, 7 Bing, 369. Persons having any legal or equitable interest in the matter in dispute, or standing in the relationship of father and son, ancestor and heir apparent, husband and wife, and brothers, are exceptions to the law of maintenance, and may maintain each other's suits. [But see Hutley *v.* Hutley, 8 L. R. Q. B. 112.] So, persons having a common interest in the same thing by the same title, may unite for their common defence of it, and agree to pay ratably the costs of suit. [Plating Co. *v.* Farquharson, 17 Ch. D. 49; Bradlaugh *v.* Newdegate, 11 Q. B. D. 1.] The ancient English statutes under Edw. I. reached attorneys as well as others. They reached equally officers and individuals; *nulle ministre le roi, ne nul autre*, were permitted to take upon him any business in suit in any court, for to have part of the thing in plea or demand. Every agreement relating thereto was declared void. The statute in Tennessee of 1821, c. 66, is to the same effect. Weedon *v.* Wallace, Meigs, 286. Lord Loughborough considered the offence of maintenance as *malum in se*, and all agreements tainted with it, even as between attorney and client, are void in equity as well as at common law. They cannot stipulate beyond just professional allowances. Kenney *v.* Browne, 3 Ridgw. P. C. 462; Wallis *v.* Duke of Portland, 3 Ves. 494; Powell *v.* Knowler, 2 Atk. 224; Stevens *v.* Bagwell, 15 Ves. 139; Wood *v.* Downes, 18 id. 120; Arden *v.* Patterson, 5 Johns. Ch. 48, 49; 1 Greenl. 292; Key *v.* Vattier, 1 Ohio, 132. The

c. 25, Westm. 2, c. 49, and particularly the statute of 28 Edw. I. c. 11, established that doctrine, which became incorporated into the common law. The substance of those statutes was made part of the statute law of New York in 1788; and by the New York Revised Statutes, (*c*) to take a conveyance of land, or of any interest therein, from a person not in possession, while the land is the subject of controversy by suit, and with knowledge of the suit, and that the grantor was not in possession, is declared *450 to be a misdemeanor. The same principle that * would render the purchase of a pretended title void, would apply, with much greater force, to a purchase while the title to the land was in actual litigation. (*a*)

courts of equity, upon general principles of policy, will not permit an attorney to accept anything from his client, pending the suit, except his demand. A solicitor or counsellor cannot contract with his client for a part of the matter in litigation as a compensation for his services. Wallis *v.* Loubat, 2 Denio, 607; [Atchison, T. & S. F. R. R. Co. *v.* Johnson, 29 Kans. 218.] There would be no bounds, said Lord Thurlow (Welles *v.* Middleton, 1 Cox, 125), to the crushing influence of his power, if it were not so. Newman *v.* Payne, 2 Ves. Jr. 203; Rose *v.* Mynatt, 7 Yerg. 30, s. P.; Merritt *v.* Lambert, 10 Paige, 352. The case of Berrien *v.* McLane, 1 Hoff. Ch. 421, contains a strong declaration that every agreement made, pending a litigation, to pay counsel or the attorney a part of the property to be recovered, is absolutely void. Not only every contract, but the actual transfer of part of the property in litigation is illegal, on the ground of the relation of the parties, and of the doctrine of champerty. Numerous authorities are cited, but sufficient are already mentioned in the preceding part of this note. But it is not maintenance for a person to assign his interest in a debt, pending a suit for its recovery; but if it be purchased to answer a private end, it is maintenance; as where a party agrees to give a stranger the benefit of a suit, on condition that he prosecute it. 2 Roll. Abr. 113; Harrington *v.* Long, 2 My. & Keen, 590; [Ball *v.* Warwick, 50 L. J. Q. B. 382.] If the purchaser gives an indemnity against all costs that have or may be incurred by the seller, in the prosecution of the suit, that act amounts to maintenance. Ib. [See Cutts *v.* Salmon, 16 Jur. 623; 12 Eng. L. & Eq. 316; Simpson *v.* Lamb, 7 El. & Bl. 84; Sayles *v.* Tibbitts, 5 R. I. 79; Lytle *v.* State, 17 Ark. 608, 663; Newkirk *v.* Cone, 18 Ill. 449.] [See, generally, *In re* Cambrian Mining Co., 48 L. T. 114; Littledale *v.* Thompson, 4 L. R. Ir. 43; Allen *v.* Frazee, 85 Ind. 283; Board of Commissioners *v.* Jameson, 86 Ind. 154; Orr *v.* Tanner, 12 R. I. 94; s. c. 17 Am. L. Reg. N. S. 759 and note.]

(*c*) Vol. ii. 691, sec. 5.

(*a*) The statute law of New York is understood to confine unlawful maintenance to the two cases of buying and selling pretended titles to land, and falsely moving and maintaining suits. Mott *v.* Small, 20 Wend. 212; s. c. 22 Wend. 403. And by reason of an alteration of the old statute of champerty, by the New York Revised Statutes, ii. 691, sec. 6, the taking of a conveyance from a party in possession of land, the subject of controversy by suit in court is no longer forbidden. Webb *v.* Bindon, 21 Wend. 98. In other respects the old law remains unaltered. [See Benedict *v.* Stewart, 23 Barb. 420; McMahon *v.* Allen, 34 id. 56; Sedgwick *v.* Stanton, 14 N. Y. 289; Crary *v.* Goodman, 22 id. 170;] [Coughlin *v.* N. Y. Cent., &c. R. R. Co., 71 N. Y. 443.]

3. Of the Due Execution of a Deed. — A deed is a writing, sealed and delivered, and, to be duly executed, must be written on paper or parchment. (*b*)

(1.) *The Deed must be in Writing, and signed and sealed.* — The law requires more form and solemnity in the conveyance of land than in that of chattels. This arises from the greater dignity of the freehold in the eye of the ancient law, and from the light and transitory nature of personal property, which enters much more into commerce, and requires the utmost facility in its incessant circulation. In the early periods of English history, the conveyance of land was usually without writing, but it was accompanied with overt acts equivalent, in point of formality and certainty, to deeds. As knowledge increased, conveyance by writing became more prevalent; and, finally, by the statute of frauds and perjuries, of 29 Charles II. c. 3, secs. 1, 2, all estates and interests in lands (except leases not exceeding three years) created, granted, or assigned, by livery and seisin only, or by parol, and not in writing, and signed by the party, were declared to have no greater force and effect than estates at will only. And by the 4th section, no person could be charged upon any "contract or sale of lands, or any interest in or concerning the same," unless the agreement, or some memorandum or note thereof, was in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized. This statute provision has been either expressly adopted, or assumed as law, throughout the United States. (*c*) In New York, it has been enacted, in every successive revision of the statutes; and in the last revision it is made to apply, not only to every estate and interest in lands, but to every trust or power concerning the same; and the exception as to leases is confined to leases for a term not exceeding one year. But the provision does not apply to trusts by implication, or operation of law. (*d*) Nor is

(*b*) Co. Litt. 35, b.

(*c*) The Civil Code of Louisiana, art. 2415, without adopting in terms the provision in the statute of frauds, declares generally, that all verbal sales of immovable property or slaves shall be void. The Tennessee statute omits the words in the English statute of frauds, *or any interest in or concerning them.*

(*d*) New York Revised Statutes, ii. 134, sec. 6, 7, 8; ib. 137, sec. 2. The words of the New York Revised Statutes are, that "no estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power, over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted,

a parol promise to pay for the improvements made upon land within the statute of frauds. They are not an interest in * 451 land, but only another name * for work and labor bestowed upon it. (*a*) There is some difficulty in deducing, with precision, from the conflict of cases, the true test of what is, and what is not, "a contract or sale of lands, or any interest in or concerning them," within the true construction of the 4th section of the statute of frauds. Mr. Justice Littledale, in *Evans* v. *Roberts*, (*b*) was of opinion that the annual produce of lands which was proceeding to a state of maturity, and which, when taken at maturity, would be severed from the ground, and would become movable goods, was not an interest in land within that section of the statute, and that the statute seemed to mean land taken as mere land, and not the annual growing productions. Mr. Justice Spencer, in *Frear* v. *Hardenbergh*, (*c*) seems to have adopted the same principle of construction (though what he said was many years prior to the other case), for he observed that the statute had in view some interest to be acquired in the land itself, by the contract, and not such as was collateral, and by which no kind of interest was to be gained in the land. (*d*)

assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful assent, thereunto authorized by writing." So again, "every contract for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and subscribed by whom the sale is to be made, or by his agent lawfully authorized." [Seaman *v.* Hasbrouck, 35 Barb. 151; Eggleston *v.* N. Y. & Harlem R. R., ib. 162. As to signing, see Worrall *v.* Munn, 1 Selden, 229; Ives *v.* Hazard, 4 R. I. 14.] But in the case of a parol contract for the sale of lands, if afterwards carried into effect by a conveyance, the deed will relate back to the date of the contract, and overreach an intermediate sale to a stranger, unless he was a *bona fide* purchaser without notice, and with a deed duly recorded. Clary *v.* Marshall, 5 B. Mon. 266.

(*a*) Frear *v.* Hardenbergh, 5 Johns. 272; Lower *v.* Winters, 7 Cowen, 263; [Sutton *v.* Sears, 10 Ind. 223; Boze *v.* Davis, 14 Texas, 331.]

(*b*) 5 B. & C. 829.

(*c*) 5 Johns. 276.

(*d*) The English cases have made very refined distinctions on the subject, and such as are difficult to be reconciled. The sale of a quantity of timber or wood, growing, and to be cut and delivered, has been held not to be within the 4th section of the statute. Anon., 1 Ld. Raym. 182; Smith *v.* Surman, 9 B. & C. 561; Yale *v.* Seely, 15 Vt. 221; but on this point, the case of Teal *v.* Auty, 2 Brod. & B. 99, is otherwise. The case of Claflin *v.* Carpenter, 4 Met. 580, agrees with the decision in 1 Ld. Raym., and restores it to the character of a sound authority. The sale of a crop of grass

Part performance of an agreement by parol, and without writing, to sell land, will, in certain cases, in the judgment of a court of equity, take the agreement out of the operation of the statute of frauds, and authorize the court to decree *a specific performance* of the contract. Such a resort to equity is addressed to the sound judicial discretion of the court; and its extraordinary jurisdiction in this case is not to be exercised when the complainant has so conducted as to destroy his claim to such an interference. (*e*) The court will always have an eye to the substantial justice of the case. The agreement to be enforced must be clearly proved, as charged in the bill, and the acts of part performance must

growing, has been held not to be a chattel, but within the 4th section of the statute. Crosby *v.* Wadsworth, 6 East, 602; Bayley, J., in Evans *v.* Roberts, 5 B. & C. 829. A sale of corn or potatoes growing in the field, held not to be within the statute, for the growing crops were mere chattels. Jones *v.* Flint, 2 Perry & Dav. 504; 10 Ad. & El. 753; Sainsbury *v.* Matthews, 4 M. & W. 343. A sale of the herbage in land passes a right in the land and possession thereof, and trespass *q. c. fregit* will lie against an intruder. But a sale of the products of land annually produced by labor (*fructus industriales*) is a sale of a chattel interest. Britain *v.* McKay & Bates, 1 Ired. (N. C.) 265. See also Stewart *v.* Doughty, 9 Johns. 113. A sale of hops and of turnips growing, is held to be within the statute. Waddington *v.* Bristow, 2 Bos. & P. 452; Emmerson *v.* Heelis, 2 Taunt. 38. Though if the contract was for turnips *thereafter* to be raised, the case was not within the 4th section of the statute, though as a chattel it was within the 17th section. It does not appear to be of much moment whether the doubtful cases come within the 4th section, as being an interest concerning land; for if the subject contracted for be a chattel interest, and be of ten pounds and upwards in value, the contract falls within the 17th section, and must be in writing. The rule to be drawn from the cases would seem to be, that if the subject-matter of the contract was not to be severed and delivered by the vendor as a chattel, but was a right in the soil to grow and bring the same to maturity, and a right of entry to cut and take it was part of the contract, the case falls within the 4th section of the statute of frauds. But when the agreement was for the trees, grass, or crop, when severed from the soil, and which were growing at the time; or if the contract was for the annual produce of cultivation and labor, or for emblements at maturity, and to be taken by entry, the case falls within the 17th section of the statute. This is the distinction taken by Mr. Rand, the learned editor of Long on Sales, 80. In Green *v.* Armstrong, in 1 Denio, 550, it was adjudged that a contract for the sale of growing trees, with a right to enter and remove them, was a contract for the sale of an interest in land, and must be in writing; but growing crops of grain and other annual productions raised by the industry of man, are personal chattels, and not within the statute. See a clear and forcible illustration of the same doctrine by Ch. B. Joy, in Dunne *v.* Ferguson, Hayes, 542.

(*e*) Benedict *v.* Lynch, 1 Johns. Ch. 370; Brown *v.* Haines, 12 Ohio, 1; Frisby *v.* Ballance, 4 Scam. 287. [See, as to discretion, Willard *v.* Tayloe, 8 Wall. 557; and generally as to part performance, Hoffman *v.* Fett, 39 Cal. 109; Green *v.* Finin, 35 Conn. 178; Billingslea *v.* Ward, 33 Md. 48; Moss *v.* Culver, 64 Penn. St. 414. *Contra*, Hairston *v.* Jaudon, 42 Miss. 380.]

unequivocally appear to relate to the identical contract set up.[1] The ground of this interference of chancery is fraud, in resisting

[1] *Agreements for the Sale of Lands.* — (*a*) *Statute of Frauds.* x^1 — An agreement to execute a written agreement to convey land is as much within the statute as an agreement to convey. Trammell *v.* Trammell, 11 Rich. (S. C.) 471; Lawrence *v.* Chase, 54 Me. 196. So an agreement to make a will devising real property. Gould *v.* Mansfield, 103 Mass. 408; [Maddison *v.* Alderson, 8 App. Cas. 467; 7 Q. B. D. 174.] So an agreement to release a mortgage in those states where the common-

x^1 It is said to be now the established English doctrine that the effect of both the fourth and seventeenth sections of the statute of frauds is only to bar the remedy, and not to make the parol contract absolutely void. Maddison *v.* Alderson, 8 App. Cas. 467, 474, 488; Britain *v.* Rossiter, 11 Q. B. D. 123. That the statute must be pleaded, see Catling *v.* King, 5 Ch. D. 660; Towle *v.* Topham, 37 L. T. 308.

The doctrine as to part performance stated in the text was examined at length in Maddison *v.* Alderson, 8 App. Cas. 467. The rule was considered to rest upon purely equitable considerations, arising from the injustice that would in many cases result if the court should refuse to regard the contract after it had been partly performed. The acts of part performance must be such as to show in themselves that they are done in pursuance of the contract. Hence part, and perhaps even full, payment of the purchase price is not sufficient. See Humphreys *v.* Green, 10 Q. B. D. 148; Suman *v.* Springate, 67 Ind. 115; Nay *v.* Mograin, 24 Kan. 75. It seems to have been considered by Blackburn, J., that nothing short of a change of possession would suffice. The doctrine has no application except to the fourth section of the statute. Britain *v.* Rossiter, 11 Q. B. D. 123; McElroy *v.* Ludlum, 32 N. J. Eq. 828. The rule is stated in substantially the above form in many cases. Ungley *v.* Ungley, 4 Ch. D. 73; Sanderson *v.* Graves, 10 L. R. C. P. 234; Brown *v.* Brown, 33 N. J. Eq. 650, 660; Wright *v.* Pucket, 22 Gratt. 370; Bechtel *v.* Cone, 52 Md. 698; Wiseman *v.* Lucksinger, 84 N. Y. 31; Laird *v.* Allen, 82 Ill. 43. Merely taking possession has been held not to be sufficient, unless improvements are made. Ballard *v.* Ward, 89 Penn. St. 358. Comp. Brown *v.* Lord, 7 Oreg. 302. and continuing in possession and making improvements has been held sufficient, Pfiffner *v.* Stillwater, &c. R. R. Co., 23 Minn. 343. The rule that the cases most nearly support would seem to be that there must be at least a change of possession, or a change in the character of a possession already held, and perhaps also some substantial improvements made or other acts done upon the faith of the purchase, for which compensation in damages cannot readily be given.

An exchange is within the statute. Connor *v.* Tippett, 57 Miss. 594. See also Dowling *v.* McKenny, 124 Mass. 478. So is an agreement to procure a conveyance. Rawdon *v.* Dodge, 40 Mich. 697. So of an agreement to allow one to shoot over land and take away the game. Webber *v.* Lee, 9 Q. B. D. 315. As to a surrender, see Ronayne *v.* Sherrard, 11 Ir. R. C. L. 146; Auer *v.* Penn, 92 Penn. St. 444. An agreement to share the profits of a sale of land is not within the statute. Benjamin *v.* Zell, 100 Penn. St. 33. As to whether a purchase of land by one person, in pursuance of an agreement with another to buy for their joint benefit, will give such other person any right which may be enforced, the authorities are in conflict. That it will not, see Parsons *v.* Phelan, 134 Mass. 109; Howland *v.* Blake, 97 U. S. 624; Harrison *v.* Bailey, 14 S. C. 334. But see Cave *v.* Mackenzie, 46 L. J. Ch. 564.

the completion of an agreement partly performed, and which part performance would work a fraud upon the party, unless the agree-

law doctrine (see 194, n. 1) still prevails. Leavitt *v.* Pratt, 53 Me. 147. But see Malins *v.* Brown, 4 Comst. 403, 409. But an agreement restricting the use of land, as, for instance, that a certain trade shall not be carried on upon it, is not within the statute. Leinan *v.* Smart, 11 Humph. 308. Neither is one for the adjustment of a doubtful boundary. Hagey *v.* Detweiler, 35 Penn. St. 409, 412; Fleming *v.* Ramsey, 46 Penn. St. 252, 259. Judicial sales are not within the statute. Smith *v.* Arnold, 5 Mason, 420; Hutton *v.* Williams, 35 Ala. 503; Fulton *v.* Moore, 25 Penn. St. 468; Halleck *v.* Guy, 9 Cal. 181; Watson *v.* Violett, 2 Duvall, 332.

Killmore *v.* Howlett, 48 N. Y. 569; Blackburn on Sales; confirm the distinction, 451, n. (*d*), between the cases where the property is to pass before severance, and those in which it is to pass afterwards. But the above-named author is of opinion, on a point mentioned earlier in the note, that, although *fructus industriales* are chattels even before severance from the soil (see Bryant *v.* Crosby, 40 Me. 9; Sherry *v.* Picken, 10 Ind. 375; Bull *v.* Griswold, 19 Ill. 631), they are not goods, wares, or merchandise, within the 17th section until after severance. It is generally held that standing timber is part of the realty. Green *v.* Armstrong, 1 Denio, 550; McGregor *v.* Brown, 6 Seld. 114; Vorebeck *v.* Roe, 50 Barb. 302; Goodyear *v.* Vosburgh, 57 id. 243; Harrell *v.* Miller, 35 Miss. 700; Kingsley *v.* Holbrook, 45 N. H. 313; Howe *v.* Batchelder, 49 N. H. 204; Pattison's Appeal, 61 Penn. St. 294; [Armstrong *v.* Lawson, 73 Ind. 498.] See Killmore *v.* Howlett, *supra*. In Kingsley *v.* Holbrook it is considered that when the titles to the land and to standing trees have become vested in different persons by deed, the trees thereafter become chattels while still standing. As to the difference between a license and an easement, or interest in lands, see iii. 452, n. 1, (*b*). Brumfield *v.* Carson, 33 Ind. 94.

Money paid upon an oral agreement for the purchase of land may be recovered back if the vendor refuses to perform his part of the contract. Hairston *v.* Jaudon, 42 Miss. 380; Cook *v.* Doggett, 2 Allen, 439. [See Eaton *v.* Eaton, 35 N. J. L. 290.] So when the agreement tendered for the buyer's signature contains unreasonable terms and he refuses to sign it, a resale by the owner will entitle him to recover his deposit. Moeser *v.* Wisker, L. R. 6 C. P. 120. But it is otherwise if he is willing to convey. Kneeland *v.* Fuller, 51 Me. 518; Congdon *v.* Perry, 13 Gray, 3. And after he has conveyed he may recover the price. Dyer *v.* Graves, 37 Vt. 369, 376. See Marcy *v.* Marcy, 9 Allen, 8, 15. A letter to the vendor's own solicitor, "I have sold my house to A. for so much money; the deeds are in your hands," is a sufficient memorandum within the statute. Owen *v.* Thomas, 3 My. & K. 353; McMurray *v.* Spicer, L. R. 5 Eq. 527, 536.

(*b*) *Title.* — A contract to convey a good title has been held to be satisfied by a conveyance of a good title without covenant of warranty. Kyle *v.* Kavanagh, 103 Mass. 356. But see Andrews *v.* Wood, 17 B. Mon. 518. But a good title is necessary even when the contract is only to make a deed. Washington *v.* Ogden, 1 Black, 450; Wellman *v.* Dismukes, 42 Mo. 101. See also Pomeroy *v.* Drury, 14 Barb. 418; Fletcher *v.* Button, 4 Comst. 396, 400; Burwell *v.* Jackson, 5 Seld (9 N. Y.) 535, 544; Little *v.* Paddleford, 18 N. H. 167; Mead *v.* Fox, 6 Cush. 199, 202; Morgan *v.* Smith, 11 Ill. 194. A purchaser will not be compelled to accept a title which there is a reasonable chance may subject him to litigation, although the court may believe the title to be

ment was carried into complete execution. (*f*) What facts will amount to a part performance sufficient to justify the interfer-

(*f*) Phillips *v.* Thompson, 1 Johns. Ch. 131; St. John *v.* Benedict, 6 id. 111; Frame *v.* Dawson, 14 Ves. 386; Clinan *v.* Cooke, 1 Sch. & Lef. 41; Lindsay *v.* Lynch, 2 id. 8; King *v.* Bardeau, 6 Johns. Ch. 38; Lord Ormond *v.* Anderson, 2 Ball & Beat. 369; King *v.* Hamilton, 4 Peters, 311; Seymour *v.* Delancy, 6 Johns. Ch. 222; Benedict *v.* Lynch, 1 id. 370; Parkhurst *v.* Van Cortlandt, ib. 278; s. c. in error, 14 Johns. 15; Keatts *v.* Rector, 1 Pike (Ark.), 391; *Ex parte* Storer, New York Legal Observer for October, 1846; [Davels, 294; Kent *v.* Allen, 24 Mo. 98; Wilson *v.* Wilson, 6 Mich. 9; Lowry *v.* Tew, 3 Barb. Ch. 407; Rhodes *v.* Rhodes, 3 Sandf. Ch. 279; Johnson *v.* Hubbell, 2 Stockt. 332.]

good. Pyrke *v.* Waddingham, 10 Hare, 1; 17 Eng. L. & Eq. 534; Richmond *v.* Gray, 3 Allen, 25, 27; Sturtevant *v.* Jaques, 14 Allen, 523, 526; Allen *v.* Atkinson, 21 Mich. 351, 361; [Butts *v.* Andrews, 136 Mass. 221, and cases cited.] It must be "a marketable title." Freetby *v.* Barnhart, 51 Penn. St. 279. See Upperton *v.* Nickolson, L. R. 6 Ch. 436, 444. The effect of the vendor's knowing that he has no title at the time of making the contract on his right to specific performance is discussed 6 Am. Law Rev. 756, and the statement that it would not be decreed in Hurley *v.* Brown, 98 Mass. 545, 547, defended against the criticism in Dresel *v.* Jordan, 104 Mass. 407, 414. [x2]

(*c*) *Time.* — Courts in this country adhere to the English rule that time is not of the essence of the contract in proper cases. Barnard *v.* Lee, 97 Mass. 92; Parkin *v.* Thorold, 16 Beav. 59. But owing to the greater fluctuations in the value of land the exceptions to it are more numerous. Richmond *v.* Gray, 3 Allen, 25, 30; Goldsmith *v.* Guild, 10 Allen, 239, 241. And time may be made of the essence of the contract in England by express agreement, and even if not originally of the essence, either party may insist on performance within a reasonable time after giving notice. Parkin *v.* Thorold, 16 Beav. 59, 71; Nott *v.* Riccard, 22 Beav. 307; McMurray *v.* Spicer, L. R.

[x2] It is evident that the giving of a good title may be either a warranty giving a right to an action for damages if it is not complied with, or it may be a condition precedent or subsequent, or may be such as to give the purchaser the option to treat it as either one or the other. The superior knowledge of the vendor as to the title is held to impose upon him the duty of disclosing any defects he may know of, at least where such defects are not equally open to the purchaser. *In re* Marsh and Earl Granville, 24 Ch. D. 11. If there is an express contract to give a good title, mere notice on the part of the purchaser will not prevent a breach prior to his taking possession. *In re* Gloag & Miller's Contract, 23 Ch. D. 320; Cato *v.* Thompson, 9 Q. B. D. 616. But taking possession with notice will be held a waiver. Cato *v.* Thompson, *supra*. In other words, there is a condition precedent, but not a condition subsequent. But if there is also an agreement for compensation for errors, there will be no waiver, but an action for damages on the agreement will lie. Phelps *v.* White, 7 L. R. Ir. 160; *Re* Turner & Skelton, 13 Ch. D. 130. See further, Lawrie *v.* Lees, 7 App. Cas. 19. Covenants restricting the use of the land are sufficient to excuse the purchaser from completing. *In re* Higgins & Hitchman's Contract, 21 Ch. D. 95; Cato *v.* Thompson, *supra*. As to when an action for deceit will lie, see, especially, Joliffe *v.* Baker, 11 Q. B. D. 255; Phelps *v.* White, 7 L. R. Ir. 160.

ence of chancery, depends upon circumstances. Generally, it may be observed, that delivery of possession is part performance. (*g*) So, the making of beneficial improvements on the

(*g*) Lacon *v.* Mertins, 3 Atk. 1; Lord Manners, in Kine *v.* Balfe, 2 Ball & Beat. 348; Wilber *v.* Paine, 1 Ohio, 251; Earl of Aylesford's Case, Str. 783; Morphett *v.* Jones, 1 Swanst. 181; Pyke *v.* Williams, 2 Vern. 455; Billington *v.* Welsh, 5 Binney, 131; Pugh *v.* Good, 3 Watts & S. 56; Gregory *v.* Mighell, 18 Ves. 328; Hart *v.* Hart, 3 Desaus. (S. C.) 592. But the possession must be referable to the agreement, and taken with the consent of the vendor. Gregory *v.* Mighell, *ubi supra*; Jervis *v.* Smith, 1 Hoff. Ch. 470; [Ham *v.* Goodrich, 33 N. H. 32; Wallace *v.* Brown, 2 Stockt.

5 Eq. 527, 542; Webb *v.* Hughes, L. R. 10 Eq. 281, 287. But the vendor cannot hold the purchaser bound by a stipulation if he himself caused the delay. Upperton *v.* Nickolson, L. R. 6 Ch. 436. [See also Holt's App., 98 Penn. St. 257.]

(*d*) English contracts usually provide for payment of interest if from any cause whatever the purchase is not completed at the time named in the contract. Under this condition interest must be paid, unless the delay is wilful on the part of the vendor. Sherwin *v.* Shakespear, 5 De G., M. & G. 517; Vickers *v.* Hand, 26 Beav. 630. As to reservation of a right to rescind by vendor if objections are persisted in, see Mawson *v.* Fletcher, L. R. 6 Ch. 91.

(*e*) *Seals.* — It is generally admitted that an impression made directly upon the paper at the time of executing the instrument purporting to be under seal by means of a steel die, which the party executing had adopted as his seal, is a valid seal. Pillow *v.* Roberts, 13 How. 472; Hendee *v.* Pinkerton, 14 Allen, 381; Allen *v.* Sullivan R. R., 32 N. H. 446; Curtis *v.* Leavitt, 15 N. Y. 9, 21, 90 (a case decided on the law of England, but also mentioning a New York statute to the same effect); Ross *v.* Bedell, 5 Duer, 462; Regina *v.* St. Paul, 7 Q. B. 232; [Pierce *v.* Indseth, 106 U. S. 546.] In Massachusetts it has been held that a mere *fac-simile* of the seal of a corporation printed with ink on the blank form of an obligation at the same time when the blank was printed, and by the same agency, is no more than a scroll, and is not a seal. Bates *v.* Boston & N. Y. C. R. R., 10 Allen, 251. The law seems to have been held otherwise in Woodman *v.* York & Cumberland R. R., 50 Me. 549, 550 (an "imprint in red ink"). In some states the distinction between sealed and unsealed instruments has been abolished either wholly or in part. McKinney *v.* Miller, 19 Mich. 142; Courand *v.* Vollmer, 31 Tex. 397. Other cases upholding scrawls, if intended for seals, are Underwood *v.* Dobbins, 47 Mo. 259; Hudson *v.* Poindexter, 42 Miss. 304; Hastings *v.* Vaughn, 5 Cal. 315; Scruggs *v.* Brackin, 4 Yerg. 528; Anderson *v.* Wilburn, 3 Eng. 155. So by statute the mere expression in the body of the instrument that it is sealed is sufficient. Milledge *v.* Gardner, 20 Ga. 700; Fish *v.* Brown, 17 Conn. 341. A printed [L. S.] is sometimes sufficient. Williams *v.* Starr, 5 Wis. 534. [x]

[x] As to the relief granted in equity where the seal is omitted by accident or mistake, see Bernards Township *v.* Stebbins, 109 U. S. 341, 349; McCarley *v.* Board of Supervisors, 58 Miss. 483.

Signature. — It has been held that a grantor need not himself write his signature, but may adopt a signature written by another. Clough *v.* Clough, 73 Me. 487; Nye *v.* Lowry, 82 Ind. 316. See also *post*, 452, n. (*a*).

land may be taken for part performance. (*h*) It was formerly held (*i*) that payment was part performance, but the more modern doctrine now is, that payment of part, or even of the whole, of the purchase-money, is not of itself, and without something more, a performance that will take the case out of the statute, for the money may be repaid. (*j*)

308; Charpiot *v.* Sigerson, 25 Mo. 63; Williamson *v.* Williamson, 4 Iowa, 279; Danforth *v.* Laney, 28 Ala. 274.] If the purchase-money be paid, and possession delivered, that is a sufficient part performance. Thornton *v.* Heirs of Henry, 2 Scam. 218.

(*h*) Lord Rosslyn, in Wills *v.* Stradling, 3 Ves. 378; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 274; Gregory *v.* Mighell, 18 Ves. 328; Morphett *v.* Jones, 1 Swanst. 172; Wack *v.* Sorber, 2 Wharton, 387; [Slater *v.* Hill, 10 Ind. 176; School District No. 3 *v.* Macloon, 4 Wis. 79.]

(*i*) Lacon *v.* Mertins, 3 Atk. 4.

(*j*) Clinan *v.* Cook, 1 Sch. & Lef. 40, 41, 129; 3 Ves. 379, 380; Story, Comm. Eq. Juris. ii. 64; Sites *v.* Keller, 6 Ohio, 483; M'Kee *v.* Phillips, 9 Watts, 85; Parker *v.* Wells, 6 Wharton, 153; Allen's Estate, 1 Watts & S. 383; Hatcher *v.* Hatcher, 1 McM. Eq. (S. C.) 311; [Kidder *v.* Barr, 35 N. H. 235; Cole *v.* Potts, 2 Stockt. 67; Underhill *v.* Allen, 18 Ark. 466; Parke *v.* Leewright, 20 Mo. 85; Cagger *v.* Lansing, 43 N. Y. 530. But see Malins *v.* Brown, 4 Comst. 403.] But see Townsend *v.* Houston, 1 Harr. (Del.) 532, in which it was held that payment of a substantial part of the purchase-money was, in chancery, a sufficient part performance. In the State of Maine, the Supreme Court declared, that it had power to decree the specific performance of a contract, in writing, to convey land, but not when it was a parol contract, even though the contract should be confessed by the answer. Stearns *v.* Hubbard, 8 Greenl. 320. But in New Hampshire, a court of equity may decree a specific performance of a parol contract for the sale of lands, if there has been part performance. Tilton *v.* Tilton, 9 N. H. 385. It is now the settled English law, that to a bill for a specific performance of a parol contract to convey land, if the answer *insists upon the statute of frauds in bar*, and there be no acts of part performance to take the case out of the statute, the courts of equity allow it to be a bar, not only when the existence of the contract is denied, but when it is confessed by the answer. Eyre, Baron, in Eyre *v.* Ivison, and Stewart *v.* Careless, cited in 2 Bro. C. C. 563, 564; Walters *v.* Morgan, 2 Cox, 369; Lord Loughborough, in Rondeau *v.* Wyatt, 2 H. Bl. 68; Lord Eldon, in Cooth *v.* Jackson, 6 Ves. 37, and Rowe *v.* Teed, 15 id. 375; Sir William Grant, in Blagden *v.* Bradbear, 12 Ves. 471; Story's Comm. on Eq. Jurisprudence, ii. 59; [Argenbright *v.* Campbell, 3 Hen. & Munf. 144, 160; Thompson *v.* Tod, Peters, C. C. 380, 388.] In Pennsylvania, where there are no courts of chancery distinct from the courts of law, the commissioners appointed to revise the Civil Code, in their report in January, 1835, provided that the action of covenant brought for a breach of covenant to sell in fee, for life, or for a term of years, any real estate, should have the effect of a bill in chancery for the specific performance of the contract, under the provisions in the act, and which are new and anomalous. The remedy was also to be applied to contracts in writing for the sale of lands, though not under seal, but there was no provision for the case of a part performance of a parol contract to sell land. In Henderson *v.* Hays, 2 Watts, 148, it was adjudged, as they had no court of chancery in that state, that the vendee could enforce in ejectment the specific performance of an agreement for the sale and purchase of lands,

The common law went further than this provision in the statute of frauds. It is deemed essential, in the English law, to the conveyance of land, that it should be by writing, *sealed* and delivered; and though a corporation can do almost any business of a commercial nature by a resolution without seal, yet the conveyance of land is not one of the excepted cases, and they cannot convey, or mortgage, but under their corporate seal. (*k*) Deeds were originally called charters; and from the time of the Norman Conquest, the charter was authenticated, by affixing to it a seal of wax, and it derived its validity from the seal. The statute law in South Carolina requires the conveyance of all freehold estates in land to be by writing, signed, sealed, and delivered, or, in other words, to be conveyed by deed. The statute law in Virginia (*l*) and Kentucky requires the same thing as to all estates or interests in land exceeding a term of five years; and the statute law in Rhode Island, as to estates exceeding a term of one year. There are probably similar statute provisions in other states; and where there are not, the general rule of the common law, that the conveyance of land must be by deed, is adopted and followed, with the exception of Louisiana, where sales of land are made by writing only, and must be registered in the office of a notary. (*m*) It had been adjudged in New

whenever a court of chancery would sustain a bill for that purpose; and that the exercise of the power depended upon the equity and justice of all the circumstances which surround the case; and that cases might occur where the agreement was valid, and the price adequate, and no blame attached to vendee, and yet a specific performance would not be decreed, as, for instance, when the vendor was of intemperate habits, and the land more advantageous *to him* than the purchase-money. In Massachusetts, a parol contract for the sale of land is not so utterly void, but that the party who is able and willing to fulfil the contract can retain the money advanced on the contract. Coughlin *v.* Knowles, 7 Met. 57.

(*k*) London Waterworks *v.* Bailey, 4 Bing. 283; [State *v.* Allis, 18 Ark. 269. But compare Crook *v.* Corporation of Seaford, L. R. 6 Ch. 551.]

(*l*) Revised Code of Virginia, i. 218, Act of 1792.

(*m*) Civil Code of Louisiana, art. 2415, 2417. In Connecticut, the statute declares that all grants, bargains, and mortgages of land shall be in writing, subscribed by the grantor, and attested by two witnesses, and duly acknowledged and recorded (Statutes of Connecticut, 1821; ib. 1838, p. 390); and I should infer that a bargain and sale of land, made according to the provisions of the statute, would be valid without a seal, and yet statutes have been passed in 1824, 1836, and 1838, confirming conveyances of real estate previously executed without seal. Statutes of Connecticut, 1838, pp. 393, 394. In Massachusetts, conveyances of land are by deed. Revised Statutes of 1836.

York in 1814, (*n*) that a conveyance of a freehold estate must be by deed, or a writing under seal; and the decision was founded upon the doctrine of the English common law. The Revised
* 452 Statutes (*o*) have adopted this rule, by declaring, * that every grant in fee, or of a freehold estate, must be subscribed and sealed by the grantor, or his lawful agent, and either duly acknowledged previous to its delivery, or be attested by at least one witness. (*a*) Nor will the mere cancelling of the deed, under which one holds title to real estate, devest the title from the grantee, and revest it in the grantor. (*b*) The case of a satisfied mortgage deed rests on different grounds, as we have had occasion already to consider. (*c*)

As a seal is requisite to a deed, the definition and the character of it are well settled. (*d*) The common law intended, by a seal, an impression upon wax or wafer, or some other tenacious substance capable of being impressed. According to Lord Coke, a seal is wax, with an impression; *sigillum est cera impressa, quia*

(*n*) Jackson *v.* Wood, 12 Johns. 73.

(*o*) Vol. i. 738, sec. 137. In Georgia, the ancient English statute laws respecting the rights of persons and property are followed and adopted with remarkable precision; all conveyances of land must be by deed of bargain and sale, or by deed of lease and release, or by deed of feoffment, enrolled or registered in the clerk's office, signed and sealed by the party conveying, before two or more witnesses. But a writing with a scroll or other representation of a seal annexed shall be sufficient for a seal of wafer or wax. Hotchkiss's Codification of the Statute Law of Georgia, 1848, pp. 406, 408.

(*a*) The place of signing in the instrument is immaterial, and even a printed instead of a written name has been said to be sufficient. Lord Eldon, in 2 Bos. & P. 239; [Saunders *v.* Hackney, 10 Lea, 194.] The ordinance of Congress of 1787, for the government of the northwestern territory, directed real estates to be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered, and attested by two witnesses. But the provision requiring two witnesses was afterwards repealed in Ohio. Chase's Statutes of Ohio, i. 66.

(*b*) Hudson's Case, cited in Prec. in Ch. 235; Bolton *v.* Carlisle, 2 H. Bl. 263, 264; Clavering *v.* Clavering, Prec. in Ch. 235; Doe *v.* Bingham, 4 B. & Ald. 672; Roe *v.* York, 6 East, 86; Dando *v.* Tremper, 2 Johns. 87; Gilbert *v.* Bulkley, 5 Conn. 262; Botsford *v.* Morehouse, 4 id. 550; Farrar *v.* Farrar, 4 N. H. 191; Holbrook *v.* Tirrell, 9 Pick. 105; [Dukes *v.* Spangler, 35 Ohio St. 119. Nor does a surrender of the deed. Taliaferro *v.* Rolton, 34 Ark. 503; Rogers *v.* Rogers, 53 Wis. 36.]

(*c*) *Vide supra*, 195.

(*d*) A deed cannot bind a party sealing it, unless it contains words expressive of an intention to be bound. If the wife merely signs and seals a deed with her husband, but is not otherwise mentioned in the deed, and there are no words of grant or release as from her, the deed has no operation against her. Catlin *v.* Ware, 9 Mass. 218: Lufkin *v.* Curtis, 13 id. 223.

cera sine impressione non est sigillum. (*e*) The common-law definition of a seal, and the use of rings and signets for that purpose, and by way of signature and authenticity, is corroborated by the usages and records of all antiquity, sacred and profane. (*f*) In the eastern states, sealing, in the common-law sense, is requisite; (*g*) but in the southern and western states, *from New Jersey inclusive, the impression on wax has been disused to such an extent, as to induce the courts to allow (but with certain qualifications in some of the states) a flourish with the pen, at the end of the name, or a circle of ink, or scroll, to be a valid substitute for a seal. (*a*) This is destroying the character of seals, and it is, in effect, abolishing them, and with them the definition of a deed or specialty, and all distinction between writings sealed, and writings not sealed. Whether land should be *453

(*e*) Inst. 169. This definition of Lord Coke is supported by all the ancient authorities. See Perkins, sec. 134; Bro. tit. Faits, 17, 30; Lightfoot & Butler's Case, 2 Leon. 21. In public and notarial instruments, the seal or impression is usually made on the paper, and with such force as to give tenacity to the impression, and to leave the character of the seal upon it. In Vermont, an impression of an *official seal*, made upon paper alone is sufficient. Revised Statutes of Vermont, 1839, p. 53. A common-law seal or impression on wax is necessary in New York, on the authentication of acts of another state. Coit *v.* Millikin, 1 Denio, 376.

(*f*) Genesis, xxxviii. 18; Exodus, xxviii. 11; Esther, viii. 10; Jeremiah, xxxii. 10, 11; Cicero, Acad. Q. Lucul. 4, 26; Heinecc. Elem. Jur. Civ. 497.

(*g*) But a distinct impression of the seal upon paper is held to be a sufficient seal, without wax or wafer. Carter *v.* Burley, 9 N. H. 558. In Connecticut, by statute, in 1838, deeds and other conveyances of real estate, and bonds executed without seal, are declared to be valid, as though the same had been sealed.

(*a*) Force *v.* Craig, 2 Halst. 272; Alexander *v.* Jameson, 5 Binney, 238; Relph *v.* Gist, 4 M'Cord, 267. In Maryland, a scroll has been considered a seal from the earliest period of its judicial history. Trasher *v.* Everhart, 3 Gill & J. 234, 246. In Virginia and Alabama, there must be evidence of an intention to substitute the scroll for a seal. 1 Munf. 487; 1 Minor (Ala.), 187. But in Alabama, by act of 2d February, 1839, the scroll is now unnecessary, provided the deed or contract *imports on its face* to be made under seal. It is understood that the scroll is, by statute, in New Jersey, Delaware, Virginia, Ohio, Kentucky, Michigan, Indiana, Illinois, Missouri, and Tennessee, made to supply the seal. Act of Michigan, April 12, 1827. Not so in Mississippi; deeds and conveyances of land are required to be by writing, signed, sealed, and delivered. Revised Code of Mississippi, 1824. The relaxation of the rule of the common law, in the substitution of a scroll for a seal, has not been carried further, in New Jersey, than to the case of instruments for the payment of money. In other cases, the seal retains its original character. By the territorial law of Ohio, in 1800, the scroll was extended to all written obligations, excepting deeds, bonds, and wills. Overseers of the Poor of Hopewell *v.* Overseers of the Poor of Amwell, 1 Halst. 169; Perrine *v.* Cheeseman, 6 id. 174; Revised Laws of New Jersey, 305, sec. 1; Chase's Statutes of Ohio, i. 287; Vanblaricum *v.* Yeo, 2 Blackf. (Ind.) 322; Statute Laws of Indiana, 1838, p. 452.

conveyed by writing, signed by the grantor only, or by writing signed, sealed, and delivered by the grantor, may be a proper subject for municipal regulation. But to abolish the use of seals by the substitute of a flourish of the pen, and yet continue to call the instrument which has such a substitute, a deed or writing, sealed and delivered within the purview of the common or the statute law of the land, seems to be a misnomer, and is of much more questionable import. In New York, the seal retains its original definition and character. (*b*)

*454 *(2.) *It must be delivered.* — Delivery is another incident essential to the due execution of a deed, for it takes effect only from the delivery. The deed may be delivered to the party himself to whom it is made, or to any other person authorized by him to receive it. It may be delivered to a stranger as an *escrow*, which means a conditional delivery to the stranger, to be kept by him until certain conditions be performed, and then to be delivered over to the grantee. Until the condition be performed, and the deed delivered over, the estate does not pass, but remains in the grantor. (*a*) Generally, an escrow takes effect from the second delivery, and is to be considered as the deed of the party

(*b*) Warren *v.* Lynch, 5 Johns. 239; Farmers' and Manufacturers' Bank *v.* Haight, 3 Hill (N. Y.), 493. But in the case of *courts and public officers*, an impression on paper, without the use of wafer or wax, is valid. New York Revised Statutes, ii. 404, sec. 61. In all other cases such an impression is a nullity as a seal. Mr. Griffith, the author of the "Annual Law Register of the United States," and to whom the public have been so much indebted for that very useful publication, has in a note to vol. iv. 1201, urged the expediency of substituting the scroll for the seal, by sensible and forcible observations, and which might well influence courts of justice, if they were at liberty to substitute their sense of expediency for a rule of the common law not changed by statute. One seal will serve for two or more grantors. Perkins, sec. 134; Mackay *v.* Bloodgood, 9 Johns. 285; Bank of Cumberland *v.* Bugbee, 19 Me. 27. So, it is sufficient if the grantor acknowledge his hand and seal before the subscribing witness, and the latter need not see him actually sign his name. Powell *v.* Blackett, 1 Esp. 97; Parke *v.* Mears, 2 Bos. & P. 217.

(*a*) Jackson *v.* Catlin, 2 Johns. 248; Perkins, sec. 137, 138, 142; Johnson *v.* Baker, 4 B. & Ald. 440; Carr *v.* Hoxie, 5 Mason, 60; [Smith *v.* South Royalton Bank, 32 Vt. 341; Graves *v.* Tucker, 10 Smedes & M. 9; Lawton *v.* Sager, 11 Barb. 349; Hagood *v.* Harley, 8 Rich. (S. C.) 325; Wight *v.* Shelby R. R., 16 B. Mon. 4. See Brown *v.* Brown, 1 Woodb. & M. 325;] [Watkins *v.* Nash, 20 L. R. Eq. 262; Andrews *v.* Farnham, 20 Minn. 246; Harkreader *v.* Clayton, 56 Miss. 383. The first delivery must be to a stranger. Ordinary of New Jersey *v.* Thatcher, 41 N. J. L. 403. The second delivery may be valid by relation back, though not made until after the grantor's death. Crooks *v.* Crooks, 34 Ohio St. 610; Latham *v.* Udell, 38 Mich. 238; Holt's App., 98 Penn. St. 257.]

from that time; but this general rule does not apply when justice requires a resort to fiction. The relation back to the first delivery, so as to give the deed effect from that time, is allowed in cases of necessity, to avoid injury to the operation of the deed from events happening between the first and second delivery. Thus, if the grantor was a *feme sole* when she executed the deed, and she married before it ceased to be an escrow by the second delivery, the relation back to the time when she was sole is necessary to render the deed valid. But if the fiction be not required for any such purpose, it is not admitted, and the deed operates according to the truth of the case, from the second delivery. It is a general principle of law, that in all cases where it becomes necessary, for the purposes of justice, that the true time when any legal proceeding took place should be ascertained, the fiction of law introduced for the sake of justice is not to prevail against the fact. (*b*) It has further been held, that if the grantor delivered a deed *as his deed*, to a third *person, to be *455 delivered over to the grantee on some future event, as on the arrival of the grantee at York, it is a valid deed from the beginning, and the third person is but a trustee of it for the grantee. (*a*) The delivery to a third person, for and on behalf of the grantee, may amount to a valid delivery. Thus, where A. delivered a deed to B., to deliver over to C., as his deed, and B. did so, and though C. refuse to accept of it, the deed was held to enure from the first delivery; because the deed was not delivered as an escrow, or upon a condition to be performed. (*b*)

(*b*) Perkins, sec. 138; Butler & Baker's Case, 3 Co. 35, b, 36, a; Frost *v.* Beekman, 1 Johns. Ch. 288; Littleton *v.* Cross, 3 B. & C. 317; [Jordan *v.* Pollock, 14 Ga. 145.]

(*a*) Perkins, 143, 145; Holt, C. J., 6 Mod. 217; Parsons, C. J., 2 Mass. 452. The distinction on this point is quite subtle, and almost too evanescent to be relied on.

(*b*) Taw *v.* Bury, 2 Dyer, 167, b; Alford & Lea's Case, 2 Leon. 110. It appears difficult to sustain the law of these cases, unless on the ground of the subsequent possession of the deed by the grantee, and its relation back. Lord Coke, in Butler & Baker's Case (3 Co. 26, b), explains this point, by admitting that C. may refuse the deed, *in pais*, when offered, and then the obligation will lose its force. In both these cases it is assumed that the third person, who first received the deed, was a stranger to C., and not his agent; and yet, in Doe *v.* Knight (5 B. & C. 671; s. c. 8 Dow. & Ryl. 348), Mr. J. Bayley, who delivered the opinion of the K. B., lays down the law according to the authority of those cases, which he cites with approbation. See Church *v.* Gilman, 17 Wend. 656, to the same point. It seems to be the rule at law, that a deed so executed and delivered will bind the grantor, if the grantee can, at any time, and in any way, get possession of it; yet a court of equity will disregard a deed

So, if a deed be duly delivered in the first instance, it will operate though the grantee suffer it to remain in the custody of the grantor. If both parties be present, and the usual formalities of execution take place, and the contract is to all appearance *456 consummated without any conditions or qualifications * annexed, it is a complete and valid deed, notwithstanding it be left in the custody of the grantor. (*a*)

as an imperfect instrument, if it be voluntary, and never parted with, and executed for a special purpose never acted on, and without the knowledge of the grantee; and it will not lend any assistance to the grantee. Cecil *v.* Butcher, 1 Jac. & Walk. 573. The deed may operate by a presumed assent, until a dissent or disclaimer appears, and then it becomes inoperative; for no person can be made a grantee against his will and without his agreement. Thompson *v.* Leach, 2 Vent. 198; 3 Preston on Abstracts, 104. If an estate of freehold be conveyed to B. without his knowledge, it is said to vest in him until his disclaimer by record. S. Touch. 285; Thompson *v.* Leach, *ubi supra*. It was finally established, in the House of Lords, in that case, that a common-law conveyance, put into the hands of an agent for the grantee, takes effect the instant it is parted with, and vests the title, though the grantee be ignorant of the transaction; and the rejection of the grant has the effect of revesting the title in the grantor by a species of remitter. Ch. J. Gibson, in Read *v.* Robinson, 6 Watts & S. 331, says that the argument of Justice Ventris in the case was masterly, and he said that the case of Thompson *v.* Leach determined the principle that intermediate interests, notwithstanding the remitter, may fasten on the title, which it is not in the power of the grantee's disagreement to unclasp. Though, in Townson *v.* Tickell, 3 B. & Ald. 31, a disclaimer by deed was held to be sufficient. See *infra*, 534. Merely executing a deed and delivering it to the register for registry, is no delivery, unless the grantee so direct it, or subsequently assent to it. Maynard *v.* Maynard, 10 Mass. 456; Samson *v.* Thornton, 3 Met. 275; [Cooper *v.* Jackson, 4 Wis. 537; Boody *v.* Davis, 20 N. H. 140; Rathbun *v.* Rathbun, 6 Barb. 98.] *x*[1] But it seems to be a settled rule, that the possession by the obligee of a deed regularly executed, is *prima facie* evidence of its delivery. This is the language of the courts throughout the country. 4 Pick. 520; 1 Harr. & J. 323; 14 Peters, 327; 3 Met. 109.

(*a*) Souverbye *v.* Arden, 1 Johns. Ch. 240; Scrugham *v.* Wood, 15 Wend. 545; Jones *v.* Jones, 6 Conn. 111; Crawford *v.* Bertholf, Saxton (N. J.), Ch. 458, 467; Doe *v.* Knight, 5 B. & C. 671; s. c. 8 Dow. & Ryl. 348; [Evans *v.* Grey, 9 L. R. Ir. 539.] In these cases the authorities are collected and reviewed; and the last of these cases considered the doctrine in the text as requiring an extended discussion. It goes over the same ground, and through the same authorities, in 1826, which had been done at New York, in 1814. In this last case it was held that if a deed be signed, sealed, and declared by the grantor, in the presence of the attesting witnesses, to be delivered as his deed, it is an effectual delivery, if there be nothing to qualify the delivery, notwithstanding the grantee was not present, nor any person on his behalf, and the deed

x[1] Having a deed recorded is presumptive evidence of delivery. Union Mut. Ins. Co. *v.* Campbell, 95 Ill. 267; Moore *v.* Giles, 49 Conn. 570; Metcalfe *v.* Brandon, 60 Miss. 685. Acceptance by the grantee is also necessary to the validity of a deed; but when a conveyance is for his benefit such acceptance will be presumed. Moore *v.* Giles, Metcalfe *v.* Brandon, *supra*.

(3.) *It must be recorded.* — By the statute law of every state in the Union, all deeds and conveyances of land, except certain chattel interests, are required to be recorded, upon previous acknowledgment or proof. (*b*) If not recorded, they are good, and pass the title as against the grantor and his heirs and devisees, and they are void only as to subsequent *bona fide* purchasers and mortgagees, whose deeds shall be first recorded. (*c*) The Eng-

remained under the control of the grantor. And more certainly would this be the case if the delivery were to a third person, for the use of the grantee, though such third person were not the agent of the grantee, and the grantee should not receive the deed, nor know of its existence until after the death of the grantor. [McLure *v.* Colclough, 17 Ala. 89; Hoffman *v.* Mackall, 5 Ohio St. 124; Jacobs *v.* Alexander, 19 Barb. 243; Stephens *v.* Huss, 54 Penn. St. 20; Rivard *v.* Walker, 89 Ill. 413. But compare Hawkes *v.* Pike, 105 Mass. 560; Parker *v.* Parker, 1 Gray, 409;] [Ruckman *v.* Ruckman, 32 N. J. Eq. 259; Jones *v.* Swayze, 42 N. J. L. 279.]

(*b*) By the New York Revised Statutes, i. 756, sec. 1, and 762, sec. 36, all conveyances of lands, tenements, and hereditaments, and chattels real, except leases for a term not exceeding three years, must be recorded. The same law in Massachusetts, but the exception reaches to leases not exceeding seven years. Mass. Revised Statutes of 1836. The usage of recording deeds in the records of the towns where the lands lay, prevailed from the early settlement of New England. By the laws of Massachusetts, in 1641, all deeds of conveyance, whether absolute or conditional, were required to be recorded, that "neither creditors might be defrauded, nor courts troubled with vexatious suits and endless contentions." Holmes's Annals, i. 261. In the Plymouth colony, conveyances, including mortgages and leases, were required to be recorded as early as 1636; in Connecticut, in 1639; in New Jersey, in 1676, 1683, and 1698; in North Carolina, in 1715; and in Virginia, from the earliest period. Baylies's Historical Memoir, i. 239. See also id. ii. 112; 1 Trumbull's History of Connecticut, 111; Leaming and Spicer's New Jersey Collections, 153, 368, 382, 541; 5 Yerg. 124; 1 Henning's Stat. 248. In addition to other conveyances in Virginia, all deeds of settlement upon marriage, wherein lands, money, or personal thing shall be settled, are void as to all creditors and subsequent purchasers, unless recorded. Revised Code of Virginia, i. 219. In Pennsylvania, the recording acts are applicable equally to legal and equitable titles; and by the act of 1715, deeds recorded have the force and effect of giving seisin and possession. A *bona fide* purchaser without notice, and with his deed duly recorded, is preferred to a previous purchaser under a sheriff's deed duly acknowledged, *but the acknowledgment never registered.* Bellas *v.* M'Carty, 10 Watts, 13. In Tennessee, all bonds or agreements in writing, for the conveyance of real or personal property, are required to be registered. Act of 1831, c. 90

(*c*) Vance *v.* M'Nairy, 3 Yerg. 171; Shields *v.* Mitchell, 10 id. 1; Morris *v.* Ford, 2 Dev. Eq. 418; [Stewart *v.* Mathews, 19 Fla. 752; Morse *v.* Wright, 60 Cal. 260. It seems that a holder by quitclaim deed may be a *bona fide* purchaser for this purpose, though not to defeat equities which do not require to be recorded. Fox *v.* Hall, 74 Mo. 315; Raymond *v.* Morrison, 59 Iowa, 371. See also note to Fox *v.* Hall, *supra;* 25 Alb. L. J. 128.] When the statute speaks of an unregistered deed as being void as against a *subsequent purchaser for valuable consideration*, they mean a *bona fide* purchaser for valuable consideration. Jackson *v.* Burgott, 10 Johns. 462, 463; Van Rensselaer *v.* Clark, 17 Wend. 25. But in North Carolina, no conveyance of land

lish law prevails generally in this country, that notice of the deed by the subsequent purchaser, previous to his purchase, will countervail the effect of the registry, and destroy his pretension *457 as a *bona fide* purchaser. (*d*) In several * of the states, as New Hampshire, Vermont, Connecticut, Georgia, Ohio, Michigan, Illinois, and Indiana, two witnesses are required to the execution of the deed; and probably the deed would not be deemed sufficiently authenticated for recording, without the signature of the two witnesses. In Delaware, Tennessee, and South Carolina, two witnesses are necessary when the deed is to be *proved* by witnesses. (*a*) There is, likewise, a fixed period of time allowed, in many of the states, within which to have the deed recorded, as, for instance, one year in Delaware, Tennessee, Georgia, and Indiana; eight months in Virginia; six months in

(other than mortgages) is good and available in law, unless proved or acknowledged, and registered in the county where the land lies, within two years after the date of the deed. Revised Statutes of North Carolina, 1837, i. 224.

(*d*) Hurst *v.* Hurst, 2 Wash. 74; State of Connecticut *v.* Bradish, 14 Mass. 296; Griffith's Register; 4 Greenl. 20; Tart *v.* Crawford, 1 M'Cord, 265; Cabiness *v.* Mahon, 2 id. 273; Story, J., in West *v.* Randall, 2 Mason, 206; Colby *v.* Kenniston, 4 N. H. 262; Montgomery *v.* Dorion, 6 id. 254. See also *supra*, 171; Tuttle *v.* Jackson, 6 Wend. 213; Hewes *v.* Wiswell, 8 Greenl. 94; Ricks *v.* Doe, 2 Blackf. (Ind.) 346; Morton *v.* Robards, 4 Dana, 258; Aikin's Alabama Digest, 2d ed. 91; [Ellis *v.* Horrman, 20 N. Y. 466.] By the New York Revised Statutes, i. 756, sec. 1, conveyances not recorded are void only as against a subsequent purchaser in good faith, and for a valuable consideration, of the same estate, or any portion thereof, whose conveyance shall be first duly recorded. This was adopting the doctrine in Jackson *v.* Burgott, 10 Johns. 457; Jackson *v.* Phillips, 9 Cow. 94; Same *v.* Post, ib. 120. In Maine, also, a deed not acknowledged or recorded is good against the grantor and his heirs. Lawry *v.* Williams, 13 Me. 281. In Maryland, a deed must be duly acknowledged and recorded, in order to be valid, even as between the *grantor and grantee*; though, if the omission to record it be unintentional, the deed may be restored by a record, under the sanction of a decree in chancery, except as against *bona fide* purchasers and creditors. The registry acts in that state are as early as 1715 and 1766. In Rhode Island, a deed not acknowledged and recorded is void, except as between the parties and their heirs. In Kentucky, a deed unrecorded is good as against a subsequent purchaser with notice, but not as to creditors, unless they had notice of it when their debts respectively were contracted. Graham *v.* Samuel, 1 Dana, 166. In Indiana, a voluntary deed, though not recorded, is good against a subsequent *voluntary* grantee. Way *v.* Lyon, 3 Blackf. 76. The registry laws only act upon the legal title, and leave equities untouched. The omission to record the deed does not impair the grantee's equity. Lord Hardwicke, in Le Neve *v.* Le Neve, 3 Atk. 646; Morton *v.* Robards, 4 Dana, 258.

(*a*) In South Carolina, in Allston *v.* Thompson, and Craig *v.* Pinson, 1 Cheves, Law, 271, 272, it was decided, after quite elaborate discussions, that a deed, without any subscribing witness, or with only one subscribing witness, was not a valid deed to convey land.

Pennsylvania, Maryland, North and South Carolina, Alabama, Illinois, and Ohio; three months in Missouri and Mississippi; and fifteen days in New Jersey. (*b*) In the other states, where there is no prescribed time, the deed must be recorded in a reasonable time; and when a deed is recorded within the reasonable or the limited time, it has relation back to the time of execution, and takes effect according to the priority of the time of execution, and not according to the priority of the registry. (*c*)

The mode of proof, and the coercion of the attendance of witnesses for that purpose, and the officers vested with authority to take and certify the proof, and the effect of such proof, all depend upon the local laws of the several * states. In *458 all the states (except in Louisiana, where the law is peculiar on this subject) *femes covert* are competent to convey real estate, with the consent of their husbands, who are to be parties to the conveyance, and the wife is to be separately and privately examined by the officer, respecting the free execution of the deed. This private examination seems to be required in all the states, with the exception of Massachusetts, Connecticut, and perhaps one or two others. The New York Revised Statutes (*a*) contain minute and specific directions on the subject of the proof and recording of conveyances of real estate. They make no provision as to the number of witnesses, or as to the time of recording; and, consequently, the common-law rule applies (and the statute expressly assumes it), that one witness is sufficient, or the acknowledgment before the officer without any witness. (*b*)

(*b*) The fifteen days in New Jersey, under the statute of June 5, 1820, was an amendment of former statutes, which allowed the time of six months to have conveyances recorded. Elmer's Dig. 86. As between the parties, a deed is valid and binding without being recorded. Den *v.* Richman, 1 Green (N. J.), 43. A judgment creditor is not a purchaser within the purview of the act. Ib. 55.

(*c*) Brown *v.* Balridge, 1 Meigs (Tenn.), 1. There are contradictory decisions on the question, whether a certified copy of a registered deed can be given in evidence, when the party is presumed to be in possession of the original, and does not produce it. 1 M'Lean, 285, 286. The Revised Statutes of Michigan of 1840 declare the copy to be *prima facie* evidence of the contents of the deed. The statute of Alabama (Aikin's Dig. 2d ed. 88) says that a deed, duly proved and certified, shall be received in evidence "as if the same were produced and proved."

(*a*) Vol. i. 756–763.

(*b*) In Alabama, a deed of lands is valid without any subscribing witness or record, if it can otherwise be satisfactorily proved. Robertson *v.* Kennedy, 1 Stewart, 245. It was declared, in the case of Norman *v.* Wells, 17 Wend. 143, that it is not sufficient

The deed must be recorded with due diligence; and deeds are to be recorded in the order, and as of the time, when delivered to the clerk for that purpose; and they have effect according to the priority of the registry. (*c*) The statute leaves the question of notice to supply the place of registry, as the rule existed before in our own and in the English law; (*d*) and it applies to conveyances of chattels real, as well as of freehold estates, *459 *except leases for a term not exceeding three years. In Maryland, as in New York, attesting witnesses are not requisite to the validity of a deed. (*a*) [1]

for a subscribing witness to a deed to prove it by stating that the party *acknowledged* the execution of it, but he must state that he *saw* the execution of the deed.

(*c*) The statute of New York gives priority to the conveyance which "shall be first duly recorded;" but it adds, that it shall be "considered as recorded from the time of the delivery to the clerk for that purpose." A provision to the same effect is in the Massachusetts Revised Statutes for 1836, though no doubt the previously existing rule of law was the same. This prevents the question which Mr. Bell says has arisen in Scotland, between a sasine first transcribed, though last presented, and a sasine, which, by the minute-book, is proved to have been first presented, though last transcribed. He admits, however, the better construction of the statute to be, that the minute-book, of the time of the presentation of the instrument, was intended to be the regulator of the order of preference by priority. 1 Bell's Comm. 679. In Moore *v.* Collins, 3 Dev. (N. C.) 126, a deed delivered to the clerk for registry within the time limited by the statute, but not registered until after the time, by reason of the death of the clerk, was held to be available as if registered when delivered. But subsequently, on a reargument in the same case, the former decision was overruled, and it was held that a deed so registered after the six months was void, as to the creditors of the bargainor, under the act of 1820. 4 Dev. 384.

(*d*) Jackson *v.* Burgott, 10 Johns. 457; and *vide supra*, 456.

(*a*) Wickes *v.* Caulk, 5 Harr. & J. 36.

[1] *Registry of Deeds.* — No one is bound to take notice of the record of an instrument which is improperly recorded; as where it is not one to which the registry acts apply, Racouillat *v.* Sansevain, 32 Cal. 376, 389; [Spielman *v.* Kliest, 36 N. J. Eq. 199; and on the other hand the registry acts have no effect in postponing equities not required to be recorded, Kettlewell *v.* Watson, 21 Ch. D. 685; *In re* Burke's Estate, 9 L. R. Ir. 24;] see St. John *v.* Conger, 40 Ill. 535; Oatman *v.* Fowler, 43 Vt. 462; or where the prerequisites of the law have not been complied with, as, for instance, where the instrument shows on its face that the acknowledgment was taken by a party in interest, Stevens *v.* Hampton, 46 Mo. 404, citing 20 Iowa, 231, and explaining 6 N. Y. 422; 14 Wis. 674; compare Groesbeck *v.* Seeley, 13 Mich. 329; or where it is not acknowledged, &c., Bishop *v.* Schneider, 46 Mo. 472, 480; Brown *v.* Lunt, 37 Me. 423; Choteau *v.* Jones, 11 Ill. 300, 321; Johnston *v.* Slater, 11 Gratt. 321, 325; Jacoway *v.* Gault, 20 Ark. 190; or where the deed is recorded in a wrong county, Harper *v.* Tapley, 35 Miss. 506; Stewart *v.* McSweeney, 14 Wis. 468. [But it has been held *contra* when the record was in

In England, the practice of recording deeds is of local and very limited application. It applies to the Bedford level tract,

the wrong book. Clader *v.* Thomas, 89 Penn. St. 343; Glading *v.* Frick, 88 Penn. St. 460.]

There are decisions that recording a deed does not charge a subsequent purchaser with notice of its contents further than they appear on the record. If, for instance, the signature is omitted, or a less sum is mentioned in a mortgage than the amount actually secured, the purchaser is only chargeable with notice of the instrument as recorded. Terrell *v.* Andrew County, 44 Mo. 309; Shepherd *v.* Burkhalter, 13 Ga. 443. But the law is otherwise in other states. Mims *v.* Mims, 35 Ala. 23; Nattinger *v.* Ware, 41 Ill. 245, 248. See Shove *v.* Larsen, 22 Wis. 142; Jordan *v.* Farnsworth, 15 Gray, 517. It has been held perhaps with more reason that when a deed as recorded has an obvious absurdity on its face, it is sufficient to put a person chargeable with notice of it on inquiry. Merrick *v.* Wallace, 19 Ill. 486.

A duly recorded deed is not notice to strangers to the grantor's title, but only to those claiming under him. Holley *v.* Hawley, 39 Vt. 525, 532; Maul *v.* Rider, 59 Penn. St. 167; Ely *v.* Wilcox, 20 Wis. 523, 530; [Kerfoot *v.* Cronin, 105 Ill. 609.] Thus a record of a conveyance by a mortgagee is not notice to his mortgagor. George *v.* Wood, 9 Allen, 80. So a purchaser is not bound to take notice of the record of a deed executed by a prior grantee whose own deed has not been recorded. Losey *v.* Simpson, 3 Stockt. 246; Ely *v.* Wilcox, *supra*. As to whether the record of a second mortgage is notice to the first mortgagee, see 176, n. 1, *ad fin.*; and as to the case of two mortgages of the same date, see Lane *v.* Davis, 14 Allen, 225, 229. Courts have differed as to whether a purchaser was chargeable with notice of a deed executed before the deed to his grantor, but recorded subsequently to it, so as to be put on inquiry whether his grantor was a *bona fide* purchaser. Ely *v.* Wilcox, *supra*. *x*[1]

One of the most difficult questions which has arisen under the recording acts is whether, if a man conveys land and dies, and before the conveyance is recorded his heirs convey to an innocent purchaser by a deed which is recorded, the former or the latter grantee will have the better title. The former has been preferred, with more or less hesitation or

x[1] The general principle is that a purchaser is bound to take notice of those deeds which are properly recorded as required by law, and which are naturally disclosed to him in tracing his chain of title. The question as to how far the purchaser is entitled to rely upon the record as correct is entirely distinct. It might well have been held that a purchaser is not entitled to disregard, without further inquiry, a deed of which he has notice by the record, because it appears upon the record to have been defectively executed. (But see *supra*, n. 1, as to acknowledgment.) He clearly is entitled to regard the record as correct, except as to matters as to which the record itself puts him upon inquiry. The purchaser takes the risk that the deeds are genuine. Reck *v.* Clapp, 98 Penn. St. 581. Under the county registration acts in England it is held that the purchaser is not bound to search the record, though he will be held to have notice of what the record contains if he does search. Leake's Dig. of Land Laws, 504, 505. Notice before he takes his deed will prevent the subsequent purchaser from being protected; but notice after he takes his deed, though before it is registered, will not. Greaves *v.* Tofield, 14 Ch. D. 563; Elsey *v.* Lutyens, 8 Hare, 159.

to the ridings of Yorkshire, and to the county of Middlesex. During the period of the English Commonwealth, there was an effort to establish county registers for recording deeds throughout England. The ancient policy was in favor of the entire publicity of transfers of land, by the fine of record, the livery under the feoffment, the enrolment of a bargain and sale, and the attornment under the grant. But the ingenuity of conveyancers, and the general and natural disposition to withdraw settlements and the domestic arrangements from the idle curiosity of the public, have defeated that policy. In Scotland, the old feudal forms, and the sasine, or symbolical tradition of the land, are retained. The "earth and stone," or "clap and happer," or "net and coble," the emblematical symbols of the field, or mill, or fishery, are delivered, with due solemnity, to the proxy of the purchaser. The instrument of sasine or infeftment, reciting the transaction, is recorded; and that constitutes the title. (*b*)

*460 ***4. Of the Component Parts of a Deed.** — A deed consists of the names of the parties, the consideration for which the land was sold, the description of the subject granted, the quantity of interests conveyed, and, lastly, the conditions, reservations, and covenants, if any there be. The general rule

(*b*) Erskine's Inst. 208, sec. 36; Bell's Comm. i. 21, 674–680. Freehold, but not leasehold property is recorded, in Scotland, in a public register; and the notarial instrument must be registered within sixty days, to render it effectual against purchasers and creditors. The English real property commissioners circulated in 1829 a great number of questions on the expediency, extent, and value of a general register, in England, of conveyances. In the summer of 1830, in their second report to the king, the commissioners recommended the establishment of a general registry of deeds and instruments relating to land, excepting leases not exceeding twenty years, at rack-rent. They considered that such a provision would contribute greatly to the security of title, and the cheapness and facility of the transfer of lands; and it was warranted by the practice of several parts of the continent of Europe, as well as of Scotland, Ireland, and the United States. A majority of the commissioners were also for abolishing the doctrine of notice, in respect to the registry of conveyance, and were for declaring, that actual notice of an unregistered deed should not affect the priority of a registered deed for a valuable consideration, either at law or in equity!

dissent, Hill *v.* Meeker, 24 Conn. 211; Harlan *v.* Seaton, 18 B. Mon. 312, 325; Rodgers *v.* Burchard, 34 Tex. 441. But the weight of later authority is in favor of the purchaser from the heirs. Kennedy *v.* Northup, 15 Ill. 148; Bowen *v.* Prout, 52 Ill. 354, 357; Youngblood *v.* Vastine, 46 Mo. 239; Earle *v.* Fiske, 103 Mass. 491.

As to possession inconsistent with the record title, see 179, n. 1, (*c*).

is, that all parties to a deed are bound by the *recitals* therein, and they operate as an estoppel, working on the interests in the land, if it be a deed of conveyance, and binding both parties and privies in blood, in estate and in law. (*a*) But one claiming land under a deed to which he was not a party, does not adopt the recitals of facts in an anterior deed which goes to make up his title. (*b*)

(1.) *Of the Form of the Deed.* — "The Saxons, in their deeds," said Sir Henry Spelman, (*c*) "observed no set form, but used honest and perspicuous words to express the thing intended with all brevity, yet not wanting the essential parts of a deed, as the names of the donor and donee, the consideration, the certainty of the thing given, the limitation of the estate, the reservation, and the names of the witnesses." This brevity and perspicuity, so much commended by Spelman, has become quite lost, or but dimly perceived, in the cumbersome forms and precedents of the English system of conveyancing. The Saxons commenced their deeds according to the form of a modern bond, or of an indenture in the first person, as given by Littleton, (*d*) by a general appeal to *all men* to whom the contract might be presented, for its truth and authenticity. (*e*) Deeds were afterwards executed by both parties; and though that practice is now generally disused, the present English forms of conveyance, and the forms in New York, and in those parts of the United States which adhere the most to the English practice, still retain the language of a mutual contract, executed by both parties; and each of them is supposed, by the fiction implied in the more formal parts of the *indenture*, to retain a copy.

*But the essential parts of a conveyance of land in fee *461
are very brief, and require but few words. If a deed of feoffment, according to Lord Coke, (*a*) be without *premises*, *habendum*, *tenendum*, *reddendum*, clause of warranty, &c., it is

(*a*) Greenleaf's Treatise on the Law of Evidence, i. sec. 23, where the whole subject is discussed.

(*b*) *Supra*, 261, n.; Doe *v.* Shelton, 3 Ad. & El. 265, 283. Nor will chancery admit the operation of the recital originating in mistake and untrue in fact. Stoughton *v.* Lynch, 2 Johns. Ch. 222; Rich *v.* Atwater, 16 Conn. 409.

(*c*) Spelman's Works, by Bishop Gibson, 234.

(*d*) Litt. sec. 372.

(*e*) Spelman, 237.

(*a*) Co. Litt. 7, a.

still a good deed, if it gives lands to another, and to his heirs, without saying more, provided it be sealed and delivered, and be accompanied with livery. (*b*)

In the United States, generally, the form of a conveyance is very simple. It is usually by bargain and sale, and possession passes *ex vi facti*, under the authority of the local statute, without the necessity of livery of seisin, or reference to the statute of uses. In Delaware, Virginia, and Kentucky, deeds operate under the statute of uses, as they did in New York prior to the first of January, 1830, when the revised statutes went into operation. In Massachusetts, under the provincial act of 9 Wm. III., a simple deed of conveyance, without any particular form, and without livery of seisin, was made effectual, provided the intention was clearly declared. (*c*)

I apprehend that a deed would be perfectly competent, in any part of the United States, to convey the fee, if it was to be to the following effect: "I, A. B., in consideration of one dollar to me paid by C. D., *do bargain and sell* (or, in New York, grant) to C. D., *and his heirs* (in New York, Virginia, &c., the words *and his heirs* may be omitted), the lot of land (describe it), witness my hand and seal," &c. (*d*) But persons usually attach so much importance to the solemnity of forms, which bespeak care and reflection, and they feel such deep solicitude in matters that concern their valuable interests, to make "assurance double sure," that generally, in important cases, the purchaser would rather be at the expense of exchanging a paper of such insignifi-
*462 cance * of appearance, for a conveyance surrounded by the usual outworks, and securing respect, and checking attacks, by the formality of its manner, the prolixity of its provisions, and the usual redundancy of its language. The English practice, and the New York practice, down to the present time, have been in conformity with the opinion of Lord Coke, that it is not advisable

(*b*) The statute of 8 and 9 Vict. c. 119, made to *facilitate the conveyance of real property*, gives the shortest form of conveyance, along with one of the technical and redundant forms, and it declares that the short form shall be as effectual as the other. The act of c. 124 of the same session gives in like manner a short form of a lease.

(*c*) Story, J., in Durant *v.* Ritchie, 4 Mason, 57. But deeds operating by way of raising a use, under the statute of uses, are also a valid mode of conveyance in the New England States. French *v.* French, 3 N. H. 239; Parsons, C. J., 6 Mass. 82.

(*d*) A similar deed held valid. 2 Dana, 23.

to depart from the formal and orderly parts of a deed, which have been well considered and settled. (*a*)

(2.) *Of the Parties.* — The parties must be competent to contract, and truly and sufficiently described. A grant to the people of a county has been held, in New York, to be void, because the statute enabling supervisors of counties to take conveyances of land applied only to conveyances made to them by their official name. (*b*) So, a grant to the inhabitants of a town not incorporated is void. (*c*) But conveyances are good, in many cases, when made to a grantee by a certain designation, without the mention of either the christian or surname, as to the wife of I. S., or to his eldest son, for *id est certum, quod potest reddi certum.* (*d*)

(*a*) In the North American Review for October, 1840, p. 313, there is given a copy of an Egyptian deed, in the Greek language, and under seal, with a certificate of registry in a public office annexed, and executed in the year 106 B. C., or more than a century before the Christian era. It was written on papyrus, and found deposited, in good preservation, in a tomb in Upper Egypt, by the side of a mummy (probably that of Nechutes, the purchaser), and contains the sale of a piece of land in the city of Thebes. It has the brevity and simplicity of the Saxon deeds, so much commended by Spelman. It gives the names and titles of the sovereigns in whose time the instrument was executed; viz., Cleopatra, and Ptolemy, her son, surnamed Alexander. It describes with precision the ages, stature, and complexion, by way of identity, of each of the contracting parties, as, for instance, Pamonthes, one of the male grantors, "aged about 45, of middle stature, dark complexion, handsome person, bald, round-faced, and straight-nosed;" and Semmuthis, one of the female grantors, "aged about 22 years, of middle size, yellow complexion, round-faced, flat-nosed, and of quiet demeanor." It then goes on to state that the four grantors (two brothers and two sisters) have SOLD out of the piece of land belonging to them in the southern part of the Memnoneia, eight thousand cubits of vacant ground, one fourth part of the whole. The bounds "are on the south by the royal street, on the north and east by the land of Pamonthes, and Bokon of Hermis, his brother, and the common land of the city; on the west by the house of Tephis, the son of Chalomn; a canal running through the middle, leading from the river. These are the abutters on all sides. Nechutes the less, the son of Asos, aged about 40 years, of middle stature, yellow complexion, cheerful countenance, long face, and straight nose, with a scar upon the middle of his forehead, has BOUGHT the same for one talent of brass money. The vendors being the acting salesmen and warrantors of the sale. Nechutes, the purchaser, has accepted the same."

There seems to be no doubt of the authenticity and age of the instrument in the minds of the distinguished German, French, and English scholars, and profound antiquaries, who have studied the subject, or by the learned author of the article in the North American Review, and it is one of the most curious, instructive, and interesting legal documents that has been rescued from the ruins of remote antiquity.

(*b*) Jackson *v.* Cory, 8 Johns. 385.

(*c*) Hornbeck *v.* Westbrook, 9 Johns. 73.

(*d*) Co. Litt. 3, a.

(3.) *Of the Consideration. — Fraudulent Conveyances.* — A consideration is generally held to be essential to a good and absolute deed; though a gift or voluntary conveyance will be effectual as between the parties, and is only liable to be questioned in certain cases, when the rights of creditors and subsequent purchasers are concerned.

The English statutes of 13 Eliz. c. 5, and 27 Eliz. c. 4, against fraudulent gifts and conveyances, being made before the *463 settlement of this country, and being in affirmance * of the principles and rules of the common law, (*a*) may be considered as part of the common law which accompanied the emigration of our ancestors. They have been reënacted in many of the states in nearly the same terms. (*b*) The first of these statutes relates to creditors, and it has been already alluded to in a former volume. (*c*) The last statute relates only to purchasers of lands, and it is settled, in England, that a voluntary conveyance, though for a meritorious purpose, will be deemed to have been made with fraudulent views, and set aside in favor of a subsequent purchaser for a valuable consideration, even though he had notice of the prior deed. (*d*) But this is a severe construction of the statute; and it has been supposed to be more reasonable and just to sustain *bona fide* voluntary conveyances, as against purchasers with actual notice, and who are intentionally defeating the fair claims and expectations of a prior grantee. (*e*) The English doctrine was applied in the case of *Sterry* v. *Arden*, (*f*) to

(*a*) Lord Mansfield, Cowp. 434, and see *supra*, ii. 440.

(*b*) North Carolina Revised Statutes, i. 287. The statutes of Kentucky of 14th December, 1796, and February 15, 1838, relate to creditors, and apply equally to debts due and not due. The territorial act of Michigan, of April 12, 1827. Those English statutes are in force in Pennsylvania, except certain sections which are inapplicable; and the rule that a deed void in part by statute, is void *in toto*, does not apply to contracts and deeds fraudulent under those statutes by construction only. 1 Ashmead, 212. The general court of the old Plymouth Colony, in 1682, provided, by statute, against fraudulent conveyances, with remarkable precision and brevity, by enacting that "all deceitful or fraudulent alienations of lands or other estate shall be of no validity to defeat any man from any due debts, just claims, title, or possession." Plymouth Col. Laws, ed. 1836, by Brigham, p. 200.

(*c*) *Supra*, ii. 440, 442.

(*d*) Doe *v.* Manning, 9 East, 59, where all the cases are elaborately reviewed. [Doe d. Newman *v.* Rusham, 17 Q. B. 723; French *v.* French, 89 Eng. L. & Eq. 85;] [Dolphin *v.* Aylward, 4 L. R. H. L. 486. See Cracknall *v.* Janson, 11 Ch. D. 1.]

(*e*) Master of the Rolls, in Buckle *v.* Mitchell, 18 Ves. 110. See also ib. 88, 89; Hudnal *v.* Wilder, 4 McCord, 294.

(*f*) 1 Johns. Ch. 261.

the case of a voluntary conveyance as against a subsequent purchaser, with *implied notice only* of the prior deed; and it was there held that such a conveyance might be made binding by matter subsequent and intervening between the voluntary conveyance and the purchase. (*g*) It is a settled principle that a deed voluntary or even fraudulent in its creation, and voidable by a purchaser, may become good by matter *ex post facto*. Thus a voluntary deed may be made good by a subsequent marriage, and marriage is held to be a high consideration in law, and fixes the interest in the grantee. (*h*) In *Cathcart* v. *Robinson*, (*i*) the construction of the statute came into discussion before the Supreme Court of the United States; and it was held that the principle of the construction of the statute of 27 Eliz., which prevailed in England at the commencement of the American Revolution, went no further than to hold the subsequent sale to be presumptive, and not conclusive evidence of a fraudulent intent in making the prior voluntary conveyance; and the court declined to adopt and follow the subsequently established construction *at Westminster Hall. (*a*) The English *464 statutes have with us undergone some alteration in their language and operation. By the statute law of New York, it is declared, (*b*) that every conveyance of any estate or interest in lands, made with intent to defraud prior or subsequent purchasers for a valuable consideration, are void as against them, unless they had actual or legal notice of the fraud, at the time of the purchase; and even then the conveyance is void as against such purchaser, if the grantee in the voluntary conveyance, or the per-

(*g*) In North Carolina, before the act in that state of 1840, the English law, as declared in Doe *v.* Manning, was held to be the law in that state, and the English rule was the same in equity as against voluntary settlement, even though the title of the purchaser vested in articles, and he was a purchaser with notice. Clanton *v.* Burges, 2 Dev. Eq. 13; Freeman *v.* Eatman, 3 Ired. Eq. 81.

(*h*) Prodgers *v.* Langham, 1 Sid. 133; Kirk *v.* Clark, Prec. in Ch. 275; Lord Eldon, 9 Ves. 193; Sterry *v.* Arden, 1 Johns. Ch. 261; Huston *v.* Cantril, 11 Leigh, 136; [Smith *v.* Allen, 5 Allen, 454.]

(*i*) 5 Peters, 264.

(*a*) The better American doctrine seems now to be, that voluntary conveyances of land, *bona fide* made, and not originally fraudulent, are valid against subsequent purchasers. Jackson *v.* Town, 4 Cowen, 603, 604; Ricker *v.* Ham, 14 Mass. 139; Cathcart *v.* Robinson, 5 Peters, 280; [Atkinson *v.* Philips, 1 Md. Ch. 507; Beal *v.* Warren, 2 Gray, 447.]

(*b*) New York Revised Statutes, ii. 134.

son to be benefited by it, was privy to the fraud. So, every conveyance, with a power of revocation or alteration reserved to the grantor, is equally fraudulent and void, as against such purchasers. (*c*) It is even made a misdemeanor to be a party or privy to any conveyance or assignment of any interest in lands, goods, or things, in action, or of any rents or profits issuing therefrom, or to any charge on any such estate or interest, with intent to defraud prior or subsequent purchasers, or to delay, hinder, or defraud creditors. (*d*) But it is declared, that no conveyance or charge shall be deemed fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration. (*e*) It is now the settled American doctrine, that a *bona fide* purchaser for valuable consideration, is protected under the statutes of 13 and 27 Eliz., as adopted in this country, whether he purchases from a fraudulent grantor, or a fraudulent grantee; and that there is no difference in this respect between a deed to defraud subsequent creditors, and one to defraud subsequent purchasers. They are voidable only and not absolutely void. (*f*)

(*c*) If a vendee be guilty of actual fraud in procuring a title to land, no title passes to him, whether the sale be private or judicial. The sale is absolutely null and void to all intents and purposes. Sands *v.* Codwise, 4 Johns. 536, 598; Gilbert *v.* Hoffman, 2 Watts, 66; [Jackson *v.* Summerville, 18 Penn. St. 359.] The Connecticut statute of frauds is short and comprehensive, and declares void all fraudulent conveyances of lands or chattels, and all bonds, suits, judgments, or contracts, with intent to avoid any debt or duty, as against the party injured. Statutes of Connecticut, 1838, c. 300.

(*d*) New York Revised Statutes, ii. 690, sec. 3.

(*e*) Ib. ii. 137, sec. 4.

(*f*) Anderson *v.* Roberts, 18 Johns. 515; Bean *v.* Smith, 2 Mason, 252; Bridge *v.* Eggleston, 14 Mass. 245; Martin *v.* Cowles, 1 Dev. & Batt. 29; Somes *v.* Brewer, 2 Pick. 184; Thompson *v.* M'Kean, 1 Ash. 129; Violett *v.* Violett, 2 Dana, 324; Price *v.* Junkin, 4 Watts, 85; Blanchard *v.* Castille, 19 La. 362; Oriental Bank *v.* Harkins, 3 Met. 332. The *bona fide* purchase for a valuable consideration from a fraudulent grantee, operates, say the courts, to purge the fraudulent grant of the fraud. If the grantee, however, knows, when he takes his deed, that the object of the grantor is to defraud others, the deed is void, though he may give a full consideration. Edgell *v.* Lowell, 4 Vt. 405; Trotter *v.* Watson, 6 Humph. 509. By the English statute of 3 and 4 Wm. IV. c. 27, sec. 26, property is not recoverable on account of fraud from a *bona fide* purchaser for a valuable consideration who has not assisted in such fraud, and had no notice of it. But if a purchaser gives a full and fair price, and takes possession, yet if it be done for the purpose of defeating creditors, or their pending execution, it is an act fraudulent and void. Lord Mansfield, in Worseley *v.* De Mattos, 1 Burr. 474, 475; [Owen *v.* Arvis, 2 Dutch. 22. See Sanders *v.* Wagonseller, 19 Penn. St. 248.] In Jones *v.* Powles, 3 My. & Keen, 581, the Master of the Rolls held

The consideration of a deed must be good or valuable, and not partaking of anything immoral, illegal, or fraudulent. It is a universal rule, that it is unlawful to contract to do that which it is unlawful to do; and every deed and every contract are equally void, whether they be made in violation of a law which is *malum in se*, or only *malum prohibitum*. (*g*) A *good* consideration is founded upon natural love and affection between near relations by blood; (*h*) but a *valuable* one is founded on something deemed valuable in a pecuniary sense, * as money, goods, *465 services; and to these must be added, though depending on a different idea, marriage. There are some deeds, to the validity of which a consideration need not have been stated. It was not required at common law, in feoffments, fines, and leases, in consideration of the fealty and homage incident to every such conveyance. The law raised a consideration from the tenure itself, and the solemnity of the act of conveyance. The necessity of a consideration came from the courts of equity, where it was held requisite to raise a use; and when uses were introduced at law, the courts of law adopted the same idea, and held that a consideration was necessary to the validity of a deed of bargain and sale. It has been long the settled law, that a consideration, expressed or proved, was necessary to give effect to a modern conveyance to uses. (*a*) The consideration need not be expressed in the deed, but it must exist. The mention of the consideration in a deed was to prevent a resulting trust, but it is only *prima facie* evidence of the amount, and may be varied by parol proof. (*b*) It is not evidence against existing creditors, that a

that the rule that a purchaser for valuable consideration, without notice, was protected by the legal estate, extended to cases where the title was impeached by secret acts of vendor, or by false assertions of vendor, provided the purchased title was clothed with possession, and the falsehood could not be detected by reasonable diligence. The position that a *bona fide* purchaser from a fraudulent grantee acquired no title against the creditors of the fraudulent grantor, though supported by the cases of Preston *v.* Crofut, 1 Conn. 527, and Roberts *v.* Anderson, 3 Johns. Ch. 371, was gainsaid and overruled by the case of Anderson *v.* Roberts, 18 Johns. 515; Bean *v.* Smith, 2 Mason, 252; Oriental Bank *v.* Haskins, 3 Met. 332.

(*g*) Aubert *v.* Maze, 2 Bos. & P. 371; Ribbans *v.* Crickett, 1 id. 264; Watts *v.* Brooks, 8 Ves. 612; Bank of the United States *v.* Owens, 2 Peters, 527.

(*h*) The relation of grandfather and granddaughter is within the requisite relation. Stovall *v.* Barnett, 4 Lit. (Ky.) 207.

(*a*) Lloyd *v.* Spillet, 2 Atk. 148; Jackson *v.* Alexander, 3 Johns. 491; Preston on Abstracts, iii. 13, 14.

(*b*) Meeker *v.* Meeker, 16 Conn. 383.

consideration has been paid. (*c*) No use will be raised in a covenant to stand seised, or by bargain and sale upon a general consideration, as by the words "for divers good considerations," but in such cases a sufficient consideration may be averred. (*d*) It is sufficient if the deed purports to be for money received or value received, without mentioning the certainty of the sum; and if any sum is mentioned, the smallest in amount or value will be sufficient to raise the use. (*e*) The consideration has become a matter of form, in respect to the validity of the deed in the first instance, in a court of law; and if a deed be brought in question, the consideration may be averred in pleading, and supported by proof. If a consideration be expressed in the deed, the grantor is estopped, and cannot be permitted to aver against it, unless there be fraud or illegality in it; and then he may show it. (*f*) The receipt of the consideration money is usually mentioned in the deed; and Mr. Preston says, (*g*) that if the receipt of it be not indorsed upon the deed, it * will, in transactions of a modern date, be presumptive evidence that the purchase-money has not been paid, and impose upon a future purchaser the necessity of proving payment, in order to rebut the presumption of an equitable lien in favor of the seller for his purchase-money. I have no idea that the courts of justice in this country would tolerate any such presumption in the first instance, from the mere circumstance of the omission to indorse on the deed the receipt of payment, for that ceremony is not now the American practice.

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(4.) *The Description of the Estate.* — In the description of the

(*c*) Kimball *v.* Fenner, 12 N. H. 248.

(*d*) Mildmay's Case, 1 Co. 175, a; Stevens *v.* Griffith, 3 Vt. 448.

(*e*) Fisher *v.* Smith, Moore, 569; Jackson *v.* Schoonmaker, 2 Johns. 235; Jackson *v.* Alexander, 3 id. 491; Cheny *v.* Watkins, 1 Harr. & J. 527; Okison *v.* Patterson, 1 Watts & S. 395; Goodell *v.* Pierce, 2 Hill, 659. [See also Price *v.* Jenkins, 5 Ch. D. 619. Comp. Lee *v.* Mathews, 6 L. R. Ir. 530; *In re* Ridler, 22 Ch. D. 74.]

(*f*) Collins *v.* Blantern, 2 Wils. 347; Paxton *v.* Popham, 9 East, 408. But the grantor is not estopped to prove that there were other considerations than the one expressed. Emmons *v.* Littlefield, 13 Me. 233; [Wait *v.* Wait, 28 Vt. 350.] Parol evidence may be given to vary the consideration. 14 Johns. 210; 20 id. 338; 16 Wend. 460; 17 Mass. 249, 257; 8 Conn. 314; [Stockett *v.* Halliday, 9 Md. 480; Bennett *v.* Solomon, 6 Cal. 134; Johnson *v.* Boyles, 26 Ala. 576; Vangine *v.* Taylor, 18 Ark. 65; Rockhill *v.* Spraggs, 9 Ind. 30; Swafford *v.* Whipple, 3 Iowa, 261; Wooden *v.* Shotwell, 3 Zabr. 465; Barker *v.* Bradley, 42 N. Y. 316; Bassett *v.* Bassett, 55 Me. 127.]

(*g*) Abstracts, i. 72, 299; ib. iii. 15.

land conveyed, the rule is, that known and fixed monuments control courses and distances. So the certainty of metes and bounds will include and pass all the lands within them, though they vary from the given quantity expressed in the deed. The least certain and material parts of the description must yield to those which are the most certain and material, if they cannot be reconciled; though, in construing deeds, the courts will give effect to every part of the description, if practicable. Where natural and ascertained objects are wanting, and the course and distance cannot be reconciled, the one or the other may be preferred, according to circumstances. (*a*) If there be nothing to control the course and distance, the line is run by the needle. (*b*) The mention of quantity of acres, after a certain description of the subject by metes and bounds, or by other known specification, is but matter of description, and does not amount to any covenant, or afford ground for the breach of any of the usual covenants, though the quantity of acres should fall short of the given

(*a*) Landmarks or fixed monuments to designate boundaries, are so important in distinguishing landed property, that to remove or destroy them was deemed a high offence by the ancient Jewish laws; and, in New York, to remove, deface, or alter them maliciously, is an indictable offence. New York Revised Statutes, ii. 695, sec. 32.

(*b*) Jackson *v.* Carey, 2 Johns. Cas. 350; Trammell *v.* Nelson, 2 Harr. & M'Hen. 4; Pernam *v.* Wead, 6 Mass. 131; Howe *v.* Bass, 2 Mass. 380; Higley *v.* Bidwell, 9 Conn. 447; Benedict *v.* Gaylord, 11 id. 335; Doe *v.* Porter, 3 Ark. 18, 57; White *v.* Gay, 9 N. H. 126; M'Iver *v.* Walker, 9 Cranch, 173; Preston *v.* Bowmar, 6 Wheaton, 580; Colclough *v.* Richardson, 1 M'Cord, 167; Welch *v.* Phillips, ib. 215; Brooks *v.* Tyler, 2 Vt. 348; Clark *v.* Wethey, 19 Wend. 320; Lessee of Wyckoff *v.* Stephenson, 14 Ohio, 13, 15, 17. The rules of law as to the location of lands by description in deeds, and as to the resort to the secondary evidence of the declarations and acts of the parties, when the primary evidence fails, are clearly stated in this last case. A grant from one *terminus* to another means a direct line; but if the line is to run along a river or creek from one *terminus* to another, it must follow the river or creek, however sinuous or indirect it may be; and if that description will not reach the *terminus*, it must be pursued so far as it conducts towards the *terminus*, and then relinquished for a direct line to the *terminus*. Shultz *v.* Young, 3 Ired. (N. C.) 385. [See Campbell *v.* Branch, 4 Jones (N. C.), 313; Jones *v.* Pettibone, 2 Wis. 308; Nichols *v.* Suncook Man. Co., 34 N. H. 345; Seneca Nations *v.* Knight, 23 N. Y. 498; Bissell *v.* N. Y. Central R. R., ib. 61; Banks *v.* Ammon, 27 Penn. St. 172; Dikeman *v.* Taylor, 24 Conn. 219; Morrow *v.* Willard, 30 Vt. 118; Phillips *v.* Bowers, 7 Gray, 21. See, generally, Emery *v.* Fowler, 38 Me. 99; Haynes *v.* Young, 36 id. 557; Doggett *v.* Willey, 6 Fla. 482; Coles *v.* Wooding, 2 P. & H. 189; Sawyer *v.* Kendall, 10 Cush. 241; Seaman *v.* Hogeboom, 21 Barb. 398; Richardson *v.* Chickering, 41 N. H. 380; Opdyke *v.* Stephens, 4 Dutch. 83.]

*467 *amount. (a) y^1 Whenever it appears by definite boundaries, or by words of qualification, as "more or less," or as "containing by estimation," or the like, that the statement of the quantity of acres in the deed is mere matter of description, and not of the essence of the contract, the buyer takes the risk of the quantity, if there be no intermixture of fraud in the case. (b) So, according to the maxim of Lord Bacon, *falsa demonstratio non nocet*, when the thing itself is certainly described; as in the instance of the farm called A., now in the occupation of B.; here the farm is designated correctly as farm A.; but the demonstration would be false if C., and not B., was the occupier, and yet it would not vitiate the grant. (c) Some

(a) Mann v. Pearson, 2 Johns. 37; Smith v. Evans, 6 Binney, 102; Powell v. Clark, 5 Mass. 355. And see 1 Aiken, 325, to the same point; Jackson v. Moore, 6 Cowen, 706; Allison v. Allison, 1 Yerg. 16; [Roat v. Puff, 3 Barb. 353; Kruse v. Scripps, 11 Ill. 98.]

(b) Stebbins v. Eddy, 4 Mason, 414; [Weart v. Rose, 1 C. E. Green, 290, 297. So in contracts to convey. Faure v. Martin, 7 N. Y. (3 Seld.) 210; Noble v. Googins, 99 Mass. 231; Slothower v. Gordon, 23 Md. 1. But an abatement would be allowed if the property were very much less than was stated, although the contract contained even stronger words. Whittemore v. Whittemore, L. R. 8 Eq. 603.] If land be sold by certain bounds, or for so much for the entire parcel, or by the lump, which is *per aversionem*, in the language of the civilians, as for a field enclosed, or an island in a river, which is a distinct and entire object, any surplus of land over the quantity given belongs to the vendee, and the price cannot be increased or diminished on account of disagreement in measure or quantity. Innis v. M'Crummin, 12 Martin, 425; Lesassier v. Dashiell, 13 La. 151; Phelps v. Wilson, 16 id. 185; La. Code, art. 2471. The Morris Canal Company v. Emmett, 9 Paige, 168; Pothier, Traité du Cont. de Vente, n. 255. A very great difference (as thirty-three per cent, for instance) between the actual and the estimated quantity of acres of land sold in the gross, would entitle a party to relief in chancery, on the ground of *gross mistake*. Quesnel v. Woodlief, 2 Hen. & Munf. 178, note; Nelson v. Matthews, ib. 164; Harrison v. Talbott, 2 Dana, 258. In the last case, the series of Kentucky decisions on the subject are ably reviewed.

(c) Blague v. Gold, Cro. Car. 447, 473; Jackson v. Clark, 7 Johns. 217; Howell v.

y^1 In support of the general rules stated in the text, see further, Cottingham v. Parr, 93 Ill. 233; Smith v. Negbauer, 42 N. J. L. 305; Adams v. Alkire, 20 W. Va. 480; Sanders v. Godding, 45 Iowa, 463; Winans v. Cheney, 55 Cal. 567. But these rules are merely guides for ascertaining the intention of the grantor, and yield when a contrary intent is shown. White v. Luning, 93 U. S. 514; Higinbotham v. Stoddard, 72 N. Y. 94; Burkholder v. Markley, 98 Penn. St. 37. Parol evidence is admissible to show whether a given monument was the one intended. Tyler v. Fickett, 73 Me. 410. The description must be sufficiently certain, so that the land intended can be laid off by a surveyor. Smiley v. Fries, 104 Ill. 416; Shoemaker v. McMonigle, 86 Ind 421.

things will pass by the conveyance of land as incidents appendant or appurtenant thereto. (*d*) y^2 This is the case with a right of way or other easement appurtenant to land. (*e*) So, also, if the owner of a mill and dam, and certain lands overflowed by the dam, sells the mill with all its privileges and appurtenances, the purchaser may continue the dam with the same head of water. (*f*) And

Saule, 5 Mason, 410; Com. Dig. Fait. E. 4; [Abbott *v.* Pike, 33 Me. 204; Harvey *v.* Mitchell, 31 N. H. 575; Bell *v.* Sawyer, 32 id. 72; Smith *v.* Chatham, 14 Texas, 322;] [Sharp *v.* Thompson, 100 Ill. 447; Moreland *v.* Brady, 8 Oreg. 303.]

(*d*) Co. Litt. 56, 121, b; 152, 307, a; Comyns's Dig. Grant, E. 11. Incorporeal hereditaments *appendant* or *appurtenant* to land, as common of piscary and of pasture and right of way, pass by a conveyance of the land to which they are annexed, without even mention of the appurtenances. Co. Litt. 121, b.

(*e*) Kent *v.* Waite, 10 Pick. 138; Story *v.* Odin, 12 Mass. 157. See also Bayley, B., in Canham *v.* Fisk, 2 Tyrw. 155, 157; and *supra*, iii. 420; [Bruning *v.* Canal and Banking Co., 12 La. An. 541; Child *v.* Chappell, 5 Seld. 246; Pratt *v.* Sanger, 4 Gray, 84; Stearns *v.* Mullen, ib. 151.]

(*f*) Blaine *v.* Chambers, 1 Serg. & R. 169; Pickering *v.* Stapler, 5 id. 107; Tilgh-

y^2 The question as to what rights will pass by a deed, other than those which are expressly mentioned in it, is dependent upon the presumed intention of the parties. In order to determine the question in an individual case, the exact form of the deed, the nature of the right claimed, and the relation of the parties to each other, must all be considered. As to the form of the deed, it is clear that a grant of a certain thing (*e. g.* a mill and dam), with all appurtenances, will be much more liberally construed in determining the extent of the implied grant than a deed conveying land by metes and bounds, and containing no evidence of any intention to pass more than is expressly granted. Baker *v.* Bessey, 73 Me. 472; s. c. 40 Am. R. 377 and note; Daniels *v.* Citizens' Savings Institution, 127 Mass. 534; Jackson *v.* Trullinger, 9 Oreg. 393; Cunningham *v.* Webb, 69 Me. 92. As to the nature of the right claimed, the general rule is that it must be a right necessary to the proper use of the property granted, and must have such open and visible connection with it that the grantee is justified, as a reasonable man, in supposing that it was known to the grantor, and was intended by him to pass. Adams *v.* Conover, 87 N. Y. 422; Voorhees *v.* Burchard, 55 N. Y. 98; Bank of British N. A. *v.* Miller, 7 Saw. 163; Dolliff *v.* Boston & Maine Railroad, 68 Me. 173. In Green *v.* Collins, 86 N. Y. 246, it was held that a warranty of title and quiet possession did not cover an open and visible easement apparently appurtenant to the land granted, which did not in fact belong to the vendor. It may be doubted whether this was not giving too much heed to the probable *real*, rather than to the *apparent*, intention of the grantor. As to the relation of the parties to one another, it has already been pointed out that a more liberal construction is applied to implied grants than to implied reservations. *Ante*, iii. 419. It seems, also, that a more liberal rule holds where the grantor grants a portion of his estate only. Simmons *v.* Cloonan, 81 N. Y. 557. Land cannot be appurtenant to land. St. Louis Bridge Co. *v.* Curtis, 103 Ill. 410. See further, Farmer *v.* Ukiah Water Co., 56 Cal. 11; Cave *v.* Crafts, 53 Cal. 135; Ottumwa Woollen Mill Co. *v.* Hawley, 44 Iowa, 57; Bangs *v.* Parker, 71 Me 468.

if a house or store be conveyed, everything passes which belongs to, and is in use for it, as an incident or appurtenance. (*g*) A conduit, conveying water to the lands sold from another part of the lands of the grantor, will pass as being necessary or *quasi* appendant thereto. (*h*) So, a raceway conducting water from a mill to another part of the grantor's land, has been held to pass by a conveyance of land with the mill thereon. (*i*) Upon a conveyance of land and delivery of possession, it has been adjudged that the growing grain does not pass to the vendee, for it is deemed to be personal estate. (*j*) A contrary rule was,
*468 *however, previously declared, in *Foote* v. *Colvin*, (*a*) and was likewise admitted in *Kittredge* v. *Woods*. (*b*) If the land be sold without any reservation of the crops in the ground, the law is strict as between vendor and vendee; and I apprehend the weight of authority to be in favor of the existence of the rule that the conveyance of the fee carries with it whatever is attached to the soil, be it grain growing, or anything else; and that it leaves exceptions to the rule to rest upon reservations to be made by the vendor. The rule was so understood and declared in *Crews* v. *Pendleton*. (*c*) A *reservation* is a clause in a deed,

man, Ch. J., Strickler *v.* Todd, 10 id. 63; Oakley *v.* Stanley, 5 Wend. 523; Hathorn *v.* Stinson, 1 Fairf. 224; [Jordan *v.* Mayo, 41 Me. 552; Cromwell *v.* Selden, 3 Comst. 253; Tourtellot *v.* Phelps, 4 Gray, 370; Olmsted *v.* Loomis, 5 Seld. 423. But see Goodrich *v.* Longley, 4 Gray, 379; De Witt *v.* Harvey, ib. 486.]

(*g*) United States *v.* Appleton, 1 Sumner, 492. When the use of a thing is granted, everything is granted by which the grantee may have and enjoy the use. Twisden, J., in Pomfret *v.* Ricroft, 1 Saund. 321, 323; and this is according to the sound maxim of the common law, that *aliquis quod concedit, concedere videtur et id, sine quo res ipsa esse non potuit.*

(*h*) Nicholas *v.* Chamberlain, Cro. Jac. 121.

(*i*) N. Ips. Factory *v.* Batchelder, 3 N. H. 190. The term *appurtenances* signifies something appertaining to another thing as principal, and which passes as incident to the principal thing, and which is of a different but congruous nature. Land cannot be appurtenant to land. Harris *v.* Elliott, 10 Peters, 25; United States *v.* Harris, 1 Sumner, 37.

Mistakes of facts in *recital* of deeds, given by official men who sell under judicial authority, may be explained. Glover *v.* Ruffin, 6 Ohio, 255.

(*j*) Smith *v.* Johnston, 1 Penn. 471.

(*a*) 3 Johns. 216. (*b*) 3 N. H. 508.

(*c*) 1 Leigh (Va.), 297; Bank of Pennsylvania *v.* Wise, 3 Watts, 394; Wilkins *v.* Vashbinder, 7 id. 378, S. P., and the case of Smith *v.* Johnston, alluded to in the text, is overruled. [Chapman *v.* Long, 10 Ind. 465; Gibbons *v.* Dillingham, 5 Eng. (Ark.) 9. But see Lauchner *v.* Rex, 20 Penn. St. 464; Baker *v.* Jordan, 3 Ohio St. 438.] [In Everingham *v.* Braden, 58 Iowa, 133, it was held that fully matured crops would not

whereby the grantor reserves some new thing to himself issuing out of the thing granted, and not *in esse* before; (*d*) but an *exception* is always of a part of the thing granted, or out of the general words and description in the grant. It is repugnant to the deed, and void, if the exception be as large as the grant itself. So it is if the excepted part was specifically granted, as if a person grants two acres, excepting one of them. (*e*) The exception is good when the granting part of the deed is in general terms, as in the grant of a messuage and houses, excepting the barn or dove house; or in the grant of a piece of land, excepting the trees or woods; or in the grant of a manor, excepting a close, *ex verbo generali aliquid excipitur*. If the exception be valid, the thing excepted remains with the grantor, with the like force and effect as if no grant had been made. (*f*)

(5.) *Of the Habendum.* — This part of the deed was originally used to determine the interest granted, or to lessen, enlarge, explain, or qualify the premises. But it cannot perform the office of devesting the estate already vested by the deed; for it is void if it be repugnant to the estate granted. (*g*) It has degenerated into a mere useless form; and the premises now contain the specification of the estate granted, and the deed becomes effectual without any *habendum*. If, however, the premises should be

pass by a deed of the land. Timber cut and lying on the ground will not so pass. Jenkins *v.* Lykes, 19 Fla. 148.]

(*d*) An incident to a grant may be the subject of a reservation, as the reservation of a rent, or of a millsite, and the right to erect milldams, and the use of streams of water; but the reservation is inoperative until the grantor exercises his right. Thompson *v.* Gregory, 4 Johns. 81; Provost *v.* Calder, 2 Wend. 517; Dygert *v.* Matthews, 11 id. 35; [Hammond *v.* Woodman, 41 Me. 177; State *v.* Wilson, 42 id. 9; Carroll *v.* Granite Man. Co., 11 Md. 399. See Craig *v.* Wells, 11 N. Y. 315; Ives *v.* Van Auken, 34 Barb. 566;] [Kister *v.* Reeser, 98 Penn. St. 1; Stockwell *v.* Couillard, 129 Mass. 231; Ashcroft *v.* Eastern Railroad Co., 126 Mass. 196. A reservation can be only to the grantor. Young, Petitioner, 11 R. I. 636.]

(*e*) Co. Litt. 47, a, 412; Plowd. 153, a; Case *v.* Haight, 3 Wend. 635. [See Young, Petitioner, 11 R. I. 636. But see Babcock *v.* Latterner, 30 Minn. 417.]

(*f*) Ive *v.* Sams, Cro. Eliz. 521; 2 Roll. Abr. 455; S. Touch. 77. The exception required by the New York Statutes (Act of 25th February, 1789, c. 32, and of 28th February, 1789, c. 44; New York Revised Statutes, i. 198), in patents of all gold and silver mines, is an instance of a valid exception within the rules of the common law. The doctrine of exceptions in a deed is fully stated in Sheppard's Touch. by Preston, 78; and see, also, Lord Ch. J. Denman's exposition of the distinction between a reservation and an exception. Doe *v.* Lock, 4 Nev. & Man. 807.

(*g*) 2 Bl. Comm. 298; Goodtitle *v.* Gibbs, 5 B. & C. 709; Deaver *v.* Rice, 4 Dev. & Batt. 431.

merely descriptive, and no estate be mentioned, then the *habendum* becomes efficient to declare the intention; and it will rebut any implication arising from the silence of the premises. (*h*) *y*[1]

(6.) *Of the Usual Covenants in a Deed.* — The ancient warranty was a covenant real, or one concerning the realty, whereby the grantor of an estate of freehold, and his heirs, were bound to warrant the title; and either upon voucher, or by judg-
* 469 ment * in a writ of *warrantia chartæ*, to yield other lands to the value of those from which there had been an eviction by a paramount title. (*a*) The heir of the warrantor was bound only on condition that he had, as assets, other lands of equal value by descent. *Lineal* warranty was where the heir derived title to land warranted; either from or through the ancestor who made the warranty, and *collateral* warranty was where the heir's title was not derived from the warranting ancestor; and yet it barred the heir from claiming the land by any collateral title, upon the presumption that he might thereafter have assets by descent from or through the ancestor; and it imposed upon him the obligation of giving the warrantee other lands in case of eviction, provided he had assets. (*b*) These collateral warranties were deemed a great grievance; and, after successive efforts to be relieved from them, the statute of 4 Anne, c. 16, made void not only all warranties by any tenant for life, as against any person in reversion or remainder, but as against the heir, all collateral warranties, by any ancestor who had no estate of inheritance in

(*h*) If words of inheritance be wanting in the *premises* and *habendum* part of a deed, a life estate cannot be enlarged into a fee by the use of those words in the covenants of warranty, for a warranty cannot enlarge the estate. Seymore's Case, 10 Co. 419, Thomas & Fraser's ed. [95, b.]

(*a*) Co. Litt. 365, a.

(*b*) 2 Bl. Comm. 301, 302. In a case of a conveyance of land with warranty, and assets descend to the heir of the grantor of greater value than the land, and that heir be a female who marries, her husband is *rebutted*, on the principle of avoiding circuity of action, from claiming the land under a title paramount to that of the grantor; for in case of his recovery the purchaser would have an action on the warranty against him and his wife. Bates *v.* Norcross, 17 Pick. 14.

y[1] That the premises are to control rather than the *habendum*, see further, Boddington *v.* Robinson, 10 L. R. Ex. 270; Winter *v.* Gorsuch, 51 Md. 180; Robinson *v.* Payne, 58 Miss. 690. See Thompson *v.* Carl, 51 Vt. 408. But the *habendum* controls the *reddendum*. Burchell *v.* Clark, 2 C. P. D. 88. And the *habendum* may be resorted to to explain and qualify the natural meaning of the premises. Blair *v.* Osborne, 84 N. C. 417; Carson *v.* McCaslin, 60 Ind. 334.

possession. (c) The statute of Anne was reënacted in New York in 1788, and adopted in Rhode Island as early as 1749; (d) but the New York Revised Statutes (e) have made a more thorough reformation, for they have abolished both lineal and collateral warranties, with all their incidents, and made heirs and devisees answerable upon the covenant or agreement of the ancestor or testator, to the extent of the lands descended or devised. (f) The settled rule of the common law is, that an express covenant will restrain or destroy a general implied covenant; (g) but the New York statutes have further declared, (h) that no covenants shall be implied in any conveyance of real estate, whether such conveyance contain special covenants * or not. (a) *470 These provisions leave the indemnity of the purchaser for failure of title, in cases free from fraud, to rest upon the express covenants in the deed; and they have wisely reduced the law on this head to certainty and precision, and dismissed all the learning of warranties, which abounds in the old books, and was distin-

(c) The covenant *real*, together with almost all other real actions, was abolished in England by the statute of 3 and 4 Wm. IV. c. 27. But if the decedent has an estate *of inheritance* in possession, and binds himself and his heirs by a general warranty, the heirs are barred with or without assets, and whether the warranty be lineal or collateral. Flynn *v.* Williams, 1 Ired. (N. C.) 509.

(d) See 1 Sumner, 358–363. In Virginia, according to the construction of the act of 1785 (1 Rev. Code, c. 13, p. 24), all warranties, lineal or collateral, which descend without assets, are void as to the heirs, but all warranties, whether commenced by disseisin or otherwise, are valid against the heirs of the warrantors, so far as assets descend from the warrantors. 2 Tucker's Blacks. 303, note 8; Lomax's Digest, ii. 247.

(e) Vol. i. 739, sec. 141.

(f) The statute of Anne does not appear to have been generally or formally reënacted in our American statute laws, because the law of lineal and collateral warranties never has been generally adopted in our American jurisprudence. [See especially Russ *v.* Alpaugh, 118 Mass. 369.]

(g) Nokes's Case, 4 Co. 80, b; Deering *v.* Farrington, 1 Mod. 113; Merrill *v.* Frame, 4 Taunt. 329; Frost *v.* Raymond, 2 Caines, 188; Weiser *v.* Weiser, 5 Watts, 279; Line *v.* Stephenson, 4 Bing. 678; s. c. 5 id. 183.

(h) New York Revised Statutes, i. 738, sec. 140.

(a) The maxim *caveat emptor* is inapplicable to a purchaser from a *trustee*, and he may set up a want of consideration or of title, as a defence to an action for the purchase-money. Adams *v.* Humes, 9 Watts, 305. But in a sale under a chancery decree, it has been held that, after distribution of the purchase-money, the purchaser, though afterwards evicted by a superior title, cannot have the sale rescinded by the court. He must submit to his loss. Glenn *v.* Clapp, 11 Gill & J. 1. Nor does a sale by a trustee in breach of trust, conclude the *cestui que trust*. Blackston *v.* Hemsworth Hospital, Duke on Charitable Uses, 644.

guished for its abstruseness and subtle distinctions. It occupies a very large space in the commentaries of Lord Coke, and in the notes of Mr. Butler; and there was no part of the English law to which the ancient writers had more frequent recourse, to explain and illustrate their legal doctrines. Lord Coke declared "the learning of warranties to be one of the most curious and cunning learnings of the law;" but it is now admitted by Mr. Butler to have become, even in England, in most respects, a matter of speculation rather than of use. The ancient remedy on the *warrantia chartæ* had, however, this valuable incident: when the warrantor was vouched, and judgment passed against the tenant, the latter obtained judgment simultaneously against the warrantor, to recover other lands of equal value. This was the consolidation of the original action with the remedy over, without the expense and delay of a cross suit. (*b*)

The remedy by the ancient warranty never had, as I presume, any practical existence in any part of the United States, and personal covenants have superseded the old warranty; and they do not run with the land, but affect only the covenantor, and the assets in the hands of his representatives, after his death. (*c*) The remedy is by an action of covenant against the grantor, or his real or personal representatives, to recover a compensation in
* 471 damages for the land * lost upon eviction for failure of title. (*a*) Upon eviction of the freehold, no personal action

(*b*) By the civil law, and also by that of France, and by the Louisiana Code, if the buyer, who is sued, fails to cite his vendor in warranty, the latter is not liable for the costs and damages resulting from defending the action. The vendor called in warranty, may either defend the suit, or abandon the defence, if he deems it hopeless. The Spanish law went to a severe extent, and by it the buyer, who failed to cite his vendor in warranty, lost all recourse on him. Delacroix *v.* Cenas, 20 Martin (La.), 356.

(*c*) It has been doubted in Virginia, whether a pure *warrantia chartæ* would lie in that state, since *voucher* was done away by statute. The technical words of a warranty were: Ego et heredes mei warrantizabimus in perpetuum. But it was held that the *covenant*, in a deed of bargain and sale, that the grantor would *warrant and forever defend*, was a personal covenant, and the bargainee was not driven to his ancient writ of *warrantia chartæ*. Tabb *v.* Binford, 4 Leigh, 132. The covenant of warranty, says Mr. Justice Story, in Stoddard *v.* Gibbs, 1 Summer, 263, is in this country deemed a personal covenant, and may not authorize a recovery over of the value from the heir, if he has assets, in a *warrantia chartæ*, but only in an action of covenant; yet that does not prevent the covenant of warranty from operating as a bar to the title of the heir by way of rebutter, when it descends upon him from the warranting ancestor.

(*a*) If land be taken by statute for public purposes, upon compensation being

of covenant lay at common law upon the warranty. The party had only a writ of *warrantia chartæ* upon his warranty, to recover a recompense in value to the extent of his freehold. But if the eviction did not defeat the freehold, and only interrupted the possession for a term, as by lease for years, in that case the party evicted might have covenant. (*b*) The introduction of the personal covenants in lieu of the ancient warranty, has done away the value of this distinction; and the usual personal covenants inserted in a conveyance of the fee, are, 1. That the grantor is lawfully seised; 2. That he has good right to convey; 3. That the land is free from incumbrances; 4. That the grantee shall quietly enjoy; 5. That the grantor will warrant and defend the title against all lawful claims. The covenants of seisin, and of a right to convey, and that the land is free from incumbrances, are personal covenants, not running with the land, or passing to the assignee; for, if not true, there is a breach of them as soon as the deed is executed, and they become *choses in action*, which are not technically assignable. (*c*) But the covenant of warranty,

made, such an eviction is not by reason of defect of title, and is not within the meaning of the covenant for quiet enjoyment. Frost *v.* Earnest, 4 Wharton, 86. If an entire failure of title be shown, the purchaser may recover back the price paid without eviction. Laurans *v.* Garnier, 10 Rob. (La.) 425.

(*b*) Pincombe *v.* Rudge, Hobart, 3; Yelv. 139, s. c. If the grantee accepts a deed without covenants, and the case be free from fraud, he cannot recover back the consideration money, though the title fails. Frost *v.* Raymond, 2 Caines, 188; Yeates, J., in 1 Serg. & R. 447; Commonwealth *v.* M'Clanachan, 4 Rand. 482; Abbott *v.* Allen, 2 Johns. Ch. 523; Emerson *v.* County of W., 9 Greenl. 88; Lighty *v.* Shorb, 3 Penn. 452; Krause *v.* Reigel, 2 Wharton, 385. *Caveat emptor* is a fixed maxim in such cases, equally applicable to the transfer of lands and chattels. Maney *v.* Porter, 3 Humph. 347. If land be sold in the absence of fraud, or of any particular agreement in favor of the title, the purchaser takes the title at his own risk, and a failure of title cannot be set up as a defence to the note given for the purchase. Owings *v.* Thompson, 3 Scam. 502.

(*c*) Bradshaw's Case, 9 Co. 60; Muscot *v.* Ballet, Cro. Jac. 369; Glinister *v.* Audley, T. Raym. 14; Hamilton *v.* Wilson, 4 Johns. 72; Logan *v.* Moulder, 1 Pike (Ark.), 323; Lomax's Dig. ii. 271; Clark *v.* Swift, 3 Met. 390; Greenby *v.* Wilcocks, 2 Johns. 1; Kerr *v.* Shaw, 13 id. 236; Starr *v.* Leavitt, 2 Conn. 244; Mitchell *v.* Warner, 5 id. 497; Withy *v.* Mumford, 5 Cowen, 137; Birney *v.* Hann, 3 A. K. Marsh. 324; Innes *v.* Agnew, 1 Ohio, 389; Parsons, C. J., in Marston *v.* Hobbs, 2 Mass. 439; Bickford *v.* Page, ib. 455; Chapman *v.* Holmes, 5 Halst. 20; Garfield *v.* Williams, 2 Vt. 327; Ch. J., in Thayer *v.* Clemence, 22 Pick. 493. [See further, Carr *v.* Dooley, 119 Mass. 449; Post *v.* Campau, 42 Mich. 90.] The covenant of warranty is not broken without eviction by paramount title, and many circumstances have been held to be tantamount to an ouster in some of the states and denied in others. See the cases *pro* and *con*, cited by Mr. Wilcox, in his learned note to 10 Ohio, 317–335; [Moore *v.* Vail, 17

and the covenant for quiet enjoyment, are prospective, and an actual ouster or eviction is necessary to constitute a breach of them. (*d*) y^1 They are, therefore, in the nature of real covenants, and they run with the land conveyed, and descend to heirs, and vest in assignees or the purchaser. The distinction taken in the American cases is supported by the general current of English authorities, which assume the principle that covenant *472 does not *lie by an assignee for a breach done before his time. (*a*) On the other hand, it was decided, by the

Ill. 185; Reese *v.* McQuilkin, 7 Ind. 450; Gilman *v.* Haven, 11 Cush. 330; Reed *v.* Pierce, 36 Me. 455; Norton *v.* Jackson, 5 Cal. 262; McCoy *v.* Lord, 19 Barb. 18.] In New Hampshire, Massachusetts, and Ohio, a seisin in fact, and *whether by right or wrong*, has been held to satisfy the covenant of seisin. 1 N. H. 175; 2 Mass. 439; 8 Ohio, 220, 307; [Parker *v.* Brown, 15 N. H. 176.] But this construction of the covenant of seisin does not do it justice, and it does not prevail in other states.

(*d*) Emerson *v.* Proprietors in Minot, 1 Mass. 464; Kelly *v.* Dutch Church, 2 Hill, 105; [Van Slyck *v.* Kimball, 8 Johns. 198; Fowler *v.* Poling, 6 Barb. 165.] If the ouster be lawful, the tenant may yield to a dispossession, and have his remedy on his covenant without involving himself in a lawsuit to defend a bad title. Hamilton *v.* Cutts, 4 Mass. 349. [Green *v.* Irving, 54 Miss. 450. So, also, the vendee may purchase an outstanding title, and recover the cost. Snell *v.* Iowa Homestead Co., 59 Iowa, 701; Mooney *v.* Burchard, 84 Ind. 285.] Mr. Justice Wilde, in Sprague *v.* Baker, 17 Mass. 589, was inclined strongly to the opinion, that if an *incumbrance* be enforced and discharged after an assignment by the covenantee, the assignee ought to be able to sue on it as principally concerned in it. [See further, Sorrels *v.* McHenry, 38 Ark. 127; Child *v.* Stenning, 11 Ch. D. 82.]

(*a*) Lewes *v.* Ridge, Cro. Eliz. 863; Comyns's Dig. tit. Covenant, B. 3; Lucy *v.* Levington, 2 Lev. 26; Andrew *v.* Pearce, 4 Bos. & P. 158. Covenants which run with the land are exceptions to the rule of the common law that choses in action cannot be assigned. They cannot be separated from the land and transferred without it, but they go with the lands, as being annexed to the estate, and bind the parties in respect to the privity of estate. But this is to be understood with the qualification that the covenants will pass where the *possession* goes from one person to another by deed, and there is afterwards a total failure of title, and a subsequent eviction. Beddoe *v.* Wadsworth, 21 Wend. 120. The assignee, by reason of the privity of estate, is entitled to the benefit of, and is bound by, all covenants running with the land. Spencer's Case, 5 Co. 17 b. Spencer's case is memorable in the English judicial history for the refined distinctions which have been raised on the vexed question, what covenants do and do not, run with the land. Sergeant Williams, in his note to 1 Saund. 240, n. 8, says, that the better opinion seems to be, that the assignee of the reversion could

y^1 In support of the text, see Bramble *v.* Beidler, 38 Ark. 200; Montgomery *v.* Reed, 69 Me. 510; Howard *v.* Maitland, 11 Q. B. D. 695. But it has been held that inability of a grantee to get possession by reason of an outstanding claim is a breach of the covenant for quiet possession. Fritz *v.* Pusey (Minn., 1884), 17 Rep. 755; Shattuck *v.* Lamb, 65 N. Y. 499. But see dissenting opinion of Dwight, C., in last cases; and that there must be an attempt to enter, see Allis *v.* Nininger, 25 Minn. 525; Scott *v.* Kirkendall, 88 Ill. 465.

K. B., in *Kingdon* v. *Nottle*, (*b*) that a covenant of seisin did run with the land, and the assignee might sue, on the ground that want of seisin is a continual breach. The reason assigned for this last decision is too refined to be sound. The breach is single, entire and perfect in the first instance. It is, however, to be regretted, that the technical scruple that a *chose in action* was not assignable, does necessarily prevent the assignee from availing himself of any or of all the covenants. He is the most interested, and the most fit person to claim the indemnity secured by them, for the compensation belongs to him, as the last purchaser and the first sufferer.

The general covenant that the grantor will warrant and defend the title (and which is usually the concluding and sweeping covenant in a deed) is also a personal covenant binding on the personal representatives of the covenantor; and it is not a covenant real, in the sense of the old feudal law, confining the remedy to

not bring an action of covenant at common law prior to the statute of 32 Hen. VIII., and that at common law covenants ran with the land, but not with the reversion. The numerous decisions, English and American, on this intricate head of the law of real property, are very industriously collected in Smith's Leading Cases, under the title of Spencer's Case. Law Library, N. S. XXVII. If a lessor grants over his reversion, he shall not have an action for rent due after his assignment, for the privity of contract follows the estate. Walker's Case, 3 Co. 22. And the assignee or purchaser of a covenant of warranty running with the land, who is evicted, may sue any one or more of the covenantors, whether immediate or remote, but he must show a damage to himself from the breach alleged, by first making satisfaction upon his own covenant to the person evicted; in like manner as the holder of negotiable paper may sue his immediate or any prior indorser, *after he has taken up the paper* from the holder below him. Kingdon *v.* Nottle, 1 Maule & S. 355; 4 id. 53; Withy *v.* Mumford, 5 Cowen, 137; Markland *v.* Crump, 1 Dev. & Batt. 94. In Norman *v.* Wells, 17 Wend. 136, Mr. Justice Cowen discusses at large the doctrine of inherent covenants running with the land, and of an assignable character, in contradistinction to those which are collateral or personal. The numerous authorities are fully and ably reviewed from the leading authority of Spencer's Case, 5 Co. 16, and that of Bally *v.* Wells, 3 Wils. 27, which is a condensation of the resolutions in the other, and he concluded that to render a covenant available to the assignee of a lease, it must be touching or concerning the thing demised, as affecting the value of the reversion, or the term, or influencing the rent.

(*b*) 1 Maule & S. 355; 4 id. 53. In Ohio, the covenant of seisin, when the covenantor is in possession claiming title, is held to be a real covenant running with the land. But if he be not in possession, and the title be defective, it is in the nature of a personal covenant, and is broken as soon as made, and never attaches to the land. Adm'rs of Backus *v.* McCoy, 3 Ohio, 211. This was in accordance with the English decisions in Maule & Selwyn; but those decisions have been severely criticised and condemned by the supreme court of Connecticut, in Mitchell *v.* Warner, 5 Conn. 497. [See, however, Kelly, C. B., in Spoor *v.* Green, 9 L. R. Ex. 99, 117.]

voucher or *warrantia chartæ*. It is in effect a covenant for quiet enjoyment. (*c*) The ancient remedy is inadequate and inexpedient, and has become entirely obsolete. (*d*) The distinction between the covenants that are in gross and covenants that run with the land (and which are covenants real, annexed to or connected with the estate, and beneficial to the owner of it, and to him only) would seem to rest principally on this ground, *473 * that to make a covenant run with the land, there must be a subsisting privity of estate between the covenanting parties. (*a*) A covenant to pay rent, or to produce title deeds, or for renewal, are covenants of the latter character, and they run with the land. (*b*) All covenants concerning title run with the land, with the exception of those that are broken before the land passes. (*c*)

(*c*) Caldwell *v.* Kirkpatrick, 6 Ala. 60.

(*d*) Parsons, C. J., in Gore *v.* Brazier, 3 Mass. 544, 545, and in Marston *v.* Hobbs, 2 id. 438; Townsend *v.* Morris, 6 Cowen, 123; and Tilghman, C. J., in Bender *v.* Fromberger, 4 Dallas, 442. A covenant to execute and deliver a good and sufficient deed of the land in fee means an operative and effectual conveyance, one that carries with it a good and sufficient title. Clute *v.* Robinson, 2 Johns. 595; Judson *v.* Wass, 11 id. 525; Carpenter *v.* Bailey, 17 Wend. 244.

(*a*) Lord Kenyon, in Webb *v.* Russell, 3 T. R. 402; Lord Ellenborough, in Stevenson *v.* Lambard, 2 East, 580; Roach *v.* Wadham, 6 id. 289; Bayley, J., in Paul *v.* Nurse, 8 B. & C. 486; Hurd *v.* Curtis, 19 Pick. 459. [See 480, n. 1.]

(*b*) Spencer's Case, 5 Co. 16, a; Vyvyan *v.* Arthur, 1 B. & C. 416; Vernon *v.* Smith, 5 B. & Ald. 1; Roe *v.* Hayley, 12 East, 469. Covenant for rent will not lie against the assignee of the lessee, if he assigns his interest in the premises before the rent becomes due. Paul *v.* Nurse, 8 B. & C. 486. The assignee is liable only for covenants broken while he continues assignee. He is liable only on the privity of estate; and he may discharge himself of liability for subsequent breaches by assigning to another. Lekeux *v.* Nash, Str. 1221; Valliant *v.* Dodemede, 2 Atk. 546; Churchwardens *v.* Smith, 3 Burr. 1271; Taylor *v.* Shum, 1 Bos. & P. 21; Armstrong *v.* Wheeler, 9 Cowen, 88. But he is liable for a breach incurred in his own time, though the action be not commenced until after he has assigned the premises. Harley *v.* King, 2 Cromp., M. & R. 18. The New York Revised Statutes, i. 747, sec. 24, would seem impliedly to have destroyed all remedy by action by assignees of lessees against assignees of lessors upon covenants against incumbrances, or relating to the title or possession of the premises demised. There must have been some mistake in the arrangement or language of the section, for the provision in the statute of 32 Hen. VIII. c. 34, was adopted in all the prior revisions of the statute law of New York, and it never could have been the intention to abolish it.

(*c*) An able writer in the London Law Magazine, No. 22, art. 4 [x. 342], discusses the character of the covenant for the production of title deeds, and concludes that the benefit of this covenant will run with the land of the covenantee, so long as a privity of estates subsists between the owners of the several estates to which the deeds relate but no longer.

There are implied as well as express covenants concerning land, and the former run with the land. The grant of a watercourse implies a covenant by the grantor not to disturb the grantee in the enjoyment of it. Any disturbance in the enjoyment of property contrary to the grant of the party creating the disturbance, is a breach of covenant. (*d*) In Pennsylvania, Delaware, Illinois, Indiana, Missouri, Mississippi, and Alabama, it is declared by statute, that the words *grant, bargain, and sell*, in conveyances in fee, shall, unless especially restrained, amount to a covenant that the grantor was seised of an estate in fee, freed from incumbrances done or suffered by him, and for quiet enjoyment as against his acts. But, in *Gratz* v. *Ewalt*, (*e*) it was adjudged, that those words in the Pennsylvania statute of 1715 (and the decision will equally apply to the same statutory language in the other states) did not amount to a general warranty, but merely to a covenant that the grantor had not done any act, nor created any incumbrance, whereby the estate might be defeated. Upon this construction, the words of the statute *are *474 divested of all dangerous tendency; and they amount to no more than did the provision in the English statute of 6 Anne, c. 35, sec. 30, upon the same words. It may not be very inconvenient that those granting words should imply a covenant against the secret acts of the grantor; but beyond that point there is great danger of imposition upon the ignorant and the unwary, if any covenant be implied, that [it?] is not stipulated in clear and precise terms. (*a*) In New York, it was decided, in *Frost* v. *Raymond*, (*b*) and proved by an examination of the authorities, that the words, "grant, bargain, sell, alien, and confirm," did not imply a covenant of title in a conveyance in fee; though the word "grant" or the word "demise" would imply a covenant of title in a lease for years. The word "give," it was also shown, in that case, would amount to an implied warranty during the life of the feoffor. (*c*) But this doctrine, though deemed sound, and

(*d*) Russel *v.* Gulwel, Cro. Eliz. 657; Bayley, J., in Seddon *v.* Senate, 13 East, 78, 79.

(*e*) 2 Binney, 95; Latham *v.* Morgan, 1 Smedes & M. Ch. 611, s. p.

(*a*) Where a deed contains an express covenant, as of warranty, that constitutes the extent of the liability of the grantor, and does away the implied covenants. Vanderkarr *v.* Vanderkarr, 11 Johns. 122; Weems *v.* McCaughan, 7 Smedes & M. 422.

(*b*) 2 Caines, 188.

(*c*) The case of Grannis *v.* Clark, 8 Cowen, 36, is to the same effect relative to the

applicable in those states which continue to be governed on this point by the common law, has ceased to have any operation in New York, under the provision in the Revised Statutes. In North Carolina and Alabama, the words "give, grant, bargain, sell," &c., do not imply any warranty of title; (*d*) and this is the conclusion which sound policy would dictate. To imply covenants of warranty from the granting words in a deed, is making those words operate very often as a trap to the unwary.

The measure of damages, in actions on these personal covenants, is regulated, in some degree, by the rule on the ancient warranty. At common law, upon voucher, or upon the writ of *warrantia chartæ*, the demandant recovered of the warrantor or heir other lands, of equal value with the lands from which
* 475 the feoffee was evicted. The value * was computed as it existed when the warranty was made; so that, though the land had afterwards become of increased value, by the discovery of a mine, or by buildings, or otherwise, yet the warrantor was not to render in value, according to the then state of things, but as the land was when he made the warranty. (*a*) And when personal covenants were introduced as a substitute for the remedy on the voucher and warranty, the established measure of compensation was not varied or affected. The buyer, on the covenant of seisin, recovers back the consideration money and interest and no more. The interest is to countervail the claim for mesne profits, to which the grantee is liable, and is, and ought to be, commensurate in point of time with the legal claim to mesne profits. The grantor has no concern with the subsequent rise or fall of the land by accidental circumstances, or with the beneficial improvements

words *grant* and *demise;* and in an action on those covenants, it is not necessary to aver an eviction. Covenant will lie on the word *grant* in the assignment of a lease. Baber *v.* Harris, 1 Perry & Dav. 360. So the word *demise,* in a lease, implies a covenant for title and for quiet enjoyment. Line *v.* Stephenson, 5 Bing. 183; Crouch *v.* Fowle, 9 N. H. 222; [Vernam *v.* Smith, 15 N. Y. 327.] The word *demise,* in a lease for years, imports a covenant for quiet enjoyment by the lessee during the continuance of the estate created by the lease, but no longer. Adams *v.* Gibney, 6 Bing. 656.

(*d*) Rickets *v.* Dickins, 1 Murph. 843; Powell *v.* Lyles, ib. 348; Roebuck *v.* Duprey, 2 Ala. 585; [Huntley *v.* Waddell, 12 Ired. 32. See Dow *v.* Lewis, 4 Gray, 468.]

(*a*) Bracton, de Warrantia, lib. 5, c. 13, sec. 3; Bro. tit. Voucher, pl. 69; ib. tit. Recouerie in Value, pl. 59; Year Book, 30 Edw. III. 14 b; ib. 19 Hen. VI. 46 a, 61 a; Ballet *v.* Ballet, Godb. 151.

made by the purchaser, who cannot recover any damages, either for the improvements or the increased value. This appears to be the general rule in this country. (*b*) But, on the covenant of warranty, the measure of damages, in Massachusetts, Maine, Vermont, and Connecticut, is the value of the land at the time of eviction, without regard to the consideration in the deed. (*c*) This may greatly exceed the value and the price of the land at the time of the sale; but the rule was adopted in the first settlement of the country, when the value of the land consisted chiefly in the improvements * made by the occupants; and *476 if the warranty would not have secured to them the value of those improvements, it would not have been of much benefit to them. In other states, the measure of damages, on a total failure of title, even on the covenant of warranty, is the value of the land at the execution of the deed; and the evidence of that value is the consideration money, with interest and costs. (*a*) If

(*b*) Staats *v.* Ten Eyck, 3 Caines, 111; Pitcher *v.* Livingston, 4 Johns. 1; Bennet *v.* Jenkins, 18 id. 50; Marston *v.* Hobbs, 2 Mass. 433; Caswell *v.* Wendell, 4 id. 108; Smith *v.* Strong, 14 Pick. 128; Sterling *v.* Peet, 14 Conn. 245; Bender *v.* Fromberger, 4 Dallas, 441; Wilson *v.* Forbes, 2 Dev. (N. C.) 30; Seamore *v.* Harlan, 3 Dana, 415; Tapley *v.* Labeaume, 1 Mo. 552; Martin *v.* Long, 3 id. 391; Earle *v.* Middleton, 1 Cheves (S. C.), 127; Buckmaster *v.* Grundy, 1 Scam. 312, 313; Goldthwaite, J., in 4 Ala. 31; [Davis *v.* Smith, 5 Ga. 274, 285; Blake *v.* Burnham, 20 Vt. 437; Foster *v.* Thompson, 41 N. H. 373.]

(*c*) Gore *v.* Brazier, 3 Mass. 523; Parker, J., in Caswell *v.* Wendell, 4 id. 108; Bigelow *v.* Jones, ib. 512; Swett *v.* Patrick, 3 Fairf. 1; Sterling *v.* Peet, 14 Conn. 245; Strong *v.* Shumway, D. Chipman, 110; Park *v.* Bates, 12 Vt. 381. But in Sumner *v.* Williams, 8 Mass. 163, 221, it was afterwards held, that on the covenants with respect to title as to warranty, &c., that the true measure of damages was the consideration money and interest. This was formerly the rule also in South Carolina. Liber *v.* Parsons, 1 Bay, 19; Guerard *v.* Rivers, ib. 265; Witherspoon *v.* Anderson, 3 Desaus. Eq. 245. But the rule is now settled in South Carolina, according to the English common-law doctrine. Henning *v.* Withers, 2 Treadw. Const. 584; Ware *v.* Weathnall, 2 M'Cord, 413; Bond *v.* Quattlebaum, 1 id. 584, and statute of 1824. In Louisiana, the vendee, on eviction, is allowed to show the increased value of the land at the time of eviction above the original price, and that value, under certain qualifications, may form part of the damages. Bissell *v.* Erwin, 13 La. 143; [Weber *v.* Coussy, 12 La. An. 534.] Such increase only is allowed as the parties could have had in contemplation at the time of the sale, and not the enormous increase produced from unforeseen or transient causes. In Ohio, the rule of damages for breach of covenants of seisin and quiet enjoyment, and of warranty of title, is the consideration money and interest, with some exceptions; and if he has enjoyed the rents and profits, it stops the claim for interest, so far as he is accountable over for those rents and profits. Clark *v.* Parr, 14 Ohio, 118; [Lloyd *v.* Quimby, 5 Ohio St. 262.]

(*a*) See the cases cited in note (*a*), *supra*; and see, also, Talbot *v.* Bedford, Cooke (Tenn.), 447; Lowther *v.* The Commonwealth, 1 Hen. & Munf. 202; Crenshaw *v.*

the subsisting incumbrances absorb the value of the land, and the quiet enjoyment be disturbed by eviction by paramount title, the measure of damages is the same as under the covenants of seisin and of warranty. The uniform rule is, to allow the consideration money with interest and costs, and no more. If the incumbrance has not been extinguished by the purchaser, and there has been no eviction under it, he will recover only nominal damages, inasmuch as it is uncertain whether he would ever be disturbed. (*b*) If, however, the grantor had notice to remove the incumbrance, and refused, equity would undoubtedly compel him to raise it, and decree a general performance of a covenant of indemnity, though it sounds only in damages. (*c*) The *477 ultimate extent of the vendor's responsibility, * under all or any of the usual covenants in his deed, is the purchase-money, with interest; and this I presume to be the prevalent rule throughout the United States. (*a*)

Smith, 5 Munf. 415; Stout *v.* Jackson, 2 Rand. 132; Stewart *v.* Drake, 4 Halst. 139; Bennet *v.* Jenkins, 13 Johns. 50; Phillips *v.* Smith, 1 North Carolina Law Repository, 475; Cox *v.* Strode, 2 Bibb, 273; Booker *v.* Bell, 3 id. 175; [Kingsbury *v.* Milner, 69 Ala. 502.] The rule in Virginia has been fluctuating. In Mills *v.* Bell, 3 Call, 326, it was the value at the time of eviction. In Nelson *v.* Matthews, 2 Hen. & Munf. 164, it was the value at the time of the contract; and the discussions and decisions in Stout *v.* Jackson have settled the rule in that state, that the proper measure of damages is the value of the land at the time of the warranty; and the purchaser does not recover of the vendor the value of his improvements. See also to the s. p. in Virginia, Threlkeld *v.* Fitzhugh, 2 Leigh, 451. The party evicted recovers on his warranty the purchase-money, with interest from the eviction, and the costs and damages thereon. See also, in support of the general rule, Blackwell *v.* The Justices of Lawrence County, 1 Blackf. (Ind.) 266, note; Sheets *v.* Andrews, 2 id. 274; Adm'rs of Backus *v.* McCoy, 3 Ohio, 221. The just measure of damages for breach of covenant to convey land, is the value of the land at the time the conveyance was to be made. McKee *v.* Brandon, 2 Scam. 339.

(*b*) Prescott *v.* Trueman, 4 Mass. 627; Delavergne *v.* Norris, 7 Johns. 358; [Pillsbury *v.* Mitchell, 5 Wis. 17; Hill *v.* Butler, 6 Ohio St. 207; Stowell *v.* Bennett, 34 Me. 422; Willson *v.* Willson, 25 N. H. 229; Hill *v.* Samuel, 31 Miss. 307.]

(*c*) Funk *v.* Voneida, 11 Serg. & R. 109, where the authorities are collected and enforced in the learned opinion of Mr. Justice Duncan; and where he shows the ancient rule, under the writ of *warrantia chartæ qui timet implicari.*

(*a*) Pitcher *v.* Livingston, 4 Johns. 1; Caswell *v.* Wendell, 4 Mass. 108; Bickford *v.* Page, 2 id. 455; Sumner *v.* Williams, 8 Mass. 162, 221; Nichols *v.* Walter, 8 Mass. 243; Logan *v.* Moulder, 1 Ark. 323. If the vendor has title, and refuses to convey according to contract, or disables himself from conveying by selling to a stranger, the rule of damages is the value of the land when the conveyance ought to have been made. Dustin *v.* Newcomer, 8 Ohio, 49; Hopkins *v.* Lee, 6 Wheaton, 109; Hopkins *v.* Yowell, 5 Yerg. 305. Upon a covenant against incumbrances, the rule of damages is the amount paid to extinguish the incumbrance, provided the same does not exceed

If the eviction be only of a part of the land purchased, the damages to be recovered under the covenant of seisin are a ratable part of the original price; and they are to bear the same ratio to the whole consideration that the value of the land, to which the title has failed, bears to the value of the whole tract. The contract is not rescinded, so as to entitle the vendee to recover back the whole consideration money, but only to the amount of the relative value of the part lost. (*b*) The French code adopts the same rule of compensation on eviction of part only of the subject; but it allows the whole sale to be vacated, if the eviction be of such consequence relatively to the whole purchase, that the purchase would not have been made without the part lost. This has the appearance of refined justice; but the prosecution of such an inquiry must, in many cases, be very difficult and delusive; and this part of the provision, allowing the contract to be rescinded, has been dropped in Louisiana. (*c*) The measure of compensation for a deficiency in the quantity of land, in the case of a sale by the acre, unattended by special circumstances, has been assumed, in some cases, to be the average, and not the relative value. (*d*) But in cases of eviction of a specific part, justice evidently requires that the relative, instead of *the average value, be taken as the rule of *478 computation; for though the part lost may not be one tenth part of the quantity of land purchased, it may be nine tenths of the value of the whole; or it may be one half part of the land sold, and yet it may be the rocky or the barren part of the farm, and not one hundredth part of the value of the remaining moiety.

The French law, prior to the revolution, gave to the buyer a compensation for improvements, and the increased value of the

the consideration money and interest. Foote *v.* Burnet, 10 Ohio, 317. Where the conduct of the vendor is fraudulent, the vendee is not limited to the rule of damages, viz. the purchase-money with interest, but his claim will be permitted to reach the value of the land at the time of the breach, with interest. Wilson *v.* Spencer, 11 Leigh, 261.

(*b*) Morris *v.* Phelps, 5 Johns. 49; Guthrie *v.* Pugsleys, 12 id. 126; Dimmick *v.* Lockwood, 10 Wend. 142; [Mooney *v.* Burchard, 84 Ind. 285.] See also Beauchamp *v.* Damory, Year Book, 29 Edw. III. 4, and 13 Edw. IV. 3; Gray *v.* Briscoe, Noys, 142; Dig. 21. 2, 13; ib. 64, § 3; Pothier, Traité du Cont. de Vente, Nos. 99, 139, 142, all which cases are cited in Morris *v.* Phelps.

(*c*) Code Napoleon, art. 1636, 1637; Civil Code of Louisiana, No. 2490.

(*d*) 2 Hen. & Munf. 178; 4 Munf. 382; [Stow *v.* Bozeman, 29 Ala. 397. The next sentence of the text is confirmed by Griffin *v.* Reynolds, 17 How. 609.]

land, in addition to the restitution of the price, with interest and costs. It was founded on the Roman law; but the provision was destitute of fixedness and precision. (*a*) The Code Napoleon (*b*) has rescued the rule from the guidance of loose and arbitrary discretion, and reduced it to certainty. It allows the purchaser, on eviction, to recover the price, and the mesne profits which he is obliged to pay to the owner, and his costs and expenses, and the increased value of the lands independent of the acts of the purchaser, and also the beneficial improvements which he may have made. The rule in the French law does not operate with equality and justice. The vendor is bound to pay for the increased value of the land; and yet if it happens to be diminished in value at the time of eviction, the vendor is not less bound to refund the purchase-money. The Civil Code of Louisiana (*c*) has closely copied the general provisions of the French code on the subject; but it has omitted this inequality of regulation; and it likewise confines the recovery to the price, mesne profits, costs and special damages (if any), and beneficial improvements. Both the French and Louisianian codes make the seller pay even for the embellishments of luxury expended on the premises, if he sold in bad faith, knowing his title to be unsound.

*479 *The rule of the common law, and the one most prevalent in this country, appears to be moderate, just, and safe. The French rule in the code is manifestly unjust. I cannot invent a case, said Lord Kames, (*a*) where the maxim *cujus commodum ejus debet esse incommodum* is more directly applicable. If the price at the time of the eviction be the standard for the buyer, it ought to be equally so for the seller. The hardship of the doctrine, that the seller must respond, in every case, for the value of the land at the time of eviction, and for useful improvements, consists in this, that no man could ever know the extent of his obligation. He could not venture to sell to a

(*a*) Pothier, Traité du Cont. de Vente, Nos. 132-141; Inst. Droit François, par Argou, ii. liv. 3, c. 23. It was declared, in Edwards *v.* Martin's Heirs, 19 La. 284, on a learned discussion of the Roman law, that by that law the purchaser, in a case of warranty, must be indemnified to the extent of the interest he had in not being evicted, but the damages were not to exceed the value of the subject-matter of the contract, or the highest damages within the contemplation of the parties at the time of the contract.

(*b*) Art. 1630-1641. (*c*) Art. 2482-2490. (*a*) Principles of Equity, i. 289.

wealthy or enterprising purchaser, or in the vicinity of a growing town, without the chance of absolute ruin. (*b*) The want of title, in cases of good faith, is a matter of mutual error; for the buyer investigates the title when he buys; and the English rule would appear to be the most practicable, certain, and benign in its application.

The manner of assigning breaches on these various covenants, depends upon the character of the covenant. In the covenant of seisin, and in the covenant that the covenantor has good right to convey, it is sufficient to allege the breach by negativing the words of the covenant. (*c*) But the covenants for quiet enjoyment and of general warranty require the assignment of a breach by a specific ouster or eviction by a paramount legal title. (*d*) So, in the case of the covenant against incumbrances, the incumbrance must be specifically stated. These are some of the general and universally acknowledged rules that apply to the subject; and it has been held not to be necessary to allege an ouster or eviction, on a breach of a covenant against incumbrances, but only that it is a valid and subsisting incumbrance. A paramount title in a third person, or a public highway over the land, are held to be incumbrances within the meaning of the covenant; (*e*) though the existence *of such a public highway would *480 not be a breach of the covenant of seisin. (*a*) [1] *y*[1]

(*b*) Ib. i. 288–303.

(*c*) It has been held in some of the states, that the covenant of seisin was satisfied if the grantor was seised *in fact* claiming a fee. Marston *v.* Hobbs, 2 Mass. 433; Twambly *v.* Henley, 4 id. 441; Prescott *v.* Trueman, ib. 627; Willard *v.* Twitchell, 1 N. H. 177. But other decisions hold that there must be a *legal* seisin in fee to answer the covenant. Lockwood *v.* Sturdevant, 6 Conn. 385. Richardson *v.* Dorr, 5 Vt. 1; and these latter decisions contain, it is apprehended, the true rule of the common law.

(*d*) Kortz *v.* Carpenter, 5 Johns. 120; Norman *v.* Wells, 17 Wend. 160; Mitchell *v.* Warner, 5 Conn. 497, 522; Beddoe *v.* Wadsworth, 21 Wend. 120. But a judgment of eviction, or a decree devesting the grantee of his right, is sufficient to sustain the action upon the warranty, without showing an actual removal from the land. Hansan *v.* Buckner, 4 Dana, 254.

(*e*) Prescott *v.* Trueman, 4 Mass. 627; Kellogg *v.* Ingersoll, 2 id. 97; Pritchard *v.* Atkinson, 3 N. H. 335.

(*a*) Whitbeck *v.* Cook, 15 Johns. 483. In a note to 10 Ohio, 317–335, the editor,

[1] *Covenants* — A. *Burden.* — (*a*). *At Law.* — It is said that at common law covenants ran with the land, so that the assignee of the lessee could sue and be

y[1] The subject-matter of n. 1 has been further considered by Judge Holmes in his book on "The Common Law." For the full discussion, with the evidence

5. Of the Several Species of Conveyances. — Sir William Blackstone (*b*) divides conveyances into two kinds, viz.: conveyances

Mr. Wilcock, has given a condensed and accurate view of the ancient law of warranty, and of the modern covenants as a substitute. Mr. Sedgwick, in his very learned Treatise on the Measure of Damages, has laboriously and fully collected the decisions in the several states on the local rule of damages *in actions for breach of real covenants* (c. 6, pp. 150–204), and to that treatise I must refer, for it would be quite foreign from this work to notice, analyze, and criticise the numerous diverse decisions on the subject. I have noticed many of them as minutely as the plan of these Commentaries would permit.

(*b*) Comm. ii. 309.

sued in covenant, but that these actions were local, as arising out of his privity of estate. Thursby *v.* Plant, 1 Wms. Saund. 240 a, n. *a*. Mr. Smith, in his note to Spencer's case, expresses the opinion that the *burden* of a covenant will not run with the land in any case, except that of landlord and tenant. 1 Sm. L. C. 6th ed. 61. It is generally laid down that there must be a privity between the plaintiff and defendant to make the defendant liable in an action of covenant. But the American authorities are not agreed as to what the privity is. Mr. Hare, in the American note to Spencer's case, 1 Sm. L. C. 6th Am. ed. 140, 141, thinks that it means tenure, when the defendant is not the original covenantor. On the other hand, it has been said that there is such a privity between the parties to a grant of an easement or *profit à prendre* that subsequent covenants in support of it will bind the heirs to whom the servient estate descends, even without mention of heirs or assigns. This seems to interpret privity as meaning only that both parties are interested in the same land, either as tenant and reversioner or as dominant and servient owner. Morse *v.* Aldrich, 19 Pick. 449. See Bally *v.* Wells, 3 Wils. 25, 29; Easter *v.* Little Miami R. R., 14 Ohio St. 48. Morse *v.* Aldrich has also

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adduced to support the view taken, the reader is referred to the last two chapters of that book. The conclusions only are given in the first part of this note. The problem presented is to trace the legal conceptions by which benefits or burdens which attached to one person by virtue of his standing in certain relations of fact could be transferred to another person who did not stand in such relations. Thus, if A. promises B. in proper form, it is natural that A. should be bound, and that B. should have the right to compel performance. But how can it be brought about that C. shall be bound, and D. have the right to enforce the contract made by A. and B.? See Lindley, L. J., in London, &c. Ry. Co. *v.* Gomm, 20 Ch. D. 562, 587. To answer the question with reference to the subject in hand, two entirely distinct principles must be taken into account. The first of these is the extension of the idea of universal heirship found in the Roman law. This conception was that the heir stood in the place of and continued the *persona* of the ancestor. The benefits and burdens which attached to the ancestor attached to the heir, because in legal contemplation the heir was the ancestor. This conception, at first applied to the universal heir, was naturally extended to the heir of particular parcels of land, and then to devisees. The last step was taken when the assignee came to be regarded as the *quasi* heir of the assignor. The conception in the case of assignee and devisee was of succession to so much of the *persona* of the assignor or devisor as related to the property assigned or de-

at common law, and conveyances which receive their force and efficacy from the statute of uses. The first class is again sub-

been mentioned with approval in New York, and tenure has been said to be unnecessary, in cases arising out of the New York manor lands, some of which are referred to *ante*, iii. 461, n. 1, (*b*). Van Rensselaer *v.* Read, 26 N. Y. 558, 574, 575; Tyler *v.* Heidorn, 46 Barb. 439, 450, 453; Van Rensselaer *v.* Hays, 19 N. Y. 68, 90; Van Rensselaer *v.* Barringer, 39 N. Y. 9. The points which seem to be considered of importance in the Year Books are occupancy of the manor on the one hand, or privity to the *contract* on the other, such as the feudal heir had to contracts in respect of his feud with or by his ancestor. Pakenham's Case, Y. B. 42 Ed. III. 3, pl. 14; Horne's Case, Y. B. 2 Hen. IV. 6, pl. 25; s. c. stated in Spencer's Case, 5 Co. Rep. 16, 18; Y. B. 5 Hen. VII. 18.

The tendency to attribute the duties of the occupants of manor lands to the land itself before feudal times, and the machinery by which the notion of a legal continuity between vendor and purchaser seems to have been worked out, have been alluded to already, 441, n. 1. Whether privity meant tenure or simply a succession, as heir or *quasi heres*, to the title of one of the parties to a contract affecting the use of the land, with the consequence that the successor was *quasi* a party to

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vised. This is, in another form, the modern idea of the *estate* as distinguished from the *land*. The other principle to be taken into account is that the land itself, as distinguished from the estate in the land, may be regarded as capable of being bound by or of possessing certain obligations or privileges. This principle receives its common illustration in the case of easements where the legal conception is of the servient tenement being bound to the dominant tenement. It is evident that, in cases falling within the first principle, only those who are strictly successors in title or estate have the benefits or burdens attached to the estate. Hence in covenants for title a disseisor has neither the benefit nor the burden. Nor in cases within this class can the possession of a disseisor be added to that of the disseisee in order to establish a right by prescription. In the case of easements, however, it is clear that after the easement had become established its benefit or burden would pass with the land to a disseisor. So, also, if the analogy were strictly carried out, an easement would be acquired by prescription by a user for the requisite time, by the successive owners of the dominant tenement, even though one or more of them held by disseisin. It is evident that the foregoing discussion touches only the legal theory upon which covenants or easements pass to others than those for or against whom they were originally established. The question of what rights and obligations do pass with the estate or land remains to be considered.

1. *Covenants of Title.* — (*a*) *Burden.* — The ordinary covenant of title found in deeds conveying an absolute interest is a personal covenant of the grantor, made entirely irrespective of any other land he may own, and is not attached to and does not pass with such land or the estate therein. It is not in the nature of such covenants to create any easement or other right in any lands of the grantor.

(*b*) *Benefit.* — The benefit of covenants of title passes with the estate in the land to which they relate while such covenants remain unbroken. This is upon the first of the principles above stated. The covenant is enforceable as a covenant, either by the original covenantee or by any one who succeeds to his *persona*, as respects the land in question. The relation created between the covenantor and the successor in title to the covenantee is thus purely

divided into original or primary, and derivative or secondary conveyances.

the contract, or whatever it meant, it may be doubted whether the previous existence of an easement could affect the question, although that seems to be the result of Morse *v.* Aldrich, *supra*, and Hurd *v.* Curtis, 19 Pick. 459. It is hard to see a reason for enforcing a covenant in support of a preëxisting easement, which does not apply with equal force when the easement is created at the same time, or when a covenant otherwise proper to run with land stands alone. On the other hand, the absence of tenure is a narrow ground for denying that the burden of a covenant may run with the land in this country. It would seem that if there is privity of title between the covenantee and the plaintiff and the covenantor and the defendant, the question of liability ought, in the United States, to be determined by considerations of policy which have been alluded to already in connection with easements, iii. 419, n. 1, A, and that a test of such doubtful meaning as privity between the parties should be abandoned.

This conclusion has been very nearly sanctioned at law, and still more nearly in equity. A stipulation in a deed poll that the grantee, his heirs and assigns, would forever maintain a fence around the granted premises, has been held to be a breach of the covenant against incum-

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a contractual relation. It leads to much the same result, and is perhaps more consistent with modern methods of legal reasoning to consider that the original covenant contains an offer to any who may become successors in title to the covenantee to be responsible for any breach of the covenants, which offer ripens into a contract with each successive taker of the title, when the title is taken.

2. *Restrictive Covenants.* — (*a*) *Burden.* — It is believed that Tulk *v.* Moxhay and the cases following it are to be properly rested upon the theory of easements. Such is the language of many of the cases, and the limitations upon the doctrine are most easily explained upon this theory. Thus it is generally held that the burden of restrictive covenants is only enforceable against an assignee of the land when they were imposed as a part of a building scheme contemplating the division of an estate into building lots, or when the covenantee retains land for the benefit of which the restrictive covenant is imposed. In other words, there must be a dominant and a servient tenement, and the intention must be shown to impose a restriction upon one for the benefit of the other. Dana *v.* Wentworth, 111 Mass. 291; Wiggins Ferry Co. *v.* O. & M. Ry. Co., 94 Ill. 83; Trustees *v.* Lynch, 70 N. Y. 440; Sharp *v.* Ropes, 110 Mass. 381; Peck *v.* Conway, 119 Mass. 546; Tobey *v.* Moore, 130 Mass. 448; Renals *v.* Cowlishaw, 11 Ch. D. 866; Nicoll *v.* Fenning, 19 Ch. D. 258; McLean *v.* McKay, 5 L. R. P. C. 327. But see Luker *v.* Dennis, 7 Ch. D. 227. Under this theory, carried to its logical conclusion, a disseisor, and even a purchaser for value without notice of the restriction, would take subject to the easement. It has been assumed, however, in most of the cases that equity would not actively interfere to enforce such a restriction as against a purchaser for value without notice. Patman *v.* Harland, 17 Ch. D. 353; Luker *v.* Dennis, *supra*; Robbins *v.* Webb, 68 Ala. 393, and cases generally in this note. Courts of equity will also refuse to enforce such restrictions in the case of building schemes where the whole character of the neighborhood has changed, so that the reasons which prompted their imposition no longer exist. Sayers *v.* Collyer, 24 Ch. D. 180; Trustees of Columbia College *v.* Thacher, 87 N. Y. 311. And there may be other

As some of those conveyances have grown obsolete, and as the principles which constitute and govern all of them have been

brances in a subsequent conveyance, and it has been intimated that the assignee would be liable to an action at law for a failure to keep up the fence, although there was no tenure between the parties and no preëxisting easement. Burbank *v.* Pillsbury, 48 N. H. 475, 482. But see Parish *v.* Whitney, 3 Gray, 516. So a similar covenant in connection with a grant of a right of way to a railroad has been held to prevent the assignee's recovering for cattle killed on the track, he having made the accident possible by his disregard of the covenant, Easter *v.* Little

grounds for such refusal. See Kelsey *v.* Dodd, 52 L. J. Ch. 34; Jackson *v.* Winnifrith, 47 L. T. 248; London, &c. Ry. Co. *v.* Bull, ib. 413. Such restrictions are not generally recognized at law *as easements*, because they do not fall within any of the recognized classes of easements. Whether such a covenant should not only operate to attach a burden to the use of the land, but also to bind successors in title to the covenantor in actions of covenant, is a more difficult question. The covenant in its nature relating to the land itself, and not to the estate in the land, is not naturally attached to the latter so as to pass as a part of the covenantor's *persona* with reference to such estate. Yet if an intention is shown to bind successors in title, it may perhaps be properly held that successive takers with notice assume the contract.

(*b*) *Benefit.* — The benefit of a restrictive covenant passes with the dominant tenement as an easement. There is here no occasion for the equitable limitations already noticed. Shaber *v.* St. Paul Water Co., 30 Minn. 179. That there must be a defined estate for the benefit of which the covenant is made, has been already stated. Renals *v.* Cowlishaw, *supra;* Dana *v.* Wentworth, *supra.* See also Master *v.* Hansard, 4 Ch. D. 718. In general, it would seem that there must also be a servient tenement the use of which is restricted. But in National Bank *v.* Segur, 39 N. J. L. 173, the benefit of a covenant not to engage in banking within the same borough was held to pass.

3. *Affirmative Covenants.* — It has been held in England that the doctrine of Tulk *v.* Moxhay has no application to affirmative covenants. Haywood *v.* Brunswick Building Soc., 8 Q. B. D. 403; London, &c. Ry. Co. *v.* Gomm, 20 Ch. D. 562, criticising Cooke *v.* Chilcott, 3 Ch. D. 694. In the latter case, Jessel, M. R., speaking of Tulk *v.* Moxhay, says, "The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of Spencer's case to another line of cases, or else an extension in equity of the doctrine of negative easements." The limitation of the doctrine to negative covenants seems to run the line at exactly the point at which it must be run upon the principle of easements. But in this country the doctrine has been held to apply to affirmative as well as negative covenants. Bronson *v.* Coffin, 118 Mass. 156; Kennedy *v.* Owen, 136 Mass. 199; Hazlett *v.* Sinclair, 76 Ind. 488; Fitch *v.* Johnson, 104 Ill. 111; Georgia Southern Railroad *v.* Reeves, 64 Ga. 492. See also Cooke *v.* Chilcott, *supra;* Werderman *v.* Société Générale D'Électricité, 19 Ch. D. 246. But the language appropriate to easements is used in many of these cases; and in Bronson *v.* Coffin, where a parcel of land was conveyed, the grantor agreeing for himself and assigns to fence, and subsequently the grantor sold a portion of the land remote from the line of the fence, it was held that the land sold was no longer liable to the covenant; the decision being rested upon the ground that the easement did not in its nature affect the remote lots.

already discussed, it will not be requisite to do more than take a cursory view of those which are the most in practice, and of the incidental learning connected with the subject. (*c*)

(*c*) By the statute of 7 and 8 Vict. c. 76, and of 8 and 9 Vict. c. 106, freehold land may be conveyed simply by way of deed, without livery of seisin, or lease and release: and no partition, or assignment, or exchange of land or lease is valid, except by deed; but where there is an agreement for a lease, payment of rent will constitute a yearly tenancy; and contingent interests may be conveyed by deed. The last act above mentioned renders feoffments void in law, except in a special case, and they shall not have any tortious operation.

Miami R. R., 14 Ohio St. 48; and it is held in Pennsylvania, that an action can only be brought against the assignee of the dominant tenement on a covenant to keep a tail race in repair, for breaches after the death of the covenantor; and that the administrator of the latter is not liable. Carr *v.* Lowry, 27 Penn. St. 257. So words sounding in covenant and contained in one and the same instrument have been considered to create an easement in a canal, and to annex to it covenants to share the expense of repairing. Norfleet *v.* Cromwell, 64 N. C. 1. So covenants to share the expense of party walls made in connection with a grant of a right to build half on each estate, and between tenants in common upon partition, bind an assignee. Savage *v.* Mason, 3 Cush. 500. And similar covenants between adjoining owners in connection with a similar grant, have been held to bind a devisee. Keteltas *v.* Penfold, 4 E. D. Smith, 122. See Burlock *v.* Peck, 2 Duer, 90. But see Todd *v.* Stokes, 10 Penn. St. 155; Block *v.* Isham, 28 Ind. 37.

On the other hand, a covenant to pay a mortgage debt will not bind the assignee of the mortgaged property, although it is expressly declared that it shall run with the land. Glenn *v.* Canby, 24 Md. 127.

(*b*) *Equitable Restrictions.* — The subject has been discussed with greater freedom in equity than at law. If the assignee takes with knowledge of the covenant by which the former owner has undertaken to bind the fee, there is a large class of cases in which equity will treat it as binding on his conscience, although there is no tenure, and the covenant neither is attached to nor creates an easement at law. This was done in favor of the covenantee in the leading case of Tulk *v.* Moxhay, 11 Beav. 571; affirmed 1 Hall & Tw. 105; 2 Phillips, 774; Wilson *v.* Hart, L. R. 1 Ch. 463; Whitney *v.* Union R. Co., 11 Gray, 359. And the same principle is applied in favor of subsequent purchasers of the premises intended to be benefited. Western *v.* MacDermott, L. R. 2 Ch. 72; L. R. 1 Eq. 499; Coles *v.* Sims, 5 De G., M. & G. 1, affirming s. c. Kay, 56; Piggott *v.* Stratton, 1 De G., F. & J. 33; Parker *v.* Nightingale, 6 Allen, 341; Schwoerer *v.* Boylston Market Ass., 99 Mass. 285, 297; Linzee *v.* Mixer, 101 Mass. 512; Clark *v.* Martin, 49 Penn. St. 289, 297; Tallmadge *v.* East R. Bank, 26 N. Y. 105. But it was held in Keates *v.* Lyon, L. R. 4 Ch. 218, that the covenantee upon repurchasing the land subject to the restriction was not bound by it under the circumstances of the case, although he had sold a portion of his remaining land in the mean time. Leading New York cases are Hills *v.* Miller, 3 Paige, 254; Barrow *v.* Richard, 8 Paige, 351. The benefit was extended to a previous purchaser in the latter case. Brouwer *v.* Jones, 23 Barb. 153; Gibert *v.* Peteler, 38 Barb. 488, 513. The restriction has even been enforced as between parties to whom the original covenantor has conveyed different parcels of his estate. Winfield *v.* Henning, 6 C. E. Green (21 N. J. Eq.), 188. See Greene

(1.) *Of Feoffment.* — Feoffment was the mode of conveyance in the earliest periods of the common law. It signified, originally,

v. Creighton, 7 R. I. 1; Harrison *v.* Good, L. R. 11 Eq. 338. But it has been held otherwise where there was no evidence that the restriction was intended for the benefit of the premises subject to it, and where it clearly was intended for the benefit of other land of the covenantee. Jewell *v.* Lee, 14 Allen, 145. It has been said that it would be enforced, although the covenantee parted with his whole interest at the time if he took the covenant with reference to land which he hoped to and subsequently did acquire. Keates *v.* Lyon, L. R. 4 Ch. 218, 227. And when the intent is manifest, the form of words employed, whether framed as a covenant, condition, or otherwise, will not affect the application of the doctrine. See the Massachusetts cases, and Clark *v.* Martin; Tallmadge *v.* East R. Bank, *supra*.

The cases which are collected above were cases of restrictions upon the full use of premises generally in connection with building schemes and the like, and relating to a particular and defined portion of land, agreed to be laid out and dealt with according to a prescribed plan. Keates *v.* Lyon, L. R. 4 Ch. 218, 225. The restrictions in question have a resemblance to easements, and it will be observed that an easement may be created as well by words sounding in covenant as by words of grant. Rowbotham *v.* Wilson, 8 H. L. C. 348, 362; Holms *v.* Seller, 3 Lev. 305; Gale on Easem. 46; Greene *v.* Creighton, 7 R. I. 1; Norfleet *v.* Cromwell, 64 N. C. 1; Spencer's Case, Am. note, 1 Sm. L. C. See Bro. Ab. *Covenant*, 2; Y. B. 27 Hen. VIII. 16, 28. Many at least of the restrictions which have been enforced might have been imposed as servitudes, although when they bind each of several lots to every other a good many conveyances and reconveyances might be necessary to accomplish the result. A grant of an easement to have land *unbuilt upon* has been recognized at law. Brooks *v.* Reynolds, 106 Mass. 31. See Greene *v.* Creighton, 7 R. I. 1, 9.

It is laid down, however, that the equitable doctrine does not stand on the analogy of easements, but on the principle "of preventing a party having knowledge of the just rights" (*ex contractu*) "of another, from defeating such rights," Brewer *v.* Marshall, 4 C. E. Green (19 N. J. Eq.), 537, 543. See Sugd. V. & P. 14th ed. 803, App. 1; although it may be doubted whether it has been established as a general proposition, even subject to the limits imposed by public policy, that equity will compel third persons to respect contracts other than those which it regards as informal conveyances of a right of property (2 Austin on Jur. 3d ed. 1001; Table II., Note 4, C. c.). Compare the much questioned case of Lumley *v.* Gye, 2 El. & Bl. 216; [followed in Bowen *v.* Hall, 6 Q. B. D. 333; see also Dickson *v.* Dickson, 33 La. An. 1261;] Ortolan, Instituts, Généralization, § 66, pl. 194; and also what has been remarked above as to covenants operating as grants. Ashley *v.* Dixon, 48 N. Y. 430.

The analogy of equitable restrictions to covenants running with the land is stronger than to easements. In all the decided cases, it is believed that the person charged has come in under the title of the party who imposed the restriction. The extent to which covenants may bind the assignee, even at law, is greater than in the case of easements, properly so called, which, as has been said, impose no greater legal obligation on the servient owner than on third persons, iii. 419, n. 1, A, (*c*). Intimations have been thrown out that there was a difference in the extent to which courts of law and courts of equity would go, as a matter of policy, in England, but a similar conflict is not likely to arise in this country. Dennett

the grant of a feud or fee; but it came in time to signify the grant of a free inheritance in fee, respect being had to the perpetuity of the estate granted, rather than to the feudal tenure. Nothing can be more concise and more perfect in its parts than the ancient charter of feoffment. It resembles the short and plain forms now commonly used in the New England states. The feoffment was likewise accompanied with actual delivery of possession of the land, termed livery of seisin. The notoriety and solemnity of the livery were well adapted to the simplicity of unlettered ages, by making known the change of owners, and preventing all obscurity and dispute concerning the title. The actual livery was performed by entry of the feoffor upon the land, with the charter of feoffment, and delivering a clod, turf, or twig, or the latch of the door, in the name of seisin of

v. Atherton, L. R. 7 Q. B. 316, 326; Western *v.* MacDermott, L. R. 2 Ch. 72, 78. It is obvious that when, as in building schemes, the assent of many people is necessary to release such a restriction, it is much harder to extinguish than an ordinary servitude or covenant between two parties. And equity judges have indicated that there were limits to the extent to which they would go in thus tying up land. Keates *v.* Lyon, L. R. 4 Ch. 218, 228 *et seq.* In Brewer *v.* Marshall, 4 C. E. Green (19 N. J. Eq.), 537, the court declined to enforce against a vendor's assignees a covenant by the vendor that neither he nor his assigns would sell marl from the premises adjoining the tract conveyed. In Keppell *v.* Bailey, 2 My. & K. 517, a covenant to carry all the limestone used on the premises over a certain railway at a certain rate was held not to bind the assignee. The covenant had a negative as well as a positive aspect undoubtedly, but the principle upon which it was decided, whether rightly or wrongly applied, seems to have been, that an affirmative covenant which is not to be performed upon the land, and which does not qualify an easement appurtenant to the premises, or the use of the land, or the rights of ownership, cannot be arbitrarily annexed to the fee, so as to bind a purchaser, notwithstanding that he takes with notice. That principle has always been followed by the common-law courts even in England, as has been shown in the note on *Easements*, iii. 419, n. 1, A. See *In re* Drew, *Ex parte* Mason, L. R. 2 Eq. 206. Nevertheless Keppell *v.* Bailey has been criticised as inconsistent with settled principles of equity by Lord St. Leonards in Sugd. V. & P. 14th ed. App. No. 1, [and must be considered overruled so far as it was simply restrictive. Luker *v.* Dennis, 7 Ch. D. 227.]

If the above views be sound, the principal difference between the legal and equitable doctrine in this country seems to be that a less degree of formality is required to create a restriction at equity than at law.

B. *Benefits.* — It is now settled that a covenant may be annexed to and run with incorporeal hereditaments. Van Rensselaer *v.* Read, 26 N. Y. 558, 576; Keteltas *v.* Penfold, 4 E. D. Smith, 122, 133; Martyn *v.* Williams, 1 H. & N. 817, 828; Hooper *v.* Clark, L. R. 2 Q. B. 200. So, on the other hand, do covenants by grantees of incorporeal hereditaments run with the land out of which they are granted. Martyn *v.* Williams, *supra*.

all the lands contained in the deed. The * ceremony was * 481
performed in the presence of the peers or freeholders of the neighborhood, who were the vassals of the feudal lord, and who might afterwards be called on to attest the certainty of the livery of seisin. (*a*)

The charter itself was not requisite. The fee was capable of being conveyed by mere livery in the presence of the vicinage. The livery was equivalent to the feudal investiture of the inheritance, for it created that seisin which became an inflexible doctrine of the common law. And if the feoffor was not able to enter upon the land, livery was made within view of it, with a direction to the feoffee to enter, and if the actual entry afterwards, in the time of the feoffor, took place, it was a good livery in law. (*b*)

The feoffment operated upon the possession without any regard to the estate or interest of the feoffor; and though he had no more than a naked or even tortious possession, yet, if the feoffor had possession, the feoffment had the transcendant efficacy of passing a fee by reason of the livery, and of working an actual disseisin of the freehold. It cleared away all defeasible titles, devested estates, destroyed contingent remainders, extinguished powers, and barred the feoffor from all future right, and possibility of right, to the land, and vested an estate of freehold in the feoffee. (*c*) In this respect the feoffment differed essentially from a fine or common recovery; for the conusor in the fine, and the tenant to the *præcipe*, must be seised of the freehold, or of an estate in fee, or for life, otherwise the fine or recovery may be avoided. (*d*)

The doctrine of disseisin forms a curious and instructive part of the old feudal law of tenures; and it has led, in modern times, to very extended and profound discussions. This branch of the work would probably appear to the * student to be * 482

(*a*) Co. Litt. 48, a; 2 Bl. Comm. 315, 316.

(*b*) Litt. sec. 419, 421; Co. Litt. 48, b.

(*c*) Co. Litt. 9, a, 49, a, 367, a; Litt. 599, 611, 698; West. Symb. sec. 251; Shep. Touch. 203, 204; Butler's Notes, 285 and 317, to Co. Litt. lib. 3.

(*d*) The effect of a mere entry upon land, claiming to take possession as owner, is much diminished in the English law. By the statute of 3 and 4 Wm. IV. c. 27, no person is deemed to have been in possession of land by a bare entry, or by continual claim near it, so as to keep his right alive, unless there be an actual change of possession.

left too incomplete, without taking some notice of this ancient and vexatious learning.

Seisin was the completion of the feudal investiture, by which the tenant was admitted into the feud, and performed the rites of homage and fealty. He then became actual tenant of the freehold. Disseisin, in fact, was the violent termination of this seisin, by the actual ouster of the feudal tenant, and the usurpation of his place and relation. It was a notorious and tortious act on the part of the disseisor, by which he put himself in the place of the disseisee, and in the character of tenant of the freehold, made his appearance at the lord's court. A wrongful entry was not a disseisin, provided the rightful owner continued in possession; for it was a just and reasonable intendment of law, that when two persons were at the same time in possession, the seisin was adjudged to be in the rightful owner. (*a*) It was the ouster or tortious expulsion of the true owner from the possession that produced the disseisin. There was a distinction between dispossession and disseisin, for disseisin was a wrong to the freehold, and made in defiance and contempt of the true owner. It was an open, exclusive, adverse entry and expulsion; whereas dispossession might be by right or by wrong; and it was necessary to look at the intention, in order to determine the character of the act. These general principles seem to be admitted in all the more modern authorities, on each side of the Atlantic, on this subject, whatever difference of opinion there may be in the application of them. (*b*)

There were two kinds of disseisin; the one was a disseisin in fact, and the other a disseisin by construction of *483 *law. The latter could be created in many ways, without forcible and violent ouster; as by feoffment with livery, by entry under an adverse lease, or by a common recovery, or by levying a fine. Whether the disseisin was affected by actual expulsion or by a constructive ouster, the legal consequences upon the title were the same. (*a*) But the doctrine of

(*a*) Litt. sec. 701.

(*b*) Litt. sec. 279; Holt, C. J., Anon., 1 Salk. 246; Taylor *v.* Horde, 1 Burr. 60; Cowp. 689, s. c.; William *v.* Thomas, 12 East, 141; Jerritt *v.* Weare, 3 Price (Exch.), 575; Smith *v.* Burtis, 6 Johns. 197; Proprietors of Kennebec Purchase *v.* Springer, 4 Mass. 416; Proprietors *v.* Laboree, 2 Greenl. 283; Varick *v.* Jackson, 2 Wend. 166; Prescott *v.* Nevers, 4 Mason, 326.

(*a*) If one tenant in common enters under a recorded deed upon land, claiming the

disseisin by election, depending upon the pleasure of the true and injured owner, and whether, for the sake of the remedy, he would or would not elect to consider himself disseised, has been extensively applied to these disseisins in construction of law. It has led to a great deal of discussion and controversy between the adherents to the ancient and rigid doctrines of disseisin, and the advocates for the melioration of that theory in its adaptation to the state of modern manners and improvement since the fall of the feudal system. The question on the efficacy of the ancient feoffment came into view, and led to enlarged discussion in *Taylor* v. *Horde;* (*b*) and the writings of the distinguished property lawyers, such as Butler and Preston, have shed a great deal of light and learning upon the character and operation of that celebrated species of conveyance.

By the doctrine of the feudal law, no person who had less than a life estate was deemed a freeholder, and none but a freeholder was considered to have possession of the land. The possession of a termor for years was the possession of the freeholder under whom he held, and who was exposed to lose the possession by the negligence or treachery of the termor. If he left it vacant, or permitted himself to be disseised, or undertook to alien it, or claimed a fee, or affirmed the title to be in a stranger, the freeholder lost the possession, which was nearly synonymous to freehold. * The possession of the termor at will, or at * 484 sufferance, was equally the possession of the freeholder. Persons in possession without a right, as tenants by disseisin, deforcement, abatement, and intrusion, could also transfer the possession and freehold by livery of seisin. The livery operated upon the possession; and it could not be made by a person in possession without transferring the freehold. The transfer was of itself a feoffment; and no writing was required, and no greater estate in the feoffor than mere possession. When charters were introduced, it was the livery, and not the charter, that worked the transfer of the fee. The feoffment was originally required to be made in the presence of the peers of the lords' court (*pares*

entirety in fee, and exercises notorious and avowed acts of exclusive ownership, such acts of ownership amount to a disseisin of his cotenants. Prescott *v.* Nevers, 4 Mason, 326; Clapp *v.* Bromaghan, 9 Cowen, 530; Parker *v.* Proprietors, &c., 3 Met. 91; [Brock *v.* Eastman, 28 Vt. 658; Hubbard *v.* Wood, 1 Sneed, 279.]

(*b*) 1 Burr. 60.

curiæ), and the entry of the feoffee was recorded in the lords' court. When this solemnity and notoriety was disused by the time of Henry II., the transfer lost much of its dignity and certainty.

The feoffment was supposed, by the Court of K. B., in *Taylor* v. *Horde*, to have lost, on account of that change, much, also, of its peculiar efficacy. But Mr. Butler does not accede to the accuracy of this opinion. The ancient efficacy of the feoffment was, that it *created an estate of freehold, though none was in the feoffor at the time of the feoffment;* and there is nothing, he observes, in the history of the English law, to show when and how it was lost. The doctrine in the time of Bracton was, that every person who had possession, however slender or naked that possession might be, as that of a tenant at will or by sufferance, or a guardian, or however tortious his possession might be, as the possession of a disseisor or intruder, he was, nevertheless, considered to be in the seisin of the fee, and to be enabled by feoffment and livery to transfer it to another. The disseisor became a good tenant to the demandant's *præcipe*, and a freeholder *de facto* in spite of the true owner. (*a*) The same efficacy, by means of the possession in the feoffor, and livery of seisin to the feoffee,
* 485 was * imputed to the feoffment, by Perkins, Coke, and others; (*a*) and the ancient doctrine, as it existed when Bracton wrote, has been continued to modern times, giving to the feoffment its primitive operation. Disseisins by election are those acts which are no disseisins unless the party chooses to consider them to be such, and which are not in themselves disseisins. The disseisin which is produced by a feoffment answers every description of an actual disseisin. Whether the feoffment was made by a person seised of an estate of freehold, or by a person having only the possession as a tenant for years, at will or by sufferance, the effect was the same. The disseisin gave to the feoffee, against every person but the disseisee, an immediate estate of freehold, with its rights and incidents; so that the wife of the feoffee became entitled to dower, and the husband to his curtesy; and the descent to the heir of the feoffee tolled the entry of the disseisee. The tenant was expelled from his fee.

(*a*) Bracton, lib. 2, c. 5, sec. 3, 4.

(*a*) Co. Litt. 48, b, 49, a; 2 Inst. 412, 413; Bullock v. Dibler, Popham, 38; Perkins, sec. 222.

and the feoffee usurped his feudal place and relation; and he became a good tenant to the *præcipe* of every demandant; though the true owner's right of entry upon him was not taken away. The uniform language of the books which treat of disseisins by feoffments, describes the feoffee as having an immediate estate of freehold, and as having acquired a seisin in fee as against strangers. The disseisin produced by a feoffment meant, according to Mr. Butler and Mr. Preston, an actual disseisin, and not one at the election of the party; and the feoffee continued vested with the freehold until the disseisee, by entry or action, regained his possession; and of that right of entry or of action he might be barred in process of time.

The character and effect of a feoffment and disseisin, according to the ancient and strict notion of them, were ably illustrated and supported by Mr. Knowler, in his argument *in *486 *Taylor* v. *Horde*. (*a*) The doctrine of the court in that case was somewhat different from the view which Mr. Butler has given of the operation of a feoffment. The opinion of Lord Mansfield has been much questioned by him and others, who deny that the efficacy of the feoffment is lost; and they insist that it does still vest an actual estate of freehold by disseisin. According to Mr. Preston, (*b*) whenever a person enters into land without title, and claims a fee, he is a disseisor, and acquires a seisin in fee. So, if a termor makes a feoffment, he gains a freehold by disseisin. The great struggle which commenced with Lord Mansfield, between the courts at Westminster and the adherents of the ancient consequences of a feoffment, is, that the latter are tenacious of holding the feoffment to its primitive operation, by which it passed a fee, by wrong as well as by right, and disseised the true owner; whilst the former are disposed to check, as much as possible, the application of the unreasonable and noxious qualities of the feoffment, and confine its operation within the bounds of truth and justice. The doctrine in *Taylor* v. *Horde* was, that if a tenant for life or years should make a feoffment, the lessor might still elect whether he would consider himself disseised; and that except in the special instance of a fine with proclamations, there was no case in which the true owner might not elect to be deemed

(*a*) 1 Burr. 60. Mr. Preston says that the argument of Mr. Knowler, and not the doctrine of Lord Mansfield, states the law most correctly.

(*b*) Preston on Abstracts, ii. 390, 392.

not disseised, provided his entry was not taken away. In *Jerritt* v. *Weare*, (*c*) the Court of Exchequer were disposed to follow the spirit of the case of *Taylor* v. *Horde*, and disarm the doctrine of disseisin of much of its ancient severity and formidable application. They adopted the doctrine in *Blunden* v. *Baugh*, (*d*)
*487 that whether there was an actual disseisin or not, * depended upon the character and intention of the act. A lease for years to a stranger, by a tenant at will rendering rent, was held, in the case from *Croke*, to be a disseisin only at the election of the owner; and, in the exchequer case, a lease by a stranger, and entry under it by the lessee, was put upon the same ground. Every disseisin is a trespass, but every trespass is not a disseisin. A manifest intention to oust the real owner must clearly appear, in order to raise an act which may be only a trespass to the bad eminence of disseisin.

In *Goodright* v. *Forester*, (*a*) the court censured and condemned the ancient doctrine of estates arising by disseisin, as they did also in *Jerritt* v. *Weare*. The opinion of Lord Mansfield received still more decided confirmation by the unanimous decision of the K. B., in *Doe* v. *Lynes*. (*b*) It was there held that a feoffment did not operate to destroy a term for years, when made without the consent of those who had the term. Lord Tenterden declared, that there was so much good sense in the doctrine of Lord Mansfield, that he should be sorry to find any ground for saying it could not be supported. A feoffment by a stranger would be void, if there was a lessee for years in possession, who did not assent to it. To attempt to turn a term into a wrongful fee with all its inequitable consequences by the old exploded notion of the transcendent operation of a feoffment, was pointedly condemned. The nature of a feoffment and disseisin were said to be materially altered since Littleton wrote. The good sense and liberal views which dictated the decision in *Taylor* v. *Horde* seem to have finally prevailed in Westminster Hall, notwithstanding the strong opposition which that case met with from the profession. The courts will no longer endure the old and exploded theory of disseisin. They now require something more than mere feoffments and leases, to work, in every case,
*488 the absolute and perilous consequences of a * disseisin in

(*c*) 8 Price (Exch.), 575.
(*a*) 1 Taunt. 578.
(*d*) Cro. Car. 302.
(*b*) 3 B. & C. 388.

fact. Those acts are a disseisin only at the election of the real owner, and are not, in all cases, absolutely and inevitably so. It will depend upon the intention of the party, or it will require overt acts that leave no room to inquire about intention, and which amount to actual ouster in spite of the real owner. Mr. Preston, in his discussion of titles under seisin and disseisin, (*a*) adheres to the strict doctrines of the old common law; and he severely condemns the judgment in *Taylor* v. *Horde*, as "confounding the principles of law, and producing a system of error." Mr. Butler, also, though more temperately and more ably, attacks its conclusions, while he admits the case was decided with much consideration and infinite ability. These writers serve, at least, to show the spirit of free inquiry and of uncompromising hostility to innovation which animates the English property lawyers, and impels them to stand watchful and intrepid sentinels over the ancient jurisprudence. While we admire their independence and patriotism, we think it would be deeply to be lamented if we were obliged, at this day, to call into practice the extravagant consequences of disseisin, after feudal tenures, and the assurance by feoffment itself, and the reasons which gave such tremendous effects to disseisins, had all become lost and buried in oblivion. (*b*)

(*a*) Preston on Abstracts, ii. 279–296.

(*b*) I presume Mr. Preston to be the same counsel who argued the cause of Goodright *v.* Forester, in the Exchequer Chamber, in 1809. 1 Taunt. 578. In that case, Sir James Mansfield, in delivering the judgment of the court, observed, that if the doctrine of estates arising by disseisin was such as had been stated by Mr. Preston, he should lament that the law was such. "Our ancestors," he observed, "got into very odd notions on these subjects, and were induced, by particular cases, to make estates grow out of wrongful acts." It is presumed that Mr. Preston is also the same counsel who argued the cause of Jerritt *v.* Weare, before the Court of Exchequer, in 1817. 8 Price, 575. In that case, Baron Graham, in delivering the opinion of the court, observed, that the principle of the decision in Taylor *v.* Horde rested on a foundation not to be shaken; and he spoke with even reprehensible harshness of the effort to revive the old doctrine of disseisin in its unmitigated force. Mr. Preston was not dismayed nor diverted from his opinions by that decision; and he says, in the preface to his third volume on Abstracts of Title, that he has stated his propositions on disseisin, though that decision was before him, with the fullest conviction of their accuracy. It is presumed, further, that Mr. Preston is the same person, who, as counsel, once more brought up and enforced his tenacious opinions on the efficacy of feoffment working a disseisin and creating a wrongful fee; and the K. B., in Doe *v.* Lynes (3 B. & C. 388), very peremptorily rejected them. His views on this subject, as laid down in his treatises on property, may therefore be considered as essentially expelled from Westminster Hall.

*489 *In this country, the decision of Lord Mansfield has not met with entire approbation; and the late and learned Chief Justice Parsons declared, that his lordship had not gone to the bottom of the matter, and had puzzled himself unnecessarily. I cannot acquiesce in the accuracy of this censure; and it appears to me that Lord Mansfield gave to a disseisin, founded on the operation of a feoffment, as much efficacy as it was entitled to receive, in this improved age of the English law. (a)

The conveyance by feoffment, with livery of seisin, has long since become obsolete in England; and though it has been, in this country, a lawful mode of conveyance, it has not been used in practice. Our conveyances have been either under the statute of uses, or short deeds of conveyance, in the nature of the ancient feoffment, and made effectual, on being duly recorded, without the ceremony of livery. The New York Revised Statutes (b) *490 have expressly *abolished the mode of conveying lands by feoffment, with livery of seisin, and in Illinois and Missouri, a feoffment, deed, or conveyance, in writing, passes the estate without livery of seisin. (a)

(2.) *Of Grant.* — This was a common-law conveyance, and applied to incorporeal hereditaments, such as reversions, rents, and services; and not being of a tangible nature, and existing only in contemplation of law, they could not be conveyed by livery of seisin. Such rights were said to lie in grant, and not in livery, and they were conveyed simply by deed. (b) There was this essential difference between a feoffment and a grant; while the former carried destruction in its course, by operating upon the

(a) It is to be regretted that the learned judge, who delivered the opinion in Prescott v. Nevers (4 Mason, 326), did not then find a proper occasion to investigate the subject of disseisin at large, upon which, he says, he had bestowed his researches at an early period of his professional life. There is no person living who would have done more complete justice to the subject; for that eminent judge never handles a question on any part of the science of law without examining it in all its relations, with equal candor and freedom, and fervor and force, and leaving it completely exhausted.

(b) Vol. i. 738, sec. 136. See also *post*, 496, note.

(a) Revised Laws of Illinois, ed. 1833; Perry v. Price, 1 Mo. 553. In South Carolina, feoffment with livery of seisin is still a valid and subsisting mode of conveyance, and, if made by the tenant for life of the legal estate, will bar all contingent remainders. Dehon v. Redfern, Dudley, Eq. 115. So, also, in Connecticut, a feoffment is a valid conveyance without the formality of livery of seisin. Bryan v. Bradley, 16 Conn. 474. [See further, Abbott v. Holway, 72 Me. 298.]

(b) Co. Litt. 9, b, 172, a.

possession, without any regard to the estate or interest of the feoffor, the latter benignly operated only upon the estate or interest which the grantor had in the thing granted, and could lawfully convey. (*c*) Feoffment and grant were the two great disposing powers of transfer of land, in the primitive ages of the English law.

To render the grant effectual, the common law required the consent of the tenant of the land out of which the rent or other incorporeal interest proceeded; and this consent was called *attornment*. It arose from the intimate alliance between the lord and vassal existing under the feudal tenures. The tenant could not alien the feud without the consent of the lord, nor the lord part with his seigniory without the consent of the tenant. (*d*)

The necessity * of the attornment was partly avoided by * 491
the modern modes of conveyance under the statute of uses;
and it was, at last, completely removed by the statutes of 4 and 5 Anne, c. 16, and 11 George II. c. 19; and it has been equally abolished in these United States. (*a*) The New York Revised Statutes (*b*) have rendered the attornment of the tenant unnecessary to the validity of a conveyance by his landlord; though to render him responsible to the grantee, for rent or otherwise, he must have notice of the grant. Nor will the attornment of a tenant to a stranger be valid, unless made with his landlord's consent, or in consequence of a judgment or decree, or to a mortgagee after forfeiture of the mortgage. (*c*)

(*c*) Litt. sec. 608, 609.

(*d*) Wright on Tenures, 171. Mr. Butler, in his note 272 to Co. Litt. lib. 3, while he admits that this doctrine formerly prevailed in England, says, that it did not prevail to an equal extent on the continent; and the lord might transfer his whole fee without the consent of the vassal; and the vassal became, by such transfer, the tenant of the new lord. Mr. Hallam, in treating of the feudal system on the continent, during the middle ages, passes over so very important a point with only a general remark, that *the connection between the two parties, under the feudal tenure, was so intimate that it could not be dissolved by either, without requiring the other's consent;* and he refers to no authority for his assertion. Hallam on the Middle Ages, i. 102. Sir Martin Wright [Tenures, 30] refers to the Book of Feuds (Feud. lib. 2, tit. 34, sec. 1) where we have these words: Ex eadem lege descendit quod Dominus sine voluntate vassalli feudum alienare non potest. But the Book of Feuds admits that this check upon the lord did not prevail at Milan. Mediolani non obtinet.

(*a*) In Massachusetts, attornments are considered as abolished without any local statute, by long usage. Shaw, C. J., 3 Met. 78.

(*b*) Vol. i. 739, sec. 146.

(*c*) New York Revised Statutes, i. 744, sec. 3. [*Cf.* Austin *v.* Ahearne, 61 N. Y. 6;

The New York Revised Statutes have given to deeds of conveyance, of the inheritance of freehold, the denomination of *grants;* and, though deeds of bargain and sale, and of lease and release, may continue to be used, they are to be deemed grants. That instrument of conveyance is made competent to convey all the estate and interest of the grantor which he could lawfully convey; and it passes no greater or other interest. (*d*) I should presume that, under the New York statute, the operative word of conveyance is *grant*, and that no other word would be held essential; but, as other modes of conveyance operate equally as grants, any words, showing the intention of the parties to convey, *492 would be sufficient. (*e*) The policy of * changing, by statute, the denomination of the usual deeds of conveyance of the freehold, and resolving them all into grants, may admit of some question. In the English law, and in the law of this country, grants are understood to apply specifically to the conveyance of incorporeal hereditaments, and to letters patent from government. This is the usual understanding and application of the term with the profession, and with the country at large. Doctor Tucker said, that the word "grant," when applied to lands in Virginia, was synonymous with "patent." There would seem to have been no necessity that the name of the ordinary and familiar conveyance, by *bargain* and *sale*, should have been dismissed and absorbed in the word *grant*. The deed of bargain and sale might have been declared to operate as heretofore, by a transfer of the title, without the necessity of the theory of raising a use. (*a*)

Raymond *v.* Kerker, 2 Ill. App. 496. But that attornment is not necessary to enable the grantee to sue for rent, see King *v.* Housatonic R. R. Co., 45 Conn. 226; Perrin *v.* Lepper, 34 Mich. 292.]

(*d*) New York Revised Statutes, i. 738, sec. 137, 138, 142, 143. So in Tennessee, the statutory deed operates as a grant to pass nothing but what the bargainor may lawfully sell, and the title passes, not by force of the statute of uses, but of the registered deed. Miller *v.* Miller, Meigs, 484.

(*e*) Lord Coke says, that the word "grant" (*concessi*) may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender, &c.; and it is in the election of a party to use it to which of these purposes he will. Co. Litt. 301, b. The word *convey*, or the word *assign*, or the word *transfer*, would probably be sufficient. It is made the duty of the courts, in the construction of every instrument conveying an estate, "to carry into effect the intent of the parties;" and that intent may as certainly appear by these words as by any other.

(*a*) Mr. Humphreys, in his Outlines of a Code, proposed that the name of all deeds should be *conveyance*, and the operative word *convey*.

It will be unnecessary to enlarge upon conveyances of a special or secondary character, as exchange, partition, confirmation, surrender, assignment, and defeasance; and without dwelling upon them, I shall proceed at once to the consideration of conveyances, which owe their introduction and universal practice to the statute of uses.

(3.) *Of Covenant to stand seised.* — By this conveyance, a person seised of lands, covenants that he will stand seised of them to the use of another. On executing the covenant, the other party becomes seised of the use of the land, according to the terms of the use; and the statute of uses immediately operates, and annexes *the possession to the use. This *493 conveyance has the same force and effect as a common deed of bargain and sale; but the great distinction between them is, that the former can only be made use of among near domestic relations, for it must be founded on the consideration of blood or marriage. No use can be raised for any purpose by this conveyance, in favor of a person not within the influence of the domestic consideration; and it makes no difference whether the grantee, if he be a stranger to the consideration, is to take on his own account, or as a mere trustee for some of the family connections. He is equally incompetent to take. (*a*) The existence of another consideration, in addition to that of blood or marriage, will not impede the operation of the deed. Covenants to stand seised are a species of conveyance said to be no longer in use in England, (*b*) as no use would vest in a stranger, to whom the consideration of blood did not extend. (*c*) They owe their efficacy to the statute of uses; and, in New York, the statute of uses is abolished, and no mention is made of this conveyance. But if the covenant to stand seised be founded on the requisite consideration, it would be good as a grant, for there could be no dispute about the inten-

(*a*) Lord Paget's Case, 1 Leon. 195; 1 Co. 154, a; Wiseman's Case, 2 Co. 15; Smith *v.* Risley, Cro. Car. 529; Hore *v.* Dix, 1 Sid. 25; Jackson *v.* Sebring, 16 Johns. 515.

(*b*) 2 Saunders on Uses and Trusts, 82. But this species of conveyance is not unknown in practice in this country. Jackson *v.* Sebring, *supra*; French *v.* French, 3 N. H. 239; [Dinkins *v.* Samuel, 10 Rich. (S. C.) 66; Davenport *v.* Wynne, 6 Ired. 128; Horton *v.* Sledge, 29 Ala. 478, 497; Wall *v.* Wall, 30 Miss. 91; Trafton *v.* Hawes, 102 Mass. 533, 537. See Underwood *v.* Campbell, 14 N. H. 393; Corwin *v.* Corwin, 9 Barb. 219; s. c. 2 Seld. 342.] [Covenant to stand seised was held to be still a valid mode of conveyance in New York in Eysaman *v.* Eysaman, 24 Hun, 430.]

(*c*) Cross *v.* Faustenditch, Cro. Jac. 181.

tion; and it is admitted, that in a covenant to stand seised, any words will do that sufficiently indicate the intention. (*d*) It is a principle of law, that if the form of the conveyance be an inadequate mode of giving effect to the intention, according to the letter of the instrument, it is to be construed under the assumption of another character, so as to give it effect. Cum quod ago non valet ut ago, valeat quantum valere potest. The qualification to this rule is, that the instrument must partake of the essential qualities of the deed assumed; and, therefore, no instru-
*494 ment can * operate as a feoffment without livery, either shown or presumed; nor as a grant, unless the subject lies in grant (as it now does in New York in all cases of the freehold); nor as a covenant to stand seised, without the consideration of blood or marriage; nor as a bargain and sale, without a valuable consideration. If there be no lease to make the deed good as a release, and no livery to make it good as a feoffment, it may operate as a bargain and sale, or if a release cannot operate because it attempts to convey a freehold *in futuro*, it will be available as a covenant to stand seised, provided there be the requisite consideration. (*a*)

(4.) *Of Lease and Release.* — This was the usual mode of conveyance in England down to the year 1841, because it did not require the trouble of enrolment. It was contrived by Sergeant Moore, at the request of Lord Norris, for a particular case, and to avoid the unpleasant notoriety of livery or attornment. It was the mode universally in practice in New York, until the year 1788. The revision of the statute law of the state at that period, which reënacted all the English statute law deemed proper and applicable, and which repealed the British statutes in force in New York while it was a colony, removed all apprehension of the necessity of enrolment of deeds of bargain and sale, and left that short, plain, and excellent mode of conveyance to its free operation. The consequence was, that the conveyance by lease and release, which required two deeds or instruments, instead

(*d*) Doe *v.* Salkeld, Willes, 673; Roe *v.* Tranmarr, ib. 682; Hayes *v.* Kershow, 1 Sandf. Ch. 258. In this last case, the learned assistant vice-chancellor, in his able judgment in support of a conveyance as a covenant to stand seised to uses, considered it to be settled that collateral consanguinity was not a meritorious consideration.

(*a*) Doe *v.* Salkeld, Willes, 673; Preston on Abstracts, i. 71, 312; Roe *v.* Tranmarr, Willes, 682, with the notes annexed to the case, as reported in Smith's Leading Cases, ii.; ib. iii. 23, 24; Cheney *v.* Watkins, 1 Harr. & J. 527.

of one, fell immediately into total disuse, and will never be revived.

The lease and release, when used as a conveyance of the fee, have the joint operation of a single conveyance. The first step was to create a small estate, as a lease for a year, and vest possession of it in the grantee. In a lease at common law, actual entry was requisite to vest the possession, *and *495 enable the lessee to receive a release of the reversion. To avoid the necessity of actual entry, the lesser estate was created by a bargain and sale under the statute of uses, and founded on a nominal pecuniary consideration. The bargain raised the use, and the statute immediately annexed the possession to the use; and the lessee, being thus in possession by the operation of the statute, was enabled to receive a release of the reversion. The release was a conveyance at common law, and operated by way of enlargement of the estate; and thus, by the operation of the lease, by way of bargain and sale, under the statute of uses, and by the operation of the release at common law, the title was conveyed.

If the lease is not to operate under the statute of uses as a bargain and sale, then a consideration is not necessary. As the statute of enrolments of 27 Hen. VIII. did not apply to terms for years, the bargain and sale for a pecuniary consideration placed the lessee, before entry, in the same situation with the lessee at common law after entry; and it was early settled that the estate of such a lessee was capable of enlargement by release, and that such a mode of conveyance was effectual. (*a*)

(5.) *Of Bargain and Sale.* — This is the mode of conveyance most prevalent in the United States; and it was in universal use in New York after 1788, and prior to the introduction of the *grant*, by the Revised Statutes, in January, 1830. (*b*) A bargain

(*a*) Lutwich *v.* Mitton, Cro. Jac. 604; Barker *v.* Keat, 2 Mod. 249. The second volume of Mr. Preston's Treatise on Conveyancing is essentially devoted to the theory of the law, as it applies to the conveyance by lease and release; and the subject is exhausted, and treated in attenuated detail.

(*b*) In New Jersey, deeds of bargain and sale without enrolment were adopted by statute in 1714, and always used. In Massachusetts, conveyance is by deed acknowledged and recorded, without any other act or ceremony whatsoever; and a deed of quitclaim and release is sufficient to pass all the estate of the grantor equally as a bargain and sale. Massachusetts Revised Statutes, 1836, pt. 2, tit. 2, c. 59. In England, by statute, 4 Vict. c. 21, a release is made as effectual as a lease and release to convey a freehold interest of any description.

and sale was originally a contract for the conveyance of land for a valuable consideration; and though the land itself would not pass without livery, the contract was sufficient to raise * 496 a use, which * the bargainor was bound in equity to perform. (a) Nothing can be more liberal than the rules of law, as to the words requisite to create a bargain and sale. There must be a valuable consideration, and then any words that will raise a use will amount to a bargain and sale. (b) After the statute of uses was passed, the use which was raised and vested in the bargainee, by means of the bargain, was annexed to the possession; and by that operation the bargain became at once a sale, and complete transfer of the title. (c)

A use may be raised by feoffment, as well as by bargain and sale, or covenant to stand seised to uses. But when raised by feoffment, the feoffor, having parted with the legal estate, cannot stand seised to the use of the feoffee, as the bargainor and covenantor, who retain in themselves the legal estate, do in the other cases. (d) Bargain and sale, and covenant to stand seised, are conveyances not adapted to settlements; and this is the reason why they have been so generally disused in England. They both require a consideration; and they could not be applied to the case of persons not *in esse*, for they have not contributed to the consideration when the conveyance was made. The conveyance by lease and release has become the universal mode by which property is conveyed in England, whether by way of sale, mortgage, or settlement. It has this attractive circumstance attending it, it has not the inconvenience and notoriety of livery, which is requisite in feoffment; nor of enrolment, which is required by the statute of 27 Hen. VIII., in a bargain and sale. It is, therefore, a mode of conveyance well adapted to that secrecy which best accords with the feelings connected with family settlements. (e)

(a) Chudleigh's Case, 1 Co. 121, b.

(b) 2 Inst. 672; Jackson *v.* Fish, 10 Johns. 456, 457; and see ib. 505, to s. p. [Lambert *v.* Smith, 9 Oreg. 185.]

(c) 2 Bl. Comm. 338.

(d) Thatcher *v.* Omans, 3 Pick. 532.

(e) In Alabama, by statute in 1812, conveyances by bargain and sale, lease and release, and covenant to stand seised, pass the possession to the purchaser, equally as if he had been enfeoffed with livery of seisin. This dispenses with the theory of raising a use under the statute of uses, and it is simple and intelligible, and the same operation is given to a deed of conveyance by statute, in other states, as in Maine,

* (6.) *Of Fines and Recoveries.* — Alienation by matter of * 497 record, as by *fines and common recoveries*, makes a distinguished figure in the English code of the common assurances of the kingdom. But they have not been in much use in any part of this country, and probably were never adopted, or known in practice, in most of the states. The conveyance by common recovery was in use in Pennsylvania, Delaware, and Maryland, before the American Revolution; but it must have become obsolete with the disuse of estates tail. Fines have been occasionally levied in New York, for the sake of barring claims; but by the New York Revised Statutes, (*a*) fines and common recoveries are now abolished. (*b*) The English real property commissioners, in their report to Parliament, in 1829, proposed the abolition of fines and recoveries in England, and to enable tenants in tail to convey the fee, and to dock the entail by deed to be enrolled in the court of chancery. They proposed, likewise, to allow *femes covert* to part with their estates and interests in law or equity, by deed, with the concurrence of their husbands, and after a private examination by an officer. The entire disuse of common recoveries followed, of course, in this country, upon the abolition of estates tail; for such a fictitious suit, considered as a conveyance of land in cases allowed by law, is most inconvenient and absurd. And since the acknowledged and long-settled competency of a

New Hampshire, Massachusetts, Vermont, Delaware, Illinois, Ohio, and North Carolina. The title passes simply by deed or writing, without livery or the execution of a use. But the doctrine of uses, under the English statute of uses, has always been considered in Massachusetts as with them an existing modification of the common law; and uses appear not to be disturbed under the Revised Statutes of 1836, and perhaps estates may still be deemed to pass by way of use. Parsons, C. J., Marshall *v.* Fisk, 6 Mass. 31. The statute in North Carolina seems to be only carrying out on this point the enactment in the statute of 27 Henry VIII. c. 10, and the theory of uses may be considered as existing. 1 North Carolina Revised Statutes, 1837, p. 259. On the other hand, in Ohio, the English statute of uses was never in force as a rule of property. Helfenstine *v.* Garrard, 7 Ohio, 275.

(*a*) Vol. ii. 343, sec. 24.

(*b*) They were abolished by statute in New Jersey, in 1799. Elmer's Dig. 90. The conveyances by fine and common recovery continued to be, as lawful assurances, part of the law of Pennsylvania, down to 1835; and in what way they were to be dealt with was under the consideration of the commissioners appointed to revise the civil code. It appears that fines and recoveries remained still lawful conveyances at the publication, in 1837, of Purdon's Digest of the Laws of Pennsylvania, though the statute of 1799 allowed estates tail to be barred by the ordinary conveyance of estates, in fee simple. Common recoveries seemed to be assumed to be valid conveyances in the North Carolina Revised Statutes, 1737, i. 261.

tenant in tail to convey and bar the issue in tail, a more simple and easy mode of conveyance might well be contrived by the sages of the law in England. The conveyance by fine, as a matter of record transacted in one of the highest courts of common law, has some great advantages, and merits a more serious consideration. Its force and effect are very great; and great solemnity is required in passing it, because, said the statute of 18 Edw. I.,

"the fine is so high a bar, and of so great force, and of a
*498 nature so powerful in itself, that it *precludes not only those who are parties and privies to the fine, and their heirs, but all other persons in the world, who are of full age, out of prison, of sound memory, and within the four seas, the day of the fine levied, unless they put in their claim within a year and a day." This bar by non-claim was afterwards, by the statute of 4 Hen. VII., extended to five years. These statutes, and this bar of non-claim after five years, were reënacted in New York, and continued in force until January, 1830; and common recoveries were equally recognized by statute as a valid mode of conveyance, down to this last mentioned period. Such a formal, solemn, and public mode of conveyance, with such a short bar by non-claim, was resorted to in special cases, where title had become complex, and the property was of great value, and costly improvements were in immediate contemplation. Doctor Tucker recommended a resort to it, in Virginia, on this very account. (*a*) In our large cities, where land is exceedingly valuable, and very expensive erections are constantly making, it may be desirable that the certainty of the title should be established within a shorter period than twenty years. This is the only objection that could possibly be made to the abolition of the conveyance by fine; for, as to the notoriety of the transfer, it is by no means equal to the record of a deed in the county where the lands are situated, and where all persons are accustomed to resort, as being the only place for information. In point of fact, the levying a fine, with us, may be considered to partake of secrecy, for it never attracts public observation. But when we come to consider the state and condition of real property in England, where conveyances are not, in general, required to be recorded, a formal proposition to abolish fines was not to have been anticipated. The circumstances of the two countries are totally different. I

(*a*) Tucker's Blacks. ii. 355, note.

should suppose that there must be great veneration justly due to a system of transfer by record, which has exhausted so much cultivation, which has been transmitted down in constant * activity, from distant ages, and on whose foundations * 499 the best part of English real property reposes. In Sergeant Wilson's Essay on Fines, they are said to be "the strength of almost every man's inheritance." Such a great innovation may have an unpropitious influence upon the character, policy, and stability of the English jurisprudence. It will, however, favorably abridge the labors of students, and make great havoc in an English law library. Volume after volume, filled with essays and adjudications upon fines and recoveries, will be consigned to oblivion. (*a*)

(*a*) Besides the extended view of the law of fines and recoveries, in all the abridgments of the law, and in Sheppard's Touchstone, there are the treatises of Pigott, Wilson, Cruise, Preston, Bayley, and Hands on fines and recoveries. The English put more to hazard, in meddling with their jurisprudence, than any other European nation; and they ought to be more jealous than any other of the spirit of innovation and codification which is abroad in the land. When a free people have their constitution and system of laws well established, construed, and understood; when their usages and habits of business have accommodated themselves to their institutions, and especially when they are secure in their persons and property, under an able and impartial administration of justice, they ought, above all things, to beware of theory, for "in that way madness lies."

Since the above note was penned, the statute of 3 and 4 Wm. IV. c. 74, has swept away fines and recoveries in England, and substituted more simple modes of assurance. The disposition of land by tenants in tail is to be by deed (as if seised in fee), but not by will or contract. If by a married woman, the disposition is to be by deed, as if she was a *feme sole*, provided it be with her husband's concurrence, and be acknowledged by her separately, &c. But the English statute endeavored to preserve the benefit of the advantageous arrangements, that could be made in fines and recoveries, by providing and designating a person in family settlements, to be called the Protector of the Settlements.

LECTURE LXVIII.

OF TITLE BY WILL OR DEVISE.

A WILL is a disposition of real and personal property to take effect after the death of the testator. When the will operates upon personal property, it is sometimes called a *testament*, and when upon real estate, a *devise;* but the more general and the more popular denomination of the instrument, embracing equally real and personal estate, is that of *last will and testament.* (*a*) The definition of a will or testament, given by Modestinus in the Roman law, has been justly admired for its precision. Testamentum est voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit. (*b*)

1. **Of the History of Devises.** — The law of succession has been deemed, by many speculative writers, of higher and better obligation than the fluctuating and oftentimes unreasonable and unnatural distributions of human will. The general interests of society, in its career of wealth and civilization, seem, *502 however, * to require that every man should have the free enjoyment and disposition of his own property; for it furnishes one of the strongest motives to industry and economy. The law of our nature, by placing us under the irresistible influence of the domestic affections, has sufficiently guarded against any great abuse of the power of testamentary disposition, by connecting our hopes and wishes with the fortunes of our posterity. In the primitive age of many nations, wills were unknown. This was the case with the ancient Germans, and

(*a*) Howard, in his Dict. de la Cout. de Norm. i. 197, gives the true derivation of the word "devise:" Devise (divisa), marque de division de partage de terres; ce mot vient du Latin diverde. Crosley on Wills, 1, note.

(*b*) Dig. 28. 1. 1. Vinnius thinks, however, that it would be a more perfect definition to say: Testamentum est suprema contestatio in id solemniter facta ut quem volumus, post mortem nostram habeamus hæredem. Vinn. Comm. in Inst. lib. 2, tit. 10; Etym. sec. 2.

with the laws of Lycurgus, and with the Athenians before the age of Solon. (*a*) But family convenience, and a sense of the absolute right of property, introduced the use of testaments, in the more advanced progress of nations. The Attic laws of Solon allowed the Athenians to devise their estates, provided they had no legitimate children, and were competent in mind, and not laboring under any personal disability. If they had children, the power to devise was qualified; and it allowed the parent to devise if the sons died under the age of sixteen; or, in the case of daughters, with the condition that the devisees should take them in marriage; and no devisee was allowed to take possession of the estate, except under the adjudication of a court of justice. The introduction of the law of devising, by Solon, was accompanied with great fraud and litigation; though his laws are said, by Sir William Jones, to have had the merit of conciseness and simplicity. (*b*)

*Prior to the time of the decemvirs, no Roman citizen *503 could break in, by will, upon the order of succession, unless the act was done and permitted in the assembly of the people. But wills were allowed at Rome by the twelve tables, and they gave the

(*a*) Successores sui cuique liberi, et nullum testamentum. Tacit. M. G. c. 20; Taylor's Elem. of the Civil Law, 522, 524; Jones's Comm. on Isæus. According to Vinnius, in his Comm. on the Institutes, lib. 2, tit. 2, Etym. sec. 4, the restraint upon the devise of real estate existed, in his day, with the Poles, Swedes, Danes, and some parts of Germany. Among the Jews, the father could not devise the inheritance from the regular line of succession. Antiquities of the Jewish Republic, by Th. Lewis, iii. 324, 325.

(*b*) Plutarch's Life of Solon, by J. & W. Langhorne; Jones's Isæus, pref. Dis. on the Attic Laws. The speeches of Isæus related chiefly to the abuses of the law of wills. The claims of heirship and of blood were urged with vehement eloquence against the frauds suggested in procuring wills, or the bad passions which dictated them, or the perfidy which suppressed the revocation of them. Most of the speeches involve the discussion of the allegation of a forged will; and they are replete with the bitterest personal reproaches. In one of them, the mode of procuring certain and infallible evidence, by the torture of slaves, is commended. These specimens of forensic discussion are the most ancient monuments extant of the kind; but they do no honor to the morals and manners of the Athenians. Cicero (Orat. pro L. Flacco, sec. 4, 5) speaks most contemptuously of the character of the Greeks for probity and truth. The writings of the Greek historians, philosophers, and orators, Thucydides, Xenophon, Plato, Aristotle, Isæus, and Lysias; the striking details in the profound and searching history of Mitford, and the testimony of St. Paul, afford abundant and sad proofs of the corruption of ancient morals. How, indeed, could sound morality and pure practice be expected among a people who had no due sense of the existence and presence of the *Father of Lights, from whom cometh down every good and every perfect gift?*

power to an unlimited extent, which was afterwards qualified by the interpretation and authority of the tribunals. They were executed with great ceremony, before five citizens, who were to represent the people; and the transaction was in the form of a purchase of the inheritance. They were, at last, by the law of the prætors, placed under the burdensome check of seven witnesses, who were required to affix their seals and signatures. (*c*) The power to devise was checked by the Emperor Justinian; and unless a fourth part of the inheritance was reserved for the children, they were allowed to set aside the testament as inofficious, under the presumptive evidence of mental imbecility. (*d*)

It seems to be the better opinion, that lands were devisable, to a qualified extent, with the Anglo-Saxons. The *folcland* was held in independent right, and devisable by will. (*e*)[1] But *504 upon the establishment of the feudal system, *at the Norman Conquest, lands held in tenure ceased to be devisable, in consequence of the feudal doctrine of non-alienation without the consent of the lord; for the power of devising would have essentially affected many of his rights and privileges. There were exceptions to the feudal restraint on wills existing as to burgage tenures and gavelkind lands. (*a*) The restraint upon the power of devising did not give way to the demands of family and public convenience, so early as the restraint upon alienation in the lifetime of the owner. The power was covertly conferred by means of the application of uses; for a devise of the use was not

(*c*) See Inst. 2. 10. 2. 3; Dig. 50. 16. 120; Novel, 115; 8 Gibbon's Hist. 78; Esprit des Loix, liv. 27.

(*d*) Inst. 2. 18. pr.; ib. sec. 1, 2, 3. *Vide supra*, ii. 327. The French civil code declares, that all persons may dispose by will, excepting those whom the law declares incapable. Civil Code, sec. 902.

(*e*) Spelman on Feuds, c. 5; Wright on Tenures, 171. *Bocland* was granted by charter, and was synonymous with inheritance; and Sir Francis Palgrave says, that testamentary dispositions were unknown to the Teutons or Teutonic nations, and he is of the highest authority as to all Anglo-Saxon and German antiquities.

(*a*) Launder *v.* Brooks, Cro. Car. 561; Co. Litt. 111, b. In Wild's Case, 6 Co. 16, it was declared, that at common law, lands were not devisable, except by custom, and in *ancient cities and boroughs*, of houses and small things. In the reign of Hen. II., only one third part of the personal estate was devisable. The other parts went to the wife and children. Glanville, lib. 7, c. 5. Blackstone, who gives a clear and succinct history of the law of bequests of personal property (Comm. ii. 491–493), says that we cannot trace the precise time when the old common-law restrictions were abolished, and the free disposition of chattels allowed.

[1] See 441, n. 1.

considered a devise of the land. The mode of doing this was by a feoffment to the use of the feoffor's last will, and the feoffor being considered as seised of the use, not of the land, could devise it. (*b*) The devise of the use was supported by the courts of equity, as a disposition binding in conscience; and that equitable jurisdiction continued, until the use became, by statute, the legal estate. The statute of uses of 27 Hen. VIII., like the introduction of feuds, again destroyed the privilege of devising; but the disability was removed within five years thereafter, by the statute of wills of 32 Hen. VIII. That statute applied the power of devising to socage estates, and to two thirds of the lands held by knight service; and this last and lingering check was removed, with the abolition of the military tenures, in the beginning of the reign of Charles II., so as to render the disposition of real property by will absolute. (*c*)

The English law of devise was imported into this country by our ancestors, and incorporated into our colonial jurisprudence, under such modifications, in some instances, as were deemed expedient. Lands may be devised by *will in all the *505 United States; and the statute regulations on the subject are substantially the same, and they have been taken from the English statutes of 32 Hen. VIII. and 29 Charles II. (*a*) In order to give a distinct view of the outlines or elements of the law on the subject of devises, I shall proceed to consider the com-

(*b*) Hoffman, Ass. V. Ch., in 1 Hoff. Ch. 253.

(*c*) The statute of wills, or a substitute for it, has been adopted throughout the United States; *but not its preamble*, either in letter or spirit. That preamble is a curiosity, as being a sample of the most degrading and contemptible servility and flattery that ever were heaped by slaves upon a master. In Scotland, down to a very recent period, almost all a man's heritage, and a great part of his estate acquired by purchase, could not be devised from the lineal heir.

(*a*) In Louisiana, the power of disposition of property by will is limited to two thirds of the testator's estate, if he leaves, at his decease, a legitimate child; and to one half, if he leaves two children; and to one third, if he leaves three, or a greater number of children; and to two thirds, if, having no children, the testator leaves a father, mother, or both. Under the name of children are included descendants, of whatever degree they be. The heirs, whose portion of the estate is thus reserved to them by law, are called *fixed heirs*, because they cannot be disinherited, except in cases where the testator has just cause to disinherit them, and which cases are defined. Civil Code, arts. 1480, 1481, 1482, 1609–1617. There is much good feeling and sympathy, and there is nothing unreasonable in these very temperate checks upon the unlimited power of devise. The law of Louisiana on this subject was borrowed essentially from the French Civil Code, arts. 913, 914, 915.

petency of the parties to a devise; the things that are devisable; the solemnities requisite to a due execution of the will; and, lastly, some of the leading rules applicable to the construction of devises.

2. Of the Parties to a Devise. — The general rule is, that all persons of sound mind are competent to devise real estate, with the exception of infants and married women. This was the provision in the English statute of wills, and I presume the exceptions equally exist in this country. (*b*) But a *feme covert*, by deed of settlement made prior to her marriage, and vesting her estate in trustees, may be clothed with a testamentary disposition of her lands; and a court of chancery will enforce such a power made during coverture, under the name of an appointment, or * 506 declaration of trust. She may devise * by way of execution of a power. (*a*) But the will that she makes, in such a case, must be executed with the same solemnities as if she had executed the deed while sole. (*b*) An infant cannot, in any case, be enabled to devise through the medium of a power; and the New York statute specially excludes the exercise of a power by a married woman during her infancy. (*c*)

(*b*) Stat. 34 and 35 Hen. VIII. c. 5; New York Revised Statutes, ii. 56, sec. 1; Massachusetts Revised Statutes, 1836, pp. 416, 417. In Virginia, the will of a blind man was admitted to probate. Boyd *v.* Cook, 3 Leigh, 32; [Edward *v.* Fincham, 3 Moore, P. C. 198. See also Dufar *v.* Croft, ib. 136.] A married woman is considered to be incapable of making a valid will of lands, even with the consent of her husband, and without any statute prohibition to that effect. Osgood *v.* Breed, 12 Mass. 525; Marston *v.* Norton, 5 N. H. 205; West *v.* West, 10 Serg. & R. 445. In Ohio (Allen *v.* Little, 5 Ohio, 65), Illinois, and Mississippi (Revised Code of Mississippi, 1824, p. 32), females are competent to make a will of real and personal estate at the age of eighteen; and, in Louisiana, the wife, who has very extensive privileges, may make a will without the authority of her husband. In Connecticut, married women may dispose of their estates, real and personal, by will, in the same manner as other persons. Statutes of Connecticut, 1838, p. 226. [See also *In re* Tuller, 79 Ill. 99; Urquhart *v.* Oliver, 56 Ga. 344.] In Lowe *v.* Williamson, 1 Green (N. J.), Ch. 82, the competency of an aged testator to make a will was ably discussed. He was deemed competent if he had a mind and memory sufficiently sound to be of a disposing mind and memory, and competent to know and understand the business in which he was engaged at the time he executed the will. The interesting head of the *disabilities* of testators is well digested in Jarman on Wills, Boston ed. 1845, i. c. 13; and I take this occasion to observe, that the notes added to the edition in two volumes, by J. C. Perkins, Esq., have given increased value to that full and excellent work, and which appears to be the most methodical and thorough treatise which we have on the subject.

(*a*) See vol. ii. of this work, 171, and New York Revised Statutes, i. 735, sec. 110.

(*b*) Casson *v.* Dade, 1 Bro. C. C. 99.

(*c*) New York Revised Statutes, i. 735, sec. 111.

Testaments of chattels might, at common law, be made by infants of the age of fourteen, if males, and twelve, if females. This was the English rule until the statute of 1 Victoria, and the testamentary power of infants is now abolished. (*d*) The laws of the several states are not uniform on this point. In Virginia no person under eighteen years of age can make a will of chattels; (*e*) and by the New York Revised Statutes, (*f*) the age to make a will of personal estate is raised up to eighteen in males, and sixteen in females. Nor can a married woman make a testament of chattels, any more than of lands, except under a power, or marriage contract, or by her husband's license. (*g*)

But infants, *femes covert*, and persons of non-sane memory, and aliens, may be devisees; for the devise is without consideration. (*h*) A devise to the heir at law is void, if it gives precisely the same estate that the heir would take by descent if the par-

(*d*) 2 Bl. Comm. 497; Arnold *v.* Earle, Rep. temp. Lee, by Phillimore, ii. 529. The statute of 1 Victoria, c. 26, declares that no will made by a person under age or by a married woman shall be valid, except such a will as might have been made by a married woman before the passing of the act; consequently a married woman in England may still make a will of personal estate with her husband's consent, and a will of real or personal estate to which she may be entitled for her separate use, and she may also make an appointment by will, in pursuance of a power to be executed, notwithstanding the coverture. [Willock *v.* Noble, 7 L. R. H. L. 580; Charlemont *v.* Spencer, 11 L. R. Ir. 347.] The statute law in Massachusetts, Vermont, and Pennsylvania, also require the testator of wills, of personal as well as real estate, not to be under twenty-one years of age. [Campbell *v.* Browder, 7 Lea, 240.]

(*e*) Revised Code of Virginia, 224.

(*f*) Vol. ii. 60. The early statute law of Connecticut required the infant of either sex to be seventeen, to be competent to dispose of personal estate by will. This is still the law of Connecticut. Statutes, 1821. The act of 1831, in Ohio, relating to wills, does not include married women among the persons incompetent to make a will, and she is presumed to have that power.

(*g*) 2 Bl. Comm. 498; Steadman *v.* Powell, 1 Addams, 58; Hood *v.* Archer, 1 M'Cord, 225; Newlin *v.* Freeman, 1 Ired. (N. C.) 514; [Lee *v.* Bennett, 31 Miss. 119.] Married women would seem to be prohibited in New York from making a will of personal estate in any case, for the statute declares that every male person of eighteen years of age, and every female, *not being a married woman*, of the age of sixteen, *and no others*, may make a will of personal estate. New York Revised Statutes, ii. 60. By the Revised Statutes of Connecticut, 1821, and of Illinois, published in 1829, a married woman may dispose of her separate estate, both real and personal, by will, in the same manner as other persons.

(*h*) Though an alien may be a devisee as well as purchaser, he takes a defeasible estate. See ii. 61. The New York Revised Statutes, ii. 57, sec. 4, have judiciously declared such devises void, if to persons who are aliens at the death of the testator. [See Wadsworth *v.* Wadsworth, 12 N. Y. 376.] [As to the law governing wills made by aliens, see Bloxam *v.* Favre, 8 P. D. 101.]

ticular devise to him was omitted out of the will. The title by descent has, in that case, precedence to the title by devise. (*i*)

The test of the rule, says Mr. Crosley, is to strike out of
* 507 the will the particular devise * to the heir, and then, if without that he would take by descent exactly the same estate which the devise purports to give him, he is in by descent and not by purchase. (*a*) Even if the lands be devised to the heir charged with debts, he still takes by descent; for the charge does not operate as an alteration of the estate. (*b*) Corporations are excepted out of the English statute of wills; and the object of the law was to prevent property from being locked up in perpetuity, and also to prevent languishing and dying persons from being imposed upon by false notions of merit or duty, to give away their estates from their families. In times of popery, said Lord Hardwicke, the clergy got nearly half the real property of the kingdom into their hands, and he wondered they had not got the whole. (*c*) But under the statute of 43 Eliz., commonly called the statute of charitable uses, a devise to a corporation for a charitable use is valid. (*d*) The New York Revised Statutes (*e*) have turned the simple exception in the English, and in the former statute of New York, into an express prohibition, by declaring, that no devise to a corporation shall be valid, unless

(*i*) Hurst *v.* Earl of Winchelsea, 1 Wm. Bl. 187; [Ellis *v.* Page, 7 Cush. 161.] But see *ante*, 412, note, the rule altered in England by statute.

(*a*) Crosley's Treatise on Wills, ed. London, 1828, p. 101.

(*b*) Allam *v.* Heber, Str. 1270; Hurst *v.* Earl of Winchelsea, 1 Wm. Bl. 187. The statute of 3 and 4 Wm. IV. c. 106, altered the English law in this respect, and declared, that on a devise of lands by the testator to his heir at law, he should be considered as taking as devisee, and not by descent. *Vide supra*, 412, note.

(*c*) Lord Hardwicke, 1 Ves. Sen. 223.

(*d*) This was so held in Flood's case, Hob. 136; and the court, in that case, admitted that the devise was void in law, because contrary to the statute of wills, but that such a devise in mortmain was clearly within the relief of the statute of Elizabeth. Mr. Crosley, in his learned and able Treatise on Wills, 116, 117, condemns this decision as a strained construction, and a repeal of the exception in the statute of wills. The statute of 9 Geo. II. c. 36, has since corrected this construction, and rendered all devises for charitable uses void, except to the two universities and certain colleges. The statute of 9 Geo. II. was not in any sense a mortmain act, for it neither prohibited nor authorized alienation in mortmain, or to a corporation. It only avoided all *devises* to charitable uses; for at common law it was lawful to devise to *individuals* to charitable uses, and the statute allows the application of property by *deed* to charitable purposes. Its sole object was to protect persons *in extremis* from imposition. The Master of the Rolls, in Corbyn *v.* French, 4 Ves. 427; Mellick *v.* The Asylum, Jacob, 180.

(*e*) Vol. ii. 57, sec. 8.

the corporation be expressly authorized to take by devise. (*f*) There was, however, the same construction of the preëxisting statutes; (*g*) and though the English statute of charitable *uses has not been reënacted either in New York, *508 New Jersey, Pennsylvania, or Maryland, nor probably in any of the United States, (*a*) the better opinion, in point of authority, would however, seem to be, that a devise of a charity, not directly to a corporation, but *in trust* for a charitable corporation, would be good. This is on the principle that a court of equity, independent of statute, and upon the doctrine of the common law, has jurisdiction over bequests and devises to charitable uses; and will enforce them, provided the objects be sufficiently definite, so as to shut out all arbitrary discretion resting upon the doctrine of *cy-près*. (*b*) [1]

(*f*) This prohibition extends to a devise of any estate and interest in real property descendible to heirs, as well as real estate itself. Wright *v.* Trustees of Methodist Episcopal Church, 1 Hoff. Ch. 225.

(*g*) Jackson *v.* Hammond, 2 Caines Cas. 337.

(*a*) It has not been repealed, but subsists in full force in Kentucky. *Vide supra*, ii. 285.

(*b*) M'Cartee *v.* Orphan Asylum Society, 9 Cowen, 437; Witman *v.* Lex, 17 Serg. & R. 88; Lord Redesdale, in Attorney General *v.* Mayor of Dublin, 1 Bligh (N. S.),

[1] *Cy-près*. — It is important to distinguish the powers exercised by English chancellors under the sign manual of the crown, from those which are part of the general jurisdiction of equity, and to which the doctrine of *cy-près* in its true sense applies. The former powers are prerogative, and include that of applying a charity, which has failed by reason of illegality, to objects quite *diversi generis* from those intended by the donor, and that of appointing a specific object in case of a gift to charity generally. Of these the one probably does not exist in this country, and the other, if anywhere, is in the legislature, as succeeding to the powers of the king as *parens patriæ*. The doctrine of *cy-près*, as understood in courts of equity, has reference to the judicial power (if it may be so called to indicate that it is a part of the general jurisdiction over trusts) to substitute for a particular charity which has been defined and has failed, another charity, *ejusdem generis*, or which approaches it in its nature and character. This power is independent of the St. 43 Eliz., and its exercise is made necessary by the fact that charities, unlike other trusts, are perpetual. Jackson *v.* Phillips, 14 Allen, 539, 574 *et seq.*, 591, where the whole subject is discussed, and many cases are gathered by Mr. Justice Gray in an able and exhaustive opinion. See also Lord Westbury's remarks in Clephane *v.* Lord Provost of Edinburgh, L. R. 1 H. L. Sc. 417, 421. The duty of the king, as *parens patriæ*, to protect property devoted to charitable uses is executed, in this class of cases, by the Attorney General, who may obtain the interposition of the court by information, and who should be made a party defendant in a suit for instructions by the trustees. Jackson *v.* Philips, 14 Allen, 539,

Witnesses to a will are rendered incapable of taking any beneficial interest under it, except it be creditors whose debts, by the

347; Moore *v.* Moore, 4 Dana, 357. The case of Dashiell *v.* Attorney General, 5 Harr. & J. 392, is a strong authority in opposition to the doctrine of the other American cases which are mentioned; but in that case there was no provision by the will for designating the poor who were to be relieved. The object was too indefinite. [Wilderman *v.* Baltimore, 8 Md. 551.] See the additional authorities cited, *supra*, ii. 285–288, where this point is also mentioned and discussed. In the case of Inglis *v.* The Trustees of the Sailor's Snug Harbor, 3 Peters, 99, it was admitted that a subsequent act of the legislature would give full validity and effect to a devise for charitable uses, where the designated object or trustees were not otherwise sufficient or competent. [Miller *v.* Chittenden, 4 Iowa, 252.] So in the case of The Trustees of the McIntire Poor School *v.* The Zanesville C. & M. Company, 9 Ohio, 203, it was held, after a very elaborate and learned discussion, that a bequest for charitable uses, where the objects were sufficiently defined, and the person designated as trustee acquired a capacity to hold by a subsequent act of incorporation, took effect as an executory devise. And in Bartlett *v.* Nye, 4 Met. 378, it was held that a devise of real estate to an unincorporated society, for charitable uses, was valid, and the heirs would be compelled to execute the trust. [Johnson *v.* Mayne, 4 Iowa, 180.] It is to be regretted, that in the recent revision of the laws of New York, this very interesting and vexatious question was not put at rest by an explicit provision, either in favor of the equity jurisdiction over such charities, to the extent, perhaps, of the statute of Elizabeth, or else by an express denial of a power to devise a charity to any persons whatever, in trust even for a charitable corporation. In Virginia, in Gallego *v.* Attorney General, 3 Leigh, 450, the equity jurisdiction over charities was elaborately discussed. The English statute of charitable uses (43 Eliz.), and all the statutes of mortmain, were repealed long since in Virginia. There is no statute restraint in that state upon devises to corporations, and a devise to a corporation for a charitable purpose, if the charity be proper and definite, is valid. Lomax's Digest, iii. 12. It was held, in conformity with Ch. J. Marshall's opinion, in 4 Wheaton, 1, that there was no common-law jurisdiction over devises to charitable uses, prior to the statute of Elizabeth; and that without the aid of statute authority, the courts of chancery had no jurisdiction to decree charities where the objects or beneficiaries were indefinite or uncertain. President Tucker, in the case in Leigh, exposed with great force the

579. The judicial doctrine of *cy-près* is recognized in Philadelphia *v.* Girard, 45 Penn. St. 9, 28; Heuser *v.* Harris, 42 Ill. 425; Cromie *v.* Louisville Orphans' Home Soc., 3 Bush (Ky.), 365, 375; [Theological Education Soc. *v.* Atty. Gen., 185 Mass. 285; *In re* Campden Charities, 18 Ch. D. 310.] See also the many cases cited 14 Allen, 590. But see Bascom *v.* Albertson, 34 N. Y. 584. As to charities, see ii. 287, note, &c. x^1

x^1 In Hampton *v.* Holman, 5 Ch. D. 183, 190, Jessel, M. R., says of the doctrine called *cy-près:* "In the first place, the doctrine is not properly called *cy-près* at all: it is merely a rule of construction, — a rule of construction, that is, by which you sacrifice the particular intent to the general intent, or the subordinate intent to the paramount intent. When you find two intents in a will which are inconsistent with each other, and you therefore cannot carry out both, you give effect to the general or paramount intent." That was not a case of charities, but it is believed that the principle is the same.

will, are made a charge on the real estate. This was by the statute of 25 George II.; and it has been generally adopted in

arbitrary and unreasonable nature of the *cy-près* principle, when applied to vague or indefinite charities. On the other hand, in Griffin *v.* Graham, 1 Hawks (N. C.), 96, the testator gave all the residue of his estate to his executors in trust, that out of the rents and profits they should establish a school for the maintenance of indigent scholars, and the trust was supported, though the object was very general, and not so specific as that in Dashiell *v.* Attorney General, *supra*. But the doctrine of execution *cy-près* does not prevail in North Carolina; and if the intention of the testator, in respect to a charity for religious purposes, cannot be literally fulfilled, a trust results for the heir, or next of kin, as the case may be. McAuley *v.* Wilson, 1 Dev. Eq. (N. C.) 276.

In the case of Coster *v.* Lorillard, in the New York Court of Errors, in December, 1835 [14 Wend. 265], Ch. J. Savage said, that the doctrine of *cy-près* was statute law; and he cited several passages from the New York Revised Statutes (i. 748, sec. 2; ib. 723, sec. 17; ib. 726, sec. 38), to show that the courts are to carry into effect the intention of the party to an instrument, *so far as it can be done consistently with law*. He said, that in that case, if the trust had been lawful, the estate in the trustees ought to have been sustained, not during the natural lives of the twelve nephews and nieces, but during the natural lives of such two of the nephews and nieces as should soonest die. See the case, *supra*, 273, and 271, and the necessity of designating the two lives.

The doctrine of the English Court of Chancery is much broader than any that has been inculcated in America. If a bequest be for charity, it matters not how uncertain the objects or persons may be; or whether the bequest can be carried into exact execution or not; or whether the persons who are to take be *in esse* or not, or whether the legatee be a corporation capable in law to take or not. In all these and the like cases, the court will sustain the legacy, and give it effect according to its own principles. Where a literal execution becomes inexpedient or impracticable, the court will execute it *cy-près*. The crown has a right to interfere where a charitable object fails, and it must signify in chancery the charitable purpose the fund shall be applied to. Simon *v.* Barber, Tamlyn, 14; Attorney General *v.* Andrew, 3 Ves. 633; Attorney General *v.* Bowyer, ib. 714; Moggridge *v.* Thackwell, 7 id. 36; Mills *v.* Farmer, 1 Meriv. 55; Bennett *v.* Hayter, 2 Beav. 81; Attorney General *v.* The Ironmonger's Company, ib. 313; the case of Trustees of the Baptist Ass. *v.* Smith, 3 Peters, App. 484. In this latter case, Mr. Justice Story investigates the doctrine with his usual research and accuracy; and he concludes (497, see also to s. P. his Comm. on Equity Jurisprudence, ii. [§ 1162], that the jurisdiction of the Court of Chancery over charities, *where no trust is interposed*, or there is no person *in esse* capable of taking, or where the charity is of an indefinite nature, is not to be referred to the general jurisdiction of that court, but that it sprung up after the statute of Elizabeth, and *rests mainly on its provisions*. The conclusion upon the authorities in England, drawn by Lord Eldon, is, that where there is a bequest to *trustees for charitable purposes*, the disposition must be in chancery, under a scheme to be approved by a master; but where the object is charity, *and no trust is interposed*, it must be by the king, under his sign manual; for in such cases the king, as *parens patriæ*, is deemed the constitutional trustee. Moggridge *v.* Thackwell, 7 Ves. 86.

In this country, the legislature or government of the state, as *parens patriæ*, has the right to enforce all charities of a public nature, by virtue of its general superintending authority over the public interests, where no other person is intrusted with

the United States as a salutary provision. (*c*) The English statute was the consequence of the decision of the K. B., in *Holdfast* v. *Dowsing*, (*d*) which established, after three several arguments at the bar, that whoever took any interest under a will was an incompetent witness to prove it. This determination, says Sir William Blackstone, (*e*) threatened to shake most of the titles in the kingdom that depended on devises by will. The statute has been recently reënacted in New York, with some qualifications. (*f*)[2] The restoration of the competency of sub-

it. The jurisdiction vested by the statute of Elizabeth over charitable uses is said to be *personally* in the chancellor, and does not belong to his ordinary or extraordinary jurisdiction *in chancery*. Lord Hardwicke, in Corporation of Burford *v.* Lenthall, 2 Atk. 553; Story, J., *ubi supra*.

(*c*) The statute of Geo. II., making void a legacy to an attesting witness, was never in force in North Carolina or Tennessee. 8 Humph. (Tenn.) 278.

(*d*) Str. Rep. 1253. (*e*) 2 Comm. 377.

(*f*) New York Revised Statutes, ii. 57, sec. 6; ib. 65, sec. 50, 51. The statute

[2] *Insanity.* — There are cases which tend to uphold the doctrine that a disorder in any of the faculties of the mind, or a delusion arising from such disorder, puts an end to testamentary capacity; that that capacity cannot exist without soundness of mind. Waring *v.* Waring, 6 Moore, P. C. 341; Smith *v.* Tebbitt, L. R. 1 P. & D. 398. See [Banks *v.* Goodfellow,] L. R. 5 Q. B. 559, [explained in Boughton *v.* Knight, 3 P. & D. 64. See also Eggers *v.* Eggers, 57 Ind. 461.] But it is well known that a man may be the subject of certain delusions and yet be rational in all other respects; and it has been laid down accordingly that when the delusion neither exercises nor is calculated to exercise any influence on the particular dispositions made by the testator; when the testator has the capacity to comprehend the extent of the property to be disposed of, and the nature of the claims of those he is excluding; the existence of such a delusion will not take away his power to dispose of his property by will. Banks *v.* Goodfellow, L. R. 5 Q. B. 549; Cotton *v.* Ulmer, 45 Ala. 378, 393; Crum *v.* Thornley, 47 Ill. 192; [Whitney *v.* Twombly, 136 Mass. 145; Rice *v.* Rice, 50 Mich. 448; Fraser *v.* Jennison, 42 Mich. 206; Lee *v.* Scudder, 31 N. J. Eq. 633; Brinkman *v.* Rueggesick, 71 Mo. 553. [See also St. Leger's Appeal, 34 Conn. 434; Van Guysling *v.* Van Kuren, 35 N. Y. 70, 74; Delafield *v.* Parish, 25 N. Y. 9; Daniel *v.* Daniel, 89 Penn. St. 191, 208; Thompson *v.* Kyner, 65 Penn. St. 368, 378; Roe *v.* Taylor, 45 Ill. 485; Denson *v.* Beazley, 84 Tex. 191; [Brick *v.* Brick, 66 N. Y. 144; Meeker *v.* Meeker, 75 Ill. 260; Garrison *v.* Blanton, 48 Tex. 299; Will of Ebenezer W. Cole, 49 Wis. 179.]

The fact that a testator entertains a notion which leads him to disinherit on slight and insufficient grounds does not take away his testamentary capacity, if the notion is not insane. Clapp *v.* Fullerton, 34 N. Y. 190; Hall *v.* Hall, 38 Ala. 131. *x*[1]

In a criminal case it has been denied

x[1] Where a testator was habitually insane, but had lucid intervals, held, that the presumption was that the will was made in a lucid interval. Kingsbury *v.* Whitaker, 32 La. An. 1055. See also Heirs of Clark *v.* Ellis, 9 Oreg. 128. Be-

scribing *witnesses, by declaring their beneficial interest *509
under the will void, put an end to a greatly litigated ques-

(58, sec. 12) requires all the witnesses to the will, who are living in the state, and of sound mind, to be produced and examined, on proof of the will before the surrogate; and yet the provision is, that the beneficial devise, legacy, or interest to a witness is void, in case "such will cannot be proved without the testimony of such witness." [Compare Caw *v.* Robertson, 1 Selden, 125.] There seems to be no room for the application of this exception, if all the witnesses must be produced and examined. But if such a witness would have been entitled to a share of the estate if the will had not been made, so much of such share is saved to him as will not exceed the value of the devise to him; and he shall recover that share of the devisees or legatees. This last is a very equitable qualification of the general rule; and it has been assumed in the Revised Statutes of Illinois, published in 1829. [As to competency of executors, see Burritt *v.* Silliman, 13 N. Y. 93; Dorsey *v.* Warfield, 7 Md. 65; Murphy *v.* Murphy, 24 Mo. 526; Noble *v.* Burnett, 10 Rich. (S. C.) 505; Gunter *v.* Gunter, 3 Jones, 441; Wyman *v.* Symmes, 10 Allen, 153. As to competency of wife of legatee, see Sullivan *v.* Sullivan, 106 Mass. 474.] x^1

The English statute of 1 Victoria, c. 26, declares, that wills are not to be invalid

that a test of capacity to commit crime could be laid down as a matter of law; either delusion, knowledge of right and wrong, or any other. The question was left at large to the jury with the instruction, that if the defendant did the act in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be, "Not guilty by reason of insanity," if the killing was the offspring or product of mental disease in the defendant. State *v.* Jones, 50 N. H. 369 (explaining Boardman *v.* Woodman, 47 N. H. 120, a will case, as consistent with Banks *v.* Goodfellow, *supra*). See State *v.* Felter, 25 Iowa, 67; Stevens *v.* State, 31 Ind. 485, 490. This doctrine has not been generally held. See Wharton & Stillé, Med. Jur. § 108 *et seq.*, § 190 *et seq.*

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lief in spiritualism does not incapacitate. Brown *v.* Ward, 53 Md. 376; s. c. 36 Am. R. 422 and note. See also Thompson *v.* Hawks, 14 Fed. Rep. 902 and note. A will may be set aside as obtained by *undue influence* when that influence was not merely persuasion or advice, but was such as to overcome the will of the testator, and cause him to dispose of his property in a manner he would not have done if left free to act. Marx *v.* McGlynn, 88 N. Y. 357; Brick *v.* Brick, 66 N. Y. 144; Haydock *v.* Haydock, 33 N. J. Eq. 494; Tobin *v.* Jenkins, 29 Ark. 151. It has been said that the law will presume undue influence where a client makes a will in favor of his attorney, or a patient in favor of his physician or any one in favor of his spiritual adviser. Thompson *v.* Hawks, 14 Fed. Rep. 902, 905; Marx *v.* McGlynn, 88 N. Y. 357, 371; Hegarty *v.* King, 7 L. R. Ir. 18. Comp. Ashwell *v.* Lomi, 2 L. R. P. & D. 477, and Parfitt *v.* Lawless, 2 L. R. P. & D. 462. But see Post *v.* Mason, 91 N. Y. 539. See further, as to capacity, Parker *v.* Felgate, 8 P. D. 171.

x^1 The interest to disqualify a witness must be present, certain, and vested. Lord *v.* Lord, 58 N. H. 7. An executor who takes no beneficial interest is a competent witness. Children's Aid Soc. *v.* Loveridge, 70 N. Y. 387; Stewart *v.* Harriman, 56 N. H. 25. So is the wife of such an executor. Stewart *v.* Harriman, *supra*; Piper *v.* Moulton, 72 Me. 155. So a disinherited heir at law or one who takes less under the will than he would as heir. Smalley *v.* Smalley, 70 Me. 545. So an inhabitant of a town to which a legacy is given. Piper *v.* Moulton, *supra*.

*510 tion, which *arose in the time of Lord Mansfield. The question was, whether a witness was competent to prove

on account of the incompetency of attesting witnesses, but beneficial devises or gifts to an attesting witness were declared void. If real or personal estates be charged with debts, the creditor, whose debt is so charged, is declared to be a competent witness, and an executor may be admitted to prove the will. The statute of 25 Geo. II. c. 6, is repealed. The word *credible*, as to the witness, is dropped. By the English statute of 6 and 7 Vict. c. 85, 22d August, 1843, the objection of incompetency to a witness in any case, as far as interest and infancy go, is abolished. But the provision does not extend to the case of a party to the record, or to the husband or wife of the same.

The insanity of the testator is a question of fact to be passed upon by the surrogate in respect to a will of personal estate. But his decision does not conclude the question so far as the will contains a devise of real estate. That can only be set at rest by an issue from chancery, or a trial at law. Bogardus *v.* Clarke, 1 Edw. Ch. 266. The question of *insanity* in a testator, when *partial*, and going to defeat the will, is powerfully and elaborately discussed by Sir John Nicholl, in the Prerogative Court of Canterbury, in the case of Dew *v.* Clark, 1 Addams, 279. He considers *delusion* to be the true criterion of insanity, which is when the patient once conceives something extravagant to exist, which has still no existence whatever, but in his own heated imagination, and wherever, at the same time, having once so conceived, he is incapable of being, or at least of being *permanently*, reasoned out of that conception; such a patient is said to be under a delusion; and delusion in that sense, and insanity, are almost, if not altogether, convertible terms. The opinion of all the judges was taken in the House of Lords, in June, 1847, as to the proper questions for the jury on trials in criminal cases, under the *defence* of insanity. See 2 N. Y. Legal Observer, 241, and Wharton's American Criminal Law, ed. Philadelphia, 1846, p. 12. The last work is ably executed. The English judges, in the opinions referred to, stated that if the party charged with a crime was not, at the time the act was committed, conscious of right and wrong, or did not know right from wrong, and that be clearly and satisfactorily proved, he was not guilty. See also Regina *v.* Higginson, 1 Carr. & Kir. 130. The same varied course of decision, and danger of contradictory decisions respecting the will of the personal and real estates, exist in England. Montgomery *v.* Clark, 2 Atk. 378; Clark *v.* Dew, 1 Russ. & My. 103; 1 Addams, 279; Hume *v.* Burton, 1 Ridg. P. C. 277.

A testator must be of sound and disposing mind and memory, but the necessary degree of mental capacity requisite, has opened a wide field for discussion in the courts. In the cases of Van Alst *v.* Hunter, 5 Johns. Ch. 148, and Sloan *v.* Maxwell, 2 Green, Ch. (N. J.) 563, the requisite sanity of a testator was much considered. Age will not disqualify from making a will, provided the testator has a competent possession of his mental faculties. Code, 6. 22. 3–8. 54. 16; Voet, 21, 36; [Horn *v.* Pullman, 72 N. Y. 269.] The failure of memory is not sufficient to create the incapacity, unless it be quite total, or extended to his immediate family and property. Den *v.* Vancleve, cited in 2 Green, 606. [Compare McMasters *v.* Blair, 29 Penn. St. 298.] [Eddy's Case, 32 N. J. Eq. 701; Yoe *v.* McCord, 74 Ill. 33; Tufnell *v.* Constable, 3 Knapp P. C. C. 122.] The Roman law applied the incapacity to extreme failure of memory as for a man to forget his own name —*fatuus præsumitur qui in proprio nomine errat.* Code, 6. 24. 14, and n. 55. The want of recollection of names is one of the earliest symptoms of a decay of the memory, but this failure may exist to a very great degree, and yet "the solid power of understanding" remain. The rule on the subject is, that sanity is to be presumed, and he who

a will, who was interested when he subscribed his name, and whose interest had been discharged when he was called on to testify. Lord Mansfield (*a*) held it to be sufficient that the competency, or disinterested character of the witness, existed when called as a witness. This decision was opposed with great ingenuity and eloquence by Lord Camden, (*b*) though the majority of the court over which he presided followed the decision of the K. B.

3. **Of Things devisable.** — It is the settled rule of the English law, that the testator must be *seised* of the lands devised at the time of making the will. He must have a legal or equitable title in the land devised. (*c*) The devise is in the nature of a conveyance, or an appointment of a particular estate; and therefore lands purchased after the execution of the will do not pass by it. (*d*) The testator must likewise continue seised at the time

seeks to avoid a will on the ground of mental imbecility, must show it. Jackson *v.* Van Dusen, 5 Johns. 144. On the trial of Earl Ferrers, for murder, before the House of Lords, the defence was insanity, and Lord Camden said in that case, "Had the noble prisoner at the bar a power of distinguishing, as a moral agent, between right and wrong, or was he ignorant in the opinion of the triers, that murder was an offence to God as well as man?" The remarks of the Solicitor General, Sir Charles Yorke, were still more striking, and show the caution with which the plea of insanity should be received. Campbell's Lives of the Lord Chancellors, v.

(*a*) Windham *v.* Chetwynd, 1 Burr. 464.

(*b*) Doe *v.* Kersey, C. B., Easter Term, 1765; Powell on Devises, 131; 1 Day, 41, note. This very point arose in Hawes *v.* Humphrey, 9 Pick. 350, and the court held that a witness to a will must have been competent at the time of attestation; and they took that side of the question as appearing to be most reasonable, and most conformable to the statute. The Mass. Revised Statutes of 1836 have declared that the witnesses must be competent at the time of attestation, and this was so declared by statute in England, and the opinion of Lord Camden has finally prevailed. But in Alabama a deposition taken *de bene esse* cannot be read at the trial, if the witness would be incompetent, *if then present*, though he was competent when the deposition was taken. Jones *v.* Scott, 2 Ala. 58. [The law as held in Hawes *v.* Humphrey is stated as well settled law in Stewart *v.* Harriman, 56 N. H. 25. See also Camp *v.* Stark, 81* Penn. St. 235; Thorpe *v.* Bestwick, 6 Q. B. D. 311.]

(*c*) Langford *v.* Pitt, 2 P. Wms. 629; Greenhill *v.* Greenhill, Prec. in Ch. 320; Potter *v.* Potter, 1 Ves. 437; M'Kinnon *v.* Thompson, 3 Johns. Ch. 307.

(*d*) Lord Mansfield, in Pistol *v.* Riccardson, 3 Doug. 361, admitted the rule to be settled, and on the ground that the will in that respect resembled a conveyance. By the Roman law, after purchased lands passed, and the rule, he said, might as well have been declared the other way, but the doctrine could not be shaken. If legacies be bequeathed to heirs, and the lands devised to B., not an heir, the heirs may claim and recover, in the character of heirs, *after acquired lands*, without being obliged to elect between the lands and the legacies. This was decided in the case of The City of Philadelphia *v.* Davis, 1 Wharton, 490, after a very elaborate discussion, and contrary to the case of Thellusson *v.* Woodford, 13 Ves. 209.

of his death. (e) In *Goodright* v. *Forester*, (f) it was held that a right of entry was not devisable. It was not a right assignable at common law, and it did not fall within the words of the statute of wills of 32 Hen. VIII. This decision was affirmed in the Exchequer Chamber, but upon other grounds; and Chief Justice Mansfield intimated, that a right that was descendible by inheritance ought to be devisable. It had been previously decided, and on much more enlarged and liberal grounds,
*511 in *Jones* v. *Roe*, (g) * that executory devises, and all possibilities coupled with an interest, were devisable. (a) But

(e) Bro. Abr. tit. Devise, pl. 15; Butler v. Baker, 3 Co. 25, a; Bunker v. Coke, 1 Salk. 237; 1 Bro. P. C. 199, s. c.; Arthur v. Bokenham, 11 Mod. 148. This rule was strictly maintained in Pennsylvania, and the case of Girard v. The City of Philadelphia, notwithstanding the will was intended by the testator to apply to lands which might be *thereafter* purchased. 4 Rawle, 328. The law is now altered in Pennsylvania, by act of 8th April, 1833. When it clearly appears that the testator intended that his will should cover after acquired lands, the rule in equity would seem to be that the heir cannot take both as heir and as legatee, and a court of equity will put him to his election to take under the will or as heir, and he will not be allowed to take in both capacities, as heir and as legatee. Thellusson v. Woodford, 13 Ves. 220, 221; Churchman v. Ireland, 1 Russ. & My. 250; s. c. 4 Sim. 520. The rule in the English chancery is, that a republication of a will by a codicil makes a will speak as of the date of the codicil, and it will, as a republication, take in lands purchased up to the date of the codicil. A clear intent will, however, prevent the application of the rule, as if the codicil should say "I am now dealing with the property I have given by the will, and with none other." Moneypenny v. Bristow, 2 Russ. & My. 117; Miles v. Boyden, 3 Pick. 213; Kip v. Van Cortland, 7 Hill (N. Y.), 846.

The English real property commissioners, in their report in April, 1833, recommended an alteration in the law to the effect that a will should pass property of any description comprised in its terms, where a testator may be entitled to at the time of his death, unless an intention to the contrary should appear upon the will. And the English Parliament, by statute of 1 Victoria, c. 26, passed *for the amendment of the law with respect to wills*, declared that every person might dispose by will of his real and personal estate, legal or equitable, which would otherwise go to his heir or executor. The power was extended to contingent, executory, and future interests, in any real or personal estates, that would devolve, if not devised, upon the heir, and to rights of entry, and to real and personal estate acquired after the execution of the will, and to which the testator is entitled at his death. The statute declares that every will, in reference to the real and personal estate comprised in it, shall be construed to speak and take effect as if it had been executed immediately before the death of the testator. Again, by the act of 7 Wm. IV. and 1 Vict. c. 26, it is declared that a general devise of real estate shall be deemed to include any real estate which the testator may have power to appoint, in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

(f) 8 East, 552; 1 Taunt. 578, s. c.

(g) 8 T. R. 88; 1 H. Bl. 30, s. c.

(a) By the New York Revised Statutes, a possibility coupled with an interest is devisable, if the person in whom the interest is to vest can be ascertained. Every

a right to enter for a condition broken, or under the warranty annexed to an exchange, is not devisable; nor is the benefit of a condition, unless it be annexed to a reversion. (*b*) The interest under a contingent remainder or executory devise, or future or springing use, is devisable. All contingent possible estates are devisable, for there is an interest. But the mere possibility of an expectant heir is not devisable, for that is not within the principle. So, if a settlement be made on the survivor of A., B., and C., neither of them can devise the possibility. The person who is to take is not ascertained. (*c*)

The comprehensive views of the right of testamentary disposition, contained in the case of *Jones* v. *Roe*, have, I presume, been generally adopted in this country. The statute of New York, of 1787, gave the power of devise to persons *seised* of estates of inheritance in lands, rents, and other hereditaments in possession, remainder, or reversion. The subsequent provisions of the statute law dropped the word "seised," and gave the power of devising to persons *having* estates of inheritance; and in *Jackson* v. *Varick*, (*d*) it was held, after much discussion, that a right of entry in land was devisable, though at the time of the devise and of the testator's death, the land was held adversely. Such a right would pass by descent; and there were no reasons of policy to create a distinction in this respect between descent and devise; and, though there was no substantial difference between the New York and the English statutes of wills, the former was rather more comprehensive in terms.

The English rule, requiring the testator to be actually * seised of the lands devised at the time of making the will, * 512 and to continue seised at the time of his death, continued to

interest which is descendible may be devised, and this embraces all contingent interests. 2 R. S. 57, sec. 2; Pond *v.* Bergh, 10 Paige, 141, 153.

(*b*) Lord Hardwicke, in Avelyn *v.* Ward, 1 Ves. 423; Goodright *v.* Forester, 8 East, 552; Preston on Abstracts, ii. 204. Mr. Preston doubts whether a mere possibility of reverter be devisable; but there seems to be no reason for doubt, since the decision in Jones *v.* Roe. The English law is now settled by the act of 7 Wm. IV. and 1 Vict. c. 26, that rights of entry for condition broken, and all other rights of entry, are devisable. In Deas *v.* Horry, 2 Hill, Ch. (S. C.) 248, Mr. Justice Harper was of opinion, that a possibility of reverter was not devisable, for it was not a possibility coupled with an interest, but a mere naked possibility.

(*c*) Doe *v.* Tomkinson, 2 Maule & S. 165. See *supra*, 311, note, as to the devise of trust estates, and 334, 335, as to the execution of a power by will.

(*d*) 7 Cowen, 238; s. c. 2 Wend. 166. ["Seised" was considered to mean "having," in Bailey *v.* Hoppin, 12 R. I. 560.]

be the law of New York, down to the recent revision of the statute law. (*a*) The general rule of the English law has been admitted to be existing in Maine, Connecticut, North Carolina, and Alabama. (*b*) The devise under the English law is a species of conveyance; and that is the reason that the devise operates only upon such real estate as the testator owned and was seised of at the time of making the will. (*c*) An auxiliary consideration may be founded on the interest which the law always takes in heirs; and the rule was, until recently, received in Massachusetts as an explicit and inflexible rule of law. (*d*) The New York Revised Statutes have altered the language of the law, and put all debatable questions to rest, and made the devises prospective, by declaring that every estate and interest descendible to heirs may be devised; and that every will made in express terms, of all real estate, or in any other terms denoting the testator's intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death. (*e*) The law in Massachusetts, Vermont, Pennsylvania, and Virginia is the same as that now in New York. In Virginia, seisin is not requisite to a devise, and a right of entry is devisable. (*f*) Rights of entry are devisable, even though there be an adverse possession or disseisin; and the will will extend prospectively, and carry all the testator's lands existing at his death, if so evidently intended. (*g*) This is also understood to be the law in Kentucky, Maine, Alabama, Connecticut, North Carolina, Illinois, and Ohio,

(*a*) Minuse *v.* Cox, 5 Johns. Ch. 441.

(*b*) Carter *v.* Thomas, 4 Greenl. 341; Meador *v.* Sorsby, 2 Ala. 712; Brewster *v.* McCall, 15 Conn. 274; Foster *v.* Craige, 3 Ired. 536. But in Whittmore *v.* Bean, 6 N. H. 47, the court seemed to think the English rule was unreasonable, and that a mere right of entry was devisable.

(*c*) 2 Bl. Comm. 378. [See 7 Am. Law Rev. 56, 57.]

(*d*) Parker, C. J., 5 Pick. 114; 10 Mass. 131; 17 id. 68.

(*e*) New York Revised Statutes, ii. 57, sec. 2, 5. But a devise of lands in a particular place, unless the intention be otherwise and apparent, will be confined to lands in that place owned by the testator, at the time of the will. Pond *v.* Bergh, 10 Paige, 140. An estate *pur auter vie*, though personal assets, may be devised under the term "lands," and a power to sell lands may be devised. 1 Hoff. Ch. 204, 225.

(*f*) Lomax's Dig. iii. p. 20; Watts *v.* Cole, 2 Leigh, 664.

(*g*) Turpin *v.* Turpin, 1 Wash. 75; Hyer *v.* Shobe, 2 Munf. 200; Stoever *v.* Lessee of Whitman, 6 Binney, 416; Tilghman, C. J., 4 Serg. & R. 435; 2 Leigh, 664; Pennsylvania Statute of Wills of 1705, and the Revised Act relating to Wills, April 8, 1833, sec. 10; Massachusetts Revised Statutes, 1836; Revised Statutes of Vermont, 1839, p. 254; Willis *v.* Watson, 4 Scam. 64; [Liggat *v.* Hart, 23 Mo. 127.]

and in the latter state the statute declares that every description of property may be devised. (*h*) We have, therefore, in many parts at least of the United * States, this settled test * 513 of a devisable interest, that it is every interest in land that is descendible. In England, the more recent test is a possibility coupled with an interest; (*a*) and under either rule the law of devise is of a sufficiently comprehensive operation over the real estate. It is probable that devises receive a construction in every part of the United States as extended as that in England.

A joint tenant has not an interest which is devisable. The reason given by Lord Coke is, that the surviving joint tenant has an interest, which first attaches at the death of the joint tenant making the will; and he insists that there is a priority of time in an instant; and Mr. Butler refers to another case in which that subtlety was applied. (*b*) A better reason than this refinement is, that the old law favored joint tenancy; and the survivor claims under the first feoffor, which is a title paramount to that of the devisee; and a devisee is not permitted to sever the joint tenancy.

4. The Execution of the Will. — The general provision on this subject is, that the will of real estate must be in writing, and subscribed by the testator, or acknowledged by him in the presence of at least two witnesses, who are to subscribe their names as witnesses. (*c*) The regulations in the several states differ in some unessential points; but generally they have adopted the directions given by the English statute of frauds, of 29 Charles II. The general doctrine of international law is, that wills concerning

(*h*) Griffith's Law Register, tit. Kentucky; [Ross *v.* Ross, 12 B. Mon. 437; and see Succession of Valentine, 12 La. An. 286;] Lessee of Smith *v.* Jones, 4 Ohio, 115; Statutes of Ohio, 1831; Jarman on Wills, i. 43, notes, Boston ed. In Tennessee, devisees cannot come in for a share of the real estate acquired *after* making the will, without bringing into hotchpot the land devised to them. Vance *v.* Huling, 2 Yerg. 135; Sturdevant *v.* Goodrich, 3 id. 95. The English statute of distributions, of 29 Chas. II., used the words "settled in his lifetime," and did not apply to a settlement or advancement by will. The Tennessee rule resembles the English law of *hotchpot*, as applicable to estates in coparcenary.

(*a*) But see *ante*, 510, n. (*e*); [511, n. (*a*) and (*b*)].

(*b*) Litt. sec. 287; Co. Litt. 185, b; Perkins, sec. 500; Butler's note 68, to Co. Litt. lib. 3.

(*c*) In ordinary cases, it is not necessary to prove that the will was read over to the testator, or that he knew the contents of it; all this fact will be presumed, if the prescribed formalities of execution are followed. But the presumption may be repelled, and positive and satisfactory proof required, if a doubt be thrown over the case. Billinghurst *v.* Vickers, 1 Phill. Eccl. 187; Day *v.* Day, 2 Green, Ch. 549.

land must be executed according to the prescribed formalities of the state in which the land is situated; but wills of chattels, executed according to the laws of the place of the testator's domicile, will pass personal property in all other countries, though not executed according to their laws. The *status*, or capacity of the testator to dispose of his personal estate by will, depends upon the law of his domicile. Mobilia personam sequuntur, immobilia situm. (*d*) [1] By the *New York Revised Statutes, (*a*) the testator is to subscribe the will at the end of it, in the presence of at least two witnesses, who are to write their places of residence opposite their names, under the penalty of fifty dollars if they omit so to write; but the omission to do it will not affect the validity and efficiency of their attestation. Three witnesses, as in the English statute of frauds, are required in Vermont, New Hampshire, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Maryland, South Carolina, Georgia, Alabama, Mississippi. Two witnesses only are requisite in New York, Pennsylvania, Delaware, Virginia, Ohio, Illinois, Indiana, (*b*) Missouri, Tennessee, North Carolina, and Kentucky. In some of the states, the provision as to attestation is more special. In Pennsylvania, a devise of lands in writing will be good, without any subscribing witnesses, provided the authenticity of it can be proved by two witnesses; and if the will be subscribed by witnesses, proof of it may be made by others. (*c*)

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(*d*) Huberus, de Conflictu Legum, sec. 15; Vattel, lib. 2, c. 8, sec. 103; Coppin *v.* Coppin, 2 P. Wms. 291; Robinson *v.* Bland, 2 Burr. 1079; Abbott, C. J., in Doe *v.* Vardill, 5 B. & C. 438; the Master of the Rolls, in Brodie *v.* Barry, 2 Ves. & Bea. 131; Kerr *v.* Moon, 9 Wheat. 565; United States *v.* Crosby, 7 Cranch, 115; M'Cormick *v.* Sullivant, 10 Wheat. 202; Darbey *v.* Mayer, ib. 469; Cutter *v.* Davenport, 1 Pick. 81; Hosford *v.* Nichols, 1 Paige, 226. See also *supra*, ii. 429, and Story's Comm. on the Conflict of Laws, ch. xi. and xii.; In the matter of Robert's Will, 8 Paige, 446, 525; Countess De Z. Ferraris *v.* Marquis of Hertford, 3 Curteis, 468.

(*a*) Vol. ii. 63, sec. 40, 41.

(*b*) The ordinance of Congress of July, 1787, for the government of the northwest territory, now composing the states of Ohio, Indiana, Illinois, &c., required three witnesses to a will devising real estates.

(*c*) Hight *v.* Wilson, 1 Dallas, 94; Huston, J., 1 Watts, 463.

[1] Moultrie *v.* Hunt, 23 N. Y. 394. It is often provided by statute that all wills shall be treated as valid which are valid by the laws of the state where they were executed, and sometimes also that it shall be sufficient if wills are executed in conformity with the law existing at the time of execution. [Camp *v.* Stark, 81* Penn. St. 235.]

The English statute of frauds required the will to be signed by the devisor, and to be attested and subscribed by the witnesses, *in his presence;* and this direction has been extensively followed in the statute laws of this country, and particularly in New York, down to the recent revision of its statute law. (*d*) The Revised Statutes have so far altered the former law as to require the signature of the * testator and of the witnesses to be *515 at the end of the will; and the testator, when he signs or acknowledges the will, is to *declare the instrument to be his last will;* and he is to subscribe or acknowledge the will in the presence of each witness; and the witnesses are to subscribe their names at the request of the testator. (*a*) The statute drops the direction in the English statute, that the witnesses are to subscribe *in the presence of the testator*, and the doctrine of constructive presence is thereby wisely rejected. (*b*)

(*d*) In England, under the statute of frauds of 29 Charles II., c. 8, sec. 5, 6, the attestation of a will by a witness making his mark is sufficient. Harrison *v.* Harrison, 8 Ves. 185; Addy *v.* Grix, ib. 504; Baker *v.* Dening, 8 Ad. & El. 94; [In Goods of Eynon, 3 L. R. P. & D. 92.] The law in South Carolina and Louisiana is the same. Adams *v.* Chaplin, 1 Hill, Ch. 266; 9 La. 512; 11 id. 251. The words of the English statute are, that the will shall be *attested and subscribed* by the witnesses. The New York Revised Statute is a little stronger, and may not admit of the same loose construction, for it says that each attesting witness shall *subscribe his name.* Making his mark has, however, been held sufficient. George *v.* Surrey, 1 Mood. & M. 516; Chaffee *v.* Baptist M. C., 10 Paige, 85. So writing with a pencil is sufficient. Geary *v.* Physic, 5 B. & C. 234; Brown *v.* B. & D. Bank, 6 Hill (N. Y.), 443. The statute of 1740, in North Carolina, requires in all cases of wills a plain and unequivocal act of publication. In New Jersey, the construction under their statute of 1714 is, that the testator must sign his name *in the presence* of the three witnesses, and the mere acknowledgment in their presence is not sufficient. Den *v.* Matlack, 2 Harrison, 86; Den *v.* Mitton, 7 Halst. 70; Combs *v.* Jolly, 2 Green, Ch. 625.

(*a*) [See McDonough *v.* Loughlin, 20 Barb. 238; Robins *v.* Coryell, 27 id. 556; Tonnele *v.* Hall, 4 Comst. 140; Lewis *v.* Lewis, 11 N. Y. 220; Seymour *v.* Van Wyck, 2 Selden, 120; Hoysradt *v.* Kingman, 22 N. Y. 372; Coffin *v.* Coffin, 23 id. 9. Compare Vernon *v.* Kirk, 30 Penn. St. 218; Abraham *v.* Wilkins, 17 Ark. 292.] The testator's request may be inferred as a matter of fact by a jury, but if one of the witnesses neither saw the testator subscribe, nor heard him acknowledge, his signature, the proof is defective. Rutherford *v.* Rutherford, 1 Denio, 33.

(*b*) [Lyon *v.* Smith, 11 Barb. 124.] The weight of authority in England was, that no formal *publication* of the will was requisite; 7 Taunt. 355; nor is it now required; but in New York, it is otherwise by statute. It was held, in Heyer *v.* Berger, 1 Hoff. Ch. 1, that the execution of the will requires it to be signed, attested, acknowledged, and *declared or published*, which is an independent act distinct from subscription or acknowledgment of subscription. So it was held, after great consideration, by Sir Herbert Jenner, in the Prerogative Court of Canterbury, in Allen *v.* Bradshaw (1 Curteis, 110), that a power in a *feme covert* to make a will of personal property, to be

The English courts, from a disposition to favor wills, departed from the strict construction and obvious meaning of the statute of frauds, and opened a door to very extensive litigation. It was held to be sufficient that the testator wrote his name at the top of the will, by way of recital; and his name, so inserted was deemed signing the will within the purview of the statute. This was the decision in *Lemayne* v. *Stanley*. (*c*) The doctrine of a constructive presence of the testator has been carried very far; and it has been decided, that if the witnesses were within view, and where the testator *might*, or had the capacity to see them, with some little effort, if he had the desire, though in reality he did not, they were to be deemed subscribing witnesses *in his presence*. (*d*) It was further held, that if the testator produced to the witnesses a will already signed, and acknowledged the signature in their presence, it was a sufficient compliance with
*516 the statute; and it was decided * to be unnecessary for the testator actually to sign the will in the presence of the

signed *and published* by her in the presence of two or more witnesses, was not well exercised if the will omitted to state that it was published by her, &c., and that extrinsic evidence of the fact was not admissible.

The English statute of 1 Victoria, c. 26, dispenses with the form of publication altogether, whereas the New York Revised Statutes require that the testator, at the time of subscribing or acknowledging the will, *shall declare* the instrument to *be his last will and testament*. An *actual publication* of the will, as a will, in the presence of the subscribing witnesses, is thus made indispensable, and so it was held in Brinckerhoff *v.* Remsen, 8 Paige, 488; s. c. 26 Wend. 825; and the will in that case was held not to be duly executed from the want of that formality. See also, to the same point, Chaffee *v.* Baptist M. C., 10 Paige, 85; New York Revised Statutes, ii. 63, sec. 40. [Torry *v.* Bowen, 15 Barb. 304; Nipper *v.* Groesbeck, 22 id. 670.] The Mass. Revised Statutes of 1836 require the execution of a will to pass real estate, or to charge or affect the same, to be signed by the testator, or by some other person in his presence, and by his express direction, and subscribed in *his presence* by three or more competent witnesses.

(*c*) 3 Lev. 1. In Kentucky, the testator's name may be in any part of the will, if the same be signed by him, or by another, and acknowledged by him as his signature. Sarah Miles's Will, 4 Dana, 1; [Upchurch *v.* Upchurch, 16 B. Mon. 102. So, also, in Alabama. Armstrong *v.* Armstrong, 29 Ala. 538.]

(*d*) Shires *v.* Glascock, 2 Salk. 688; Davy *v.* Smith, 3 id. 395; Longford *v.* Eyre, 1 P. Wms. 740; Casson *v.* Dade, 1 Bro. C. C. 99; Tod *v.* Earl of Winchelsea, 2 Carr. & P. 488; Russell *v.* Falls, 3 Harr. & M'Hen. 457; Edelen *v.* Hardey, 7 Harr. & J. 61; Neil *v.* Neil, 1 Leigh, 6. In this last case the English decisions were carefully reviewed, and it was decided, that the attestation of a will of lands in Virginia, under their statute, which was the same as the statute of 29 Car. II. c. 3, was *prima facie* a good attestation, if made in the same room with the testator; and that it was *prima facie* not an attestation in his presence, if not made in the same room.

witnesses. (*a*) [1] Nor is it held necessary that the witnesses should attest in the presence of each other, or that they should attest every page or sheet, or that they should know the contents, or that each page should be particularly shown to them. (*b*) It is necessary, however, that the witnesses should not only be in the testator's presence, but that the testator should have mental knowledge of the fact; and in *Right* v. *Price*, (*c*) where the witnesses attested the will while the testator was corporally present, but in a state of insensibility, it was held to be a void attestation. It is further settled, that the subscribing witnesses need not attest at one time, nor altogether. The statute of frauds required that the witnesses should attest in the presence of the testator; but it did not say that they should attest in the presence of each other, and, therefore, it is not required. They may attest separately, and at different times. (*d*) It is to be presumed, that the English rules of construction of the statute of frauds in the execution of the will, apply in those states which have followed the language of the statute; but in New York the alterations which have been mentioned have rendered some of these decisions inapplicable. (*e*)

(*a*) Stonehouse *v.* Evelyn, 3 P. Wms. 254; Grayson *v.* Atkinson, 2 Ves. 454; Ellis *v.* Smith, 1 Ves. 11; White *v.* British Museum, 6 Bing. 310; [Sisters of Charity *v.* Kelly, 67 N. Y. 409.]

(*b*) Bond *v.* Seawell, 3 Burr. 1773. (*c*) Doug. Rep. 241.

(*d*) Cook *v.* Parsons, Prec. in Ch. 184; Jones *v.* Lake, 2 Atk. 176, note. The witnesses must subscribe in the presence of the testator. Moore *v.* King, [3 Curteis, 243.] Prerogative Court of Canterbury, Mich. 1842.

(*e*) By the report of the English property commissioners, in April, 1833, they pro-

[1] But the testator's name must have been signed, before the witnesses subscribe. Chase *v.* Kittredge, 11 Allen, 49; Jackson *v.* Jackson, 89 N. Y. 153; Hudson *v.* Parker, 1 Rob. Ec. 14; Shaw *v.* Neville, 33 Eng. L. & Eq. 615; Beckett *v.* Howe, L. R. 2 P. & D. 1; Goods of Puddephat, ib. 97. *x*[1]

x[1] Fischer *v.* Popham, 3 L. R. P. & D. 246; Burke *v.* Moore, 9 Ir. R. Eq. 609. And where the testator acknowledges his signature, the witnesses must see, or have the means of seeing, the signature at the time. In the Goods of Gunstan, 7 P. D. 102. In order that an attestation may be in the presence of a testator, it must be so made that he either does, or may, without great effort, see the act. The execution was held to have been in the presence of the testator in Will of John Meurer, 44 Wis. 392; Etchison *v.* Etchison, 53 Md. 348. Held not to have been in Ludlow *v.* Ludlow, 35 N. J. Eq. 480; Mandeville *v.* Parker, 31 N. J. Eq. 242; In the matter of Downie's Will, 42 Wis. 66.' The testator's name may be written by another in his presence and at his request where he is unable to write. Lord *v.* Lord, 58 N. H. 7.

At common law a will of chattels was good without writing. (*f*) In ignorant ages, there was no other way of making a will but by words or signs. But, by the time of Henry VIII., and especially in the ages of Elizabeth and James, letters had become so generally cultivated, and reading and writing so widely diffused, that verbal, unwritten, or nuncupative wills were confined *517 to extreme cases, * and held to be justified only on the plea of necessity. (*a*) They were found to be liable to great frauds and abuses; and a case of frightful perjury in setting up a nuncupative will (*b*) gave rise to the statute of frauds of 29 Charles II. c. 3, which enacted, that no nuncupative will should be good where the estate bequeathed exceeded thirty pounds, unless proved by three witnesses, present at the making of it, and specially required to bear witness; nor unless it was made in the testator's last sickness, in his own dwelling-house, or where he had been previously resident ten days at the least, except becoming sick from home, and dying without returning, and reduced to

posed that the testator's signature should be at the foot of the will, and that it should be attested by two witnesses, and that they should subscribe in the presence of each other. They were for abolishing nuncupative wills, except in the case of sailors and soldiers; and the English statute of 1 Victoria, c. 26, followed the suggestion, and declared that *every* will of real or personal estate must be in writing, and signed by the testator, or by some other person in his presence and by his direction, in the presence of two witnesses at one time; though soldiers and mariners in actual service may dispose of personal estate as before; and such signature must be made or acknowledged by the testator in the presence of the witnesses, and the witnesses are to attest and subscribe the will in the presence of the testator, but no form of attestation is necessary; and every will thus executed is declared to be valid *without any other publication thereof.* This statute put an end to nuncupative wills in England, with the reservation only of the two excepted cases; and before this statute the doctrine of the English courts was, that the evidence to prove a nuncupative will must be strict and stringent; that the requisitions of the statute must be strictly complied with in every single particular, and especially as to the *rogatio testium.* The deceased himself was required by the statute to bid the persons present to bear witness. Bennett *v.* Jackson, 2 Phill. 190; Lemann *v.* Bonsall, 1 Addams, 389. Some of the American cases seem to have indulged in a considerable relaxation of this just and necessary requisition of the statute. Mason *v.* Dunman, 1 Munf. 456; Parsons *v.* Parsons, 2 Greenl. 298; [Will of Rachel Hulse, 52 Iowa, 662.]

(*f*) Swinb. on Wills, 6.

(*a*) Perkins, sec. 476; Swinb. on Wills, 32.

(*b*) Cole *v.* Mordaunt, 28 Charles II., 4 Ves. 196, note. No court has authority or discretion to give effect to a paper as a will, in respect to which the deceased had not finally made up his mind, or which appears not to be intended to be testamentary, or to have a dispositive or revocatory effect. Taylor *v.* D'Egville, 3 Hagg. Eccl. 202; Bragge *v.* Dyer, ib. 207; The King's Proctor *v.* Daines, ib. 218. [See McBride *v.* McBride, 26 Gratt. 476.

writing within six days after the testator's death, and not proved till fourteen days after his death, and the widow or next of kin has been summoned to contest it. This regulation has been incorporated into the statute law of this country; (*c*) but even these legislative precautions were insufficient to prevent the grossest frauds and perjury, in the introduction of nuncupative wills. (*d*) And as a further and more effectual remedy, the New York Revised Statutes (*e*) declared that no nuncupative or unwritten will shall be valid, unless made by a soldier while in actual military service, or by a mariner while at sea; and every will of real or personal property must be equally subscribed by the testator, or acknowledged by him in the presence of at least two attesting witnesses. In Pennsylvania, also, two witnesses are required to the attestation of a will of personal as well as of real estate. They follow, in this respect, the ecclesiastical law of England. (*f*) So, in Virginia and Tennessee, two witnesses are required to a will of chattels. (*g*) In South Carolina, the act of

(*c*) It was adopted as the statute law of New York, until 1830, and it was re-enacted in Ohio, in 1831, and in New Jersey, in 1795, and in the Mass. Revised Statutes, in 1836, and in Indiana, in 1818; and in Georgia, the original statute of Charles II is assumed and adopted as the law of the state. So in North Carolina. But by statute in North Carolina, all wills in writing of personal property after the 4th of July, 1841, are to be executed with the same formalities as wills of real estate, except nuncupative wills. In many of the other states besides those mentioned in the text, as in Massachusetts, Vermont, Rhode Island, Delaware, Arkansas, Missouri, Michigan, Mississippi, South Carolina, and Wisconsin, the same form of execution is requisite in wills of personal and real estate. In Pennsylvania, where the English statute is followed, it is held that a nuncupative will is not good unless made when the testator is *in extremis*, or has been overtaken by sudden and violent illness, and has no time or opportunity to make a written will. The doctrine of the case of Prince *v.* Hazleton, in 20 Johns. 502 (and which case was before the New York Revised Statutes had nearly abolished nuncupative wills), seems to have been approved and adopted. Case of Priscilla E. Yarnall's Will, 4 Rawle, 46. [See further, Harrington *v.* Stees, 82 Ill. 50; Broach *v.* Sing, 57 Miss. 115; Sadler *v.* Sadler, 60 Miss. 251; Lewis *v.* Aylott, 45 Tex. 190; Bolles *v.* Harris, 34 Ohio St. 38.]

(*d*) See the case of Prince *v.* Hazleton, 20 Johns. 502, which affords memorable proof of such practices.

(*e*) Vol. ii. 60, sec. 22; ib. 63, sec. 40. [See Hubbard *v.* Hubbard, 12 Barb. 148; s. c. 4 Selden, 196; *Ex parte* Thompson, 4 Bradf. (N. Y.) 154; Warren *v.* Harding, 2 R. I. 133; Sampson *v.* Browning, 22 Ga. 293; Ridley *v.* Coleman, 1 Sneed, 616; Lucas *v.* Goff, 33 Miss. 629; Dockum *v.* Robinson, 26 N. H. 372.]

(*f*) Lewis *v.* Maris, 1 Dall. 278; Swinburne on Wills, Part IV. sec. 24. p. 293.

(*g*) Redford *v.* Peggy, 6 Rand. 316; Suggett *v.* Kitchell, 6 Yerg. 425. In Tennessee, they follow generally the rule of the English law, that a will of chattels is liberally construed, and must be executed with like solemnity. It need not be signed or

1824 requires that wills of personal estate be attested by three witnesses; and it is a general rule of law, and one recognized in South Carolina, that a will of personal property, which operates upon the property of the testator existing at his death, must be executed according to the requisites of the law existing at
*518 *that time. (a) Lord Loughborough had long ago perceived the importance of such a wise provision, and had expressed a wish that wills of real and personal estates were placed under the same restrictions. (b) It is now required in the English ecclesiastical courts, that a nuncupative will be proved by evidence more strict and stringent than that applicable to a written will, even in addition to all the requisites prescribed by the statute of frauds. (c)

At common law, an infant could act as an executor at the age of seventeen; though this is now altered in England, by the statute of 38 Geo. III. c. 87; and an alien could be an executor. The executor might act without letters testamentary; and if one of several executors renounced, he might afterwards come in and administer; though the Court of Chancery might exact from him security. An executor of an executor succeeded to the trust of the first executor. (d) But by the New York Revised Statutes, (e) some judicious improvements are made upon the antecedent law. It is declared, that infants under the age of twenty-one years and

sealed by the party. The authentic wishes of the testator as to the disposition of his property is sufficient. McLean v. McLean, 6 Humph. 452; Williams on Executors, i. 54.

(a) In the matter of Elcock's Will, 4 M'Cord, 39. The English law is very loose as to the nature of the instrument disposing of personal property; and marriage articles, promissory notes, assignment of bonds, letters, &c., though not intended as wills, yet, if they cannot operate in another way, may be admitted to probate as wills of personal property, provided the intention of the deceased be clear that the instrument should operate after his death. 2 Hagg. E. 247.

(b) 5 Ves. 285. The better to guard against the undue influence to which persons are liable in their last sickness, the law of Scotland will not allow, by what is termed the law of deathbed, the alienation of land to the prejudice of the heir, if made by a man in his last sickness, and within sixty days of his death. 1 Bell's Comm. 84–99.

(c) Lemann v. Bonsall, 1 Addams, 389. But nuncupative wills are now no longer valid in England, by the statute of 1 Vict. c. 26, except as to the wills of soldiers and mariners in service. Every will must be in writing. In North Carolina, by statute, 1840, wills of personal estate (nuncupative wills under regulations excepted) must be executed with the same formalities as wills of real estate.

(d) Shep. Touch. by Preston, 460, 462, 464.

(e) Vol. ii. 69–72.

aliens, not being inhabitants of the state, are not competent to serve as executors; nor is a married woman entitled to letters testamentary, unless with * the consent in writing *519 of her husband; and in that case he is deemed responsible for her acts jointly with her. A non-resident executor is required to give the like bond as is required by law of administrators; and on the objection of a creditor, or other person interested in the estate, the surrogate, on reasonable cause shown, may require the like security from any executor, either before or after letters testamentary are granted. If letters be granted upon any will, the executors not named in them cannot act until they appear and qualify; nor can an executor interfere with the estate, except to pay funeral charges, before letters testamentary are granted; and the power of an executor to administer on the estate of the first testator is abolished. These provisions are calculated to secure fidelity and increase confidence in the execution of a delicate and dangerous trust.

The law of Louisiana, in respect to last wills, is peculiar. Wills, under the code of that state, are of three kinds; nuncupative or open, mystic or sealed, and holographic. They are all to be in writing. The first, or nuncupative testament, is to be made by a public act before a notary, as dictated by the testator, in the presence of three or five witnesses, according to circumstances; and to be read to the testator, and signed by the testator and witnesses; and if the testator be disabled, another person may sign it for him, in his presence, and that of the witnesses, or it may be executed by his private signature, in the presence of three, or five, or seven witnesses, according to circumstances, and they are to subscribe it. The second, or mystic testament, is to be signed by the testator, and sealed up, and presented to a notary and seven witnesses, with a declaration that it is his will; and the notary and witnesses are to subscribe the superscription. The third, or holographic testament, is one entirely written, and signed by the testator, and subject to no other form, and may be made out of the state. The attestation of subscribing witnesses at the bottom will not mar it, for their signatures make no part of the will. (*a*)

(*a*) Andrews *v.* Andrews, 12 Martin (La.), 713; Knight *v.* Smith, 3 id. 163; Langley *v.* Langley, 12 La. 114; [Succession of Roth, 31 La. An. 315. Olographic wills are provided for by statute in several other states. See Douglass *v.* Harkrender, 8 Baxt. 114; Estate of Rand, 61 Cal. 468; Toebbe *v.* Williams, 80 Ky. 661.]

No woman can be a witness to a will in any case; and no other person who takes under the will can be a witness, except *520 it be in the case of a *mystic testament. These prescribed forms are not requisite in the testaments made abroad, of certain descriptions of people. Children cannot be disinherited but for one of ten causes, which are enumerated, and all of which relate to filial disobedience or atrocity in relation to parents. Among those acts are cruelty to the parent, or an attempt on his life, or a refusal to ransom him from captivity, or to become his security when in prison. (*a*) There is a provision made for cases in which the testator or witnesses are too illiterate to write their names; and the regulations in general are complex and singular, (*b*) and, I should think, not well adapted to the judgment and taste of the people of the other states in the Union, who have been accustomed to the more simple provisions of the English law. (*c*)

5. The Revocation of a Will. — A will duly made according to law, is, in its nature, ambulatory during the testator's life, and can be revoked at his pleasure. (*d*) But to prevent the admission of loose and uncertain testimony, countervailing the operation of an instrument made with the formalities prescribed, it is provided that the revocation must be by another instrument exe-

(*a*) Civil Code of Louisiana, art. 1567–1614.

(*b*) The Civil Code of Louisiana, on the subject of the execution of wills, is taken from the Napoleon Code. Under that code, the French tribunals construed the law with severe strictness; and unless the testament itself proved, by the terms used in it, an absolute impossibility that there was an omission of the formalities required by the code, the will was annulled. It was at last attempted even to annul a testament for a faulty punctuation! This led to a mitigation of the antecedent rigorous doctrine, and to the establishment of the reasonable principle, that when a clause in a will is susceptible of two meanings, it shall have that construction which will give the instrument effect. Toullier, Droit Civil Français, v. 890–416, and particularly n. 430. The same liberal principles of interpretation have been adopted under the same articles in the Civil Code of Louisiana. Seghers *v.* Antheman, 13 Martin (La.), 73.

(*c*) Under the rule of equity, that what ought to be done is sometimes considered as done, the execution of a will may be controlled by equitable views of the subject. Thus land, which has been agreed or directed to be sold, is considered as money; money which has been agreed or directed to be laid out in the purchase of land, is considered as land; and, therefore, in equity, money directed to be laid out in land will not pass by will, unless executed as if the property were land; but land directed to be converted into money will pass by a will competent to pass money.

(*d*) Vynior's Case, 8 Co. 81, b.

cuted in the same manner; or else by burning, cancelling, *tearing, or obliterating the same by the testator him- *521
self, or in his presence, and by his direction. This is the language of the English statute of frauds, and of the statute law in every part of the United States. (*a*)

A will may be revoked by implication or inference of law; and these revocations are not within the purview of the statute; and they have given rise to some of the most difficult and interesting discussions existing on the subject of wills. They are founded upon the reasonable presumption of an alteration of the testator's mind, arising from circumstances since the making of the will, producing a change in his previous obligations and duties. The case stated by Cicero (*b*) is often alluded to, in which a father, on the report of the death of his son, who was then abroad, altered his testament, and appointed another person to be his heir. The son returned after the father's death, and the centumviri restored the inheritance to him. There is a case mentioned in the Pandects to the same effect; (*c*) and it was the general doctrine of the Roman law, that the subsequent birth of a child, unnoticed in the will, annulled it. This is the rule in those countries which have generally adopted the civil law, *Testamenta rumpuntur agnatione posthumi;* (*d*) and there is not, perhaps, any code of civilized

(*a*) [White *v.* Casten, 1 Jones (N. C.), 197; Clark *v.* Smith, 34 Barb. 140; Kent *v.* Mahaffey, 10 Ohio St. 204; Lawyer *v.* Smith, 8 Mich. 411. But see Smiley *v.* Gambill, 2 Head, 164.] See the New York Revised Statutes, ii. 64, sec. 42; Griffith's Law Register; Collection of Statutes, by J. Anthon, Esq.; 1 Revised Code of Virginia, c. 104, sec. 3; Massachusetts, New Jersey, and other Revised Statute Codes. The English statute of frauds did not require the will to be *signed in the presence* of the witnesses, but it required the instrument of revocation to be signed in their presence. The Revised Statutes of New York, Massachusetts, Virginia, &c., require the same precise formalities in both cases.

(*b*) De Orat. l. 1, c. 38.

(*c*) Dig. 28. 5. 92. The statute of Ohio, 1831, p. 243, makes provision for such an identical case, and revokes the will *pro tanto*. So, in Kentucky, under the construction given to their statute of wills, after-born and posthumous children, pretermitted in the will, and not provided for by settlements, are entitled to such shares of the estate as they would have taken if no will had been made. Haskins *v.* Spiller, 1 Dana, 170. So, in Alabama, Aikin's Dig. 2d ed. 449. In Virginia, New Jersey, and Connecticut, and probably in other states, it is provided by statute, that if the testator had no issue when he made his will, and dies, leaving issue, or a posthumous child be born, and the will makes no provision for such an event or contingency, the will becomes wholly void. Revised Code of Virginia, i. 224; Elmer's Dig. 131, 600, 601; Statutes of Connecticut, 1838, p. 227; R. S. N. J. 1847.

(*d*) Cic. de Orat. 1, 57; Inst. 2. 13, Procem.; Ferriere, Com. h. t.; Huber, 2, l. 3, 5; ib. tit. 17, sec. 1.

jurisprudence in which this doctrine of implied revocation does not exist, and apply when the occurrence of new social relations and moral duties raises a necessary presumption of a change of intention in the testator. It is a settled rule in the English law, that marriage and the birth of a child, subsequent to the execution of the will, are a revocation in law of a will of real as well as of personal * estate, provided the wife and child were wholly unprovided for, and there was an entire disposition of the whole estate to their exclusion. This principle of law is incontrovertibly established; (a) though it is said to have been no part of the ancient jurisprudence of England; and the first case that recognized the rule that the subsequent birth of a child was a revocation of a will of personal property, was decided by the court of delegates, upon appeal, in the reign of Charles II.; and it was grounded upon the law of the civilians. (b) The rule was next applied in the case of *Lugg* v. *Lugg;* (c) and it was shown by Dr. Hay, in *Shepherd* v. *Shepherd*, (d) to have been continued down to 1770, as the uncontradicted and settled law of Doctors' Commons, that a subsequent marriage and a child amounted to a revocation of a will; but that one of these events, without the concurrence of the other, was not sufficient.

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The rule was applied in chancery to a devise of real estate, in *Brown* v. *Thompson;* (e) but it was received with doubt and hesitation by Lord Hardwicke and Lord Northington. (f) The distinction between a will of real and personal estate could not well be supported; and Lord Mansfield declared that he saw no ground for a distinction. (g) The great point was finally and solemnly settled, in 1771, by the Court of Exchequer, in *Christopher* v. *Christopher*, (h) that marriage and a child were a revocation of a will of land. The Court of K. B. have since decided, (i)

(a) The rule that marriage and the birth of a child are an implied revocation does not apply in cases where the whole estate is not devised by the will, nor in all cases where a man has children by a former marriage. Denman, C. J., in Doe v. Edlin, 4 Ad. & El. 582.

(b) Overbury v. Overbury, 2 Show. 253 [242.]

(c) 1 Ld. Raym. 441; 2 Salk. 592.

(d) 5 T. R. 51, note.

(e) 1 Eq. Cas. Abr. 413, pl. 15; 1 P. Wms. 804, note by Mr. Cox.

(f) Parsons v. Lanoe, 1 Ves. 189; Amb. 557; Jackson v. Hurlock, 2 Eden, 282.

(g) Wellington v. Wellington, 4 Burr. 2165.

(h) Dickens, 445.

(i) Doe v. Lancashire, 5 T. R. 49.

after great deliberation, that marriage and the birth of a *posthumous* child were an implied revocation of a will of real estate.

*523 *It is generally agreed, that the implied revocation by a subsequent marriage and a child, being founded on the presumption of intention, may be rebutted by a parol evidence. This was so held by the K. B., in *Brady* v. *Cubitt*; (*a*) but the rule was subsequently questioned; (*b*) and there has been great difficulty in prescribing the extent of the admission of circumstances which would go to rebut the presumption of a revocation. The Court of K. B., in *Kenebel* v. *Scrafton*, (*c*) held, that marriage and a child were a revocation of a will, *when the wife and children were wholly unprovided for*, and there was an entire disposition of the whole estate. But whether the revocation could be rebutted by parol proof of subsequent declarations of the testator, or other extrinsic circumstances, though there was no provision in the will for those near relatives, was a question on which the court gave no opinion. If the wife and children be provided for by a settlement, it is now understood to be the rule, that marriage and a child will not revoke a will; and this case forms an exception to the general rule. (*d*)

The English law on this subject was reviewed in New York, in the case of *Brush* v. *Wilkins*; (*e*) and it was adjudged to be the law in New York, founded on those decisions, that subsequent marriage and a child were an implied revocation of a will, either of real or personal estate, and that such presumptive revocation might be rebutted by circumstances. The better opinion is, that under the English law there must be the concurrence of a subsequent marriage and a subsequent child, to work a revocation of a will; and that the mere subsequent birth of children, unaccompanied by other circumstances, would not amount to a presumed revocation. This was the rule laid down *by Sir George Hay, in *Shepherd* v. *Shepherd*, (*a*) and *524

(*a*) Doug. 31.

(*b*) Lord Alvanley, 4 Ves. 848. (*c*) 2 East, 530.

(*d*) *Ex parte* the Earl of Ilchester, 7 Ves. 348. In Fox *v.* Marston, in the Prerogative Court of Canterbury, before Sir Herbert Jenner (1 Curteis, 494), parol declarations of testator were admitted to rebut the implied revocation of a will of personal estate from marriage and the birth of a child. [But see Israell *v.* Rodon, 2 Moore, P. C. 51.]

(*e*) 4 Johns. Ch. 506. (*a*) 5 T. R. 51, note.

by the Court of K. B., in *White* v. *Barford.* (*b*) Sir John Nicholl, in *Johnston* v. *Johnston*, (*c*) pressed very far and very forcibly the more relaxed doctrine, that it was not an essential ingredient in these implied revocations, that marriage and a child should both occur to create them; and he held, that a birth of a child, *when accompanied with other circumstances* leaving no doubt of the testator's intention, would be sufficient to revoke the will of a married man. The case in which he pressed the rule to this extent was one that contained so much justice and persuasive equity in favor of the revocation, that it must have been difficult for any court, with just and lively moral perceptions, to resist his conclusions. He placed the doctrine of implied revocation, not where Lord Kenyon had placed it, on any tacit condition annexed to the will, but on the higher and firmer ground, where Lord Mansfield, and, indeed, the civil law, had placed it — on a presumed alteration of intention, arising from the occurrence of new moral duties, which, in every age, and in almost every breast, have swayed the human affections and conduct. It was doubted, however, in the case of *Brush* v. *Wilkins*, whether Sir John Nicholl had not carried this point of revocation farther than the English law would warrant, and which had never adopted the notion of the *inofficiosum testamentum* of the civil law. In a subsequent case, (*d*) Sir John Nicholl seems to have regained the former track of the law; and he lays down the general doctrine, that a will is presumptively revoked by marriage and issue, and that the presumption may be rebutted by unequivocal evidence of an intention that the will should operate notwithstanding those subsequent events. Thus, it has been held, in pursuance of this principle, that marriage and issue are not a revocation of a will, when there are children of a former marriage, and there is a provision for a second wife and her issue. (*e*) y^1

(*b*) 4 Maule & S. 10.

(*c*) 1 Phill. 447.

(*d*) Gibbens *v.* Cross, 2 Addams, 455. See also Talbot *v.* Talbot, 1 Hagg. Ec. 705, to the same point.

(*e*) Johnson *v.* Wells, 2 Hagg. Ec. 561. The English law as it stood prior to the statutes of 7 Wm. IV. and 1 Vict. c. 26 (and for which *vide infra*, 533), was declared

y^1 Subsequent marriage alone was held to work a revocation in Duryea *v.* Duryea, 85 Ill. 41; Byrd *v.* Surles, 77 N. C. 435. Subsequent birth of children alone was held to revoke in Negus *v.* Negus, 46 Iowa, 487; Fallon *v.* Chidester, ib. 588; Alden *v.* Johnson (Iowa, 1884), 17 Rep. 743.

In this country we have much statute regulation on the subject. There is no doubt that the testator may, if he pleases, devise all his estate to strangers, and disinherit his children. This is the English law, and the law, in all the states, with the exception of Louisiana. Children are deemed to have sufficient security in the natural affection of parents, that this unlimited power of disposition will * not be abused. If, * 525 however, the testator has not given the estate to a competent devisee, the heir takes, notwithstanding the testator may have clearly declared his intention to disinherit him. The estate must descend to the heirs, if it be not legally vested elsewhere. (*a*) This is in conformity to the long-established rule, that in devises to take place at some distant time, and no particular estate is expressly created in the mean time, the fee descends to the heir. But by the statute laws of the states of Maine, Vermont, New Hampshire, Massachusetts, (*b*) Connecticut, New York, (*c*) New Jersey, Pennsylvania, Delaware, Ohio, and Alabama, a posthumous child, and, in all of those states except Delaware and Alabama, children born after the making of the will, and in the lifetime of the father, will inherit in like manner as if he had died intestate, unless some provision be made for them in the will, or otherwise, or they be particularly noticed in the will. (*d*) The reasonable operation of this rule is only to disturb and revoke

in Marston *v.* Roe, 8 Ad. & El. 14, in the Exch. Chamber, to be, that if an unmarried man, without any child by a former wife, devised his estate, and left no provision for any child by a future marriage, notwithstanding he might have made provision therein for a future wife, the law annexed a tacit condition to such a will, that if he afterwards married, *and had a child*, the will should be revoked, and evidence was not admissible to rebut that presumption or destroy that condition.

(*a*) Denn *v.* Gaskin, Cowp. 657, 661; Jackson *v.* Schauber, 7 Cowen, 187; s. c. 2 Wend. 1.

(*b*) Massachusetts Revised Statutes, 1836, part 2, tit. 3, c. 62, sec. 8.

(*c*) New York Revised Statutes, ii. 65, sec. 49. [See Bloomer *v.* Bloomer, 2 Bradf. 339.]

(*d*) In Pennsylvania and Delaware, marriage, or an after child not provided for, is a revocation *pro tanto* only. In Pennsylvania, under the construction given to their act of 1794, the subsequent birth of issue is, *in itself*, a revocation of a previous will, so far only as regards such issue, on the ground that it produces a change in the obligations and duties of the testator. Tomlinson *v.* Tomlinson, 1 Ash. 224. This appears to be the sound doctrine on the subject. In Ohio, Indiana, Illinois, and Connecticut, the birth of a child avoids the will *in toto*. Statutes of Ohio, 1831, p. 243. Statutes of Connecticut, 1821, p. 200; Statutes of Illinois, 1829, and of Indiana, 1831. This is the case in which no provision is made by the will for such a contingency. [Estate of Squire, 11 Phil. 110.]

the will *pro tanto*, or as far as duty requires. The statute
* 526 law in Maine, * New Hampshire, Massachusetts, and Rhode Island goes further, and implies the same relief to all children, and their legal representatives, who have no provision made for them by will, and who have not had their advancement in their parent's life, unless the omission in the will should appear to have been intentional. In South Carolina, the interference with the will applies to posthumous children; and it is likewise the law, that marriage and a child work a revocation of the will. In Virginia and Kentucky, a child born after the will, if the testator had no children before, is a revocation, unless such child dies unmarried, or an infant. If he had children before, after-born children, unprovided for, work a revocation *pro tanto*. In the states of Maine, Massachusetts, Rhode Island, Connecticut, New York, Maryland, and probably in other states, if the devisee or legatee dies in the lifetime of the testator, his lineal descendants are entitled to his share, unless the will anticipates and provides for the case. This is confined, in Connecticut, to a child or grandchild; in Massachusetts, Rhode Island, and Maine, to them, *or their relations;* and in New York, *to children or other descendants*. The rule in Maryland goes further, and by statute, no devise or bequest fails by reason of the death of the devisee or legatee before the testator; and it takes effect in like manner as if they had survived the testator. (*a*)

* 527 * By the New York Revised Statutes, (*a*) if the will disposes of the whole estate, and the testator afterwards marries, and has issue born in his lifetime, or after his death, and the wife or issue be living *at his death*, (*b*) the will is deemed to be revoked; unless the issue be provided for by the will or by a settlement, or unless the will shows an intention not to make any provision. No other evidence to rebut the presumption of such revocation is to be received. This provision is a declaration of the law of New York, as declared in *Brush* v. *Wilkins*, with the additional provision of prescribing the exact extent of the proof which

(*a*) Laws of the several states in Mr. Anthon's collection; Griffith's Law Register, h. t.; Digest of Rhode Island Statutes, 1798, p. 282; 6 Harr. & J. 54; New York Revised Statutes, ii. 66, sec. 52; Mass. Revised Statutes, 1836, part 2, tit. 3, c. 62.

(*a*) Vol. ii. 64, sec. 48.

(*b*) The statute must mean here to refer equally to the posthumous issue.

is to rebut the presumption of a revocation, and thereby relieving the courts from all difficulty on that embarrassing point. (*c*)

The will of a *feme sole* is revoked by her marriage. This is an old and settled rule of law; and the reason of it is, that the marriage destroys the ambulatory nature of the will, and leaves it no longer subject to the wife's control. It is against the nature of a will, to be absolute during the testator's life, and therefore it is revoked in judgment of law by the marriage. (*d*) *y*[1] If the wife survives her husband, the will, according to the opinion of Sergeant Manwood, (*e*) revives, and takes effect equally as if she had continued a *feme sole*. But the strong language of the judges in the modern cases, in which they declare that the will becomes revoked and void by the marriage, (*f*) would seem to bar the conclusion of the learned sergeant; and Mr. Roper, in his laborious and accurate *treatise on the Law of Property, in relation to husband and wife*, (*g*) assigns * very good reasons why the *528 will cannot be deemed to have revived by the death of the husband. The provision in the New York Revised Statutes, (*a*) declaring that the will of a married woman shall be deemed revoked by a subsequent marriage, effectually puts an end to the question under that statute. A second will is a revocation of a former one, provided it contains words expressly revoking it, or makes a different and incompatible disposition of the property. Unless it can be found to have contained one or the other, it is no revocation of a former will. (*b*) Any alteration of the estate

(*c*) In Havens *v.* Van Den Burgh, 1 Denio, 27, it was adjudged that marriage and the birth of a child were an implied revocation of a previous will, if there be no provision in or out of the will for such new relations, though the presumption of a revocation may be repelled by circumstances showing that the testator intended the will to stand, notwithstanding the change in his family.

(*d*) Forse and Hembling's Case, 4 Co. 60, b. (*e*) Plowd. 343, a.

(*f*) Hodsden *v.* Lloyd, 2 Bro. C. C. 534; Doe *v.* Staple, 2 T. R. 684; Long *v.* Aldred, 3 Addams, 48. But the will of a *feme covert* made during marriage under a power, is not revoked by her surviving her husband. Morwan *v.* Thompson, 3 Hagg. Ec. 239.

(*g*) Vol. ii. 69.

(*a*) Vol. ii. 64, sec. 44. This is also the English law. 2 Curteis, 326, Phil. ed.

(*b*) Hitchins *v.* Basset, 3 Mod. 203; Harwood *v.* Goodright, Cowp. 87.

y[1] The contrary was held in Webb *v.* Jones, 36 N. J. Eq. 163, as resulting from the adoption of statutes giving a married woman control over her property, and thereby destroying the reason of the rule. See the cases collected in a note to this case. Miller *v.* Phillips, 9 R. I. 141.

or interest of the testator in the lands devised, by the act of the testator, is held to be an implied revocation of the will, on the ground, principally, of its being evidence of an alteration of the testator's mind. A sale of the estate devised operates, of course, as a revocation; for the testator must die while owner of the land, or the will cannot have effect upon it. A valid agreement, or covenant to convey lands, which equity will specifically enforce, will also operate in equity as a revocation of a previous devise of the same. It is as much a revocation of the will in equity, as a legal conveyance of the land would be at law; for the estate, from the time of the contract, is considered as the real estate of the vendee. (*c*)

Not only contracts to convey, but inoperative conveyances, will amount to a revocation of a devise, to the extent of the property intended to be affected, if there be evidence of an intention to convey, and thereby to revoke the will. (*d*) A bargain and sale without enrolment, feoffment without livery of seisin, a * 529 conveyance upon a consideration * which happened to fail, or a disability in the grantee to take, have all been admitted to amount to a revocation, because so intended. (*a*) If, however, the testator substitutes a new disposition of the land, and intends to revoke the will by means of that substitution, in that case, if the instrument cannot have that effect, and the substitution fails, there is no revocation. (*b*) It is further the acknowledged but very strict and technical rule of law, that if the testator conveys away the estate, and then takes it back by the same instrument, or by a declaration of uses, it is a revocation, because he once parted with the estate. Either an intention to revoke, or an alteration of the estate without such an intention, will work a revocation. (*c*) The law requires that the same interest which

(*c*) Cotter *v.* Layer, 2 P. Wms. 622; Rider *v.* Wager, ib. 332; Mayer *v.* Gowland, Dickens, 563; Knollys *v.* Alcock, 5 Ves. 654; Vawser *v.* Jeffery, 2 Swanst. 268; Walton *v.* Walton, 7 Johns. Ch. 258; [Blair *v.* Snodgrass, 1 Sneed (Tenn.), 1. See Plowden *v.* Hyde, 21 L. J. (N. S.) Ch. 796; Andrew *v.* Andrew, 8 De G., M. & G. 336.] [See further, Prater *v.* Whittle, 16 S. C. 40; Warren *v.* Taylor, 56 Iowa, 182; Coulson *v.* Holmes, 5 Saw. 279.]

(*d*) Mountague *v.* Jefferies, 1 Roll. Abr. 615.

(*a*) Roper *v.* Radcliffe, 10 Mod. 230; Lord Hardwicke and Lord Eldon, 3 Atk. 748, 803; 7 Ves. 373; 2 Swanst. 268.

(*b*) Lord Eldon, 7 Ves. 373; 4 East, 419; 4 Russ. 452, 458, S. P.

(*c*) Dister *v.* Dister, 3 Lev. 108; Darley *v.* Darley, 3 Wils. 6. If the testator be

the testator had when he made the will should continue to be the same interest, and remain unaltered to his death. The least alteration in that interest is a revocation. If the testator levies a fine, or enfeoffs a stranger to his own use, it is a revocation, though the testator be in of his old use. (*d*) Lord Hardwicke, in *Parsons* v. *Freeman*, (*e*) admitted that these were prodigiously strong instances of the severity of the rule; and Lord Mansfield observed, that the *Earl of Lincoln's Case*, decided upon the same principle, was shocking; and that some overstrained resolutions of the courts upon constructive revocations, contrary to the real intention of the testator, had brought scandal upon the law. (*f*) The unreasonableness of the rule, holding an act to be a revocation * which was not so intended, and even when * 530 the intention was directly the contrary, has been often complained of; and the English courts have latterly shown a strong disposition not to assume the doctrine, unless there was some express authority for it. (*a*)

The doctrine, hard and unreasonable as it appears in some of its excrescences on this subject, and notwithstanding it has been repeatedly assailed by great weight of argument, has, nevertheless, stood its ground immovably, on the strength of authority, as if it had been one of the essential landmarks of property. The cases have been investigated and discussed with the utmost research and ability, by the courts of law and equity, and the principle again and again recognized and confirmed, that by a conveyance of the estate devised, the will was revoked, because the estate was altered, though the testator took it back by the same instrument, or by a declaration of uses. (*b*) The revocation is upon the technical ground that the estate has been altered, or new modelled, since the execution of the will. The rule has been carried so far, that if the testator suffered a recovery, for the very purpose of confirming the will, it was still a revocation,

disseised and die before reëntry, it is at common law a revocation of the will. 1 Roll. Abr. 616, tit. Devise, S.

(*d*) Trevor, C. J., in Arthur *v.* Bockenham, Fitzgib. 240.

(*e*) 3 Atk. 748.

(*f*) 3 Burr. 1491; Doug. 722.

(*a*) Charman *v.* Charman, 14 Ves. 584; Vawser *v.* Jeffery, 3 B. & Ald. 463.

(*b*) Goodtitle *v.* Otway, 1 Bos. & P. 576; 7 T. R. 399, s. c.; 3 Ves. 650; Kean's Will, 9 Dana, 25. [See Brown *v.* Brown, 16 Barb. 569; Vaudemark *v.* Vaudemark, 26 id. 416.]

for there was not a continuance of the same unaltered interest. There is an exception to the rule in the case of mortgages and charges on the estate, which are only a revocation in equity *pro tanto*, or *quoad* the special purpose; and they are taken out of the general rule on the fact of being securities only. (*c*) These doctrines of the English cases have been reviewed in this country, and assumed to be binding, as part of the settled
* 531 * jurisprudence of the land. It was decided that a contract for a sale of the land was a revocation of the devise, even though the contract should afterwards be rescinded, and the testator restored to his former title. Legal and equitable estates, as to these implied revocations, were deemed to stand on the same ground. (*a*) It has also been held, (*b*) that if the testator, after devising a mortgage, forecloses it, or takes a release of the equity of redemption, it is a revocation of the devise. It is equally a revocation if he cancelled the mortgage, and took an absolute deed; for it was an alteration of the interest and a new purchase. Some of the excesses to which the English doctrine has been carried, have not been acquiesced in, but the essential rules have been taken to be law.

A codicil is an addition or supplement to a will, and must be executed with the same solemnity. (*c*) It is no revocation of a will, except in the precise degree in which it is inconsistent with it, unless there be words of revocation. (*d*) If the first will be not actually cancelled, or destroyed, or expressly revoked, on making a second, and the second will be afterwards cancelled, the

(*c*) Sparrow *v.* Hardcastle, 3 Atk. 798; s. c. 7 T. R. 416, note; Brydges *v.* The Duchess of Chandos, 2 Ves. Jr. 417; Cave *v.* Holford, 3 Ves. 650; 7 T. R. 399; 1 Bos. & P. 576, s. c.; Harmood *v.* Oglander, 6 Ves. 221. In the above case of Cave *v.* Holford, the doctrine of these implied revocations was elaborately discussed and sustained; but Lord Ch. Eyre, in a learned opinion, endeavored, though unsuccessfully, to restrict the application of the precedents.

(*a*) Walton *v.* Walton, 7 Johns. Ch. 258.

(*b*) Ballard *v.* Carter, 5 Pick. 112.

(*c*) New York Revised Statutes, ii. 64, sec. 42.

(*d*) Brant *v.* Wilson, 8 Cowen, 56; [Read *v.* Manning, 30 Miss. 308; Larrabee *v.* Larrabee, 28 Vt. 274; Bradley *v.* Gibbs, 2 Jones, Eq. 13; Alt *v.* Gregory, 8 De G., M. & G. 221; Molyneux *v.* Rowe, ib. 368. See Payne *v.* Payne, 18 Cal. 291.] If a testator intends to revoke a will by an instrument making new dispositions, this is only a conditional intention to revoke the first will, and if he leaves the second will incomplete, the first will remains good, for there is wanting the requisite evidences of revocation. Winsor *v.* Pratt, 2 Brod. & B. 652; Bethell *v.* Moore, 2 Dev. & Batt. 311.

first will is said to be revived. (*e*) y^1 But the first will is not revived if the testator makes a second, and actually cancels the first by an absolute act rendering it void, and then cancels the second will; it will, in such a case, require a republication to restore the first will. (*f*) The mere act of cancelling a will does not amount *to anything, unless it be done *532 *animo revocandi.* The intention is an inference to be drawn from circumstances; and the fact of cancelling may be, in many cases, an equivocal act. If, however, the will be found cancelled, the law infers an intentional revocation; for it is *prima facie* evidence of it, and the inference stands good until it be rebutted. (*a*) y^1 The inference is the same, and it would require

(*e*) Goodright *v.* Glazier, 4 Burr. 2512. It is, however, not quite settled whether the revocation of a second will revives a former uncancelled will; and such an effect will depend on circumstances. Kirkcudbright *v.* Kirkcudbright, 1 Hagg. Ec. 325; In Helyar *v.* Helyar (Reports in the time of Sir Geo. Lee, by Phillimore, i. 474), decided by Sir Geo. Lee, in the Prerogative Court, in 1754, it was held that the execution of a second will of a different purport was, by law, a revocation of the first, *though the second does not now appear.* [See 1 Phillim. Ecc. 413.] [As to destruction of a codicil, see Matter of Simpson, 56 How. Pr. 125.]

(*f*) Burtenshaw *v.* Gilbert, Cowp. 49; Semmes *v.* Semmes, 7 Harr. & J. 388; Major *v.* Williams, 3 Curteis, 432. There are contradictory opinions of Lord Mansfield, as given in Cowp. 53 and 92, on the point whether, if the first will be not cancelled, in point of fact, but be revoked by the terms of the second will, and the second will be cancelled, the first will be thereby restored, without republication. Lord Hardwicke held, in Martin *v.* Savage, cited in 1 Ves. 440, that parol evidence was inadmissible under the statute of frauds to sustain a republication of a devise of lands. But constructive republications, Mr. Powell, in his Treatise on Devises, p. 666, considers as out of the statute, and may, under circumstances, be good. In Pennsylvania it is held that a will may be republished by parol. Jones *v.* Hartley, 2 Wharton, 103. *Contra*, Major *v.* Williams, 3 Curteis, 432. [See Cutto *v.* Gilbert, 9 Moore, P. C. 131.]

(*a*) Onions *v.* Tyrer, 1 P. Wms. 343; Burtenshaw *v.* Gilbert, Cowp. 49; Jackson *v.* Holloway, 7 Johns. 394; Sir John Nicholl, in Rogers *v.* Pittis, 1 Addams, 30; Beth-

y^1 It seems that the first will is not *ipso facto* revived by the cancellation of a second will which contains a clause of revocation, but that it is a question of intention. Pickens *v.* Davis, 134 Mass. 252. See s. c. 45 Am. R. 322 and note. That a revival in such case is impossible, see Scott *v.* Fink, 45 Mich. 241; Stevens *v.* Hope (Mich.), 17 N. W. Rep. 398. But see Randall *v.* Beatty, 31 N. J. Eq. 643 and note.

y^1 *Statutory Revocation.* — The exact wording of the different statutes must be looked to in each case; but, in general, it may be said that the statutes require (1) certain acts (*e. g.*, cancellation, obliteration, &c.) to be done, and (2) that they shall be done *animo revocandi.*

(1.) An obliteration of a part of a will has been held a revocation of such part. Bigelow *v.* Gillott, 123 Mass. 102; s. c. 25 Am. R. 32 and note; Swinton *v.* Bailey, 1 Ex. D. 110. But *contra* in New York. Lovell *v.* Quitman, 88 N. Y. 377. Drawing pencil lines across the signature has

strong proof to rebut it, if a will be traced to the party's possession, and be not forthcoming at his death. (*b*) Cancelling, in the slightest degree, with a declared intent, will be a sufficient revocation; and, therefore, throwing a will on the fire, with an intent to burn it, though it be only slightly singed, and escape destruction, is sufficient evidence of the intention to revoke. (*c*) An obliteration of part of a will is only a revocation *pro tanto*. (*d*)

The New York Revised Statutes (*e*) have dispensed with all refinements on this point. In no case does the destruction or revocation of a second will revive the first, unless the intention to revive it be declared at the time as part and parcel of the act of destruction or revocation of the second will. Those statutes

ell *v.* Moore, 2 Dev. & Batt. 311. In Colvin *v.* Fraser, 2 Hagg. Ecc. 266, a will was executed in India in duplicate; one part remained in India, and the other was brought to England by the testator; and it was never traced out of his possession, and was not found at his death. It was held, upon a very elaborate discussion, to be a *prima facie* presumption that the testator had destroyed the duplicate in his possession, and that he thereby intended to revoke the one not in his possession; and that it lay with the party setting up the will to negative these presumptions. Boughey *v.* Moreton, 3 Hagg. Ecc. 191, note, s. p.

(*b*) Lillie *v.* Lillie, 3 Hagg. Ecc. 184.

(*c*) Bibb *v.* Thomas, 2 Bl. 1043.

(*d*) Sutton *v.* Sutton, Cowp. 812; Larkins *v.* Larkins, 3 Bos. & P. 16; Short *v.* Smith, 4 East, 419.

(*e*) Vol. ii. 66, sec. 53.

been held a sufficient *mutilation*. Woodfill *v.* Patton, 76 Ind. 575. Actual destruction is necessary to satisfy the words "or otherwise destroying." Cheese *v.* Lovejoy, 2 P. D. 251.

(2.) A destruction by one who has not testamentary capacity at the time, or whose act is caused by undue influence, does not effect a revocation. Rich *v.* Gilkey, 73 Me. 595; Brunt *v.* Brunt, 3 L. R. P. D. 37. So, though there was an actual intent to revoke, yet if that intent was wholly due to a mistaken supposition of the testator (*e. g.*, that he could erase one name and substitute another), there will be no revocation. This is the doctrine of dependent relative revocation. Giles *v.* Warren, 2 L. R. P. & D. 401; In the Goods of McCabe, 3 L. R. P. & D. 94; Dancer *v.* Crabb, ib. 98; Homerton *v.* Hewett, 25 L. T. 854; *In re* Nelson, 6 Ir. R. Eq. 569; Wilbourn *v.* Shell, 59 Miss. 205. Comp. Banks *v.* Banks, 65 Mo. 432. A subsequent will will revoke a former when it shows such to have been the intent, or when it is inconsistent with it. If the subsequent will is only partially inconsistent with the former, the revocation is *pro tanto* only. Dempsey *v.* Lawson, 2 P. D. 98; O'Leary *v.* Douglass, 1 L. R. Ir. 45.

(3.) Parol evidence is admissible to prove the contents of a lost will. Sugden *v.* Lord St. Leonards, 1 P. D. 154; Foster's App., 87 Penn. St. 67. Declarations of the testator admitted not to have been a part of the *res gesta*, have been held admissible to show whether the testator's will was mutilated by himself or another, Tucker *v.* Whitehead, 59 Miss. 594; also to show an intent to revive a former will by the cancellation of a later one, Pickens *v.* Davis, 134 Mass. 252. See s. c. 45 Am. R. 322 and note.

have essentially changed the law on the subject of these constructive revocations, and rescued it from the hard operation of those technical rules of which we have complained, and placed it on juster and more rational grounds. It is declared that no bond, agreement, or covenant, made by a testator, for a valuable consideration, to convey any property previously devised or bequeathed, shall be deemed a * revocation of the will, * 533 either in law or in equity; but the property passes by the will, subject to the same remedies for a specific performance against the devisee or legatee, as might be had against the heir or next of kin if the property had descended. So, a charge or incumbrance upon any estate, for securing the payment of money, or the performance of covenants, shall not be deemed a revocation of any will previously executed; but the devise or legacy takes effect subject to the charge or incumbrance. Nor shall any conveyance, settlement, deed, or other act of the testator, by which his estate or interest in property previously devised or bequeathed shall be altered, but not wholly devested, be deemed a revocation; and the same estate or interest shall pass by the will; which would otherwise descend, unless, in the instrument making the alteration, the intention thereby to revoke shall be declared. If, however, the provisions of the instrument by which such alteration is made, be wholly inconsistent with the terms and nature of the previous will, the instrument shall operate as a revocation, unless the provisions therein depend on a condition or contingency, and the same has failed. (*a*)

(*a*) New York Revised Statutes, ii. 64, sec. 45–48. A sale of lands devised, and taking back a bond and mortgage for the purchase-money, is a revocation, under the New York Revised Statutes, of the devise of the specific lands, and the bond and mortgage pass with the personal estate. Adams *v.* Winne, 7 Paige, 97. The English real property commissioners, in their report, in April, 1833, recommended alterations in the law respecting the revocations of wills, so as to rescue it from complicated and incongruous rules, and reducing it on this point to more simplicity. They proposed four modes, and four modes only, of revocation: (1.) By another inconsistent will or writing, executed in the same manner as the original will; (2.) By cancellation, or any act of the same nature; (3.) By the disposition of the property by the testator in his lifetime; (4.) By marriage in the case of a woman. By the first and third of these modes, the will may be revoked, either entirely or in part; by the second and last, the revocation would be complete. The statute of 1 Victoria, c. 26, so far followed the report as to declare that all wills made by a man or woman are revoked by marriage, except when made in exercise of a power, where the property appointed would not, in default of such appointment, pass to the heir, executor, or next of kin. No will was to be revoked by presumption of an intention from an

The simplicity and good sense of these amendments recommend them strongly to our judgment; and they relieve the law from a number of technical rules, which are overwhelmed in a labyrinth of cases; and when detected and defined, they are not entirely free from the imputation of harshness and absurdity.

An estate vests, under a devise, on the death of the testator, before entry. (*b*) But a devisee is not bound to accept of a devise to him *nolens volens;* and he may renounce the gift, by which act the estate will descend to the heir, or pass in some other direction under the will. The disclaimer and renunciation must be by some unequivocal act; and it is left undecided whether a verbal * 534 disclaimer * will be sufficient. A disclaimer by deed is sufficient; and some judges have held that it may be by a verbal renunciation. Perhaps the case will be governed by circumstances. (*a*)

6. **Of the Construction of Wills.** — It will not be consistent with the plan of this work to do more than state the leading prin-

alteration of circumstances. No will to be revoked otherwise than by another will or codicil, or by writing executed like a will, or by destruction with intention to revoke; and no alteration made after execution to have any effect unless executed as a will. No will in any manner revoked to be revived otherwise than by reëxecution or a codicil to revive it; and if a part has been revoked, and afterwards the whole, such part shall not be revived by a revocation of the whole, unless an intention to revive that part be shown. No conveyance made or act done subsequently to the execution of a will, except it amount to a revocation, shall prevent the operation of the will with respect to such estate as the testator has power to dispose of at the time of his death. And a will shall be construed to speak and take effect from the death of the testator. Thus, in Dingley *v.* Dingley, 5 Mass. 535, the devise was of a remainder to the sons of A. who had three sons when the will was made, and five at the testator's death; and it was held that the devise was to the five sons. See King *v.* Bennett, 4 M. & W. 36, to s. p.

These English statutory provisions seemed to have followed essentially the alterations made by the New York Revised Statutes, and they cut up a vast field of established judicial legislation.

(*b*) Co. Litt. 111, a.

(*a*) Townson *v.* Tickell, 3 B. & Ald. 31; Doe *v.* Smyth, 6 B. & C. 112; Webster *v.* Gilman, 1 Story, 499. To give the devise effect, as against the heir, the New York Revised Statutes (i. 748, sec. 8) require the will to be duly proved and recorded in the surrogate's office, within four years after the testator's death, with the usual exception in case the devisee be under disabilities. The manner of proving a will containing a devise of real estate, before the surrogate, on the application of an executor, or devisee, or other person interested in the estate, is particularly pointed out by the New York Revised Statutes, ii. 57–59. The proceedings on admission of wills of personal estate to probate, and the mode of relief by appeal from the admission or refusal of a will of real or personal estate, are detailed in the New York Revised Statutes, ii. 60–62; ib. 66–68, and the act of 20th April, 1830, amending the same.

ciples which have been established and applied to the construction of wills. The attempt to examine cases at large on this subject would be impracticable, from the incalculable number of them; and though we are not to disregard the authority of decisions, even as to the interpretations of wills, yet it is certain that the construction of them is so much governed by the language, arrangement, and circumstances of each particular instrument, which is usually very unskilfully and very incoherently drawn, that adjudged cases become of less authority, and are of more hazardous application, than decisions upon any other branch of the law. (*b*)

The intention of the testator is the first and great object of inquiry; and to this object technical rules are, to a certain extent, made subservient. The intention of the testator to be collected from the whole will, is to govern, provided it be not unlawful, or inconsistent with the rules of * law. (*a*) The control * 535 which is given to the intention by the rules of law is to be understood to apply, not to the construction of words, but to the nature of the estate — to such general regulations in respect to the estate as the law will not permit; as, for instance, to create an estate tail, to establish a perpetuity, to endow a corporation with real estate, to limit chattels as inheritances, to alter the character of real estate, by directing that it shall be considered as personal, or to annex a condition that the devisee in fee shall not alien. To allow the testator to interfere with the established rules of law, would be to permit every man to

(*b*) Wills are frequently drawn in such a rude and perplexed composition as to be almost impossible to be reduced to a consistent and intelligent meaning: a remarkable instance of this occurs in the case of Doe *v.* Perratt (6 Mann. & Gr. 314), which was carried to the House of Lords in 1843, in which the twelve judges were nearly equally divided on the questions whether a remainder vested in A. or B., and when, or was void for uncertainty; and whether the words "first male heir of the branch of D.'s family," were to be considered as used by the testator in a technical or in a popular sense. These questions led to very elaborate discussions, and there can be no provision which will avoid such questions, so long as a freedom of devising is allowed. They are beyond the reach of the ingenuity of codifiers.

(*a*) Finlay *v.* King, 3 Peters, 346. The testator may make his own glossary in the will itself, and define the terms he employs. Where the latter part of a will is inconsistent with a prior part, the latter part will prevail. This rule is as ancient as the time of Lord Coke (Co. Litt. 112, b), and was thoroughly examined and declared by Lord Brougham, in Sherratt *v.* Bentley, 2 My. & Keen, 149; Fraser *v.* Boone, 1 Hill, Ch. (S. C.) 367, s. p.; [Stickle's Appeal, 29 Penn. St. 234; Mütter's Estate, 38 id. 314; Iglehart *v.* Kirwan, 10 Md. 559. See Morrall *v.* Sutton, 1 Phillips, 583.]

make a law for himself, and disturb the metes and bounds of property. (*b*)

(*b*) Lord Hardwicke, in Bagshaw *v.* Spencer, 2 Atk. 580; M'Kean, C. J., in Ruston *v.* Ruston, 2 Dallas, 244; State *v.* Nicols, 10 Gill & J. 27. In the case of Inglis *v.* The Trustees of the Sailors' Snug Harbor, 3 Peters, 117, 118, the English rules of the construction of wills are declared and enforced, to the extent that the intention of the testator is to be sustained if it can be done lawfully and consistently; and that a general intent in a will is to be carried into effect at the expense of any particular intent, provided such general intent be consistent with the rules of law; for when there are conflicting intents, that which is the most important must prevail. Chase *v.* Lockerman, 1 Gill & J. 185, s. P. The testator, if he does not infringe the rules of law, has a right to say with Staberius, when he imposed an unpalatable condition in his will: Sive ego prave, seu recte, hoc volui.

In the case of Ommanney *v.* Bingham, decided in the House of Lords, in 1796, on appeal from Scotland, Sir Charles Douglas, by a codicil to his will, directed that if his daughter L. should marry B., to whom he had a strong dislike, neither she nor her husband, or their representatives, should take any part of his estate, and he made in that event another disposition of the same. His daughter married B., notwithstanding, in her father's lifetime. One question was, whether the codicil was not void as being *contra libertatem matrimonii*. The codicil was sustained in the House of Lords, and it was considered that the condition was not void by the law of England. Robertson's Law of Personal Succession, c. 8, sec. 1, pp. 153–160. Whether a condition annexed to a legacy, that the child do not marry without the consent of the mother or guardian, is or is not valid, depends upon the intention of the testator. It is not considered only *in terrorem*, if there be a bequest over on breach of the condition. Stratton *v.* Grymes, 2 Vern. 357. In Scott *v.* Tyler, 2 Bro. C. C. 431, s. c. 2 Dickens, 712, it was decided, after a great examination, that when a condition is annexed to a legacy that the legatee should marry *with the consent of her mother*, and she marries without it, the gift goes over to the residuary disposition, for it is a valid condition. See *supra*, 125, n.

Mr. Wigram, now Sir James Wigram, Vice-Chancellor, has written an able treatise on the "*Examination of the Rules of Law respecting the Admission of Extrinsic Evidence in Aid of the Interpretation of Wills*," and he holds such evidence admissible, if the aid can be made auxiliary to the right interpretation of the testator's words. The rules he lays down are, that if there be nothing in the will to destroy the presumption that the testator expressed himself in words according to their strict and primary acceptation, and they are *sensible* with reference to extrinsic circumstances, they are to be construed in the strict and primary sense. But if they be *insensible* under such a reference, then the expounder may travel out of the will to search for a popular or secondary sense which will make them sensible. If, however, the words, aided by the guidance of the material facts in the case, are insufficient to determine the meaning, the will is so far void for uncertainty. Still, courts of law, in certain cases, admit extrinsic evidence of intention, to make certain the *person or thing* intended. These rules are supported by a critical and full examination of a series of adjudged cases. Mr. Ram, in his treatise on the "*Exposition of Wills of Landed Property*," has collected, in a small compass and practical form, an extensive and general collection of the authorities and principles of construction applicable to wills; and he illustrates the positions that the intention of the testator is to be taken from the whole will, and we are to look at the introductory words — the context — to other devises in the will — practical effect is to be given to all the words in the will — of two inten-

It does not require the word "heirs" to convey a fee; but other words denoting an intention to pass the whole interest of the testator, as a devise of *all my estate*, *all my interest*, *all my property*, *my whole remainder*, *all I am worth* or *own*, *all my right*, *all my title*, or *all I shall die possessed of*, and many other expressions of the like import will carry an estate of inheritance, if there be nothing in the other parts of the will to limit or control the operation of the words. (*c*) So if an estate be given to a person generally *or indefinitely, with a power of disposition, it *536 carries a fee; unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case, the express limitation for life will control the operation of the power, and prevent it from enlarging

tions, the chief one is to be carried into effect, if both cannot — the intention to be followed is the one existing at the time the will was made, and the technical effect of words is presumed to be intended, if a different intention does not appear in the will.

With respect to the words requisite to comprise the personal estate in a testament of chattels, see a digest of the cases in Jarman on Wills, i. c. 23, Boston, 1845, edited by J. C. Perkins, Esq.

(*c*) [Piatt *v.* Sinton, 37 Ohio St. 353. See also Hughes *v.* Pritchard, 6 Ch. D. 24; *In re* Methuen & Blore's Contract, 16 Ch. D. 696;] Comyns's Dig. tit. Devise, n. 4; Doe *v.* Morgan, 6 B. & C 512; Sheppard's Touchstone, by Preston, 439; Preston on Estates, ii. 68–173. Mr. Preston has given a view and discussion of authorities on the construction of wills, as to the quantity of interest devised, and as to the operation of the word "estate." His conclusion is (146), that the word *estate*, used in application to real property, will be construed to express either the quantity of interest, or describe the subject of property, as the sense in which it is intended to be used shall appear from the context of the will. [Compare Pippin *v.* Ellison, 12 Ired. 61; Sanderson *v.* Dobson, 1 Ex. 141; Molyneux *v.* Rowe, 8 De G., M. & G. 368.] See, to the same point, the decision of the Q. B. in Doe *v.* Lean, 1 Ad. & El. (N. S.) 238. It will carry a fee, though it point at a particular house or farm, unless restrained by other expressions; for it will be intended to designate as well the quantity of interest as the locality of the land. Ib. 130. The sixth chapter in the second volume of Preston on Estates, 68–288, is a collection and analysis of cases on the construction of wills, and more especially as to the efficacy of the term "estate." If to this we add Cruise's Digest, tit. Devise, chapters 9, 10, 11, 13, and Jarman on Wills, i. c. 22 and 24, Boston, 1845, edited by J. C. Perkins, Esq., we have a full view of the immense accumulation of English cases on the subject. In the latter work they are clearly classified and arranged. In the note to Mr. Williams's American edition of Hobart's Reports, 3–7, the learned editor has also given a digest of numerous cases, as well American as English, respecting the words in a devise, which, without the word "heirs," will convey a fee. And with respect not only to the construction of devises, but to the English and American law of devises at large, we may safely refer to the third volume of the Digest of the Laws of Real Property, by Judge Lomax, of Virginia, which contains a learned and valuable digest of the subject.

the estate to a fee. (*a*) If it distinctly appears to be the intention to give a greater estate than one for life, as a devise to B. *forever*, or to him and *his assigns forever*, or to him and *his blood*, or to him and his *successors*, or to him and his *children*, such expressions may create a fee in the devisee. (*b*) So a devise of the rents and profits of land is a devise of the land itself. (*c*)

* 537 * In the construction of devises, the intention of the testator is admitted to be the pole-star by which the courts must steer; yet that intention is liable to be very much controlled by the application of technical rules, and the superior force of technical expressions. (*a*) *y*[1] If the testator devises land to another

(*a*) Jackson *v.* Coleman, 2 Johns. 391; Jackson *v.* Babcock, 12 id. 389; Jackson *v.* Robins, 16 id. 537, 588; Case of Flintham, 11 Serg. & R. 16; *supra*, 319, s. P.

(*b*) Wild's Case, 6 Co. 16, b; Com. Dig. tit. Devise, N. 4; Preston, *supra;* Beall *v.* Holmes, 6 Harr. & J. 205; Davis *v.* Stephens, Doug. 321; Johnson *v.* Johnson, 1 McM. Eq. (S. C.), 346; [Pratt *v.* Leadbetter, 38 Me. 9.]

(*c*) Co. Litt. 4, b; 8 Co. 95, b; 2 Ves. & Bea. 68; Shadwell, V. C., in Stewart *v.* Garnett, 3 Sim. 398; 1 Johns. Ch. 499; 9 Mass. 372; Andrews *v.* Boyd, 5 Greenl. 199. So as to personal property, a gift of the produce of a fund is a gift of the fund itself, unless there be words of qualification restraining the extent and duration of the interest. Adamson *v.* Armitage, 19 Ves. 416. By the English statute of 1 Victoria, c. 26, a devise without any words of limitation is to be construed to pass the fee, or the testator's whole estate, unless a contrary intention shall appear by the will. No devise to a trustee or executor shall pass less than the testator's whole estate, unless a definite term of years, absolute or determinable, or an estate of freehold, be given expressly or by implication. And under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, the trustee takes the fee, and not an estate determinable when the purposes of the trust are satisfied.

(*a*) The rule is understood to be settled, that if a devise be made to the *heir*, *right heir*, *heir at law*, or *lawful heir* of the testator, and there be a person, when the disposi-

y[1] The question in each case is not strictly as to the testator's intention, but as to the intended meaning of the words he has used. Miles *v.* Harford, 12 Ch. D. 691, 699. The will, as a whole, must first be examined, and if its terms are clear there is no question of construction. If its terms are ambiguous or capable of more than one meaning, a number of rules of construction have been laid down for ascertaining what meaning is to be taken. See a summary of such rules, 2 Jarman on Wills (5th ed.), 840. A few of the more important of these rules are: (1.) Ordinary words are presumed to be used in their natural, and technical words in their legal, sense, where used. Rhodes *v.* Rhodes, 7 App. Cas. 192; Studd *v.* Cook, 8 App. Cas. 577; Leach *v.* Jay, 6 Ch. D. 496; 9 Ch. D. 42. See Minot *v.* Harris, 132 Mass. 528. (2.) The argument of inconvenience or absurdity may be resorted to only to resolve an ambiguity. Bathurst *v.* Errington, 2 App. Cas. 698. (3.) The same word is presumed to be used in the same sense throughout the will. (4.) If two clauses are inconsistent, the latter governs. Woodbury *v.* Woodbury, 74 Me. 413. 5.) Words obviously written or omitted by mistake may be corrected or inserted; *e. g.*, "and" for "or." Morgan *v.*

generally, as a devise of lot No. 1 to B., without using words of limitation, or any expression which denotes anything more than

tion of the will takes effect, who answers that description, no other person can take, unless by a *plain declaration* in other parts of the will, the testator *intends* that some other person shall take, and has sufficiently identified him; and when that *intention* is proved, it controls the *legal operation* of the words of limitation used in the will. Sir Thomas Plumer, in Marquis Cholmondeley *v.* Lord Clinton, in 2 Jac. & Walk. 65, 189. The opinion is a distinguished specimen of judicial argument and illustration. See, also, the elaborate opinion of Mr. Justice Baldwin, to the same point, in the Circuit Court of the United States for the Pennsylvania district, in the case of Packer *v.* Nixon, decided December, 1833. But see, *ante*, 412. In England, under a devise to the heir of the testator, he takes as devisee, and not by descent.

In a will of a personal estate to A. for life, remainder to the heirs at law, the better opinion is, that though the word *heirs at law* has a definite sense as to real estate, yet when applied to personal property, it means the legal representatives or next of kin. Holloway *v.* Holloway, 5 Ves. 399; Vaux *v.* Henderson, cited in the note in 1 Jac. & Walk. 388; Rieks *v.* Williams, 1 Dev. Eq. 1; McCabe *v.* Spruil, ib. 189; Wright *v.* Trustees of Methodist Episcopal Church, 1 Hoff. Ch. 212, 213. [See Finlason *v.* Tatlock, L. R. 9 Eq. 258.] But if real and personal estate be devised after a life estate, to the heirs at law, both the next of kin and the heir at law cannot take, if it appears both descriptions of property were to go together, and then the heir will take the whole. If, however, the construction will admit of *singula singulis*, the next of kin would probably be admitted to take the personal, and the heir the real estate. Gwynne *v.* Muddock, 14 Ves. 488.

If a will contains a limitation over of personal property to the testator's *next of kin*, in the event of the failure of a previous gift of the same, it has been a vexatious question in the English books whether the limitation is to be confined to the *nearest in blood*, or to the *next of kin* within the statute of distributions; for upon the first construction, a surviving brother would take in exclusion of the children of a deceased brother or sister. Upon the other construction, the nephews and nieces would come in by right of representation, *per stirpes*, and take one moiety of the property. The cases of Carr *v.* Bedford, 2 Ch. Rep. 146; Phillips *v.* Garth, 3 Bro. C. C. 64; Lord Kenyon, in Stamp *v.* Cooke, 1 Cox, 234; Sir John Leach, in Hinckley *v.* Maclarens, 1 My. & Keen, 27, are in favor of the last construction. The cases of Roach *v.* Hammond, Prec. in Ch. 401; of Thomas *v.* Hole, Cas. temp. Talbot, 251, and of Rayner *v.* Mowbray, 3 Bro. C. C. 234, where the word *relations* received the same construction, may also be referred to as authorities in favor of the same rule. In Wright *v.* Atkyns, Turn. & Russ. 143, the word *relations* was declared to mean persons entitled according to the statute of distributions. When gifts by will to *relations* are made to them *simpliciter*, the persons to take and the proportions are determined by the statute of distributions. Roach *v.* Hammond, *ubi supra;* but if the bequest be to relations, "to be equally divided between them," the distribution must be *per capita* among the persons included in the statute. Thomas *v.* Hole, *ubi supra*. So, in a will to the chil-

Thomas, 9 Q. B. D. 643; Heald *v.* Heald, 56 Md. 300; Howerton *v.* Henderson, 88 N. C. 597. (6.) Children presumptively means legitimate children. Dorin *v.* Dorin, 7 L. R. H. L. 568. (7.) There is a presumption against disinheritance. Wood *v.* Mitcham, 92 N. Y. 375. But all the above are mere presumptions, and liable to be rebutted. The further question, as to what evidence outside the will itself can be resorted to to aid in construing it, is of course entirely distinct.

a description of the land devised, and if there be nothing in the will by which a fee by implication may be inferred, the devisee takes only an estate for life. There is almost an endless series of English authorities to this point, and the rule has been recognized in this country as of settled and binding obligation. (*b*) This rule has been broken in upon in South Carolina, (*c*) and probably in other states, in favor of the intention. It was set aside in Massachusetts, in the case of a devise of wild or uncultivated lands. (*d*) The New York Revised Statutes (*e*) have swept away

dren of A., B., and C., equally to be divided, they take *per capita*. Blackler *v.* Webb, 2 P. Wms. 383; Butler *v.* Stratton, 3 Bro. C. C. 367; [Gilliam *v.* Underwood, 3 Jones, Eq. (N. C.) 100; Patterson *v.* McMasters, ib. 208.] On the other hand, in Elmsley *v.* Young, 2 My. & Keen, 82, 780, Sir John Leach adhered to his former opinion, but, on appeal, the Lords Commissioners, Shadwell and Bosanquet, overthrew this established construction, and held that the limitation over to the *next of kin* was confined to the nearest of blood; and Lord Thurlow, Lord Eldon, Sir William Grant, and Sir Thomas Plumer, were all understood to have spoken in disapprobation of the original construction. Brandon *v.* Brandon, 3 Swanst. 312. It appears that the last construction is the best sustained, and that the words *next of kin* have acquired a technical meaning, and ought to be taken as meaning the next of kin according to the statute of distribution, unless it appears by the explanatory context that the testator intended by the words his nearest of blood, and to exclude the representatives of a deceased brother and sister, and to give all to the surviving brother or sister, and which I think would be a very unreasonable and forced construction, when the words *next of kin* are used *simpliciter*, without any explanation. Wright *v.* Trustees of Methodist Episcopal Church, 1 Hoff. Ch. 213. See the Law Magazine for August, 1835, art. 5, where this question is fully and skilfully examined. In McCullough *v.* Lee, 7 Ohio, 15, it was adjudged that as between the *mother* and the *aunt*, the words in the statute of descent, "shall pass to *the next of kin to and of the blood of the intestate*," would give the estate to the mother.

(*b*) Denn *v.* Gaskin, Cowp. 657; Frogmorton *v.* Wright, 3 Wils. 414; Jackson *v.* Harris, 8 Johns. 141; Doe *v.* Allen, 8 T. R. 497; Doe *v.* Child, 4 Bos. & P. 835; Jackson *v.* Wells, 9 Johns. 222; Jackson *v.* Embler, 14 id. 198; Ferris *v.* Smith, 17 id. 221; Hawley *v.* Northampton, 8 Mass. 38; Morrison *v.* Semple, 6 Binney, 94; Steele *v.* Thompson, 14 Serg. & R. 84; Wright *v.* Denn, 10 Wheat. 204; Beall *v.* Holmes, 6 Harr. & J. 209, 210; 11 East, 220.

(*c*) Whaley *v.* Jenkins, 3 Desaus. Eq. 80; Jenkins *v.* Clement, Harper, Eq. (S. C.) 72; Dunlap *v.* Crawford, 2 M'Cord, Eq. 171. By statute in South Carolina, in 1824, words of inheritance are declared not to be necessary to pass a fee by devise.

(*d*) Sargeant *v.* Towne, 10 Mass. 303.

(*e*) Vol. i. 748, sec. 1; ib. ii. 57, sec. 5. But the provisions in the New York Revised Statutes do not impair the validity of the execution of any will, or impair any vested right, or affect the construction of any deed or will which shall have *taken effect* prior to the first of January, 1830. They only apply in relation to wills then existing, so far as concerns the proceedings before the surrogate, and implied revocations. Ib. i. 750, sec. 11; ii. 68, sec. 68, 69, 70, and 778, sec. 8. If the will was made before the Revised Statutes, but the testator died after they went into operation, the validity of

all the established rules of construction of wills, in respect to the quantity of interest conveyed. * It is declared, that *538 every grant or devise of real estate, or any interest therein, shall pass all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied. (*a*) These provisions relieve the courts in New York from the study of a vast collection of cases, and from yielding obedience any longer to the authority of many ancient and settled rules, which were difficult to shake and dangerous to remove. Their tendency is to give increased certainty to the operation of a devise. (*b*) But the language of the provision making every devise of real estate, or any interest therein, in all events and in every case, pass the whole estate or interest of the testator, unless an intent to pass a less estate appears by *express* terms or by *necessary* implication, would seem to be rather too imperative, and not to leave quite room enough for the reasonable construction of the intention of the testator not to pass a fee. It will still be a question in every case, what words amount to a devise of the estate; for the courts are frequently obliged to say, *voluit sed non dixit.* Lands held by the testator, as mortgagee or trustee, will pass by the usual general words in a will, unless it can be collected from the language of the * will, or the purposes and objects of the *539 testator, that the intention was otherwise. (*a*)

In most of the other states, the rules of the English law con-

the trusts and provisions of the will are determined by the law existing at his death. De Peyster *v.* Clendining, 8 Paige, 295.

(*a*) The statute law of Ohio, of 1834, of New Jersey, 1784, of Virginia, 1787, of Vermont, 1839, and of Kentucky, Alabama, South Carolina, North Carolina, Maryland, and Tennessee, are to the same effect. Lomax's Digest, iii. 177, 178; Elmer's Digest, 595; Revised Statutes of Vermont, 1837, p. 254. [See Walker *v.* Walker, 28 Penn. St. 40; Thompson *v.* Hoop, 6 Ohio St. 480.] See also *supra*, 512.

(*b*) The suggestion of the want of such a legislative provision, directing a fee to pass, in every case of a devise of land, unless clearly restrained, was made in Beall *v.* Holmes, 6 Harr. & J. 228, by Ch. J. Buchanan, who gave an elaborate opinion in support of the existing English rule of construction, as being still in Maryland the established law of the land. Since that decision, the law in Maryland has been altered; and, by statute, in 1825, all devises of land without words of perpetuity, pass the whole estate, unless it appear by a devise over, by words of limitation or otherwise, that the testator intended to devise a less estate. 1 Harr. & G. 138, note.

(*a*) Jackson *v.* Delancy, 13 Johns. 537; Braybroke *v.* Inskip, 8 Ves. 417; Wall *v.* Bright, 1 Jac. & Walk. 494; Galliers *v.* Moss, 9 B. & C. 267. Lands vested in the devisor as mortgagee will pass in a will by the words *debts and securities for money.* Mather *v.* Thomas, 10 Bing. 44.

tinue to govern; and, even in New York, a series of judicial precedents will gradually be formed upon the construction of the statutes, and they will become guides for the government of analogous cases. It is most desirable that there should be some fixed and stable rules even for the interpretation of wills; and whether those rules be founded upon statute, or upon a series of judicial decisions, the beneficial result is the same, provided there be equal certainty and stability in the rule. There has been a strong disposition frequently discovered in this country to be relieved from all English adjudications on the subject of wills, and to hold the intention of the testator paramount to technical rules. The question still occurs, whether the settled rules of construction are not the best means employed to discover the intention. It is certain that the law will not suffer the intention to be defeated, merely because the testator has not clothed his ideas in technical language. But no enlightened judge will disregard a series of adjudged cases bearing on the point, even as to the construction of wills. Established rules, and an habitual reverence for judicial decisions, tend to avoid the mischiefs of uncertainty in the disposition of property, and the much greater mischief of leaving to the courts the exercise of a fluctuating and arbitrary discretion. The soundest sages of the law, and the solid dictates of wisdom, have recommended and enforced the authority of settled rules, in all the dispositions of property, in order to avoid the ebb and flow of the reason and fancy, the passions and prejudices of tribunals. When a particular expression in a will has received a definite meaning by express adjudications, that
* 540 meaning ought to be adhered * to, for the sake of uniformity, and of security in the disposition of landed property. (*a*)

The general doctrine with respect to the expressions used by the devisor is, that if they denote only a *description of the estate*, as a devise of the house A., or the farm B., and no words of limitation be employed, then only an estate for life passes; but if the words denote the *quantity of interest* which the testator possesses, as all his estate in his house A., then a fee passes. (*b*)

(*a*) Judge Paterson, in Lambert *v.* Paine, 3 Cranch, 184; Lord Kenyon, in Doe *v.* Wright, 8 T. R. 66; Nott, J., in Carr *v.* Porter, 1 M'Cord, Ch. 71, 72; Parsons, C. J., in Ide *v.* Ide, 5 Mass. 501.

(*b*) Hogan *v.* Jackson, Cowp. 299.

Another general rule is, that if the testator creates a charge upon the *devisee* personally, in respect of the estate devised, as if he devises lands to B., on condition of his paying such a legacy, the devisee takes the estate on that condition; and he will take a fee by implication, though there be no words of limitation, on the principle that he might otherwise be a loser. But where the *charge is upon the estate*, and there are no words of limitation, or other words denoting an intention to pass the fee, but only a devise to A. of his lands, after the debts and legacies are paid, the devisee takes only an estate for life. (*c*) In every case in which the land is charged with a trust which cannot be performed, or in which the will directs an act to be done which cannot be accomplished unless a greater estate than one for life be taken, it becomes necessary that the devise be enlarged to a fee. (*d*) The distinction created by this rule has ceased, under the operation of the New York statute which has been mentioned. Introductory * words to a will cannot vary *541 the construction, so as to enlarge the estate to a fee, unless there be words in the devise itself sufficient to carry the interest. Such introductory words are like a preamble to a statute, to be used only as a key to disclose the testator's meaning. (*a*) A fee will pass by will, by implication of law, as if there be a devise over of land *after the death of the wife;* the law, in that case, presumes the intention to be, that the widow shall be tenant for

(*c*) Jackson *v.* Bull, 10 Johns. 148; Jackson *v.* Martin, 18 id. 35; Spraker *v.* Van Alstyne, 18 Wend. 200; Harris *v.* Fly, 7 Paige, 421; McLellan *v.* Turner, 15 Me. 436; Gibson *v.* Horton, 5 Harr. & J. 177; Beall *v.* Holmes, 6 id. 208; Lithgow *v.* Kavenagh, 9 Mass. 161; Story, J., 10 Wheat. 231; 3 Mason, 209–212; Denn *v.* Mellor, 5 T. R. 558; Goodtitle *v.* Maddern, 4 East, 496; Cruise's Digest, tit. Devise, c. 11, sec. 49–70; Preston on Estates, ii. 207, 217–220, 228, 235, 243–250; Doe *v.* Garlick, 14 M. & W. 698; [Olmstead *v.* Olmstead, 4 Const. 56; and see Gridley *v.* Gridley, 33 Barb. 250.] [See Marshall *v.* Gingell, 21 Ch. D. 790.] Where, by the devise of lands, the devisee is to pay "thereout," or "out of the estate," certain legacies, it is a *charge* on the estate. Such a charge is no interest in, but a lien on the land charged, and the remedy is by action or bill against the devisee, or the *terre-tenant*, if he purchased with notice of the charge. Gardner *v.* Gardner, 3 Mason, 178; s. c. 12 Wheat. 498; Taft *v.* Morse, 4 Met. 523. [See Thayer *v.* Finnegan, 134 Mass. 62, and cases cited, as to when a legacy is to be considered charged upon real estate; Scott *v.* Stebbins, 91 N. Y. 605; Walter's App., 95 Penn. St. 305.]

(*d*) Collier's Case, 6 Co. 16; Doe *v.* Woodhouse, 4 T. R. 93.

(*a*) Preston on Estates, ii. 188, 192, 206; Beall *v.* Holmes, 6 Harr. & J. 205, where this point is thoroughly examined. See also Finlay *v.* King, 3 Peters, 346; [Van Derzee *v.* Van Derzee, 30 Barb. 331.]

life. So, a devise over to B. on the dying of A. before twenty-one, shows an intention, that if A. attains the age of twenty-one, he should have a fee, and he takes it by implication. (*b*)

The general rule is, that all devises shall be deemed lapsed, if the devisee dies in the lifetime of the testator. But there is a distinction taken in the English books between a lapsed legacy of personal estate, and a lapsed devise of real estate; and while the former falls into the residuary estate, and passes by the residuary clause, if any there be, and if not, passes to the next of kin, the latter does not pass to the residuary devisee, but the devise becoming void, the estate descends to the heir at law. (*c*) [1] The

(*b*) Bro. tit. Devise, pl. 52; Willis *v.* Lucas, 1 P. Wms. 472; Frogmorton *v.* Holyday, 3 Burr. 1618; Doe *v.* Cundall, 9 East, 400; 1 Sim. & Stu. 547, 550; Preston on Estates, ii. 252; Cassell *v.* Cooke, 8 Serg. & R. 290. But this rule, that a gift by will to A. after the death of B. is a gift to B. for life by implication, is said to be confined to estates of inheritance, and is not applied to personal estates. White *v.* Green, 1 Ired. Eq. 50. The heir at law may be disinherited by implication, according to the doctrine of Lord Eldon, in Kerr *v.* Wauchope, 1 Bligh, 25, 26. If the testator gives his estate to A., and the estate of A. to B., in that case A. cannot be permitted to take the estate under the will, unless he performs the implied condition annexed to his devise of giving his estate to B. He is put to his election. If he refuses to comply with the will, equity raises another implied condition out of the will, and gives to B., *out of the estate devised to A.*, by way of compensation, the value of the estate intended for B. But an implication may be rebutted by a contrary implication equally strong; for devises by implication are sustained only upon the principle of carrying the testator's intention into effect. Rathbone *v.* Dyckman, 3 Paige, 1. In Bampfield *v.* Popham, 2 Vern. 449, it was declared that an *express* estate for life could not be enlarged by implication.

(*c*) Brown *v.* Higgs, 5 Ves. 501; Roberts *v.* Cooke, 16 id. 451; Leake *v.* Robinson, 2 Meriv. 393; Humberstone *v.* Stanton, 1 Ves. & Bea. 388; Woolmer's Estate, 3 Wharton, 477; Denman, C. J., in Doe *v.* Edlin, 4 Ad. & El. 582; Jones *v.* Perry, 3 Ired. Eq. 200. [See Savage *v.* Burnham, 17 N. Y. 561; Downing *v.* Marshall, 23 id. 366;] [Stonestreet *v.* Doyle, 75 Va. 356.] By statute in Georgia, legacies do not

[1] See 7 Am. Law Rev. 56, 57. It has been thought that a residuary devise is not specific under modern statutes extending wills to after acquired real property. Thayer *v.* Wellington, 9 Allen, 283, 296. But see Hensman *v.* Fryer, L. R. 3 Ch 420, 425. *x*[1]

x[1] Under the Wills Act in England a legacy does not lapse by the death of the legatee before the testator, but takes effect as though the legatee had died immediately after the testator. But if the legacy is void, the property included in it goes into the residuary clause, if there is any, and a contrary intent has not been indicated by the testator. Blight *v.* Hartnoll, 23 Ch. D. 218. See also Holyland *v.* Lewin, 26 Ch. D. 266. See Pratt *v.* McGhee, 17 S. C. 428. See further, as to what is a specific devise, *In re* Ovey, 20 Ch. D. 676; Bothamley *v.* Sherson, 20 L. R. Eq. 304.

reason given is, that a bequest of personal property refers to the state of the property at the testator's death, whereas a devise operates only upon land whereof the testator was seised when he made his will; and it is not presumed that he intended to devise by the residuary clause, a contingency which he could not have foreseen, or to embrace in it lands contained in the * lapsed * 542 devise. (*a*) There is a further distinction between a lapsed and a void devise. In the former case, the devisee dies in the intermediate time between the making of the will and the death of the testator; but, in the latter case, the devise is void from the beginning, as if the devisee be dead when the will was made. The heir takes in the case of lapsed devise, but the residuary devisee may take in the latter case, if the terms of the residuary clause be sufficiently clear and comprehensive. (*b*) This distinc-

lapse, if any issue of the legatee be living when testator dies. Prince's Dig. 256. So, in Pennsylvania, Purdon's Dig. 5th ed. 972, and the legacy in favor of a child or lineal descendant of the testator descends to the issue of the legatee dying in the lifetime of the testator. The law is the same in South Carolina, Virginia, Maryland, Massachusetts, and probably in most of the other states. Mass. Revised Statutes, 419, sec. 24; 1 Revised Code of Virginia, 376; Young *v.* Robinson, 11 Gill & J. 328. See Revised Statutes of Connecticut, Vermont, New Jersey, and Mississippi.

(*a*) Doe *v.* Underdown, Willes, 293; Lord Hardwicke, in Durour *v.* Motteux, 1 Ves. Sen. 322; Jones *v.* Mitchell, 1 Sim. & Stu. 290. The court of appeals in Kentucky, in Gore *v.* Stevens, 1 Dana, 207, adhered to the English distinction as stated in the text. See also to s. P., 8 Ves. 25; 15 id. 414, 415; Cruse *v.* Barley, 3 P. Wms. 20; 1 Ves. 140; 10 Ves. Jr. 500; James *v.* James, 4 Paige, 115; Warner *v.* Swearingen, 6 Dana, 195. But in the case of a devise to A. and the heirs of his body, and in default of issue to B. in tail, and A. dies in the lifetime of the testator, though the devise to A. had lapsed, yet the remainder to B. vested immediately on the testator's death. White *v.* Warner, 3 Doug. 4.

(*b*) Doe *v.* Sheffield, 13 East, 526; Doe *v.* Scott, 3 Maule & S. 300; Lessee of Ferguson *v.* Hedges, 1 Harring. (Del.) 524. In Van Kleeck *v.* The Reformed Dutch Church, 6 Paige, 600, Chancellor Walworth examined the subject at large, and with a review of all the English cases; and he concludes that the case of Doe *v.* Sheffield was contrary to the strong current of decisions in favor of the claims of the heir at law in such cases, which had existed for nearly a century, and that its effect was entirely destroyed by a decision of the House of Lords, the other way, three or four years afterwards. It was a solitary opinion, without reference to a single adjudged case previously existing to support it. He concluded that a residuary devise of all the testator's real estate not before disposed of by his will, did not embrace real estate which was in terms absolutely devised to others, although such real estate was not legally and effectually devised, either from the incapacity of the devisee to take real estate by devise, or by reason of his death in the lifetime of the testator. The weight of English and American authority would appear to be in favor of this conclusion, and that the heir at law takes in such a case, and not the residuary devisee. This

tion appears to be founded on a presumption (though it would seem to be rather overstrained) of a difference in the views and intention of the testator between the two cases. The subject has been recently discussed in the courts in this country. In *Greene* v. *Dennis*, (*c*) the devise was held void, because the devisee was incompetent to take; and yet, though the devise was void from the beginning, the heir was preferred to the residuary devisee, on the ground that the testator never intended that the specific devise, which was void, should fall into the *residuum*. The residuary devise was of "the rest and residue of the estate not therein disposed of." But where the devise was upon a condition subsequent, and a contingent interest depending upon the failure of that condition, the residuary devise was held, in *Hayden* v. *Stoughton*, (*d*) to be entitled to the estate in preference to the heir, because the contingent interest had not been specifically devised, and it was carried along by the residuary devise. The alteration of the law in New York, Virginia, and those other states, making the devise operate upon all the real estate owned by the testator at his death, may produce the effect of destroying the application of some of these distinctions, and give greater consistency and harmony to the testamentary disposition of real and personal estates. (*e*)

decree was affirmed on appeal to the Court of Errors, in December, 1838. See 20 Wend. 457.

(*c*) 6 Conn. 292; Lingan *v.* Carroll, 3 Harr. & M'Hen. 333, s. p. [See Tongue *v.* Nutwell, 13 Md. 415.] In Connecticut, if the devisee or legatee, being a child or grandchild of the testator, dies before him, and no provision be made for such a contingency, the issue of such devisee or legatee take as if he had survived the testator. But if there be no such issue, the estate so disposed of by that devise or legacy is to be treated as intestate estate. Statutes of Connecticut, 1839, p. 227. See also Statute of New Jersey, 1824, Elmer's Dig. 601; Revised Statutes of Vermont, 1839, p. 257; and Revised Code of Mississippi, 1824, p. 32, to the same effect. So also, by the statutes of 19th March, 1810, in Pennsylvania, if a child or other lineal descendant of testator dies before him, leaving issue, the devise or legacy does not lapse, but remains good in favor of the issue. The general rule of the English law is, that a bequest of personal property fails, if the donee dies in the lifetime of the testator. The rule is otherwise in Scotland.

(*d*) 5 Pick. 528.

(*e*) By the English statute of wills, of 1 Victoria, c. 26, unless a contrary intention appears, a residuary devise includes estates comprised in lapsed and void devises. So, a general devise or bequest includes estates or personal property over which the testator had a general power of appointment.

The law of legacies has grown into a copious system, and has been well digested

The title by devise closes the view of the law of real property, and with it the present work, which has insensibly extended far beyond my original intention. The *system of our *543 municipal law is so vast in its outlines, and so infinite in its details, that I have passed by many interesting subjects, to which I have not been able to extend my inquiries. The course of lectures in Columbia College included an examination of the remedies provided for the recovery of property and redress of injuries; and I had prepared and delivered lectures on the history of a suit at law, according to the English model, including the doctrine of special pleading. But that subject has been laid aside; for to extend such a discussion beyond the courts of New York was not in my power; and the object of the work is professedly national, and not local. I have not the means at my command to give anything approaching to a full and correct view of the practice of the courts in *the several states; nor *544 would the value of such a work be worth the effort. The remedies, in every case, have been alluded to, and the principles on which they were founded stated, when we were upon the subject of rights; but the practice in the state courts is exceedingly diversified, and is undergoing constant changes. That of New York, in particular, was essentially altered by the revision of the

by Mr. Roper; but with much more force, precision, and accuracy, by Mr. Preston. It is too full of detail, and too practical, to admit of much greater compression than Mr. Preston has given it; and I have been obliged, in the present extended state of this work, to desist from the attempt. Some provisions, as to the payment of legacies, are inserted in the New York Revised Statutes, ii. 90, sec. 43–51. They are not to be paid until after a year from the granting of letters testamentary, or of administration; and payment may be enforced by the surrogate. When a legacy, subject to a contingency, becomes payable and is paid, it has been held to be absolutely vested, and not liable to be hung up and devested by a contingency happening subsequently. Coehoun *v.* Thompson, 2 Molloy, 281. If the legatee be a minor, legacies under the value of $50 may be paid to the father; and of the value of $50, or more, to the general guardian of the minor, on approved security. The former rule was, that the father, *quasi* father, was not entitled to receive the legacies due to his minor children. Genet *v.* Tallmadge, 1 Johns. Ch. 8; Miles *v.* Boyden, 3 Pick. 213. So after the expiration of a year from the granting of letters testamentary, or of administration, the executor or administrator may be sued for a legacy, or distributive share, if there be sufficient assets, and a demand previously made, and a bond, with approved surety given, to refund in case of need. New York Revised Statutes, ii. 114, sec. 9–17. In Pennsylvania, by the act of 1810, no devise or legacy to *lineal descendants* lapses by reason of the death of the devisee or legatee in the lifetime of the testator, if such devisee or legatee leave issue surviving the testator.

statute law in 1830; and the science of special pleading (curious, logical, and masterly as it is) has fallen into very considerable disuse and neglect in almost every part of the country, without the prospect, or perhaps the hope, of revival. (*a*) The general principles of equity have also been stated in the course of the work, so far as they were applicable to the various subjects which came successively under review; but, for the reasons already mentioned, in reference to suits at law, I have not undertaken to meddle with the remedial branch of equity jurisprudence. The law of crimes and punishments is, no doubt, a very important part of our legal system; but this is a code that rests, in each state, upon an exact knowledge of local law; and, since the institution of the penitentiary system, and the almost total abolition of corporal punishment, it has become quite simple in its principles, and concise and uniform in its details. Our criminal codes bear no kind of comparison with the complex and appalling catalogue of crimes and punishments which, in Eng-

(*a*) Lord Tenterden, in 3 B. & Ad. 16, observed, that special pleading was founded upon and adapted to the trial by jury; for the object of the science was to reduce the case before trial to a simple question of fact, whereby the duties of the jury might be more easily and conveniently discharged. And to those students who would wish to study the subject thoroughly, I would recommend Stephen's Treatise on the Principles of Pleading, as being the best book that ever was written in explanation of the science. The legislature of Maine, in 1831, enacted, that in all civil actions the general issue shall be pleaded, and the defendant is not entitled to plead any other plea to the merits than a general issue, and he may give the special matter in evidence under that plea. So also the legislature of Massachusetts, by statute of 16th April, 1836, enacted, that "in every civil action thereafter to be tried in the Supreme Judicial Court, or Court of Common Pleas, all matters of law or of fact, in defence of such action, might be given in evidence under the general issue, *and no other plea is bar of such action should be pleaded.*" In New York, the statute is not imperative, but merely allows the defendant to plead the general issue, and give any special matter in evidence, which, if pleaded, would be a bar, on giving notice of the special matter. But the courts consider the statute as very remedial, and construe the notices most liberally. Chamberlain *v.* Gorham, 20 Johns. 746; Fuller *v.* Rood, 3 Hill, 258. The enactment in Massachusetts is a thorough innovation upon the settled and orderly course of common-law proceedings in the administration of justice. The danger is, that, like other sudden and extreme reforms in the established law, it may prove to be injudicious and inconvenient, and operate as an oppressive check to the investigation of truth and the application of law. The English government, on the other hand, have, as late as the fourth year of the reign of William IV., in their wisdom and experience, very much restricted the use of the general issue in pleading, and increased in a tenfold degree the necessity of special pleading, as more conducive to truth, to certainty, and to justice. See the American Jurist, No. 32, art. 5 [xvi. 324].

land, constitutes the basis of the system of the pleas of the crown.

I trust I have already sufficiently discharged my engagements with the public; and I now respectfully submit these volumes to the candor of the profession, though not without being conscious of the imperfection of the plan, and still more so of its imperfect execution.

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