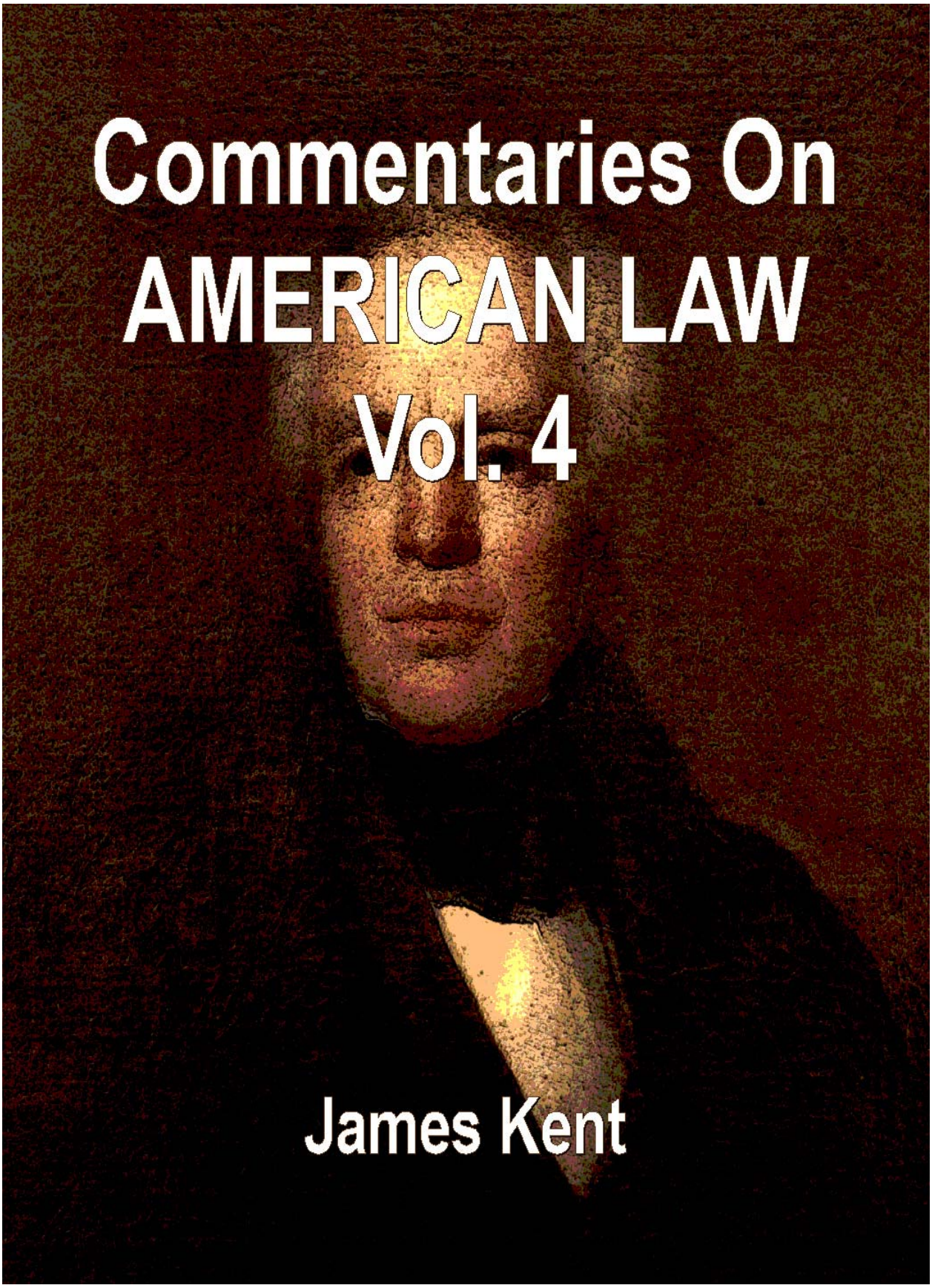
Commentaries On
AMERICAN LAW
Vol. 4
James Kent

# COMMENTARIES ON AMERICAN LAW

BOOK 4 (1830)

JAMES KENT

Based on the first edition

Footnotes have been converted to chapter end notes.
Spelling has been modernized.

## Table of Contents

**PART 6 (con't.) - Of the Law Concerning Real Property:**

# PART 6 (con’t.):
# Of the Law Concerning
# Real Property

LECTURE 53

## 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 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 seizin and fee, have always been so used in this state, 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.[1] In Connecticut and Virginia, the terms seizin 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.[2] The statute of New York, to which I have alluded, made an unnecessary distinction in legal phraseology as applied to estates; and the distinction 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 enactment's.

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 to escheat, and to any rents or services certain, which had been, or might be, created or reserved. And, to 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.[3] It was undoubtedly proper, that the tenure of lands in this state 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 this state 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 [4]

A fee, in the sense now used in this country, is an estate of inheritance in law, belonging to the owner, and transmissible to his heirs.[5] 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.[6]

The most simple division of estates of inheritance is that mentioned by Sir William Blackstone,[7] into inheritances absolute or 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.[8] Mr. Preston, in his Treatise on Estates,[9] 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 comprehensive 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 seized.[10] 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.[11] The limitation to the heirs 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 in feoffments and grants.[12]

The location of the word in 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.[13] 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 seized 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.[14] If a man purchases lands to himself for ever, or to him and his assigns for ever, 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.[15] 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 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.[16]

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 account of the efficacy and solemnity of the conveyance, and because a prior feoffment in fee is implied.[17] 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 disseized.[18] It does not apply to a release by way of extinguishment, as of a common of pasture;[19] 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 release takes the like estate in quantity which he had before in common.[20] 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.[21] 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.[22] 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.[23]

Thus stands the law of the land, without the aid of legislative provision. But in this country, the statute law has in several instances abolished the inflexible rule of the common law, which has long survived the reason of its introduction, and has rendered the insertion of the word heirs no longer necessary. In Virginia, Kentucky, Alabama, and New York,[24] 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. 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.[25]

(2.) A qualified, base, or determinable fee, (for I shall use the words promiscuously,) is an interest which may continue for ever, but the estate is liable to be determined 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.[26] 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 for ever, 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 by a release.[27] These qualified or determinable, fees are likewise termed base fees, because their duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the title. A tenant in tail may, by a bargain and sale, lease and release, or covenant to stand seized, create a base fee, which will not determine until the issue in tail enters.[28]

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.[29]

3. A conditional fee is one which restrains the fee to some particular heirs exclusive of others, as to the heirs of a man's body, or to the heirs male of his body.[30] 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. Even 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.[31] 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.[32]

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 Westminster 2d.

 

13 Edw. I. c. 1. commonly called the statute *de 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 pretense, 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.[33]

(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 parties lar estate in the donee, and a reversion in the donor. Where the donee had a fee simple before, he had by the statute only 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. 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 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,[34] and the true policy and rule 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, the common recovery was not within the restraint of the statute *de donis*.[35] 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 estates tail in England, for along 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, 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 remainder-man 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.[36]

 

In *Mary Portington's case*[37] Lord Coke says, that the judgment in 12 Edw. I. 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 thee 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 parts of the English jurisprudence, and they subsisted in full force before our revolution, subject equally to the power of being barred by a fine or common recovery. 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, and in New York, as early as 1782, and all estates tail were turned into estates in fee simple absolute.[38] So, in North Carolina, Kentucky, Tennessee, Georgia, and Missouri, estates tail have been entirely abolished by being converted by statute into estates in fee simple.[39] In the states of Vermont, Indiana, Illinois, 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.[40]

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 particular heirs in exclusion of others, have never been recognized or adopted.[41] 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,[42] every freeholder was authorized to give or sell at his pleasure any lands whereof he was seized in fee simple; and by the act of 1813,[43] every person having an estate of inheritance, was enabled to give or devise the same; and by the new revised statutes,[44] every person capable of holding lands, and seized 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 absolute;[45] 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.[46]

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 limitations. 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 by fine or recovery; and the estate tail can only be rendered inalienable during the settlement on the tenant for life, and the infancy of the remainder-man in tail.

 

Executory limitations went further, and allowed the party to introduce at his pleasure any number of lives, 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.[47] This was the rule settled by Lord Chancellor Nottingham, in the great case of the *Duke of Norfolk*;[48] and the decision in that case has been acquiesced in uniformly since that time, and every attempt to fetter estates by a more indefinite extent of limitation, or a more subtle aim at a perpetuity, has been defeated.[49] 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.[50]

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 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.[51]

And yet, with a strange kind of inconsistency in the law, he is not, any more than a tenant for life, bound to discharge encumbrances on the estate. If, however, he does it, or pays the interest on them, he is presumed to do it in favor of the inheritance.[52] 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 the encumbrance 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.[53] On the other hand, the tenant cannot affect the issue in tail, or those in remainder or reversion, by his forfeitures or engagements. They are not subject to any of the debts or encumbrances created by the tenant in tail, unless he comes within the operation of the bankrupt law, or creates the mortgage by fine.[54]

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 human affections.[55]

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, they have 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 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 the country.

Some of the most distinguished of the Scots 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 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.[56] 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'[57] seems to have assumed that these entailed settlements could not be carried beyond the limit of four generations. This is the construction given to that law by some of the modern civilians,[58] though Domat admits that the novel is expressed in a dark ambiguous manner, and he intimates that it was introduced by Tribonian, from corrupt views. It is also termed by Mr. Gibbon,[59] 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 kind 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., etc., 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.[60] But the Code Napoleon annihilated even the mitigated entailments allowed by the ordinance of 1747, and declared all substitutions or entails to be null and void, even in respect to the first donee.[61]

## NOTES

1. See the Reports *passim*, and particularly 18 Johns. Rep. 74 and 20. id. 548, 553.

2. 6 Conn. Rep. 373. 386. 500. 4 Munf. 205. Notes to 2 Blacks. Com. 44, 47, 77, 104, by Dr. Tucker.

3. N.Y. Revised Statutes, vol. i. 718. sect. 3 and 4. — p. 722. sect. 2.

4. Ibid. p. 718. sect. 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*.

 

5. The word feudum imports not only *Beneficium*, but *Beneficium* and *haereditatem*. It is an inheritable estate. *Feudum idem est quod haereditas*. Litt. sec. 1. Wright on Tenures, 148.

6. 1 Co. 140. b. 10 Co. 98. b. Vaughan's Rep. 201. 2 Blacks. Com. 259. Preston on Estates, Vol. 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.

7. Com. Vol. ii. 104, 109.

8. 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 Term Rep. 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.

9. Vol i. 419.

10. Litt. sect. 1. and 11. Co. Litt. 1. b. Fleta, lib. iii. 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.

11. 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 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. 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, vol. ii. P.8

12. Litt. sec. 1.

13. Lord Coke, in 3 Bulst.128.

14. 1 Co. 87. b. 100. b. Gilbert on Uses and Trusts, by Sugden, 29. 143. *Tapner v. Merlot*, Willes' Rep. 177. *Van Horn v. Harrison*, 1 Dal. Rep. 137.

15. Holt, Ch. J., 6. Mod. Rep. 109.

16. 2 Blacks. Com 107, 108.

17. Co. Litt. 9. b. Preston on Estates, vol. ii. 51, 52.

18. Ibid. 2 Blacks. Com. 357.

19. Co. Litt. 280. a.

20. Co. Litt. 9. b. 273. b. Preston, *ub sup*. 5. 55-59.

21. Co. Litt. 9. b.

22. Ibid. *Holdfast v. Marten*, 1 Term Rep. 411. *Fletcher v. Smiton*, 2 ibid. 656. *Newkirk v. Newkirk*, 2 Caines' Rep. 345. Dane's Abr. vol. iv. ch. 128.

23. Comyn's Dig. tit. Chancery, 2. T. 1.

24. Statute of Virginia, December 13, 1792. Statute of Kentucky, December 19, 1796. New York Revised Statutes, vol. i. 748. sect. 1, 2. Griffith's Law Register.

25. Mr. Humphreys, in his Essay on Real Property, and Outlines of a Code, p. 235. 1st edit. 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 to country. But I think it very probable that the abolition of the rule requiring the word heirs, to pass a fee by 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 day 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

26. 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 Black. Com. 109. Preston on Estates, vol. i. 431, 432, 433, 441-481, 483.

27. *Goodwright v. Searle*, 2 Wils. Rep. 29.

28. *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 basic 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 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 flan, 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, vol. 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.

29. 10 Co. 97. b. Preston on Estates, vol. 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. Shelden*, 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 Term Rep. 107. note;) and yet Mr. Preston (on Estates, vol. ii. 353.) concludes that limitations of remainders, after qualified or limited estates of remittance were in use at common law

30. Fleta, lib. 3. ch. 3. sect. 5. 2 Blacks. Com. 110.

31. Bracton, lib. 2. ch. 6. 17. b. Co. Litt. 19. on 2 Inst. 333.

32. F. N. B. 219.

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

34. Lord Bacon on the use of the law. Co. Litt. 19. b. 6 Co. 40.

35. Co. Litt. 19. b. *Mildmay's case*, 6 Co. 40. *Mary Portington's case*, 10 Co. 35.

36. *Martin v. Strachan*, 5 Term Rep. 107. note. This case was affirmed in the House of Lords, Willes's Rep. 444.

37. 10 Co. 3.

38. Act of Virginia, of 7th October, 1776. Laws of N.Y. sess. 6. ch. 2.-sess. 9. ch. 12. N.Y. Revised Statutes, vol. i. 722. sec. 3.

39. Act of North Carolina, 1784. Act of Kentucky, 1796. Griffith's Reg. under the appropriate heads, No. 8.

40. In New Hampshire, estates tail are said to be retained, but I should infer 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. In Alabama and Mississippi, a man may convey or devise land to a succession of donees then living, and to the heirs of the remainder-man. In Connecticut, by statute, (Kirby's Rep. 118. 176, 177. Swift's Dig. vol. i. 79.) and in Ohio 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. This is also the case in New Jersey, by the act of 1820, 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 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 in two of these states by will, and they are chargeable with the debts of the tenant. (Dane's Abr. vol. iv. 621. *Lithgow v. Kavenagh*, 9Mass. Rep. 167. 170. 173. Statute of Mass. 1791. c. 60. Jackson on Real Actions, 299.) 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. & Rawle, 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, ill the same manner as estates in fee simple. 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 Harris if Gill, 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 seized, they go to the issue, but not to collaterals. (Statutes of 1782 and 1799. 3 Harris & McHenry, 244. 1 Harris & Johns. 244, 465. 2 Ibid. 69, 281. 314. 3 Ibid. 302.)

41. Kirby's Rep. 118. 176. 3 Day, 339. Swift's Digest, vol. L 79.

42. Laws N.Y. sess. 10. ch. 36.

43. Laws N.Y. sess. 36. ch. 23.

44. N.Y. Revised Statutes, vol. i. 719. sec. 10.

45. Litt. sec. 13. Co. Litt. 19. a.

46. 2 Bay, 397. 1 McCord's Ch. Rep. 91. 2 ibid. 324. 326. 328.

47. In *Benjough v. Edridge*, 1 Simons, 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!

48. 3 Cases in Chancery, 1.

49. *Duke of Marlborough v. Earl Godolphin*, 1 Eden's Rep. 404. *Long v. Blackall*, 7 Term Rep. 100.

50. N.Y. Revised Statutes, vol. i. 723, 724. sec. 17. 19.

51. Moseley, 224. Cases temp. Talbot, 16.

52. *Amesbury v. Brown*, 1 Vesey, 447. *Earl of Buckinghamshire v. Hobart*, 3 Swanston, 186.

53. Lord Talbot, in *Chaplin v. Chaplin*, 2 P. Wms. 235. *Amesbury v. Brown*, 1 Vesey, 477. *Earl of Buckinghamshire v. Hobart*, 3 Swanston, 186.

54. *Jenkins v. Keymes*, 1 Lev. 237.

55. 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 has 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 Wm. Jones' Rep. 101. 1 Charles I.) But the luster 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."

56. Smith's Wealth of Nations, vol. i. 383, 384. Edin. Review, vol. xl. 359. Miller's Inquiry into the Present State of the Civil Law of England, 407. Bell's Comm. on the Laws of Scotland, vol. i. 44.

57. Novel, 159. Ch. 2.

58. Browne's View of the Civil Law, vol. i. 189. Wood's Inst. of the Civil Law, 189. Domat's Civil Law, 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.

59. Hist. Vol. Viii. 80.

60. Pothier *Traité des Substitutions*, sec. 7. art. 4. Touillier, tom. 5. p. 27. 29. *Repertoire de jurisprudence*, tit. Substitution

 

*fidei commissaire*, sec. 9. art. 2.

61. Code Napoleon, art. 896. In monarchical governments, like those of France and England, 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 the 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.

 

LECTURE 54

## Of Estates for Life

AN estate of freehold is a denomination which applies equally to an estate of inheritance, and an estate for life.[1] *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.[2] Sir William Blackstone[3] confines the description of a freehold estate simply to the incident of livery of seizin, 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 seizin, no other estates were properly freehold estates. But this criterion of a freehold estate, as being one in fee, or for life, applies as well to estates created by the operation of the statute of uses, as to those which are conveyed by livery of seizin; 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, whether it be a corporeal or 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 a 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 *praecipe* in a real action, and he had a right to call in the aid of the reversioner or remainder-man, when the inheritance was demanded. These rights give him importance and dignity as a freeholder and freeman.[4]

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 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.[5] Sir Henry Spelman[6] 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 not, in this state, an obligation upon a tenant for life has been completely removed by the act, declaring all estates to be allodial.[7] 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 investiture, should make an acknowledgment of his submission, with an assurance of service and fidelity. The rites of the feudal investiture were exceedingly solemn, and implied protection and reverence, beneficence and loyalty.[8]

Life estates may be created by express words, as if A. conveys land 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 or 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.[9] 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 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 life." 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.[10]

These estates may be made to depend upon a contingency which can happen and determine the estate before the death of 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 indeterminate 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.[11] If the tenant for the life of B. died in the lifetime of B., the estate was open 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. ch. 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, 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.[12] 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.[13] The interest of every occupant, general or special, is therefore, in this state, 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 the Virginia statute of 1792 follows in the footsteps of the English statutes, and leaves a scintilla of interest in certain events in the heir as a special occupant; and this I apprehend to be the construction of the statute in Maryland of 1799. In Massachusetts, on the death of the tenant *pur autre vie*, the law is said to give the estate to his heir; and yet, in that and other states, where the real and personal estates of intestates are distributed in the same way and manner, the question does not seem to be material.

(2.) Tenancy by the curtesy is an estate for life, created by the act of law. When a man marries a woman seized, at any time during the coverture, of an estate of inheritance, in severalty, in coparcenary, or in common, and has 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 seizin, or at the death of the wife, or whether it was born before or after the seizin.[14]

 

This estate is not peculiar to the English law, as Littleton erroneously supposes,[15] for it is to be found, with some modifications, in the ancient laws of Scotland, Ireland, Normandy, and Germany.[16] Sir Martin Wright is of opinion that curtesy was not of feudal origin, for it is laid down expressly in the book of feuds,[17] that the husband did not succeed to the feud of the wife without a special investiture; and he adopts the opinion of Craig, who deduces curtesy from one of the rescripts of the emperor Constantine.[18] 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 by Bracton, and especially in a writ, in 11 Hen. III. with the fulness and precision of the law definitions at the present day[19] 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 Scotland,[20] and it remains almost entirely unshaken in our American jurisprudence.

Vermont forms an exception, for the title by curtesy has been laid under the equitable restriction, of existing only in the event that the children of the wife entitled to inherit died within age and without children.[21] So in South Carolina, 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; because 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 seizin of the wife, issue, and death of the wife, The law vests the estate in the husband on the death of the wife, without entry. His estate is initiate on issue had, and consummate on the death of the wife.

The wife, according to the English law, must have been seized in fact and in deed, and not merely of a seizin in law of an estate of inheritance, to entitle the husband to his curtesy.[22] 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 reversion or remainder, unless the particular estate be ended during the coverture.[23] This is still the general rule at law, though in equity the letter of it has been relaxed by a free and literal construction.[24] But the circumstances of this country have justly required some qualification of the strict letter of the rule; and if the wife be owner of waste, uncultivated lands, not held adversely, she is deemed seized in fact, so as to entitle her husband to his right of curtesy.[25] 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 with 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, the wife must have had such a seizin 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 seized, and the husband will not have his curtesy.[26]

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 seized, nor deemed to be so.[27] The law of curtesy in Connecticut is made to symmetrize with other parts of their system; and in that state, ownership without seizin, is sufficient to govern the descent or devise of real estate.[28]

 

At common law, the husband could not be tenant by the curtesy of a use;[29] 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 seizin in equity as a *cestui que trust.* So, if money be agreed to be laid out in the 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.[30] 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 seizin. The wife must have had a seizin of the freehold and inheritance, *simul et semel,* either at law or in equity, during the coverture.[31] In *Roberts v. Dixwell,*[32] 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 seizin 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 seizin 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 inheritance, 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 seizin in the wife.[33] And if lands be devised to the wife 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 for the wife and her heirs, and bar him of his curtesy.[34] 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.[35] 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*,[36] 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. She married, had issue which died, and then she died under age, by which the devise over took effect; still it was held, that the husband was entitled to his curtesy.[37] 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 seizin was wrongful, and there be an eviction under a title paramount. The distinction is principally between a condition and a limitation. If the wife's seizin 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

 

encumbrances are destroyed. On the other hand, a limitation merely shifts the estate from one person to another, and leaves the prior seizin 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.[38]

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.[39] 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.[40] This is showing the authority, but not the reciprocal justice or equity of the distinction. There is no parity of justice in the case. 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 remainder-man.[41]

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 re-enacted in 17S7.[42] The injury of the alienation to the heir was removed by the statute of 6 Edw. I. c. 3. also re-enacted in 1787.[43] That statute declared, that 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 this state, by a provision in the new statute code, which declares that a conveyance by a 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.[44]

(3.) The next species of life estates created by the act of the law, is that of dower. It exists where a man is seized 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 seized, 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.[45]

'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,[46] We find the law of dower, in the mode of endowing *ad ostium ecclesiae*, in common use in the time of Glanville,[47] 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;[48] whereas, in Magna Carta,[49] the law of dower, in its modern sense and enlarged extent, as applying to all lands of which the husband was seized 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 every where 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, seizin of the

 

husband, and his death.[50] 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.[51] But a *feme covert*, being an alien, was not by the common law entitled to be endowed any more than to inherit.[52] This rule has been relaxed in some parts of this country, and in Maryland, an alien widow, who married in the United States, and resided here when her husband died, was admitted to dower.[53] In New York, while the general rule is admitted, that the alien widow, even of a natural born citizen, is not entitled to dower in her husband's lands, yet, under the statute of 1802, the widows of aliens entitled by law to hold real estate, are held to be dowable.[54] This reasonable construction of the act of 1802, has been confirmed by a general statute provision, declaring 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.[55]

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.

I. Of what estate the wife may be endowed.

The husband must have had seizin 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 seizin. The mere possibility of the estate being defeated by survivorship prevents dower.[56] 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 seized.[57] It is sufficient to give a title to dower, that the husband had a seizin in law without being actually seized; 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 seizin by the husband's entry, whereas the husband has always the power of procuring seizin of the wife's land.[58] If land descends 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 seizin in law as heir.[59] But it is necessary that the husband should have been seized 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 seizin of the husband, in the action of dower.[60] If, however, upon the determination of a particular freehold estate, the tenant holds over and continues his seizin, 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 seizin either in fact or in law. The lathes of the husband will prejudice the claim of dower when he has no seizin in law, but not otherwise; and Perkins states general cases in illustration of the rule.[61] So, if a lease for life be made before marriage, by a person seized 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 to the reversion in fee, was not seized 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.[62]

 

A transitory seizin 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 dower.[63] The same doctrine applies 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 seized 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.[64]

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.[65] The husband must be seized 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. The intervening freehold of B. preserves the freehold and the inheritance of A. distinct, and protects them from merger and consolidation, and consequently prevents the attachment of dowers.[66]

Dower attaches to all real hereditaments, such as rents, commons in gross or appendant, and piscary, provided the husband was seized of an estate of inheritance in the same.[67] 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.[68] The claim of dower attaching upon all the lands whereof the husband was seized at any time during the coverture, is a severe dormant encumbrance upon the use and circulation of real property. In point of fact, it is of little or no use, unless the husband dies seized; 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, and I am inclined to think wisely, to the lands whereof the husband died seized.

This is the case in the states of Vermont, Connecticut, Ohio, Tennessee and North Carolina.[69] In 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.[70] If the 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 seized of any estate in the land of which the widow could be endowed.[71] 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 during coverture.[72] In Tennessee, the restriction upon the widow's dower is substantially the same; and in Missouri it would seem to be subject generally 'to

 

the husband's debts; whereas, in North Carolina, the widow's dower is declared by statute to be paramount to the claims of creditors.[73]

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.[74] 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 seizin, to avoid the attachment of the legal title of dower,[75] But a court of equity considered the equity of redemption as a right inherent in 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 definitively 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.[76] 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 his curtesy in such an estate. 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*,[77] 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.[78] But the reasoning 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.[79] 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.

In these 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, Virginia, and probably in most or all of the other states, the wife is held dowable of an equity of redemption.[80] Though the wife joins with her husband in the mortgage, and though the husband should afterwards release the equity, the wife will still 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.[81] If, however, the mortgage was 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.[82] In the cases of *Harrison v. Eldridge*, and *Barker v. Parker*,[83] 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 encumbrance by the husband or his representatives, and not when the equity of redemption is released to the mortgagee or conveyed.[84]

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 seized in respect to all the world but the mortgagee and his assigns. Even in the view of the English courts of equity, the owner of the equity of redemption is the owner of the land, and the mortgage is regarded as personal assets.[85] The rule in several of the states is carried to the extent of giving to the wife her dower in all trust estates. This is said to be the law in Pennsylvania, Maryland, Virginia, and Alabama;[86] but the rule in those states must be understood 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 seized in fee of the dry technical title, by way of trust or power, for the sole interest of others.[87] In all 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.

Though the wife be dowable of an equity of redemption, she is, after her husband's death, if she claims her dower, bound to contribute rateably towards the redemption of the mortgage. If the heir redeems, she contributes by paying, during life, to the heir, the 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.[88] In England, the widow entitled to (lower 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.[89]

As to the interest of the 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[90] 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,[91] have settled this question in this state, by declaring that a widow shall not be endowed of lands conveyed to her husband by way of mortgage, unless he acquired an absolute estate therein during the marriage.[92]

II. In what way dower will be defeated.

Dower will be defeated upon the restoration of the seizin under the prior title in the case of defeasible estates, as in the case of re-entry for a condition broken, which abolishes the intermediate seizin.[93] 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. ch. 4. preserved the wife's dower, unless the tenant could show affirmatively a good seizin out of the husband and in himself. This

 

statute, according to Perkins, was in affirmance of the common law.[94] The principle is, that the wife shall have dower of lands of which her husband was of right seized of an estate of inheritance, and not otherwise. If, therefore, a disseizor die seized, 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 disseizee.[95] And the sound principle of making the title to dower rest upon the 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.[96] But under the complicated modifications of seizin 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 seizin 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 preserved though the seizin was defeated, by reason of some prior distinct seizin which had attached in the husband.[97]

If the husband be seized 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.[98] 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.[99] Whether dower 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.[100] The estate of the husband is, in a more emphatic degree, overreached and defeated 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.[101]

As a general principle, it may be observed, that the wife's dower is liable to be defeated by every subsisting claim or encumbrance, in law or equity, existing before the inception of the title, and which would have defeated the husband's seizin. 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 to dower is regulated in equity by the nature of the property in the equity view of it.[102]

III. 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 seizin. 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 the wife given and proved according to law; and this is now the declared statute law of New York.[103]

 

If the husband and wife levy a fine, or suffer a common recovery, the wife is barred. of her dower.[104] This is the only regular way, in the English law, of barring dower after it has duly attached. 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.[105] But other ingenious devices 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 divested 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 a subsequent exercise of the power, as being a prior and 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, conveyancers have limited the land to the use of the purchaser's appointee, and in default of 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.[106] A more sure way to bar the dower, was by the introduction 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 during the life of the wife, in trust for the purchaser's heirs and assigns, with remainder to the heirs of the purchaser in fee.[107] 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.[108] In this country, we are, happily, not very liable to be perplexed by such abstruse questions and artificial rules which have encumbered the subject of dower in England to a grievous extent. Even in these 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 seizin 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 a forfeiture of dower by way of penalty; but reconciliation with the husband would reinstate the wife in her right. The statute was re-enacted in New York in 1787, and has undergone very material modification in the new revised code.[109] The same provision has been made by 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.[110] New York, however, is to be considered as an exception to this remark, for by the revised statutes the wife only forfeits her dower in cases of divorce *a vinculo* for misconduct, 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.[111] But in case of such a divorce for the adultery of the husband, it is doubtless 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.[112] 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.[113] 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 of 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; and the distinction depends upon a positive provision by statute for the one case, and none for the other.[114]

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.[115] 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.[116] It has also been settled, after great discussion in the English House of Lords, 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.[117]

In New York, the statute of 27 Hen. VIII, concerning jointures, was, in 1787, adopted verbatim,[118] but it has been altered and improved by the new revised statutes; and the principle in equity, allowing jointures to exist also by a 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, etc. 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."[119]

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 lands, whereof she would have been otherwise dowable. Both these provisions formed a part in the statute of this state of 1787, and they have probably been adopted in all the states where the law of jointure in bar of dower has been introduced.[120]

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.[121] It is generally said, however, that though such a collateral satisfaction be good in equity, it is not pleadable in bar of dower at law.[122] 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 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.[123] 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.[124]

The New York Revised Statutes[125] have embodied most of these principles of law and equity, with some variations and amendments. They declare, according to the. law of 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.[126] It is likewise declared, that every 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.[127]

It was a principle of the common law, that if the husband, seized 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.[128] This principle is also introduced into the New York Revised Statutes, and the widow is required to evince 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.[129]

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.[130] 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.[131] This is the English rule in respect to a fine, and the wife's dower is 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, if she resides out of the state, the simple execution of the (Iced by her, will be sufficient to bar her dower, as to the lands in this state so conveyed, equally as if she were a *feme sole*.[132]

 

IV. The manner of assigning dower.

To give greater 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,[133]) it was provided by Magna Carta,[134] 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 her dower, was 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 Carta is, probably, the law in all the United States. In New York the provision is re-enacted, 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.[135] 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. 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 vested estate for life, which will enable her to sustain her ejectment.[136]

It was decided in New Jersey, that though the widow could not enter upon the land until dower was assigned, yet, being in possession, she could not be ousted by the owner of the fee in ejectment, unless her dower was assigned her.[137] 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, until dower be assigned; and she has, therefore, a freehold for life, unless sooner defeated by the act of the heir.[138] There is the same statute provision in Kentucky and Virginia, and the rule in Connecticut 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.[139]

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.[140]

The assignment of dower may be made *in pais* by parol, by the party who has the freehold; but if the dower be not assigned within the forty days, by the heir or devisee, or other person seized of the lands subjected 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 it 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.[141] 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,[142] that he had never known any such action in Massachusetts. On recovery at law, the sheriff delivers to the demandant possession of her dower by metes and bounds, if the subject be properly devisable, and the lands be held in severalty.[143] If the dower arises from rent, or other incorporeal hereditament, as commons or

 

piscary, of which the husband was seized in fee, the third part of the profits is appropriated to the widow.[144] If the property be not divisible, as of 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.[145] 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 proportionate periods.[146] 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.[147] 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.[148] 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,[149] and the point was proved, and learnedly illustrated, in *Geer v. Hamblin*.[150] If A. be seized, and 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.[151] 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 be no other equivalent lands, a rent must be assigned to her issuing out of the mansion house.[152]

If the husband dies seized, 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.[153] But the widow is not entitled to damages for the detention of the dower, unless the husband died seized.[154] 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.[155] The provision in the statute of Merton was adopted in New York in 1787, and in Massachusetts in 1783 and 1816, and the damages in the case of detention of dower rest probably on similar grounds throughout the United States. 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;[156] 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 lands 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.[157] The reason assigned in the old books for the rule has been ably criticized 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. 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.[158] If the husband continues in possession after he has mortgaged the land, and makes improvements, the wife will have the benefit 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.[159]

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, which gave the improvements to the owner of the soil.[160] 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 fit. creasing 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 of the estate, 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*,[161] 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. Merron*,[162] 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,[163] to stand upon solid 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*,[164] 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 the value of the land at the time of the alienation, though it had arisen greatly in value afterwards, exclusive of buildings erected by the alienee. The same doctrine was followed in *Shaw v. White*,[165] and the language of the statute to which these decisions alluded,[166] 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." But 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*;[167] 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 general 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, even as against a purchaser, 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.[168] The New York revised statutes[169] have declared, that if the husband dies seized, 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 and in other states,) is altogether omitted.

When the certainty of the estate belonging to the widow as dower,, is ascertained by assignment, the estate does not pass by the assignment, but the seizin of the heir in defeated *ab initio*, and the

 

dowress is in, in tat of law, of the seizin of her husband, and this is the reason that neither livery nor writing is essential to the validity of an assignment in pais.[170] 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 part of the two remaining third parts of the land whereof she was dowable.[171] In *Bedingfield's case*[172] 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,[173] 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.

In the English law, the wife's remedy by action for her dower, is not within the ordinary statutes of limitations, 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) removed.[174] In South Carolina it was held, in *Ramsay v. Dozier*,[175] and again in *Boyle v. Rowand*,[176] that time was a bar to dower, as well as to other, claims. But in the English law there is no bar, and 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 special cause be shown, courts of equity carry the account book to the death of the husband.[177] The New York Revised Statutes[178] 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.[179]

Dower may be recovered by bill in equity, as well as by 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 at 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 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.[180] The equity jurisdiction has been equally entertained in this country,[181] 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.[182]

In addition to the legal remedies at law and in equity, the surrogates in the several counties in this state, 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.[183] This convenient and summary mode of assignment of dower under the direction of the courts of probates in the several states, has, probably, in a great degree, superseded the common law remedy by action. When the widow is legally seized of her freehold estate, as dowress, she may bequeath the crop in the ground of the land held by her in dower.[184]

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, 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 aedificandi, ardendi, arandi et claudendi*.[185] But, under the pretense 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.[186]

(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.[187] The doctrine of emblements is, applicable only to the products of the earth which are annual, and raised by the yearly and labor of the tenant. It applies to grain, garden roots, etc., but not to grass, or fruits, which are the natural product of the soil, and do not essentially owe their annual existence to the cultivation of man. The tenant, under the protection of this rule, is invited to agricultural industry, without the apprehension of loss by reason of the unforeseen contingency of his death.[188]

(3.) Tenants for life have the power of Making under 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 persona} representatives of the tenant for life, are entitled to recover the whole, or a proportional part of the rent in arrear.[189] 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.[190]

(4.) In estates for life; if the estate be charged with an encumbrance, 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 encumbrance 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 rateable part of an encumbrance 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.[191] If he pays off an encumbrance 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. [192] And if the encumbrancer neglects for years to collect his interest from the tenant for life, he may, notwithstanding, collect the arrears from the remainder-man, though the assets of the estate of the tenant for life would equitably be answerable to the remainder-man[193] for his indemnity, and they remain answerable for arrears of interest accrued in his lifetime.

The true principle on this subject is, that the 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.[194] But the Master of the Rolls, in *White v. White*,[195] 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 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.[196] The rents and profits are to be applied in discharge of the arrears of interest accruing during a 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*.[197] The rule applies to a tenant in dower, and by curtesy, as well as to any other tenant for life, with this qualification, that a dowress is only bound to keep 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.[198]

But while tenants for life are entitled to these privileges, the law has discovered a similar solicitude for those who have an interest in the inheritance in remainder or reversion. If, therefore, the tenant for life should by neglect or wantonness, occasion any permanent waste to the substance of the estate, whether the waste be voluntary or permissive,[199] as by pulling down houses, suffering them to go to decay from the want of ordinary care; cutting the timber unnecessarily; 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.[200]

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.[201] 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.[202] 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.[203] 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 being chargeable with waste.[204] 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 destroyed in clearing.[205] And in *Ballentine v. Poyner*,[206] 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.

The tenant 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[207] 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.[208]

 

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; or by a special action on the case in the nature of waste, to recover damages.[209] The modern 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, with. out impeachment of waste, had the effect of transferring to the lessee the property of the timber. The modern remedy in chancery by injunction is broader than that 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 remainder-man or reversioner in fee, the action of waste would not lie at law, for it lay only on behalf of him who had the next immediate estate of inheritance.[210] 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.[211] The chancery remedy is limited to cases in which the title is clear and undisputed;[212] and the remedy by an action on the case in the nature of waste has been held[213] not to lie for permissive waste. If this last doctrine be well founded, (and I think it may very reasonably be doubted,[214]) 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, as far as it is founded either upon the common law, or upon the statute of Gloucester,[215] has been generally received as law in this country, and is applicable to all kinds of tenants for life and years. It is frequently said by Lord Coke in his Commentaries,[216] and it was so declared by the K. B. in the *Countess of Shrewsbury's case*,[217] 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. Reeve, who was thoroughly read in the ancient English law, insists that the common law provided a remedy against waste by all tenants for life and for years, and that the statute of Gloucester only made the remedy more specific and certain.[218]

The provision in the statute of Gloucester, giving by way of penalty, the forfeiture of the place wasted and treble damages, was re-enacted in New York and Virginia,[219] and it is the acknowledged rule of recovery in some of the other states in the action of waste.[220] It may be considered as 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.[221]

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.[222] The statute of 6 Anne, c. 31., guarded the tenant from the consequences 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, or 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 waste.[223] 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 ever been formally adopted in any of the states. It was intimated, upon the argument in the case of *White v. Wagner*,[224] 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.

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.[225] Alienation by feoffment; with livery of seizin, or by matter of record, as by fine or recovery, of a greater estate than the tenant for life was entitled to, by divesting the seizin, 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.[226] But an alienation for the life of the tenant himself, did not work any wrong, and, therefore, says Lord Coke,[227] 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 New York and Pennsylvania, 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 lawfully grant. 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.[228]

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 the 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, at common law, work a discontinuance, when the warranty descends upon him who has right to the lands.[229] 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.[230]

 

## NOTES

1. This is even made a matter of legislative declaration, in the N.Y. Revised Statutes, vol. i. 772. sec. 5.

2. Fuerunt in conquestu liberi homines, qui libere tenuerunt tenementa sua per libera servitia, vel per liberas consuetudines. Bracton, lib. 1. p. 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 Feidalite. So, in Doomsday, the liberi were expressed to be *qui ire poterant quo volebant*. Dalrymple on Feudal Property, p. 11.

3. Com. vol. ii. 104.

4. Sullivan's Lectures on Feudal Law, lec. 6. Preston on Estates, vol. i. 206-210.

5. Wright on Tenures, 190.

6. Treatise of Feuds and Tenures: ch. 2.

7. N.Y. Revised Statutes, vol. i. 718. sec. 3.

8. See Lib. Feud. Jib. 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 vita contra omnem hominem, excepto rege et quod credentiam sibi commissam non manifestabit.* Doctor Gilbert Stuart, in his View of Society in Europe, p. 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 Caesar, and the nervous and profound text of Tacitus.

9. Co. Litt. 42. a,

10. 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, p. 33.

11. Bracton, lib. 4. ch. xxviii. sec. 1. Co. Litt. 42. a.

12. Lord Kenyon in *Doe v. Luxton*, 6 Term Rep. 289.

13. N.Y. Revised Statutxr, vo1. 1. 722. sec. 6.

14. Litt. sec. 35. 52. Co. Litt. 29. b. *Paine's case*, 8 Co. 34.

15. Litt. sec. 35.

16. Co. Litt. 30. a. Wright on Tenures, 193. 2 Blacks. Com. 126. In Normandy, according to the Coutumier, ch. 119. the curtesy lasted only during the widowhood of the husband. 1 Hale's Hist. C. Law, 219.

17. Feud. lib. 1. tit. 15. lib. 2. tit. 13.

18. Wright on Tenures, 194.

19. Glanville, lib. 7. ch. 18. Bracton, lib. 5. c. 30. sec. 7. Hale's Hist. Com. Law, ch. 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 i nglice; and theMirror, ch. 1. sec. 3. says, that this title was granted of the curtesy of King Henry I.

20. In Scotland there is this variation in the curtesy from that in England, that the wife must have been seized 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 Com. vol. i. 5th ed. 61.

21. Statute of Vermont, of 10thMarch, 1797, sec. 61.

22. Co. Litt. 29. a.

23. Perkins, sec. 457. 464. Co. Litt. 29. a. *De Grey v. Richardson*, 3 Atk. 469.

 

24. *De Grey v. Richardson*, 3 Atk. 469. *Sterling v. Penlington*, 7 Viner, 149. p 111.

25. *Jackson v. Sellick*, 8 Johns. Rep. 262. *Clay v. White*, 1 "Munf. 162. *Green v. Liter*, 8 Cranch, 249. *Davis v. Mason*, 1 Peters' U. S. Rep. 503.

26. *Jackson v. Johnson*, 5 Cowen,74.

27. *Bush v. Bradley*, 4 Day, 298. Kline v. Beebe, 6 Conn. Rep. 494.

28. 4 Day, *ub. supra*.

29. Gilbert, on Uses, by Sugden, 48. 440.

30. *Sweetapple v. Bindon*, 2 Vern. 636. *Watts v. Ball*, 1 P. Wins. 108. *Chaplin v. Chaplin*, 3 Ibid. 229. *Cashborne v. Scarfe*, 1 Atk. 603. *Cunningham v. Moody*, 1 Ves. 174. Dodson v. Hay, 3 Bro. 404.

31. *Hearle v. Greenbank*, 1 Ties. 298. 3 Atk. 716. S. C.

32. 1 Atk. 607.

33. *Pitt v. Jackson*, 3 Bro. 51. *Morgan v. Morgan*, 5Madd. Reps. 248. Amer. ed.

34. *Bennet v. Davis*, 2 P. Wms. 316.

35. 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 Tomes. J. 433.

36. 8 Co. 34.

37. *Buckworth v. Thirkell*, 3 Bos. & Pull. 652. note.

38. *Buckworth v. Thirkell*, 3 Bos. & Pull. 652. note. Butler's note 170. to Co. Litt. 241. a. Roper on Husband and Wife, vol. i. 36, 37. Preston on Abstracts of Titles, vol. iii. 384. Park on Dower, 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. & Pull. 654. cites the distinction of Mr. Butler, as worthy of attention, and Mr. Roper has varied it, and discussed it. Neither of them, as it would appear to me, 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.

39. Preston on Abstracts of Title, vol. iii. 385.

40. *Sidney v. Sidney*, 3 P. Wins. 276.

41. Co. Litt. 251. a. b. 302. b. 2 Inst. 309.

42. Laws N.Y. sess. 10. ch. 50. sec. 6.

43. Laws N.Y. sess. 10. ch. 48. sec.

44. N.Y. Revised Statutes, vol. i. 739. sec. 143. 145.

45. Litt. sec. 36. Perkins, sec. 301. N.Y. Revised Statutes, vol. 1. 740. sec. 1. Park's Treatise on the Law of Dower, 5.

46. 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. nor. Gem. c. 18. dot em non azor marito, sod uzori maritus of ert. In this custom we probably have the origin of the right of dower, which was carried by the northern barbarians into their extensive conquests.; and when a permanent interest was acquired inland, 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, p. 29, 30. 223-227.

 

Olaus Magnus records the same custom among the Goths; and Dr. Stuart 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. Observ. upon the ancient Statutes, p. 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 Blacks. Com. 129. Spelman, Gloss. ad vocem, deduces dos from the French, douaire; and Sir Marlin 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 viduite*. Oeuvres d. D', guesseau, tom. 4. 660.

47. Glan. lib. 6. o. 1.

48. Bracton, lib. 2. c. 39. sec. '. Fleta, lib. 5. c. 24. sec. 7.

49. C. 7.

50. Co. Litt. 31. a.

51. Co. Litt. 33. a. 7 Co. 42. *Kenne's case*. Doct. & Stu. 22.

52. Co. Litt. 31. b. *Kelly v. Harrison*, 2. Johns. Cas. 29.

53. *Buchanan v. Deshon*, 1 Harr. cr Gill. 280.

54. *Sutliff v. Forgey*, 1 Cowen, 89. 81bid. 713. S. C.

55. N.Y. Revised Statutes, vol. i. 740. sec. 2.

56. Litt. sec. 45.

57. F. N. R. 150. k. Co. Litt. 31. b.

58. Bro. tit. Dower, pl. 75. Litt. sec. 448. 681. Co. Litt. 31. A..

59. Perkins, sec. 371, 372.

60. *Bancroft v. White*, 1 Caines' Rep. 185. Embree v. Ellis, 2 Johns. Rep. 119.

61. Perkins, sec. 386, 367, ‘368, s69,370. Bro. tit. Dower, pl. 29.

62. Co. Litt. 32. a. *D'Arcy v. Blake*, 2 Sch. tjr Lef 387. Shoemaker v. Walker, 2 Serg. & Rawle 556.

63. Co. Litt. 31. b., and so declared in Nash r. Preston, Cro. Car. 190. and Sneyd v. Sneyd, 1 Atk. 442.

64. *Holbrook v. Finney*, 4 Mass. Rep. 566. *Clarke v. Munroe*, 14 Ibid. 551. *Bogie v. Rutledge*, 1 Bay, 312. Stow v. Tiflt, 15 Johns. Rep. 458.

65. *Tabelee v. Tabelee*, 1 Johns. Ch. Rep. 45. *Swaine v. Perine*, 5 Ibid. 482. *Gibson v. Crehore*, 5 Pick. 146. *Russell v. Austin*, 1 Page, 192. The N.Y. Revised Statutes, vol. i. 740. sec. 5 and 6. have incorporated in a statute provision these well settled principles in judicial jurisprudence.

66. Perkins, 333. 335. 338. Bro. tit. Dower, pl. 6. Finch's Law, p. 12s. gates' case, 1 Salk. 254. Mr. Park, in his copious and thorough Treatise on the Law of Dower, p. 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 seized of several estates, ap initio, and the dower must consequently be defeated. *Cordal's case*, Cro. Eliz. 316. Boothby v. Vernon, 9 Nod.Rep.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 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 seizin 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.

67. Perkins, sec. 342. 345. 347. Co. Litt. 3~. a. Par~ an Dower112.4.

68. Stoughton v. Leigh, 1 Taunt. Rep. 402. Coates v. Cheever, 1 Cowen, 460.

69. Griffith's Register. Swift's Dig. vol. i. 85. Stewart v. Stewart, 5 Conn. Rep. 317. Winstead v. Winstead, 1 Hayw. 243. In Connecticut, and probably in those 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.

70. Conner v. Shepherd, 15Mass. Rep. 164. Johnson v. Perley, 2 H. Rep. 56. Griffith's Register, tit. Maine.

71. Webb v. Townsend, 1 Pickering's Rep. 21.

72. Reed v. Morrison, 12 Serg. & Rawle, 18.

73. Griffith's Register, li. t. Frost v. Etheridge, 1 Badger 4 Der. 30.

74. Bro. tit. Dower pl. ii. Perkins, sec. 392.

75. Cro. Car. 191.

76. Lord Hardwicke, in Hinton v. Hinton, 2 Vesey, 631. Noel v. Jevon, 2 Freeman, 43.

77. 2. P. Wms. 700.

78. 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, Reports in Chancery, vol, i. 134. Radnor v. Rotheram, Prec. in Chancery, 65. Bottomly v. Fairfax, ibid, 326. Ambrose v. Ambrose, l P. Wms. 321 were all opposed to Fletcher v. Robinson, cited in Prec. in Chancery, 250. and 2 P. Wms. 710.

79. Chaplin v. Chaplin, 3. P. Wms. 229. Godwin v. Winsmore, 2 Atk. 525. Sir Thomas Clarke, in Burges v. Wheate, 1 Blacks. Rep. 138. Dixon v. Saville, 1 Bro. 326. D'Arey v. Blake, 2 Sch.. Of Lef. 387.

80. Bird v. Gardner, 10 Mass. Rep. 364. Snow v. Stephens, 15 bid. 278. Fish v. Fish, 1 Conn. Rep. 559. Hitchcock v. Harrington, 6 Johns. Rep. '290. Collins v. Terry, 7 ibid. 278. Coles v. Coles, 15 ibid. 319. Titus v. Neilson, 5 Johns. Ch. Rep. 452. N.Y. Revised Statutes, vol. 1. 740. sec. 4. Montgomery v. Bruere, 2 Southard, 865. Reed v. Morrison, 12 Serg. & Rawle, 18. Heth v. Cocks, 1 Randolph, 344.

81. Tabele v. Tabele, 1 Johns. Ch. Rep. 45. Swaine v. Perine, 5 ibid. 482. Titus v. Neilson, ibid. 452. Peabody v. Patten, 2 Pick. Rep. 517. Gibson v. Crehore, 5 ibid. 146.

82. Jackson v. Dewitt, 6 Cowen, 316.

83. 2 Halsted, 392. 17Mass. Rep. 564.

84. Popkin v. Bumsted, 8Mass. Rep. 491. Bird v. Gardiner, 10 ibid. 364. Coates v. Cheever, 1 Cowen, 460. Jackson v. Dewitt, 6 ibid. 316.

85. Brown v. Gibbs, Prec. in Ch. 97. Carbone v. Scarfe, 1 Aik. 605

86. Shoemaker v. Walker, 2 Serg. & Rawle, 554. Reed v. Morrison, 12 ibid. 18. Statutes of Virginia, 1785 and 1792. Miller v. Beverly, 1 Hen. BfMunf. 368. Clairborne v. Henderson, 3 ibid. 322. Griffith's Reg.

87. See Rowton v. Rowton.. 1 Hen, 3..Mjnf. 9.2

88. Swaine v. Perine. 5 john. Ch. Rep. 482 Gibson v. Crehore, 5 Pickering, 146

89. Palmes v. Danby, Prec. in Ch. 137.

90. Stewart v. Waters, 1 Caines' Cas. in Error, 47. Jackson v. Willard, 4 Johns. Rep. 41. Huntington v. Smith, 4 Conn. Rep. 235. Eaton v Whiting, 3 Pick. Rep. 484. d Vol. i. 741. sec. 7.

 

91. Vol. i. 741. Sec.7

92. 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. Rep. 534. it was held that the freehold was in the mortgagor before foreclosure or entry. If the morgagee 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 also the necessity or reason of the case.

93. Perkins, sec. 311, 312. 317.

94. Perkins, sec. 376. It was, however, re-enacted in totidern verbis in New York in 1787. Laws N.Y. sess. 10. ch. 4. sec. 4., and it is in substance adopted and enlarged by the N.Y. Revised Statutes, vol. i. 742. sec. 16, which declares, that “no judgment or decree confessed by or recovered against the husband; and no lathes, 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.”

95. Litt. sec. 393. Co. Litt. 240, h. Berkshire v. Vanlore, Winch. 77.

96. Perkins, sec. 381.

97. Perkins, sec. 379, 380. Park on Dower, 148.

98. Bro. tit. Tenures, p1. 33. tit. Dower, p1. 86. *Paine's case*, 8 Co. 34. Jenk. Cent. 1. case 6. p. 5.

99. Jenk. Cent. vb. sup. Preston on Abstracts of Title, vol, iii. 373. $teller's note 170. to Co. Litt. 241, a.

100. The cases of Sammes v. Payne, 1 Leon. 167. f oldsb. 81. Flavill v. Ventrice, Viner's Rbr. vol. ix. 217. F. pl. 1. Sumner v. Partridge, 2 Atk. 47. and *Buckworth v. Thirkell*, 3 Bos. & Pull. 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 arguments, is strongly condemned as being repugnant to settled distinctions on this abstruse branch of the law.

101. Butler's note 170. to Co. Litt. 241. a. Sugden on Powers, 333. Preston on Abstracts of Title, vol. iii. 372. Park on Dower, 168186.

102. Greene v. Greene, 1 Hammond's Ohio Rep. 538. 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.

103. N.Y. Revised Statutes, vol. i. 742. sec. 16.

104. 10 Co. 49. b. *Lampet's case*, Plowd. 504. Eare v. Snow.

105. Goodell v. Bingham, 1 Bos. & Pull. 192.

106. Butler's note 119. Co. Litt. 216. a., and note 330. to Co. Lit(.3?O. h. Gilbert on Uses. by Sugden, 321. note. Fearne on Remainders, vol. i. 437. note, 5th edit. Park on Dower, 85. 187, 188. Lord Eldon, in Maundrell v. Maundrell, 1o Vesey, 263. 265, 266. Heath. 1. in 3 Vesey, 657.

107. Butler's note 330. to lib. 3. Co. Litt.

108. Park on Dower, p. 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.

109. Laws N.Y. sess. 10. ch. 4. sec. 7. N.Y. Revised Statutes, vol. i. 741. sec. S. 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 vol. 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; 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 term 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 vol. 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 offense 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 impotentice. (N.Y. Revised Statutes, vol. ii. 142, 143, 144.) It may be very difficult to know 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 meanless, and it ought to be added, in justice to the revisers, that the bill, as originally reported by then, 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 offense, if any, which was to destroy the dower.

110. Swift's Digest, vol. i. 86. Dane's Abr. vol. iv. 672. 676.

111. 2 Blacks. Com. 130.

112. N.Y. Revised Statutes, vol. ii. 145. sec. 45. Connecticut Statutes, 180. tit. Dower. Mass. Stat. 1785. c. 69.

113. Co. Litt. 36. b. Vernon's rase, 4 Co. 1.

114. Sidney v. Sidney, 3 P. Wms.269. Blount v. Winter, cited in note to 3 Plowd. 277. The Master of the Rolls, in Seagrave v. Seagrave, 7 3 Vesey, 443.

115. Co. Litt. 36. b.

116. Lord Hardwicke, in Hervey v. Hervey, 1 Atk. 56e, 563. Jordan v. Savage, Bacon's Abr. tit. Jointure, B. 5.

117. Drury v. Drury, 5 Bro. P. C. 570. 4 Bro. Ch. Rep. 506, note. See also Caruthers v. Caruthers, ibid. 500.

118. Laws of New York, sess. 10. ch. 4. per. P.

119. N.Y. Revised Statutes, vol. 1. 741. sec. 9, 10.

120. The provisions of the statute of 27. Hen. VIII, have always been in force in Massachusetts. Hastings v. Dickinson, 7Mass. Rep. 153. And they have been essentially re-enacted in Connecticut, though there the jointure may consist of personal as well as real estate. Swift's Dig. vol. i 86. So, in Virginia, if the widow be evicted of her jointure, she has still a right to claim her dower. Ambler v. Weston, 4 Hen. 4 JITunf. 23. The lawof jointure under the statute of 27 Hen. VIII. exists in Pennsylvania and South Carolina, (2 Const. Rep. by Treadway, 747. 1 Dallas, 417.) 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. & Rawle, 309. But the N.Y. Revised Statutes would appear to have 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.

121. Wake v. Wake, 3 Bro. 255. 1 Vesey, jun. 335. S. C. Duncan v. Duncan, 2 Yeates' Rep. 302.

122. Co. Litt. 36. b. Harg. note 224. to lib. 1. Co. Litt. Lawrence v. Lawrence, 2 Vern. Rep. 365. 1 Dallas' Rep. 117. McKean, Ch. J. Larrabee v. Van Alstyne, 1 Johns. Rep. 307.

123. Lord Alvanley, in French v. Dacres, 2 Vesey, jun. 578. Lord Redesdale, in Birmingham v. Kirwan, 2 Sch. 4 Lef. 451. Larrabee v. Van Alstyne, 1 Johns. Rep. 307. Van Orden v. Van Orden, 10 ibid. 30. Jackson v. Churchill, 7 Cowen's Rep. 287. Pickett v. Peay, 2 Const. Rep. S. C. 746. See also, *Butler's and Baker's case*, 3 Leon. 272, arg. Gosling v. Warburton, Cro. Eliz. 128:

124. French v. Davies, 2 Vesey's Rep. 572. Strahan v. Sutton, 3 Ves. Rep. 249. Kennedy v. Nedrow, 1 Dallas' Rep. 415. Adsit v. Adsit, 2 Johns. Ch. Rep. 448. Jackson v. Churchill, 7 Cowen's Rep. 287. Pickott v. Peay, 2 Const. Rep. S. C. 746. Evans v. Webb, 1 Yeates' Rep. 424. Perkins v. Little, 1 Greenleaf, 150.

 

125. Vol. i. 741. sec. 11, 12, 15, 14.

126. The statute of Virginia of 1727, gave the widow nine months, and the statute of Vermont, in 1799, sixty days, to make her election; and if she made none, she was held exclusively to her dower at common law.

127. N.Y. Revised Statutes, vol. i. 742. sec. 15.

128. Co. Litt. 31. b.

129. N.Y. Revised Statutes, vol. i. 740. sec. 3.

130. 3 Mason's Rep. 351.

131. Catlin v. Ware, 9 JVtass. Rep. 218. Lufkin v. Curtis, 13 Ibid. 223. Powell v. M. and B. Man. Company, 3Mason's Rep. 347.

132. N.Y. Revised Statutes, vol. i. 758. sec. 11. The law commissioners in England, appointed by the crown in 1828, to inquire into the law of England respecting real property, for the purpose of ascertaining what improvements could be made therein, reported, in 1829, several very essential and fundamental alterations in the shape of propositions. If adopted by Parliament, they would remove a great deal of existing inconvenience, injustice, and absurdity, and assimilate the English law of real property, much more than it is at present, with the law of property in the United States.

Under the head of curtesy, they propose, (1.) That curtesy shall attach upon all hereditaments whereof the husband and wife were seized in law during the coverture, equally as if such seizin had been obtained in fact. (2.) Upon all hereditaments to which the husband and wife had a right in possession during coverture, although seizin thereof may not have been obtained: (3.) The right shall attach, notwithstanding there may have been no issue of the marriage, upon all hereditaments or property to which the same would have attached if issue had been born. (4.) If the deceased wife left issue living by a former husband entitled to her estate as her heir at law, the curtesy shall attach only upon an undivided moiety of such estate.

Under the head of dower, they propose, (1.) That dower shall attach at law upon hereditaments to which the husband, at his death, had a right, though e may not have had seizin thereof. (2.) The wife shall be entitled to dower in equity, out of all such hereditaments which belonged to the husband at his death, and, from their nature, subject to dower, as would, by the rules of equity, be subject to the husband's curtesy, had the same belonged to her, and the husband had survived her. (3.) The husband may, by conveyance or devise, bar his wife's dower, in all cases in which e might, by conveyance or devise, bar his heirs or issue in tail; and the widow's right of dower is likewise made subject to all charges and encumbrances made by the husband, and to his debts and contracts, in all cases in which his heir or devisee would be subject.

133. Co. Litt. 124. b.

134. Ch. 7.

135. N.Y. Revised Statutes, vol. i. 742. sec. 17.

136. Litt. sec. 43. Co. Litt. 32. b. 37. a. Doe v. Nutt, 2 Carr 4 Payne, 430. Jackson v. O'Donaghy, 7 Johns. Rep. 247. Jackson v. Aspell, 20 ibid. 411. Jackson v. Vanderheyden, 17 ibid. 167.Chapman v. Armstead, 4Munf 382. Moore v. Gilliam, 5 ibid. 346. Johnson v. Morse, 2 N. H. Rep. 49. Sheaffer v. O'Neil, 9 Nags. Rep. 13.

137. Den v. Dodd, Halsted, 367.

138. 3 Halsted, 129.

139. Stedman v. Fortune, 5 Conn. Rep. 462. Griffith's Reg. tit. Kentucky.

140. Branson v. Yancy, 1 Bad. & Dev. Eq. Cas. 12. 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.

141. Co. Litt. 32. b. 2 Inst. 2".

142. P. 307.

143. Litt. sec. 36. In the state of Alabama, the whole of the husband's mansion house is to be included in the one third, unless manifestly unjust. Griffith's Reg.

144. Co. Litt. 144. b. Popham, 87.

 

145. Co. Litt. 32. a. Perkins, sec. 342. 415. Park on Dower, 112. 252.

146. Stoughton v. Leigh, 1 Taunt. Rep. 409.

147. 5 Bos. & Pull. 33.

148. Litt. sec.44. Co. Litt. 32. b.

149. Co. Litt. 31. a.

150. Decided in the Supreme Court of New Hampshire in 1808, 1 Greenleaf, 54. note.

151. 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.; 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 Rela-, tion, p. 58.

152. Perkins, sec. 406.

153. Co. Litt. 32. a. Harg% note, 192, ibid.

154. Co. Litt. 32, b.

155. Co. Litt. 32. b

156. Fitz..Rbr. tit. Voucher, 288. and tit. Dower, 192. cites 17 Hen. III. Perkins, sec. 328.

157. Sir Matthew Hale's MSS. cited in Harg. Co. Litt. n. 193. to lib. 1. Co. Litt.

158. Humphrey v. Phinney, 2 Johns. Rep. 484. Catlin v. Ware, 9Mass. Rep. 218. Powell v. M. & B. Man. Co. 3 Mason's Rep. 347. Thompson v. Morrow, 5 Serg. & Rawle, 289. Hale v. James, 6 Johns. Ch. Rep. 258. Russell v. Gee, 2 Const. Rep. S. C. 994.

159. Hale v. James, 6 Johns. Ch. Rep. 258. Powell v. M. & B. Man. Co. 3Mason's Rep. 450.

160. Story, J. 3 Mason's Rep. 368.

161. 3 Mass. Rep.. 544.

162. 5 Serg. & Rawle, 289.

163. 3 Mason's Rep. 375.

164. 11 Johns. Rep. X10.

165. 13 Johns. Rep. 179.

166. Laws N.Y. sess. 29. Ch. 168.

167. 2 Johns. Rep. 484.

168. In the case of Powell v. M. & B. Man. Co. 3 Mason's Rep. 573. it was suggested, that in Hale v. James, 6 Johns.Ch.Rep. 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 benefitted 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 i and so he expressly de= Glared.

169. Vol. i. 742. sec. 19,!20,:1, to-, 28:

170. Co. Litt. 35. a.

 

171. Perking, sec. 419. Co. Litt. 384. b.

172. 9 Co. 176

173. N.Y. Revised Statutes, vol. i. 793. sec. 23.

174. Davenport v. Wright, Dy. 224. a. Sheppard', Touch. by Preston, Col. i. 28.32. Park on Dower, 311.

175. 1 Tre!. Con. Rep. S. C. 112.

176. 5 Dens. Ch. Rep. 555.

177. Oliver v. Richardson, 9 Vesey, 222. See also, Swaine v. Perine,5 John#. Ch. Rep. 482.

178. Vol. i. 742. sec. 18.

179. In the report of the English real property commissioners is 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 is the rule precisely in the N.Y. Revised Statutes, (see supra,) and in vol. ii. 303. '343. the writ of dower, as well as all other real actiowe, is abolished, and the action of ejectment substituted and retrained, after dismissing all the fictitious parts of it. The real actions are still retained in several of the United States. In Massachusetts is particular, the writ of right, and the possessory real actions, are not ply preserved, but they are in active and familiar use in all their varied forms and technical distinctions, after having become simplified, and rendered free from every troublesome encumbrance that perplexed the ancient process and pleadings. Under the free, liberal, and plastic genius of that republic, the pleadings remain admirable specimens of simplicity, brevity and precision, and display their clear, strong, and accustomed logic. 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 remain rooted, in a soil that never felt the fabric of the feudal system; whilst, on the other hand, the English parliamentary commissioners, in their recent report, have proposed 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 action, 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.”

180. Goodenough v. Goodenough, Dickens, 795. Curtis v. Curtis, 2 Bro. 620. Mundy v. Mundy, 4 Bro. 295. 2 Vesey, jun. 122. S. C.

181. Swaine v. Perine, 5 Johns. Ch. Rep. 482. Greene v. Greene, 1 Hammond's Rep. 535. Dr. Tucker, note to 2 Blacks. Com. 135.. n. 19.

182. Harrison v. Eldridge, 2 Halsted, 401, 402.

183. N.Y. Revised Statutes, vol. ii. 488-492. Coates v. Cheever. 1 Cowen,46d.

184. Perkins, sec. 521. Dy. 316. pl. 2. The Statute of Merton, 20 Hen. III. had this provision, and it has been frequently re-enacted in this state, and is included in the new revision of our statute laws N.Y. Revised Statutes, vol. i. 743. sec. 25.

185. Co. Litt. 41. b.

186. Co. Litt. 93. a. b.

187. *Oland's case*, 5 Co. t.16. Debow v. Titus, a Halsted, t5&.

188. Co. Litt. 55. b.

189. See vol. iii. 376.

190. Bevans v. Briscoe, 4 B arr. 6s Johns. 139.

191. Lord Hardwicke, in Casborne v. Searfe, 1 At/c. 606. Revel v. Watkinson, 1 Vesey, 93. and in Amesbury v. Brown, 1 Vesey, 480. Tracy v. Hereford, 2 Bro. 128. Penhyrn v. Hughes, 5 Vesey, 99.

192. Lord Eldon, in Earl of Buckinghamshire v. Hobart, 3 Swanst. 199

 

193. Roe v. P gson, 2 Arddd. Rep. 581. Amer. ed.

194. Rowel v. Walley, 1 Rep. in Ch. 219.

195. 4 Vesey, 24.

196. Lord Eldon, in White v. White, 9 Vesey, 560. Allan v. Back-house, 2 Ves. & Beam. 65.

197. 5 Vesey, 99.

198. Vide supra.

199. 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. Harb. 377, to lib. 1. Co. Litt. Park on Dower, 357.

200. Co. Litt. 53. a. b. Butler's note 122. to lib. 3. Co. Litt. Danc" Abr. vol. 3. tit. waste. passim. 2 Blacks. Com. 281.

201. Jackson v. Brownson, 7 Johns. Rep. 227.

202. Hastings v. Cruncklеton, 3 Yates Rep. 261.

203. Conner v. Shepherd, 15Mass. Rep. 164.

204. Findly v. Smith, 6 Munf. 134. Crouch v. Puryear. 1 Rand's Rep.253.

205. Parkins v. Coxe, 2 Hayw. 339.,

206. Ibid. 110.

207. Co. Litt. 54. a. 2 Inst. 145. 303.

208. White v. Wagner, 4 Harr. 8r Johns. 373.

209. In the case of the Governors of Harrow School v. Alderton, 2 Bos. & Pull. 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

210. Co. Litt. 53. b. 54. a.

211. Perrot v. Perrot, 3.1tk. 94. Aston v. Aston, 1 Vesey, 264. Vane v. Barnard, 2 Vern. 738. Lord Thurlow, in Tracy v. Hereford, 2 Bro. 138. Kane v. Vanderburgh, 1 Johns. Ch. Rep. 11. The N.Y. Revised Statutes, vol. i. 760. sec. 8. have incorporated the doctrine of these chancery decisions, so far as to give to the person seized 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 N.Y. sess. 34. ch..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, p. 329,

212. Pillsworth v. Hopton, 6 Vesey, 51. Storm v. Mann, 4 Johns Ch.Rep. 21

213. Gibson v. Wells, 4 Bos. & Pull. 290. Herne v. Bembow, 4 Taunt. Rep. 764.

214. See the just and able criticism by counsel on those decisions, in 4 Harr. Bf Johns. 378, 379. 388, 389, and the dictum of Johnson, J. ibid. 393.

215. 6 Edw. I. c. 5.

216. 2 Inst. 299.

217. 5 Co. 13.

218. Reeve's Hist. of the English Law, vol. ii. 73. 148. 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 yielded the like damages, and had a keeper set over her to guard against future waste.

 

219. Laws N.Y. 1787. sess. 10. ch. 6. Act of Virginia, 1794. ch. 139.

220. Cameron & Norw. N: C. Rep. 26. Ch. J. Parsons, in 4Mass. Rep. 563. Johnson, J. in 4 Harr. 8s Johns. 391. Mr. Dane, in his General Abridgment and Digest of American Law, vol. 3. ch. 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, p. 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 while I leave this point as I find it, resting on these conflicting opinions, 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, Rastel, and Coke, on the doctrines and pleadings in real actions. Until the late work of Mr. Roscoe on 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 luster on the profession in this country. I have recently been informed, that the Supreme Court of Massachusetts have decided the question of the forfeiture in waste, in accordance with the opinions which Ch. J. Parsons and Judge Jackson had previously expressed.

221. By the New York Revised Statutes, vol. ii. 334, 335. 343. the writ of waste, as a real action, is 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.

222. 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. b. 1 Vesey, 462.

223. Harg. note 3'77. to lib. 1. Co. Litt.

224. 4 Harr. 8r Johns. 381-385.

225. *Nihil de jure facere potest quis quod vertat ad exhceredationem Do vnini sui-si super hoc convictus fuerit fcedum de jure amittet.* Glanville, lib. 9. ch. 1. Litt. sec. 415. 2 Blacks. Com. 274

226. Co. Litt. 251. b. 252. a. 356. a. 2 Inst. 309. Statute of Gloucester, 6 Edw. I. c. 7. Preston on Abstracts of Titles, vol. 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, and then suffered a common recovery, he forfeited his life estate; but in Smith v. Clyfford, 1 Term Rep. 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, p. 125-140. has discussed this point, and examined those authorities, with much ability, and he holds the latter 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 seemingly apparent contrariety between them. The one justifies the latter case by showing that it went on new ground furnished by the statute of 14 Eli,:., subsequent to the first case; whereas the other, not being able to reconcile the cases on principle, condemns the latter decision with unceremonious and blunt severity.

227. 2 Inst. 309.

228. N. Y Revised Statutes, vol. i. 739. sec. 143. 145. McKee v. Pfout, 3 Dallas, 486.

229. Co. Litt. 229. a. Gilbert on Tenntre, Tit. discontinuance, 1 t~'.

230. Doe v. Danvers, 7 East's Rep. 321. Wells v. Prince, 9Mars. Rep. 508, Jackson v. Mancius, 2 Wendell, 357.

 

LECTURE 55

# Of Estates for Years, at Will, or at Sufferance

I. **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,[1] 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.[2]

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.[3] 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.[4] But the interest of the lessee was still insecure, until the statute of 21 Hen. VIII. c. 15, removed the doubts arising from the conflicting authorities, and enabled the lessee for years to falsify a recovery suffered to his prejudice.[5] 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.[6]

It was said, in the *Duke of Norfolk's case*,[7] 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, had 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.[8] 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. Barnes*.[9] 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 learning is fortunately not of much use or application in these United States, but a cursory view of its general principles seems to be due to the cause of legal science, and it will at least excite and gratify the curiosity of the American student.

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 encumbrance 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 possession, or to recover it when lost. This protection extends generally as against all

 

estates and encumbrances created intermediately between the raising of the term and the time of the purchase 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*,[10] 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 encumbrancers. Mr. Butler considered that case as the magna carts 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 remainder-man has no interest in them, other than a right to redeem, or fulfilling the purpose of their creation.

Where 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. 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 encumbrances, 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 encumbrance, 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 term.[11]

The same doctrine received the sanction of Lord Eldon, in *Maundrell v. Maundrell*,[12] 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 molded 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 encumbrancers 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.[13]

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.[14] 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 the purchaser, for an assignment of a term standing out in trustees.[15] 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.[16]

The purchaser or mortgagee may call for the assignment 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 of *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 system, which on this subject afford better security to title, and greater certainty to law.

A proviso of *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 if the term was once satisfied, and had not been assigned, it was subject to he barred by the operation of the statute of limitations. So, if it had been assigned, and had 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 us a defense 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 toxin to be a term in gross.

The two latest cases at law on the subject are those of *Doe v. Wrighte*, and *Doe v Hilder*.[17] In the first of those cases, a term for 1000 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 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 encumbrancer. The presumption of a surrender was deemed 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.[18] Lord Eldon was strongly opposed to the modern facility in courts of law, of sustaining the presumption of the surrender of a term.[19] But the Vice Chancellor, Sir John Leach, in *Emery v. Grocock*,[20] supports the doctrine of the K. B. in the most clear and decided language; and this would seem to be the most authoritative conclusion from the review of the cases on the subject.[21]

As the owner of the fee is entitled to all the benefits 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 be severed from it, or made to pass by a will not executed with the solemnities requisite to pass real estate.[22]

In this country, we have instances of long terms of near 1000 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.[23] Our registry acts applicable to mortgages and conveyances, determine the rights and title of *bona fide* purchasers and mortgages, 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; 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 property law.

In New York, under the recently revised statutes relative to uses and trusts,[24] these trust terms cannot exist for the purposes contemplated in the English equity system. All trusts, except those authorized and modified in 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 lands to be applied to the education or support of any person, during his life; 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. 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 this state.

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.[25]

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 seizin. The tenant was never technically seized, and derived no 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 by Bracton, and Fleta, and other ancient authorities;[26] 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. ch.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 with this amendment, that no agreement, not in writing, and subscribed by the party, for letting or hiring of lands, is valid for any longer period than one year from the making thereof.[27]

If land be let upon shares for a single crop only, that does not amount to a lease, and the possession remains in the owner.[28] But if 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.[29]

A lessee for years may not only assign, or grant over his whole interest, but he may underlet for any fewer or less number of years than he himself holds, and he may encumber the land with rent, and

 

other charges. If the deed passes all the estate, 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. 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.[30]

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.[31] Before entry under the lease, as a demise at common law, the lessee had only an executory interest, or *interesse termini*, and no possession.[32]

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 the 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.[33] 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 lease by indenture, or by a fine *sur concessit*, for years, and afterwards an estate vests in him, the indenture or fine will operate by way of estoppel, to entitle the lessee to hold the lands for the term specified.[34] 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.[35]

There are several ways in which a term for years may be extinguished.

(1.) *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.[36]

 

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 estate which is merged, and the lesser estate is extinguished.[37] As a general rule, equal estates will not drown in each other. The merger is produced, either from the meeting of an estate of higher degree, with an estate of inferior degree; or from the meeting of the particular estate, and the immediate reversion, in the same person. 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.[38] 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 reversioner to himself.[39]

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.[40] 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.[41] Surrender is the act of the party, and merger is the act of law. The latter consolidates two estates, and sinks the lesser in the greater estate. But the merger is co-extensive with the interest merged, as in the case of joint tenants, and tenants in common. The merger is only to the extent of the part in which the owner has two several estates. An estate may merge for one part of the land, and continue in the remaining part of it.[42]

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.[43] 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.[44] 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 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.[45] 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.[46]

Merger is not favored in equity, and is never allowed, 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 take place without regard to the intention, as in the instance mentioned by Lord Coke.[47] At law, the doctrine of merger will operate, even though one of the estates be held in 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.[48] 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 co-extensive, it has been held that the equitable estate merges in the legal, in equity as well as at law.[49] 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 existence.[50] 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.[51]

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.[52]

(2.) *By Surrender*.

Surrender is the yielding up of an estate for life or years, to him that has the next immediate estate in reversion or remainder, whereby the lesser estate is drowned by mutual agreement.[53] The under-lessee cannot surrender to the original lessor, but he must surrender to his immediate lessor or his assignee.[54] 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.[55] As there is a privity of estate between the parties, no livery of seizin is necessary to a perfect surrender, though (as we have already seen) the surrender is required by the statute of frauds to be in writing. It has accordingly been held by Lord Chief Baron Gilbert,[56] that a lease for years cannot be surrendered by merely cancelling of 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.[57]

To guard against the mischievous consequences which sometimes result from a surrender, in discharging the un der lessee from the payment of rent, and the conditions and dependent covenants annexed to his lease, the statute of 4 Geo. 11. 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 under-lessees, 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;[58] but in those states in which it has not been adopted, the question may arise how far the under-tenant, (whose derivative estate still continues,) is discharged front all the rents and covenants annexed to his tenancy, according to the authority of *Barton's case*;[59] and of *Webb v. Russell*,[60] in which that inequitable result is indicated. The same rule is declared in the text books of the old law.[61]

(3.) A term for years may be defeated by a condition, or by a proviso of *cesser* on the happening of a specified event, or by a, release to the disseizor of the reversioner.[62]

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, in 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. Where agreements have been adjudged not to operate by passing an interest, but to rest in contract, there have been, usually, either an express agreement for a further lease, or, construing the agreement to be a lease *in praesenti*, would work a forfeiture, or the terms have not been fully settled, and something further was to be done.[63]

Leases for years may be forfeited by any act of the 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 disseizin, or if he breaks any of the conditions annexed to the lease, he forfeits the same.[64] But these forfeitures are very 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.[65] As conveyances with us are in the nature of grants, and as grants pass nothing but what. the grantor may lawfully grant;[66] 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.

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.[67] The limitation and modifying of estates, by virtue of powers, came from equity into the common law, with the 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 has, 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.[68] 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 interests 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 construction in the Court of Appeals in South Carolina, in the case of *Black v. Ligon*.[69]

 

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 sub-lessees, 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 the prohibition against alienation. Even a lease for fifty-seven years was held to fall within the prohibition.[70] 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 remainder-man, or there is merely a defect in the execution of the power, equity will interfere and help the power.[71]

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 inducement to permanent improvements. But the landlord is not bound to renew without a covenant for the purpose;[72] 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.[73] These beneficial covenants to renew the lease at the end of the term, run with the land, and bind the grantee of the reversion.[74]

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.[75] If, however, the lease for years depends upon an uncertain event, as if a tenant for life, or a husband seized 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 takes them, if there would have been time to have reaped what had been sowed, provided the lessor had lived.[76] The common law made a distinction between the right to emblements, and the expense of plowing 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 compensation for plowing and manuring the land, provided the lease was determined before the crop was actually in the ground.[77]

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,[78] 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 year 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 any extraordinary and

 

unavoidable calamity, as tempests, fire, or enemies.[79] 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.[80]

II. **Of estates at will**.

An estate at will is where one man lets land to another to hold at the will of the lessor.[81] 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. 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 away the emblements.[82] 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 rents.[83] The tenant at will is also 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.[84]

Estates at will, in the strict sense, have become almost extinguished under the operation of judicial decisions. Lord Mansfield observed,[85] that an infinite quantity of land was held 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 bound to give reasonable notice of an intention to terminate the estate. The language of the books now is, that a tenancy at will cannot arise without express grant or contract, and that all general tenancies are constructively tenancies from year to year.[86] 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 term. 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, and half a year's notice to quit must be given, prior to the end of the term.[87] 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.[88]

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 determine 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 except at the end of the years.[89] The English rule of six months' notice prevails in New York, 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*,[90] 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*,[91] 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 Putney, upon an elaborate and thorough view of the subject, in *Ellis v. Paige*,[92] that in a tenancy at will the parties must give to each other reasonable notice of a determination of the will.[93] 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 proportionably reduced.[94] In Pennsylvania, the common 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, in the year 1772.[95]

The reservation of an annual rent is the leading circumstance that turns leases for uncertain terms into leases from year to year.[96] 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;[97] and an actual tenant at will has not any assignable interest, though it is sufficient to admit of an enlargement by release.[98] On the other hand, estates which are constructively tenancies for the term of a year, or from year to year, may be assigned.[99] A strict tenant at will, in the primary sense of that tenancy, is not entitled to notice to quit; nor is a tenant, whose term is to end at a certain time, for in that case both parties are apprized of their rights and duties. The lessor may enter on the lessee when the term expires, without further notice.[100] Except for the purpose of notice to quit, tenancies at will seem even still to retain their original character;[101] and the distinction between tenants from year to year, and tenants at will, was strongly marked in the case of *Nichols v. Williams*.[102]

The New York Revised Statutes[103] authorize a summary proceeding to regain the possession, where the tenant for one or more years, or for part of a year, or at will, or sufferance, holds wrongfully against his landlord; but it requires one month 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 above 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 and Maryland for such cases, and the statute requires in the one state three, and in the other one month's notice only, and they make no discrimination between different kinds of tenants.[104]

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,[105] 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. The exception is now dropped in the Massachusetts and New York statutes of frauds.[106]

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?[107] The whole of the title in the Pandects upon this subject,[108] 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 periods of the English law, when the doctrine was first introduced, with the overbearing claims of the feudal aristocracy, and the scrupulous technical rules of the common law.

III. **Of estates at sufferance**.

A tenant at sufferance is one that comes into the possession of land by lawful title, but holds over by wrong after the determination of his interest.[109] He has only a naked possession, and no estate which he can 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;[110] and, independent of statute, he is not liable to pay any rent.[111] 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.[112] 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.[113]

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 re-enacted in New York, though they are not generally adopted in this country.[114] There is, likewise, in this state, 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 seized 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 possessions.[115] This last provision was taken from the statute of 6 Anne, c. 18., and the common law 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.[116]

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.[117] Independent of any statute provision, the landlord may re-enter 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.[118] But the landlord would, 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 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.

## NOTES

1. Co. Litt. 46. a. See also, vol. ii. 278 of the present work.
2. Litt. sec. 67.
3. Co. Litt. 46. a. Lord Parker, in *Theobalds v. Duffoy*, 9 Mod. Rep. 102.
4. F.N.B. 198. cites 19 Hen. VI.
5. See a list of the authorities pro and con, taken principally from the Year Books, cited in the margin to Co. Litt. 46. a.
6. F. N. B. 221. 2 Blacks. Cam. 142. Reeves' Hist. of the Eng. law, vol. iv. 252, 235.
7. 3 Ch. Cas. 24.
8. *Denn v. Barnard*, Cowp. Rep. 597.
9. 1 Vent. 53. 80. 1 Lep. 270. S.C.
10. 1 Term Rep. 763. 1 Coll, Jurid. 251. S.C.
11. See the strong and lucid opinion of Mr. Fearne on the subject of these attendant terms, in 2 Coll. Jurid. 279.
12. 10 Vesey, 246.
13. *Capel v. Girdler*, 9 Vesey, 509,
14. *King v. Smith*, Sugden's Treat. of Vendors and Purchasers, App. n. 13. *The King v. St. John*, 2 Price, 317.
15. *Wilkes v. Bodington*, 2 Vern. 599.
16. *Wynn v. Williams*, 5 Vesey, 130.
17. 2 Barnw. & Ald. 710, 783.
18. See Mr., now Sir Edward B. Sugden's Letter to Charles Butler, Esq. on the doctrine of presuming a surrender of terms assigned to attend the inheritance.
19. 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 Essay on Vendors and Purchasers, for Lord Eldon's continued marks of disapprobation of the recent doctrine.
20. 6 Madd. Rep. 54.
21. 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, p. 477-512.
22. Levet v. Needham, 2 Vern. 138. Whitchurch v. Whitchurch, 2 P. Wms. 236. Villiers v. Villiers, 2 Atk. 71.
23. *Gay's case*, 5 Mass. Rep. 419. Brewster v. Hill, 1 N. H. Rep. 350.
24. N.Y. Revised Statutes, vol. i. 727, 728, 729, 730. sec. 45. 49. 55. 60, 61. 65. 67.
25. Gibbon's Hist. vol. viii. 86. note. Lord Kaimes' Gentleman Farmer, 407. cited in 1 Bro. Civil Law, 198. note. Dr. Browne, p. 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. Bell's Com. vol. i. 69, 70.
26. Fleta, lib. 5. c. 5. sec. 18, 19, 20. Dalrymple on Feudal Property, ch. 2. sec. 1. p. 25. Preston on Estates, vol. i. 204,205,206.

 

27. N.Y. Revised Statutes, vol. ii. 135. sec. 8.

28. Hare v. Celey, Cro. Eliz. 143. Bradish v. Schenck, 8 Johns. Rep. 151.

29. Jackson v. Brownell, 1 Johns. Rep, 267,

30. Holford v. Hatch, Doug. 183. Bacon, tit. Leases, I. 3.

31. Bacon's Abr. tit. Leases, M.

32. Co. Litt. 270. a. S. Touch. by Preston. 267.

33. Co. Litt. 46. b. 270. a. b. 338. a. Preston on Conveyancing, vol. ii. 211-217. Doe v. Walker, 5 Barnw. & Cress. 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 surrender 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 matadorphosed subita radice retenta est-stipite crura teneri.

34. Weale v. Lower, Pollexfen, 54

35. Co. Litt. 45. a. 47. b. Bacon's Abr. tit. Leases, 0. Preston on Convey. vol. ii. 136. 139.

36. 2 Blacks. Com. 177. Preston on Convey. vol. iii. P. 7. 15. 18. 23.

37. Ibid. p. 7.

38. Ibid. 182,183. 201.213. 219. 225. 261.

39. Doe v. Walker, 5 Barnw. & Cress. 111.

40. 3 Preston on Convey. 23.153.

41. ibid. 25.

42. Ibid. 88, 89.

43. Preston on Conveyancing, vol. iii. 50. 55. 87. 107. 166.

44. Preston on Conveyancing, vol. iii. 273. 285. 294. Donisthorpe v. Porter, 2 Eden's Rep. 162,

45. Ibid. 294. 5. 309

46. Ibid. 306. 7.

47. Co. Litt. 54. b. Preston, ibid. 43-49.

48. 1 P. Wms. 41. 1 Atk. 592. Preston on Convey. vol. iii. 314,315. 557. 558

49. Preston, *ub. sup.* 314-342. Donisthorpe v. Porter, 2 Eden's Rep. 162. Goodright v. Wells, Doug. 771. Wade v. Paget, 1 Bro. 363. Selby v. Asten, 3 Vesey, 339.

50. Forbes v. Moffatt, 18 Vesey, 384. Gardner v. Astor, 3 Johns. Ch. Rep. 53. Starr v. Ellis, 6 Johns. Ch. Rep. 393. Freeman v. Paul, 3 Greenleaf, 260. Gibson v. Crehore, 3 Pickering, 475.

51. Lord Rosslyn, in Compton v. Oxenden, 2 Vesey, jr. 261. James v. Johnson, 6 Johns. Ch. Rep. 417. James v. Morey, 2 Cowen, 246.

52. The 3d volume of Mr. Preston's extensive Treatise on Conveyencing, 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 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. I use language by no means too strong; nor do I perceive, with the exception of his treatise on merger, (and even that treatise is far too attenuated, and abounds in repetitions,) the evidence of any remarkable superiority of judgment in the management of his materials. His works have no claim to the merit of compactness, or of orderly and lucid arrangement.

53. Co. Litt. 337..b

54. Preston on Abstracts of Title, vol. 2. 7.

55. Livingston v. Potts, 16 John.. Rep. 28. Shep. Touch. by Preston, vol. 2. 300, 301. In that old and venerable work, under the title Surrender, the whole law is fully and clearly laid down; but Mr. Preston says, 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 is to be examined.

56. Magennis v. Macullagh, Gilb. Q we in Eq. 236.

57. Doe v. Sybourn, 7 Term Rep. 2. Goodtitle v. Jones, ibid. 47.Doe v. Hilder, 2 Barnw. & Ald. 782.

58. N.Y. Revised Statutes, vol. i. 744. sec. 2.

59. Moor, 94.

60. 3 Term Rep. 401.

61. Shep. Touchstone, by Preston, vol. ii. 301.

62. Co. Litt, 274. a.

63. Sturgeon v. Painter, Noy, 128. Foster v. Foster, 1 Lev. 55. Baxter v. Browne, 2 Wm. Blacks. Rep. 973. Goodtitle v. Way, 1 Term Rep. 735. Doe v. Clare, 2 ibid. 739. Roe v. Ashburner, 5 ibid. 163 Doe v. Smith, 6 East's Rep. 530. Poole v. Bentley, 12 ibid. 168. Morgan v. Bissell, 3 Taunt. Rep. 65. Jackson v. Myers, 3 Johns. Rep. 388. Jackson v. Clark, ibid. 424. 5 Johns. Rep. 77. Jackson v. Kisselbrack, 10 ibid. 336. Jackson v. Delacroix, 2 Wendell, 433. Preston on Convey. vol. ii. 177.

64. Co. Litt. 251. b. Bacon, tit. Leases, sec. 2.

65. N.Y. Revised Statutes, vol. i. 739. sec. 143. 146.; and see, as to other parts of the United States, supra.

66. Litt. sec. 608, 609, 610. 618. Co. Litt. 330. b. 332. e

67. Hale v. Green, 2 Rol.Abr. 261. pl. 10. Ram on Tenure and Tenancy, p. 75.

68. Lord Mansfield, in 1 Burr. 120. Campbell v. Leach, Amb. 740. Ex parte Smyth, 1 Swanst. Rep. 337. 357. Hale, Ch. B., in Jenkins v. Kemishe, Hard. 395. Sugden on Powers, 2 Lond. edit. 545. Roe v. Prideaux, 10 East's Rep. 158.

69. Harper's Eq Rep. 205.

70. 2 Dow, 90. 285. 5 ibid. 293. 1 Bligh, 339. Bell's Com. vol. i. 69.

71. Campbell v. Leach, Amb. 740. Shannon v. Bradstreet, 1 Sch. & Lef. 52. Sugden on Powers, 364--368. 564, 565. In ch. 10. of Mr. Sugden's Treatise of 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 N.Y. Revised Statutes, vol. 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 observations of the revisors, which were annexed to their proposed modification and digest of the law of powers, were particularly striking and valuable, and show that they had studied the doctrine as it existed in the English law thoroughly, and penetrated its labyrinth with searching sagacity and ultimate success. It is impossible to make such a technical subject intelligible to any but technical men, but the article of powers in the revised statutes, though incapable of being understood by the ley gents will relieve the profession and conveyancers wonderfully, and bar the introduction into this state of some of the most hidden mysteries of the science. The doctrine may be noticed hereafter in its application to different subjects, and I would now only observe that by the Revised Statutes, powers, as they before existed, are abolished, and precise rules substituted for the creation, construction, and execution of them. It provides, 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 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. N.Y. Revised Statutes, vol. i. 732, 733. sec. 73. 87, 88, 89, 90, 91. Every special and beneficial power, general or special, not embraced in the article, is declared not to be valid, and no power can be executed, except by an instrument in writing, which would be sufficient to pass the interest in it, if the person executing the power was the owner. No disposition, by virtue of a power, shall be void in law or equity, on the ground that it was more extensive than was authorized by the power, and the estate or interest. shall be valid, so far as it is embraced by the terms of the power. Ibid. sec. 92. 113. 123.

72. Lee v. Vernon, Bro. P. C. vol. vii. 432. ed. 1784. Robertson v. St. Johns, 2 Bro. 140.

73. Furnival v. Crew, 3 Atk. 83. Lord Eldon, in Willan v. Willan, 16 Ves. 84. Rutgers v. Hunter, 6 Johns. Ch. Rep. 215,

74. Moore, 159. Pl. 300.

75. Litt. sec. 68.

76. Co. Litt. 56. a.

77. Bro. Abr tit. Emblements, pl. 7. tit. Tenant pour Copie de Court roll, pl. 3. Stewart v. Doughty, 9 Johns. Rep. 108.

78. Dig. 19. 2. 9.

79. Dig. 19. 2. 15. 1. and 2.

80. Pindar v. Ainsley, cited by Buller, J. in 1 Term Rep. 312. See also, supra.

81. Litt. sec. 68.

82. 21 Hen. VI. 37. 35 Hen. VI. 24. pl. 30. 3 Hen. VIII. Keilw. 162. pl. 4. 13 Hen. VIII. 16. pl. 1. Litt. sec. 68. Co. Litt. 55. a. Viner's Abr. vol. 10. tit. Estate, 406. B. c. pl. 5. Kighly v. Bulkly, 1 Sid. 339

83. Kighly v. Bulkly, 1 Sid. 348. Leighton v. Theed, 2 Salk. 413.

84. Litt. sec. 69. Co. Litt. 56. b. 56. a. Ellis v. Paige, 1 Pickering, 43.

85. 3 Burr. 1607.

86. Preston on “Abstracts of Title, vol. ii. 25. Wilmot, J. 3 Burr. 1609.

87. Bro. Abr. tit. Lease, p1. 53. Layton v. Field, 3 Salk. 222.

88. Kingsbury v. Collins, 4 Bingham, 202

89. Leighton v. Theed, 1 Ld. Raym. 707. Doe v. Snowden, 2 W. Blacks. Rep. 1224. Doe v. Porter, 3 Term Rep. 13. Porter v. Constable, 3 Wils. 25. Right v. Darby, 1 Term Rep. 159. Roe v. Wilkinson, cited from M.S. in Butler's note, 228. to lib. 3. Co. Litt. Jackson v. Bryan, 1 Johns. Rep. 322.

90. 17,Mass. Rep. 287.

91. 2 Pick. 70.

92. 2 Pick. 71. note.

93. 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.

94. Right v. Darby, 1 Term Rep. 159. Doe v. Hazell, 1 Esp. N. P. Rep. 94.

95. Gibson, J. in Logan v. Herron, 8 Serg. & Rawle 458.

 

96. De Grey, Ch. J. in 2 W. Black. 1173.

97. Jackson v. Bradt, 2 Caines, 169.

98. Litt. sec. 460. Co. Litt. 270. b.

99. Preston on Abstracts, vol. ii. 25.

100. Messenger v. Armstrong, 1 Term Rep. 54. Bright v. Darby, ibid. 162. Jackson v. Bradt, 2 Johns. Rep. 169. Jackson v. Parkhurst, 5 ibid. 128. Bedford, v. McElhetton, 2 Serg. & Rawle, 49. Ellis v. Paige, 1 Pick. 43.

101. 7 Johns. Rep. 4. Nichols v. Williams, 8 Cowen, 75.

102. 8 Cowen, 13.

103. The N.Y. Revised Statutes, vol. i. 745. sec. 7. & vol. ii. 512, 513. sec. 28.

104. Stat. of Pennsylvania of March, 1772, and of, Maryland, Dec. 1793.

105. 29 Charles II chap. 3.

106. Putnam, J. in Ellis v. Paige, 2 Pick. 71. note. N.Y. Revised Statutes, vol. ii. 135. sec. 8.

107. Dig. 19. 2. 13. 11. Ibid. 1. 14. Pothier's Pandectae, tom. 2. 225. Brown's Civil Law, vol. i. 198. I have assumed the existence of the rule in the Roman law, requiring notice to quit, upon the credit of Dr. Brown; but he cites no authority for it, and I have not perceived it in the text of the Digest.

108. Lib. 19. tit. 2. Locati conducti

109. Co. Litt. 57. b.

110. Co. Litt. 270. b. Jackson v. Parkhurst, 5 Johns. Rep. 128. Jackson v. McLeod, 12 ibid. 182.

111. Cruise's Dig. tit. 9. ch. 2. sec. 6.

112. 2 Blacks. Cam. 150.

113. Co. Litt. 57. b. 2 Inst. 134.

114. N.Y. Revised Statutes, vol. i. 745. sec. 10, 11.

115. N.Y. Revised Statutes, vol. i. 749. sec. 7.

116. Co. Litt. 57. b. 2 Inst. 134.

117. See ante, vol. iii. 384. and N.Y. Revised Statutes, vol. i. 745. sec, 7,8,9,

118. Taylor v. Cole, 3 Term Rep. 292. 1 H. Blacks. 555. S. C. Taunton v. Costar, 7 Term Rep. 431. Argent v. Durrant, 8 ibid. 403. Turner v. Meymott, 1 Bingham. 158

 

LECTURE 56

## 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.[1] They are divided by Littleton[2] 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.[3] 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.[4] 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 divest the estate in reversion, or pluck the seignory out of the hands of the lord.[5] It was a tacit condition annexed 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 condition 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.[6] 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 seignory, as well as the tenant, for default on his part, to forfeit his freehold.[7]

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,[8]) and no other person could take advantage of a condition that required a re-entry to revest the estate. The 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 a release to the person who had the estate subject to the condition.[9] The assignee of the reversion could not enter for a condition broken, 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 to enable assignees of reversions to particular estates, to which conditions were annexed, to take advantage of the conditions; 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 re-enacted in some of these United States; and though the statute was made for the special purpose of relieving the king, and his grantees, under the numerous forfeitures and grants of estates that had belonged to monasteries and other religious houses, yet the provision is so reasonable and just, that it has doubtless been generally assumed and adopted as part of our American law.[10] 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.[11]

(2.) *Of conditions in deed.*

These conditions are expressly mentioned in the contract between the parties, as if a man (to use the case put by Littleton[12]) 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 breach of the condition; but the grantor or his heirs may enter and take advantage of the breach by ejectment, though there be no clause of entry.[13]

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.[14] 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 not assign or underlet without license, or do not marry a particular person.[15]

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 creating the estate.[16] A precedent condition is one which must take place before the estate can vest, or be enlarged; or if a lease be made to B. for a year, to commence from the first day of May thereafter, upon condition that B. paid 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 inn 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.[17] 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.[18]

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 seized, 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.[19]

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 would be forfeited, and go over to the residuary devisee as a contingent interest, on non-compliance in a reasonable time with the condition.[20] Though an estate be conveyed, it passes

 

to the grantee subject to the condition, and lathes 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.[21] It is a general principle of law, that he who enters for a condition broken, becomes seized of his first estate, and he avoids, of course, all intermediate charges and encumbrances.[22]

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.[23] 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.[24]

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 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 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. (and which was adopted in New York in 1788, and the provision is now incorporated into the body of the new Revised Statutes,[25]) for the formal re-entry at common law. But it is in the nature of a limitation to determine the estate when the period of the limitation arrives, with out entry or claim, and no act is requisite to vest the right in him who has the next expectant interest.[26]

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 it is so far a limitation, and to be distinguished from a condition, that upon the 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.[27] These conditional limitations, though not valid in the old conveyances at common law, yet, within certain limits, they are good in wills and conveyances to uses.[28]

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. 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.[29]

 

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 ú20. 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,[30] 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.[31]

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 of *summum jus*, and in many cases hardly reconcilable with conscience.[32] 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 divested, but becomes absolute.[33] So, if the condition be personal, as that the lessee shall not sell without leave, the executors of the lessee not being named, may sell without incurring a breach.[34] A court of equity will never lend its aid to divest 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.[35] But the relief, according to the modern doctrine in equity, is confined to cases where the forfeiture has been the effect of inevitable accident, and the injury is capable of compensation.[36] In the case of *Hill v. Barclay*,[37] 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 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 appertaining to an estate in tail or in fee. If the grant be upon condition that the grantee shall not commit waste, or not take the profits, or his wife not have her dower, or the husband his curtesy, the condition is repugnant and void, for these rights are inseparable from an estate in fee.[38] 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.[39] 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*.[40]

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,[41] 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 *Newkirk v. Newkirk*,[42] 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 continued 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.[43] Whether the words amount to a condition, or a limitation, or a covenant, may be matter of construction, depending on the contract.[44] 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 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.[45]

## NOTES

1. Co. Litt. 201. a.
2. Litt. sec. 325.
3. Litt. sec. 378, 380. Co. Litt. 215. b. 233. b. 234. b.
4. Co. Litt. 215. a. 251. b.
5. Glanv. lib. 9. ch. 1. Fleta. lib. 3. ch. 16. Wright on Tenures, 203.
6. Wright on Tenures, p. 196-199. Butler's note 84. to lib. 3. Co. Litt.
7. Fleta, lib. 3. ch. 16. sec. 9. 15. 25.
8. This ancient rule is noticed in the very modern case of *Jackson v. Topping*, 1 Wendell, 388.
9. Litt. sec. 347, 348. Co. Litt. 215. a.
10. Laws of N.Y. sess. 11. ch. 7. and N.Y. Revised Statutes, vol, i. 747. sec. 23, 24., and by Act of Virginia, November 29, 1792.
11. Co. Litt. 215. a. b.
12. Litt. sec. 325.
13. Lord Hardwicke, in *Wigg v. Wigg*, 1 Atk. 383. *Doe v. Watt*, 1 Mann. & Ryl. 694.
14. Litt. sec. 325. 327. Co. Litt. 203. a. Shep. Touch. 157.
15. Co. Litt. 206, 207. Shep. Touch. by Preston, vol. i. 128-130.
16. Ashhurst, J. in 1 Term Rep. 695. Lord Eldon, in 2 Bos. & Pull. 295. Heath, J. ibid. 297.
17. 2 Blacks. Com. 154.
18. *Popham v. Bampfield*, 1 Venn. 83.
19. 2 Blacks. Com. 156. Preston on Abstracts of Title, vol. ii. 185.

 

20. *Hayden v. Stoughton*, 5 Pick. Rep. 528.

21. Co. Litt. 246. b.

22. Perkins, sec. 840. Sh. Touch. by Preston, vol. i. 121. 155.

23. *Pells v. Brown*, 2 Cro. 591. Holt, Ch. J., *Page v. Hayward*, 11 Mod. Rep. 61. Lord Hardwicke, in *Wigg v. Wigg*, 1 Atk, 383. 2 Blacks. Com. 155.

24. Shep. Touch. by Preston, vol. i. 117. Preston on Estates, vol. i. 45. 49. 128, 129.

25. N.Y. Revised Statutes, vol. ii. 505. sec. 30.

26. Co. Litt. 214. b. 218. a. 10 Co. 40. b. 2 Blacks. Com. 155. Preston on Estates, vol. i. 46-48. Shep. Touch. by Preston, vol. i. 121.

27. Butler's note 99. to lib. 3. Co. Litt. Mr. Douglass, in a note to Doug. Rep. 755. thinks the distinction between a conditional limitation, and a remainder, merely verbal; but Mr. Fearne (Fearne on Remainders, p. 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 do appear to be subtly refined, and essentially verbal.

28. Fearne on Remainders, p.10. p. 391-393. 409. 410. In *Lady Ann Fry's case*, 1 Trent. 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. The N.Y. Revised Statutes, vol. j. 725. sec, 27. have established and made valid those conditional limitations, whether created by deed or will, and they have thus wisely put an end to the nice and unreasonable distinction in the English books on this point.

29. Co. Litt. 215. a. *Pennant's case*, 3 Co. 64. Preston on Abstracts of Title, vol. iii. 397. 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, vol. i. 40, 41. 63. Mr. Preston here confounds conditional and contingent limitations; but Lord Mansfield, in *Buckworth v. Thirkell*, 3 Bos. & Pull. 247. note. S. C. 1 Col. Jurid. 247. marked the distinction, and said there might be a limitation depending on a contingency without any condition in it.

30. Lect. 53.

31. *Poole v. Nedham*, Yelv. 149. *Baldwin and Cock's case*, 1 Lean, 74. Preston on Estates, vol. i. 43, 44. 49, 50.

32. Co. Litt. 205. b. 219. b. 8 Co. 90. b.

33. Co. Litt. 206. a. 208. b. 2 Blacks. Com. 156. Parker, Ch. J. in *Mitchel v. Reynolds*, 1 P. Wms. 189. Lord Ch. J. Preby, in *Cary v. Bertie*, 2 Vern. 339.

34. Dyer, 66. a. p1. 8 Moore, 11. p1. 40.

35. *Popham v. Bampfield*, 1 Yern. 83.

36. *Rolfe v. Harris*, 2 Price's Exch. Rep. 207. note. *Bracebridge v. Buckley*, ibid. 200.

37. l8 Vesey. 56.

38. *Mildway's case*, 6 Co. 40. Litt. sec. 360. Co. Litt. 208. b. 223, a. *Stukeley v. Butler*, Hob. 168.

39. *Mary Portington's case*, 10 Co. 42. a.

40. Co. Litt. 223. a.

41. Litt. Sec. 361. Co. Litt. 223.

 

42. 2 Caines' Rep. 345.

43. Best, Ch. J. in *Doe v. Phillips*, 9Moore's Rep. 46.

44. The words usually employed in creating a condition 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, etc. The apt words of limitation are, while-so long as-until-during, etc. 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. Bacon's Abr. tit. Conditions, H.

45. Litt. sec. 338. Co. Litt. 209. b. *Jackson v. Crafts*, 18 Johns. Rep. 110. *Swett v. Horn*, 1 Adam's N. H. Rep. 332.

 

LECTURE 57

# Of 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 approximated 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 origin and 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 origin and general nature of mortgages.*

The English law of mortgages appears to have been borrowed, in a great degree, from the civil law; and the Roman *hypotheca* corresponded 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.[1] 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 with the more absolute alienation of the fee; and both the alienation and the mortgage of land were permitted only with the concurrence of the lord.[2]

The English books distinguish 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 payment; and if he did not, then the land was lost, and became dead to him for ever.[3] This latter kind of mortgage is the one which is generally in use in this country. The Welch mortgages, which are very frequently mentioned in the English books, though they have now gone entirely 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.[4]

There is a 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. If no 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.[5]

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 him to redeem by a given day, or be for ever 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.[6] The distinction between a pawn and a 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.[7]

According to the civil law, a pledge could not be sold without judicial sanction, unless there was a special agreement to the contrary; 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 debtor, was declared to be void.[8]

hile on this subject of pledges, it may be proper 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.[9] But without any bill to redeem, the creditor may sell at auction, on giving reasonable opportunity to the debtor to redeem, and apprizing him of the time and place of sale; and this is the more convenient and usual practice.[10] 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 be, comes entitled to redeem.[11]

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 re-entry, 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 forfeited, and the estate became absolute in the mortgagee, without the right or the hope of redemption.[12]

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.[13] 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 past.[14] 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.[15] If the representatives of the mortgagee were mentioned in the feoffment, whether they were heirs, executors, or assignees, the payment could rightfully be made to either of them.[16]

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. 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.[17] The practice of placing the conveyance in fee, 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.[18] 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.[19]

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 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.[20] 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 to show that an absolute deed was intended as a mortgage, and that the defeasance has been omitted or destroyed by fraud or mistake.[21]

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. An agreement, at the time of the loan, to purchase

 

absolutely for a given price, in case of default, is not permitted to interfere with the right of redemption;[22] though an agreement to give the mortgagee the right of preemption in case of a sale has been assumed to be valid.[23] 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.[24] He may become the purchaser at the sale of the mortgaged premises by the master under a decree,[25] 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.[26] 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.[27]

The case of an absolute sale, with an agreement for a re-purchase within a given time, is totally distinct, and not applicable to mortgages. Such 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.[28]

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.[29] 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. 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*,[30] which had declared a contrary doctrine, after being repeatedly attacked, was at last entirely destroyed as an authority.[31]

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.[32] 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.[33]

 

It is usual to add to the 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 postponed, again and again, from six months to six months, to the great annoyance-of the mortgagee.[34] 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.[35] 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,[36] though it is considered as rather unnecessary and cumbersome. The mortgagee 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.[37] 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.[38]

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 this state 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.[39] These powers fall under the class of powers appendant or annexed to the estate, and they are powers coupled with an interest, and 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.[40] 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.[41]

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;[42] 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.[43] Such powers are construed liberally in furtherance of the beneficial object. A 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.[44] 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.[45]

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.[46] This rule more strongly applies to extended, than to restricted executions of powers, for *omne magis 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.[47] In respect, however, to the execution of a power to sell contained in a mortgage, I apprehend, that the specific directions usually contained in the mortgage, and particularly when they are the subject of a statute provision, will preclude all departure from those directions, and consequently that the power in a mortgage to sell would not include a power to lease. It is declared by statute in this state, 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.[48]

A very vexatious question has been agitated, and has distressed the English courts, from the early case of *Graves v. Mattison*;[49] down to the recent decision in *Wynter v. Bold*,[50] 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 "roll'd in tangles," and subtle disputations, and eternal doubts, will insensibly encumber and oppress a 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 the 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 150 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 parents, nor until it had become vested in the trustees in possession.[51] 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 interests of the person in reversion or remainder; and modern settlements usually contain a prohibitory clause against it.[52]

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 *Russell v. Russell*, in 1783.[53] It was followed by the decision in *Birch v. Ellames*,[54] 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 mortgagor, and all who claim under him, with notice, either actual or constructive, of such deposit 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.[55]

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.[56] 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 lien.[57] 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 mortgagee.[58]

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 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. This equitable mortgage will bind the vendee and his heirs, and volunteers, and all other 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 real or other personal security, or where the object of the sale was not money, but some collateral benefit.[59] In *Mackreth v. Symmons*,[60] 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;[61] and it has been extensively recognized and adopted in these United States.[62]

It has been a question much discussed, as to the facts and circumstances which would amount to the taking of security from the vendee, so as to destroy the existence of the lien. In several cases it is held, that 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 covenant 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. But 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. Taking the deposit of stock is also a waiver of the lien;[63] and, notwithstanding the decision of the master of the rolls, in *Grant v. Mills*,[64] 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.[65]

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 vendor's lien cannot be retained against creditors, holding under a *bona fide* conveyance from the vendee.[66] The 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.[67]

(2.) *Of the mortgagor's estate and Equity of Redemption.*

 

Upon the execution of a mortgage, the legal estate vests in the mortgagee, subject to be defeated upon performance of the condition. 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 practice, 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 suit. This is the English doctrine, and I presume it prevails very extensively in the United States.[68]

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.[69] 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.[70] 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. 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,[71] for no rent is reserved; and so long as he pays his interest, he is not accountable, in the character of a receiver, 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; 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.[72]

But whatever character we may give to the mortgagor in possession by sufferance of the mortgagee, he is still a tenant.[73] 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 belong to his anomalous character, and is the most appropriate term that can be used.[74]

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 disseizor, or lessee, at his election. This is supposed by Mr. Coventry to be the better opinion.[75] The lease of the mortgagor is said to amount to a disseizin 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 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. 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.[76] 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 now 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."[77] 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 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*;[78] 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*,[79] and it pervades all the subsequent and modern cases on the subject, both in England and in this country.[80]

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 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.[81] 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 fair a debt. This is the conclusion to be drawn from a view of the English and American authorities.[82]

The equity of redemption is not liable, under the English law, to sale or execution, as real estate.[83] It is held to be equitable assets, and is marshaled according to equity principles.[84] But, in this

 

country, the rule has very extensively prevailed, that an equity of redemption was vendible as real property on an execution at law, and it is also chargeable with, the dower of the wife of the mortgagor.[85] On the other hand, the estate of the mortgagee, before foreclosure, is not the subject of execution, not even though there has been a default, and the condition of the mortgage forfeited.[86] 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.[87] It was, also, by the statute of 7 and 8 Wm. III. that 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.[88] But an action at law by the mortgagee, will not lie for the commission of waste, because he has only a contingent interest[89] and yet actions of trespass, *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.[90]

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;[91] 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 this state, 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 enlarged discretion of a court of equity, which would interfere for his indemnity in special cases in which justice manifestly required it.

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 remainder-man and reversioner, a judgment-creditor, and every other encumbrancer, unless he be an encumbrancer *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.[92] Lord Hardwicke felt himself bound to allow a prowling assignee, who had bought in the equity of redemption for an inconsiderable sum, to redeem.[93] 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.[94] 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.[95]

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 portion of equity jurisdiction.[96] In carrying

 

the right of redemption into effect, a court of equity is sometimes obliged to marshal the burden according to the equity of the different claimants, in order to preserve a just proportion among those who are 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.[97]

(3.) *Of the estate and rights of the mortgagee*.

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 by-gone rents, for he possessed in his own right, and not in the character of receiver.[98] 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 to be paid him, and in default he may distrain.[99] 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*;[100] 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.[101]

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,[102] 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 the 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.[103] The statute of 11 Geo. II c. 19. expressly admitted of the attornment to 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.[104]

It will depend, therefore, upon the act of the tenant, under a lease from the mortgagor subsequent to the mortgage, whether the mortgagee can sustain a suit or distress for the rent prior to his recovery in ejectment. In this state, 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.

If the mortgagee obtains possession of the mortgaged premises before foreclosure, he will be accountable for the actual receipts of rents and profits, and nothing more, unless they were reduced, or lost by his wilful default, or gross negligence.[105] By taking possession, he imposes upon himself the duty of a provident owner, and he is bound to recover what such an owner would, with reasonable diligence, have received.[106] 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 collecting and receiving the rents.[107] 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. is allowed to the mortgagee for managing the estate.[108]

The mortgagee in possession is likewise allowed for necessary expenditures in keeping the estate in repair, and in defending the title;[109] 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,[110] and they have been sometimes allowed, and sometimes disallowed, in this country.[111] The mortgagee in possession holds the estate strictly as a trustee, with the duties and obligations 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.[112]

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 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.[113] 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.[114]

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 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 mortgage of it.[115] 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.[116] 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, 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.[117] Lord Hardwicke, in the great case of *Le Neve v. Le Neve*,[118] 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 "wrapt 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.[119]

The statute of New York postpones an unregistered deed, only as against a subsequent purchaser 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. The doctrine of notice equally applies, however, as I apprehend, throughout the United States, and it every where turns on a question of fraud, and on the evidence requisite to infer it.[120]

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 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.[121] Though the cases use very strong language in favor of 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.[122] 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 encumbrance was received, the mortgagee has then a right to try his speed in attaining a priority of registry.[123]

As courts of law have concurrent jurisdiction with courts of equity, in case of frauds, it was adjudged, in *Jackson v. Bargott*,[124] that the question of notice, and of the preference due to the prior unregistered deed, by reason of notice, was cognizable in a court of law. But in *Doe v. Allsop*,[125] 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 *bona fide* purchaser; and as the statute in New York uses the words purchaser in good faith, the jurisdiction of our 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 subsequent docketed judgment, and the statute regulations concerning the registry of mortgages, and the docketing of judgments, do not reach the case. 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.[126] The rule in Pennsylvania is different;[127] 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 encumbrance, 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 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 seizin, to the prejudice of the mortgage. This sound doctrine is, for greater certainty, made a statute provision in New York.[128]

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, is 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.[129] But Lord Camden was evidently of a different opinion, though he held himself bound by precedents to consider the registry not notice.[130] In this country, the registry of the deed is held to be constructive notice of it to subsequent purchasers and mortgagees;[131] 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.[132]

The ancient rule was, that if the mortgagor contracted further debts with the mortgagee, he could not redeem without paying those debts also.[133] 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.[134] 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 himself, or his assignee for valuable, consideration, or devisee for the payment of debts.[135] 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 encumbrance, with notice of the agreement.

The principle is, that subsequent advances cannot be tacked to a prior mortgage, to the prejudice of

 

a *bona fide* junior encumbrancer; but a mortgage is always good, to secure future loans, when there is no intervening equity.[136] It is necessary that the agreement, as contained in the 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 encumbrance. This is requisite to secure good faith, and prevent error and imposition in dealing.[137] It is the settled rule in England, that a regularly executed mortgage cannot be enlarged, by tacking subsequent advances to it, in consequence of any agreement by parol;[138] and an agreement to that effect in writing could not, as I apprehend, affect a subsequent encumbrancer, unless he had dealt with the mortgagor with full knowledge of the agreement.

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 a preference over it. The same rule would apply if the first, as well as the second encumbrance, was a judgment; but the encumbrancer 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, has, nevertheless, its root in the Roman law.

The general maxim in that system, on the subject of pledges and hypothecations, was, *qui prior est tempore potior est jure*; but it yielded to this doctrine of substitution, when the subsequent encumbrancer took the place of a prior one by purchasing in the first mortgage, and tacking it to his own.[139] 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 encumbrance is not constructive notice, as we have already seen) of the intervening encumbrance. 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*.[140]

The English doctrine of tacking was first solemnly established in *Marsh v. Lee*,[141] 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. Dutchess of Marlborough*.[142] It was admitted in this last case, that the rule carried with it a great appearance of hardship, inasmuch as it defeated an innocent second encumbrancer 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 encumbrance; and the equities between the second and third encumbrancers 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 has "both law and equity for him." The legal title and equal equity prevail over the equity.[143]

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.[144] This leaves the doctrine of 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.[145] 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 encumbrancers are to be made parties to a bill to foreclose, that their claims may be chargeable in due order.[146]

There is no natural equity in tacking, and when it supersedes a prior encumbrance it works manifest injustice. By acquiring a still more antecedent encumbrance, the junior party acquires, by substitution, the rights of the first encumbrancer 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 recorded today, and B., whose deed is with equal honesty acquired and recorded tomorrow, 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.

With the abolition of the English system of tacking, we are relieved from a multitude of refined distinctions, which have given intricacy to this peculiar branch of equity jurisprudence. The doctrine of notice is also of very extensive application throughout the law of mortgage, and it 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 it depends upon the infinitely varied circumstances of each case. The general doctrine is, that whatever puts a party upon 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. 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, 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. 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 conditions of the lease.[147]

IV. *Of foreclosure.*

The equity of redemption which exists in the mortgagor, after default in payment, may be barred or foreclosed, if the mortgagor 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 the encumbrances according to priority.[148]

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, Tennessee, Kentucky, and probably in several other states.[149] 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. In Massachusetts and Maine, the mortgagor has

 

three years, and in Connecticut fifteen years, and in New Hampshire one year, to redeem after entry and seizin by the mortgagee, upon breach of the condition, or under the decree of foreclosure.[150] The severity of the 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.[151]

But, 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 tie 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. But, according to the case of *Took v. Hartley*,[152] 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 the 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.[153]

There has been some embarrassment and conflict of opinion manifested 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.[154] 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 reconveyance is gone, for it would be inequitable to open the foreclosure against the purchaser. But in *Hatch v. White*, the reasoning of the court was against the conclusion, that the suit at law opened the foreclosure in any case.

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.[155] 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*,[156] and that the proper remedy was to prohibit the mortgagee from selling at law the equity of redemption.[157]

When he proceeds by bill to foreclose, he must make all encumbrancers existing at the filing of the bill, (and which of course includes the junior, as well as prior encumbrancers,) parties, in order to prevent a multiplicity of suits, and that the proceeds of the mortgaged estate may be duly distributed, and the encumbrancers who are not parties will not be bound by the decree.[158] The reason of the rule

 

requiring all encumbrancers, 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 encumbrancers who are not parties.[159] If a surplus remains after satisfying the encumbrancers who are brought into court, it will be paid over to the mortgagor as the proceeds of his equity of redemption, though subsequent encumbrancers who were not parties, would probably be permitted, on application to the court, and due proof of their title, to intercept its transit.[160]

The general rule is, that all persons materially interested in the mortgage, or mortgaged estate, ought to be made parties to a bill to 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 remainder-man, for they all may be interested in the right of redemption, or in taking the accounts. If the mortgage consists of a reversion or remainder, subject to an estate for life, it may be foreclosed, but the estate of the tenant for life would not be affected, and he would have no interest in the foreclosure.[161] The bill to foreclose is filed in the name of the mortgagee, or of 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.[162] 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.[163]

The right 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 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.[164] 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 the right to redeem from twenty years, as it before

 

stood, to ten years.[165]

It is the better and prevailing opinion in the English courts, that if a mortgagee enters in the lifetime of the tenant for life, the remainder-man will be barred of his right to-redeem after twenty years from such entry. The principle is, that the remainder-man 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[166] and of Sir William Grant, and it was so decided in *Harrison v. Hollins*.[167] 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.[168]

As the right of redemption belongs exclusively to a court of equity, the remainder-man's bill to redeem must, in New York, be filed within ten years "after the cause thereof shall accrue;"[169] and whether the cause for redemption, as respects the remainder-man, 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 remainder-man 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 remainder-man, 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, in those instances where the remainder-man might-have called on him sooner, very consistent with true policy and substantial justice.[170]

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 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.[171] 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 by parol proof, or circumstances sufficient to put down or destroy the contrary presumption.[172]

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.[173] In New York,[174] and probably 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 unsatisfactory 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 encumbrancers 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 a statute regulation on the subject in March,, 1774.[175] As proceedings under a power are *in pais*, and no day in court is given to. the mortgagor to set up any equitable. defense, a court off equity will interfere, where payments have been: made, and not. credited, and stay the proceedings, and regulate the gale 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.[176] A sale under a power, as well as under a decree, will bind the infant heirs, for the infant has no day after 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.[177]

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 be not part of the decree, 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.[178] 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. 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.

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. In England the sale has the attributes of 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.[179]

If a mortgage be satisfied 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.[180] 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.[181] But the general understanding, and the practice on this subject in this country, has been different, 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*,[182] 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 to the mortgagor. 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 accessary, 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 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, are with the doctrine.[183]

In Massachusetts, the technical rules of the common law are more 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. So, also, in New Jersey, notwithstanding the opinion that was declared in *Den v. Spinning*, the old English strict common law doctrine is recalled, and it is now held, that payment of the debt does not cause the title to revert to the mortgagor, and a conveyance is held to be necessary. This is the doctrine also in Maine, Connecticut, Virginia, and Kentucky.[184]

## NOTES

1. 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 v,_,v of the Roman hypotheea, 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 a 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 a judicial decree. (Code, 8. 28. 4. Ibid. 34. 3. sec. 1.) The mortgagee was even allowed to tack another encumbrance to his own, and thereby to gain-a preference over an intermediate encumbrance. (Dig. 20. 4. 3.) The analogy might be traced in other important particulars. See Pothier's Pandectee Justinianece, lib. 27. and Dict. du Digest par Thevenot-Dessaules, tit. Hypotheque, passim. In Doctor Brown's View of the Civil Law, vol. i. p. 200-210, the general features of similitude between the Roman hypotheca and the English mortgage, are strongly delineated.

2. Glanville, lib. 10. ch. 6. Nulli liceat feudum vendere vet pignorare sine permissione illius domini. Feud. lib. 2. tit. 55.

3. Co. Litt.,x.05. a. 2 Blacks. Cam. 157.

4. Fulthrope v. Foster, 1 Vern. 476. The Welch 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 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 inhonesta. Glan. lib. 10. ch. 6. and 8. The French code civil, no. 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.

5. Bro. Abr. tit. Pledges, p1. 20. tit. Trespass, pl. 271. Burnet, J. is Ryall v. Rowley, 2 Vesey, 358. 359. Mores v. Gorham, Owen's Rep. 123. Ratcliff v. Davis, 1 Bulst. 29. Cro. Jac. 244. Yelv. 178. S. C. Comyn's Dig. tit. Mortgage by Pledge of Goods, b. Demaudray v. Metcalfe, Prec. in Ch. 419. Vandezee v. Willis, 3 Bro. 21.

6. Glanville, lib. 10. dh. 6. 8.

7. The Master of the Rolls, in Jones v. Smith, 2 Vesey, jr. 378. Powell on Mortgages, p. Barrow v. Paxton, 5 Johns. Rep. 258. Brown v. Bement, 81bid. 96. McLean v. Walker, 10 Ibid. 471. Garlick v. James, 12 Jbid. 146. Wilde, J. in 2 Pick. 610. Haven v. Law, 2 X.. H. Rep. 13. De Lisle v. Priestman, 1 Brown's Penn. Rep. 176.

8. Inst. lib. 2. tit. 8 sec. 1. Vinnii Com. h. t. Code 8. 35. 3. Perezius on the Code, vol. ii. 62. tit. 34. sec. 4, 5. p. 63. sec. 8. Bell's Com. on the Law of Scotland, vol. ii. 22. 5th edit. Merlin's Repertoire, art. Gage. Code Civil, art. 2078. Institutes of the Laws of Holland, by J. Vanderlinden, translated by J. Henry, Esq. p. 180.

9. Kemp v. Westbrook, 1 Vesey, 278. Demendray v. Metcalf, Pree. in Ch. 419. Vanderzee v. Willis, 3 Bro. 21.

 

10. Tucker v. Wilson, 1 P. Wms. 261. 1 Bro. P. C. 494. edit. 1784. Lockwood v. Ewer, 2 Atk. 303. Hart v. Ten Eyck, 2 Johns. Chan. Rep. 100.

11. Kemp v. Westbrook, 1 Vesey, 278. N.Y. Revised Statutes. Vol. 1366. tec. 20.

12. Litt. sec. 332.

13. Co. Litt. 210. b.

14. Litt. sec. 337.

15. *The Lord Cromwel's case,* 2 Co. 79. Litt. sec. 334. Co. Litt. 208. b.

16. *Goodell's case,* 5 Co. 95. Co. Litt. 210. This case of Goodell, 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.

17. Dey v. Dunham, 2 Johns. Ch. Rep. 182. N.Y. Revised Statutes, vol. i. 756. Harrison v. The Trustees of Phillips Academy, 12 Mass. Rep. 456. Blaney v. Bearce, 2 Greenleaf, 132

18. Lord Talbot, in Cotterell v. Purchase, Cases temp. Talbot, 89. Baker v. Wind, 1 Vesey, 160.

19. Lund v. Lund, 1 X. H. Rep. 39. Bickford v. Daniels, 2 ibid. 71. Runlet v. Otis, ibid. 167. Erskine v. Townsend, 2Mass. Rep. 493. Kelleran v. Brown, 4Mass. Rep. 443. Stocking v. Fairchild, 5 Pick. Rep. 181.

20. Taylor v. Weld, 5Mass. Rep. 109. Cary v. Rawson, 8Mass. Rep. 159. Wharf v. Howell, 5 Binney, 499. Menude v. Delaire, 2 Dessaus. 564. Reed v. Landale, Hardin, 6. James v. Morey, 2 Cowen's Rep. 246. Anon. 2 Hayw. 26. Dabney v. Green, 4 Hen. 8fMunf. 101. Thompson v. Davenport, 1 Wash. Rep. 125. Hughes v. Edwards, 9 Wheat. Rep. 489.

21. Maxwell v. Mountacute, Pree. in Ch. 526. Lord Hardwicke, in Dixon v. Parker, 2 Vesey, 225. Marks v. Pell,! Johns. Ch. Rep. 594. Washburne v. Merrills, 1 Day, 139. Strong v. Stewart, 4 Johns. Ch. Rep. 167. James v. Johnson, 6 Johns. Cle. Rep. 41'7. Clark v. Henby, 2 Cowen's Rep. 324. Murphy v. Tripp, 1 Monroe's Rep. 73. Slee v. Manhattan Company, 1 Page, 48.

22. Bowen v. Edwards, 1 Rep. in Ch. 117. Willett v. Winnell, 1 Vern. 488.

23. Orby v. Trigg, 3 Eq. Cas..fibr. 599. pl. 24. 9 Mod. 2. S. C.

24. Wrixon v. Cotter, 1 Ridgway, 295. Austin v. Bradley, 2 Day, 466. Lord Redesdale, in Hicks v. Cooke, 4 Dow, 16.

25. Ex parte Marsh, 1 Madd. Ch. Rep. 148,

26. N.Y. Revised Statutes, vol. ii. 546. sec. 7. and 14.

27. Munroe v. Allaire, cited in 1 Caines' Cases in Error, 19, Davoue v. Fanning, 2 Johns. Ch. Rep. 252. Downes v. Grazebrook, s Merivale, 200. Slee v. Manhattan Company, 1 Paige,48.

28. Barrell v. Sabine, 1 Vern. 268. Endsworth v. Griffith, 15 Viner, 468. pl. 8. Longuet v. Scawen, 1 Vesey, 405. 1 Powell on Mortgages, 138. note T.

29. Lord Eldon, in Carleton v. Leighton, 3 Merivale. 667. e

30. Doug. Rep. 455.

31. 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 N.Y. Revised Statutes, vol. i. 739. lands held adversely mass be mortgaged, though they cannot be the subject of grant.

32. Wilson v. Kimbley, 7 East, 128.

33. Floyer v. Lavington, 1 P. Wms. 268. Briscoe v. King, Cro. Jac. 281. Yelv. 206. Lord Hardwicke, in Lawless v. Hopper, 3 Atk. 278. Drummond v. Richards, 2 Munf. 337. This doctrine has been made a statute provision in the N.Y. Revised Statutes, vol. i. 738. sec. 139. where it is declared, that no mortgage shall be construed as immplying 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. In Ancaster v. Masses, 1 Bro. C. C. 464. 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 simple contract creditor, for there was still a debt; but. the statute in New York has disregarded the suggestion.

34. In Edwards v. Cunliffe, 1 Madd. Ch. Rep. 160. the usual order on foreclosure was, that the mortgagor pay in six months, or stand foremclosed. This was afterwards enlarged to six months more, then to five, then to three, and to three again.

35. 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, Comyn's Rep. 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 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 ten.ar cem propositi virum?

36. Anon. 6 Madd. Ch. Rep. 15.

37. Ibid.

38. Corder v. Morgan, 18 Vesey, 394.

39. N.Y. Revised Statutes, vol. ii. 545. sec. 1 and 2.

40. Bergen v. Bennett, 1 Caines' Cases in Error, 1. Wilson v. Troup, 2 Cowen, 195. N.Y. Revised Statutes, vol. is 735. sec. 108. 737. sec. 133.

41. Wilson v. Troup, *ub. sup.*

42. Wilson v. Troup, 7 Johns. Ch. Rep. 25.

43. 1 Powell on Mortgages, 61. a. ed. Boston, 1828.

44. Roberts v. Dixall, 3 Eq. Cas. Abr. 668. p1. 19. Kenworthy v. Rate, 6 Vesey. 793.

45. Lingon v. Foley, 2 Ch. Cas. 205. Sheldon v. Dormer, 2 Vern. 310. Trafford v. Ashton, i P. Wms. 415. Allan v. Backhouse, 2 Ves. & Beam. 65.

46. Joy v. Gilbert, 2 P. Wms. 13. Mills v. Banks, 3 ibid. 1.

47. Isherwood v. Oldknow,, 3 Maule & Selw. 382. Sugden on Powers, 447. 449. 2d London ed.

48. N.Y. Revised Statutes, vol. i. 786. sec. 119, 120,121.

49. Sir T. Jones, 201.

50. 1 Simon 8r Stuart, 507.

51. Sir Joseph Jekyll, in Evelyn v. Evelyn, 2 P. Wms. 661. 14 Viner, 240. p1.11.

52. See Coote's Treatise on the Law of Mortgages, p. 147. to 163. and 1 Powell on Mortgages, p. 74. to 100. Boston ed. 1828, where the 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 IL, when the first adjudication was made, down to the present day, have expressed an opinion, either for or against the expemdiency 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 N.Y. Revised Statutes, vol. 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.

53. 1 Bro. 269.

54. 2 Azast. 427.

55. Ex parte Haigh, 11 Vesey, 403. Norris v. Wilkinson, 12 ibid. 192. Ex parte Hooper, 19 ibid. 477.

56. Ex pate Whitbread, 19 Vesey, 209. Lord Ellenborough, in Doe v. Hawke, 2 East's Rep. 486. Ex parte Kensington, 2 Ves.

 

& Beam. 79.

57. Ex parte Coombe, 4 Madd. Rep. 133. Lucas v. Dorrien, 7 Taunt. Rep. 279. Ex parte Coming, 9 Vesey, 115. Ex parte Bulteel, 2 Cox, 243. Norris v. Wilkinson, 12 Vesey, 192. Ex parte Pearse, l Buck. B. C. 525.

58. Berry v. Mutual-Ins. Company, 2 Johns; C1. Rep. 603.

59. Chapman v. Tanner, 1 Vern. 267. Lord Hardwicke, in Walker v. Preswick, 1 Vesey, 622. Lord Eldon, in Austin v. Halsey, 6 Vesey, 483. Sir Wm. Grant, in Naire v. Rowse, Ibid. 759. Hughes v. Kearney, 2 Sch. 4 Lef. 132. Meigs v. Dimock, 6 Conn. Rep. 458.

60. 15 Vesey, 329.

61. Dig. lib. 18. tit. 1. 1. 19.

62. Cole v. Scot, 2 Wash. 191. Cox v. Fenwick, 3 Bibb. 183. Carson v. Green, 1 Johns. Chan. Rep. 308. Fish v. Howland, 1 Paige, 20. Bayley v. Greenleaf, 7 Wheaton, 46. Gilman v. Brown, 1 Mason's Rep. 191. Watson v. Wells, 5 Conn. Rep. 468. Jackman v. Hallock, 1 Hammond's Ohio Rep. 318. But this doctrine of an equitable lien for the purchase money has been judicially declared not to exist in Pennsylvania, though it had previously been assumed to exist there by very distinguished judges. Kauffelt v. Bower, 7 Serg. & Rawle, 64. Semple v. Burd, Ibid. 286. It is said also not to have been adopted in all its extent in Connecticut. Daggett, J. 6 Conn. Rep-464.

63. Nairn v. Prowse, 6 Vesey, 752.

64. 2 Ves. & Beam. 306.

65. Gilman v. Brown, 1 Mason, 191. 4 Wheaton, 255. S. C. 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; venditee vero res et traditie non aliter emptori acquiruntur, quam si is venditori pretium solverit, vel olio modo ei satisfecerit, veluti expromissore aut pignore dato. Inst. 2. 1. 41. Hoc nomine fidejussor, hie intelligi videtur. Vinnius in Inst. h. t.

66. Bayley v. Greenleaf, 7 Wheaton, 46.

67. Finch v. Earl of Winchelsea, 1 P. Wins. 277. The question, whether taking a bond or bill destroyed the lien, has been quite a. vexed one in the hooks.. In Fawell v. Healis, Amb. 724. taking a bond was considered to have destroyed the lien. In Blackburn v. Gregson, 1 Bro. 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 the lien continued, although a bond was given. In Winter v. Anson, 1 Simon 6; Stuart, 434. it 'vas held, that there was no lien where the bond was taken for the purchase money, payable at a future day, with interest. It was dedecided to the same effect in Wragg v. the Comptroller-General, 2 Dess. S. C. R. 509. But we have decisions directly to the contrary, in White v. Casanove, i Hayw. 6; Johns. 106. Cox v. Fenwick, 2 Bibb. 183. and Kennedy v. Woolfolk, 3 Hayw. 197. and Mr. Justice Story also draws a contrary conclusion, in Gilman v. Brown, 1 Mason's Rep. 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 Haywood, 197. and in Fish v. Howland, l Paige, 20. where this doctrine of lien is laid down, with comprehensive, accuracy and precision.

68. Birch v. Wright, 1 Term Rep. 378. Buller, J. Rockwell v. Bradley, 2 Conn. Rep. 1. Blaney v. Bearce, 2 Greenleaf, 132. Erskine v. Townsend, 2 Mass. Rep. 493. Parsons, Ch. J. in Newall v. Wright, s Mass. Rep. 138. Colman v. Packard, 16 Ibid. 39. Simpson v. Ammons, 1 Binney, 176. McCall v. Lenox, 9 Serg. & Rawle, 302, though I should infer from the language of the last case cited, that the ejectment would not lie until after a default.

69. See the opinion of Jackson, J. in Fitchbury Cotton Man. Co. v. Melven, 15 Mass. Rep. 268. and the case of Wilder v. Houghton, 1 Pick. 87.

70. Runyan v. Mersereau, 11 Johns. Rep. 534. Jackson v. Bronson, 19 Ibid. 325. Dickenson v. Jackson, 6 Cowen, 147.

71. Powsely v. Blackman, Cro. Jac. 659.

72. Keech v. Hall. Doug. 21. Moses v. Gallimore, Ibid. 279. Buller, J. in Birch v. Wright, 1 Term Rep. 383. Thunder v. Belcher, 3 East, 449. Sir Thomas Plumer, in Christopher v. Sparke, 2 Jac. 4 Walk. 1234. 5 Bingham, 421. With respect to notice to quit, the American authorities differ. In Massachusetts, Connecticut, and Pennsylvania, and probably in other states, the English rule is followed, and the notice is not requisite. Rockwell v. Bradley, 2 Conn. Rep. 1. Wakenan v. Banks, Ibid. 445. Groton v. Boxborough, 6 Mass. Rep. 50. Duncan, J. in 9 Serg. & Rawle, 311. 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 priority had ceased. Jackson v. Laughhead, 2 Johns. Rep. 75. Jackson v. Fuller, 4 Ibid. 215. Jackson v. Hopkins, 18 Ibid. 487. But now by the N.Y. Revised Statutes, vol. 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.

73. Patridge v. Bere, 5 Barnw. & Ald. 604.

74. Buller, J. in Birch v. Wright, 1 Term Rep. 383. Sir Thomas lumer, in Cholmondelly v. Clinton, 2 Jac. 8; Walk. 183. Coote on the Law of Mortgage, 327-334. Coventry's Notes to 1 Powell, 1.57. 175. edit. Boston, 1821..

75. 1 Powell, 159. note 160-162. See also Thunder v. Belcher, 3 East. 449.

76. Jackson, J. in 15 Mass. Rep. 270. Parker, Ch. J. 1 Pick. 90. Duncan, J. 9 Serg.& Rawle, 311. N.Y. Revised Statutes, vol. ii. 312.

77. Emanuel College v. Evans, 1 Rep. in Ch. 10. In the case of Rosecerrick 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 Richard 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 transferrable from one to another, though at common law a feoffment or fine would have extinguished it; he declared he would not favor the equity of redemption beyond existing precedents.

78. 1 Yarn. 7. 2 Vent. 364. 1 Vern. 232. V. C.

79. 1 Vern. 190.

80. In Seton v. Slade, 7 Vesey, 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. Rep. 30. Clark v. Henry; 2 Cowen's Rep. 324. Wilcox v. Morris, 1 Murphy, 117. 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 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.

81. Casborne v. Scarfe, 1 Atk. 603. 2 Ac. 8J Walk. 194. note S. C.

82. The King v. St. Michaels, Doug. Rep. 630. The King v. Edington, 1 East's Rep. 288. Jackson v. Willard, 4 Johns. Rep. 41. Runyan v. Mersereau, 11 ibid. 534. Huntington v. Smith, 4 Conn. Rep. 235. Willington v. Gale, 7 Mass. Rep. 138. McCall v. Lenox, 9 Serg. & Rawle, 302. Ford v, Philpot, 5 Harr. 8r Johns. 312. Wilson v. Troup, 2 Cowen's Rep. 195. Eaton v. Whiting, 3. Pick. Rep. 484. Blaney v. Bearce, 2 Greenleaf, 132. The growth and consolidation of the American doctrine, that until foreclosure the mortgagor remains seized of the freehold, and that the mortgagee has, in effect, but a chattel interest, was fully shown, and ably illustrated, by the Chief Justice of Connecticut, in Clark v. Beach, 6 Conn. Rep. 142.; and these general principles were not questioned by the court.

83. Lyster v. Dolland, 1 Vesey; jun. 431. Scott v. Scholey, 8 East's Rep. 467. Metcalf v. Scholey, 5 Bos. & Pull. 461.

84. Plunket v. Penson, 2 AM. 290. 1 Vesey, jun. 436. S. C.

85. Waters v. Stewart, 1 Caines' Cases in Error, 47. Hobart v. Frisbie, 5 Conn. Rep. 592. Ingersoll v. Sawyer, 2 Pick. Rep. 276. Ford v. Philpot, 5 Harr. 4 Johns. 312. 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, F Rep. 16.

86. Jackson v. Willard, 4 Johns. Rep. 41. Blanchard v. Colburn, 16 Mass. Rep. 345. Eaton v. Whiting, 3 Pick. Rep. 484. Huntinton v. Smith, 4 Conn. Rep. 035.

87. Thornborough v. Baker, 3 Swanst. Rep. 628. Tabor v. Tabor. ibid. 636.

 

88. Lord Hardwicke, in Robinson v. Litton, 3 Rile. 209.!bid. 723, Brady v. Waldron, 2 Johns. Ch. Rep. 148.

89. Peterson v. Clark, 15 Johns. Rep. 205.

90. Smith v. Goodwin, 2 Greenleaf, 173. Stowell v. Pike, ibid. 2P,-,

91. Campbell v. Macomb, 4 Johns. Ch. Rep. 534.

92. Lord Ch. B. Comyns, in Jones v. Meredith, Comyn's Rep. 670. Bateman v. Bateman, Prec. in Ch. 197. Sharpe v. Scarborough, 4 Vesey, 538. 1 Powell on )mortgages, 312. 369. in notis. Grant V. Duane, 9 Johns. Rep. 591. Hill v. Holliday, 2 Litt. 332. Smith V. Manning, 9 Mass. Rep. 422. Bird v. Gardner, 10 ibid. 364.

93. Anon. 3 Atk. 313.

94. The Master of the Rolls, in Palk v. Clinton, 12 Vesey, 59. Calkins v. Munsell, 2 Root's Rep. 333.

95. Shirley v. Watts, s AM. 200. Brinckerhoof v. Brown, 4 John's. Ch. Rep 671.

96. In New Jersey, Delaware, South Carolina, 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 now the exclusive jurisdiction in equity is withdrawn from the chancellor, and equity powers are partially vested in the circuit judges as vice-chancellors, and they exercise, in distinct capacities, a mixed jurisdiction of law and equity. The same mixed, jurisdiction is partially conferred on the county courts in Maryland and Virginia, and on the circuit courts in Missouri, and exercised concurrently with the chancellors in those states. In the states of Vermont, Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, Ohio, Illinois, Kentucky, Tennessee, North Carolina, and Alabama, the jurisdiction of law and equity is vested in one tribunal; though, in some of those states, chancery powers are confined to a few specified objects; and in Louisiana, the distinction between law and equity, according to the theory of the English law, seems to be entirely unknown. In Massachusetts, the equity powers of the supreme judicial court are very 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. Rep. 493. Kelleran v. Brown, 4 ibid. 443. Skinner v. Brewer, 1 Pick. Rep. 468. Jackson on Real Actions, p. 49. 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 principles of equity in Pennsylvania 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, jun., Student at Law, 1826."

97. *Sir Wm. Harbert's case*, 3 Co. 14. 1 Powell on Mortgages, 342. b. Stevens v. Cooper, 1 Johns. Ch. Rep. 425. Scribner v. Hickok, 4 ibid. 530.

98. 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.

99. Moss v. Gallimore, Doug. Rep. 279. Buller, J. in Birch v. Wright, 1 Term Rep. 378.

100. 2 Bing. 54.

101. Ex parte Wilson, 2 Ves. & Beam. 252.

102. Sanders v. Van Sickle and Garrison, 3 Halsted, 31'3. McKircher v. Hawley, 16 Johns. Rep. 289.

103. Jones v. Clark, 20 Johns. Rep. 51. Magill v. Hinsdale, 6 Cone. Rep. 464.

104. N.Y. Revised Statutes, vol. i. 744. sec. S. New Jersey Revised Laws, 192. sec. 1-7. 3 Halsted, 317.

105. Anon.1 Vern. 44. 1 Eq. Cas. Abr. 328. pl. 1 Robertson v: Campbell, 2 Call, 428. Ballinger v. Worsley, 1 Bibb. 195.

106. Williams v. Price, 1 Sim. 8; Stu. 581. 3 Powell on Mortgages, 949. a. note. Hughes v. Williams, 12 Vesey, 493

107. Bonethon v. Hockmore, 1 Vern. 816. French v. Baron, 2 Atk. 120. Godfrey v. Watson, 3 ibid. 517. Langstaffe v. Fenwick, 10 Vesey, 405. Davis v. Dendy, 3 Madd. Ch. Rep. 95.

108. Moore v. Cable, 1 Johns. Ch. Rep. 385. Breckenridge v. Brooks, 2 Marshall, 339. Gibson v. Crehore, 5 Pick. 146.

109. Godfrey v. Watson, 3 Atk. 517. Lord Alvanley, in 4 Vesey, 480. Moore v. Cable, 1 Johns. Ch. Rep. 385. Saunders v. Frost, 8 Pick. 259.

 

110. Exton v. Greaves, 1 Vern. 138. Talbot v. Braddill, ibid. 183. note.

111. 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. 4 John&. 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 any thing new, but only for keeping the premises in repair. 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.

112. Holdridge v. Gillespie, 2 John&. Ch. Rep. 30.

113. N.Y. Revised Statutes, vol. i. 756. sec. 1. Ibid. 762. sec. 3'7. The term purchaser, in the statute, is declared to embrace every mortgagee, and his assignee.

114. 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.

115. Com. de l'Ord. de Louis XV. sur les Substitutions, par JK. Furgole, cited by Mr. Butler, note 249. sec. 11. to lib. 3. Co. Litt. Pothier, Traité des Substitutions, art. 4. sec. 6.

116. Code Civil, No. 1071, Le Defaut de transcription ne pourra Ere supplde ni regarde, comme couvert par la connaiasance que lea creanciers ou let tiers acquereurs poarraient avoir eue de la disposition par d'autres vaies 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. (Euvres D'.A,,uue.vseau, t. 12. p. 476. oct. ed.

117. Davis v. The Earl of Strathmore, 16 Vesey, 419. '

118. 3 Atk. 646. 1 Ves. & Beam. 436. S. C.

119. 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, vol. i. p. 38.,Miller's Inquiry into the Civil Law of England, p.-304. Mr. Humphrey, in his Outlines of a Code, p. 324. 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 ten thousand refinements in the civil law.

120. Farnsworth v. Childe, 4 Mass. Rep. 637. McMechan v. Griffing, 3 Pick. 149. Taylor v. McDonald, 2 Bibb, 420. Guerrant v. Anderson, 4 Randolph, 208. Jackson v. Sharp, 9 Johns. Rep. 164. Jackson v. Burgott, 10 Johns. Rep. 457. Roads v. Symmes, 1 Hammond, 281. Muse v. Letterman, 13 Serg. & Rawle, 167. Hudson v. Warner, 2 Harr. 81 Gill, 415. In the case of Righton v. Righton, 1 Const. Court, 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 Dess. 254. Tait v. Crawford, 1 M 'Cord, 265.

121. Lord Hardwicke, in Hine v. Dodd, 2 Atk. 275. Lord Alvanley, in Jolland v. Stainbridge, 3 Vesey, 478. Jackson v. Elston, 12 Johns. Rep. 452. Dey v. Dunham, 2 Johns. Ch. Rep. 182. McMechan v. Griffing, 3 Pick. 149.

122. 8 Johns. Rep. 137. 1 Hammond's Ohio Rep. 281.

123. Cushing v. Hurd, 4 Pick. 253.

124. 10 Johns. Rep. 457.

125. 5 Barnw. & Ald. 142.

 

126. Jackson v. Dubois, 4 Johns. Rep. 216. Jackson v. Terry, 13 Ibid. 471. Jackson v. Town, 4 Cowen, 605. Ash v. Ash, 1 Bay, 304. Ash v. Livingston, 2 Ibid. 80. Penman v. Hart, ibid. 251. Hamilton v. Levy, 1 McCord's Ch. Rep. 114.

127. Semple v. Burd, 7 Serg. & Rawle, 288.

128. N.Y. Revised Statutes, vol. i. p. 749. sec. 5.

129. Latouche v. Dusenberry, 1 Sch. 4 Lef. 157. Bushell v. Bushell, ibid. 90. See also the opinion of Sergeant Hill, in 4 Madd. Ch. Rep. 286. note.

130. Morecock v. Dickins, mb. 678.

131. Johnson v. Stagg, 2 Johns. Rep. 510. Frost v. Beekman, 1 Johns. Ch. Rep. 298. 18 Johnson, 544.. S. C. Peters v. Goodrich, 3 Conn. Rep. 146. Hughes v. Edwards, 9 Wheaton, 489. Thayer v. Cramer, 1 McCord's Ch. Rep. 395. Evans v. Jones, 1 Yeates, 174.

132. Heister v. Fortner, 2 Binney, 40. Hodgson v. Butts, 3 Cranch, 140. Frost v. Beekman, 1 Johns. Ch. Rep. 300. But see Morrison v. Trudeau, in Chrysty's Dig, of Decisions in Louisiana, tit. Mortgages, 4. pl. 8. where such a deed is said to operate as notice to third persons.

133. Shuttleworth v. Laycock, 1 Vern. 245. Baxter v. Manning, ibid. 244. Anon. 3 Salk. 84.

134. This was clearly and learnedly shown by Mr. Justice Jackson, in 15 Mass. Rep. 407. and see supra, pa. 130.

135. Troughton v. Troughton, 1 Vesey, 86. Anon. 2 ibid. 662. Heams v. Bance, 3 Atk. 630. Powis v. Corbat, ibid. 556. Lowthian v. hastel, 3 Bro. 162. Hamerton v. Rogers, 1 Vesey, jun. 513. Lord Alvanley, in Jones v. Smith, 2 Vesey, jun. 376.

136. Gardner v. Graham, 7 Viner's Abr. 52. E. p1. 3. Lyle v. Ducomb, 5 Binney, 585. Hughes v. Worley, 1 Bibb. 200. Liyingston v. McInlay, 16 Johnson, 165. Hendricks v. Robinson, 2 Johns. Ch. Rep. 309. Brinckerhoff v. Marvin, 5 ibid. 326. James v. Johnson, 6 ibid. 420. Skirras v. Caig, 7 Cranch, 34. Story, J. in Conard v. The Atlantic Insurance Company, 1 Peters' U. S. Rep. 448.

137. Pettibone v. Griswold, 4 Conn. Rep. 158. Stoughton v. Pasco, 5 ibid. 442. St. Andrew's Church v. Tompkins, 7 Johns. Ch. Rep. 19.

138. Ex parte Hooper, 19 Vesey, 477.

139. Heineccii, Elem. Jur. Civ. secund. ord. Pand. b. ii. tit. 4. sec. 35. Opera, tom. 5. Part 2. p. 350.

140. Lord Elden, 11 Vesey, 619..

141. 2 Vent. 337.

142. 2 P. Wms. 491.

143. The law established by these decisions has been regularly transmitted down in Westminster Hall unshakenly to this day. Belchier v. Butler, 1 Eden, 523. Frere v. Moore, 8 Price, 475.

144. 1 Sch. 4 Lef. 157. 430. In McNeil 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.

145. Grant v. U. S. Bank, 1 Caines' Cases in Error, 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 on a system of artificial reasoning, and encouraged fraud See also, 11 Serg. & Rawle, 223. 3 Pick. 50. 6. munf. 560.

146. i Haines v. Beach, 3 Johns. Ch. Rep. 459.

147. The law concerning notice, express aud implied, is very amply discussed by Mr. Coventry, in his notes to Powell on Mortgages, tool, ii. ch. 14. p. 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
- ossce 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, etc. 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.

148. Mondey v. Mondey, 1 Ves. & Beam. 223.

149. Johns. Ch. Rep. passim. Nelson v. Carrington, 4 Munf. 332. Downing v. Palmateer, 1 Monroe, 66. Humes v. Shelby, 1 Tenn. Rep. 79. Hurd v. James, ibid. 201. Rodgers v. Jones, 1 McCord's Ch. Rep. 221. Paunell v. Farmers' Bank, 7 Barr. 4 Johns. 202. David v. Grahame, 2 Harr. 8f Gill, 94.

150. Lockwood v. Lockwood, 1 Day, V5. Lyon v. Sanford, 5 Conn. Rep. 544. Swift's Dig. vol. ii. 656. 683. Erskine v. Townsend, 2 Mass. Rep. 493. Baylies v. Bussen, 5 Greenleaf, 153. Swett v. Horn, 1 N. R. Rep. 332. The practice of a strict foreclosure has also been allowed in North Carolina. Spiller v. Spiller, 1 Hayw. 482.

151. Edwards v. Cunliffe, 1 Madd. Rep. 287. Perine v. Dunn 4 Johns. Ch. Rep. 190.

152. 2 Bro. 125. Dickens, 785. S. C.

153. Dashwood v. Blythway, 1 Eq. Cas. Abr. 317. pl. 3. Mosely, 196. S. C. Perry v. Barker, 13 Vesey, 198.

154. Lord Thurlow's opinion, as represented by Sir Samuel Romilly, and by Lord Eldon, in Perry v. Barker, 8 Vesey, 527. Hatch v. White, 2 Gallis. 152. Amory v. Fairbanks, 3 Mass. Rep. 562. Globe Ins. Co. v. Lansing, 5 Cowen, 380. Omaly v. Swan,3 Mason, 474.

155. Booth, v. Booth, 2 Atk. 343. Burnell v. Martin, Doug. 417. Schoole v. Sall, 1 Sch. 4 Lef. 176. Dunkley v. Van Buren, 3 Johns. Ch. Rep. 330. Hughes v. Edwards, 9 Wheat. Rep. 489.

156. 2 Johns. Ch. Rep 125.

157. The N.Y. Revised Statutes, vol. 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. In Massachusetts, likewise, similar embarrassments have been felt, and the law there is, that the mortgagee cannot sell the equity of redemption in discharge of a debt secured by the mortgage. Atkins v. Sawyer, 1 Pick. 351. The N.Y. Revised Statutes have, in other respects, materially changed the established practice ou this subject. It is now declared, that while a bill of foreclosure is pending in chancery, and after a decree thereon, 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 mortgage 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. N.Y. Revised Statutes, vol. ii. 191. sec. 153. 156. 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. (ibid. sec. 152.) As the action of ejectment upon a mortgage is abolished, (ibid. p. 312. sec. 57.) the jurisdiction at law over the debt, as well as over the pledge, would appear by these provisions to be taken away and transferred to chancery at the election of the e mortgagee. The alteration has affected a general principle, and its propriety in this latter extent of it, may be questioned. The object of the provision undoubtedly was, to give unity and simplicity to the remedy, and prevent unnecessary expense; but as the law stood before the statute, the creditor was obliged to resort to law upon his bond, for the unsatisfied portions of his debt, after the proceeding in rem had been exhausted; and if the debtor had any defense by payment, release, insolvent's discharge, or otherwise, he was enabled to have it decided before the common law tribunal for the trial of matters of fact, and of that tribunal he is now deprived at the election of the creditor.

158. Godfrey v. Chadwell, 2 Vern. 601. Morret v. Westerne, 2. Vern. 663. Hobart v. Abbott, P. Wm.a. 643. Fell v.. 'Brown, 2 Bro. T'16. Bishop of Winchester v. Beavor, 1 Vesey, 314. Sherman v. Cox, 3 Ch. Rep. 46. Haines v. Beach, 3 Johns. Ch. Rep. 459. Lyon ySaudford, 5 Conn. Rep. 544. Renwick v. Macomb, 1 Hop*. 277. The English practice is to settle by decree

 

the order of payment according to priorities, and the decree is, in detail, that the second encumbrancer shall redeem the first, the third the second, and so on. See Mondey v. Mondey, 1 Ves. & Beam. 223. and 3 Merivale, 216. note.

159. The N. 1. Remised Statutes, vol. 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.

160. The N.Y. Revised Statutes, voL 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.

161. Penniman v. Hollis, 13 Mass. Rep. 429. On a sale by the mortgagee, in the lifetime of the mortgagor, the surplus is personal estate, but if the Bale he after the mortgagor's death, the surplus, as well as the equity of redemption, belongs to his' heir. Wright v. Rose, w Sim dr_Stte: 32 Moses v. Murgatroyd, 1 Johns. Ch, Rep. 130.

162. Com. Dig. tit. Chancery, 4. A. 9. Demarest V. Wynkoop, 3 John*. Ch. Rep. 145. Scott v. Macfarland, 13 Mass. Rep. 309. Grace v. Hunt, Cooke's Tenn. Rep. 344. Denn v. Spinning, 1 Hal-sted's Rep. 471. The cases, as to parties, are collected in 3 Powell on Mortgages, 968-977. 989-992.

163. Cholmley v. Oxford, 2 Atk. 267. Sir William Grant, 'in The Bishop of Winchester v. Paine, 11 Vesey, 199. Perine v. Dunn, 4 Johns. Ch. Rep. 140.

164. Jenner v. Tracy, cited in Cox's note to 3 P. Wins. 287. Belch v. Harvey, ibid. Anon. 3 Atk. 313. Aggas v. Pickerell, ibid. 225, Smith v. Clay, 3 Bra. 639, note. Lord Kenyon, in Bonny v. Ridgard, cited in 17 Vesey, 90. Hodle v. Healey, 1 Ves. & Beam. 536. Demarest v. Wynkoop, 3 Johns. Ch. Rep. 129. Kane v. Bloodgood, 7 ibid. 90. Slee v. Manhattan Company, 1 Paige, 48. Lamar v. Jones, 3 Harr. 4 Mc Henry, 328. Sir Thomas Plumer, in Chalmer v. Bradley, 1 Jac. 4 Walk. 83. Lyttle v. Rowton, 1 Marshall, 519. Elmendorf v. Taylor, 10 Wheaton, 168. Lord Redesdale, in Cholmondeley v. Clinton, 2 Jac. 4s Walk. 191.

165. N. Y. Revised Statutes, vol. ii. 301. sec. 49, 50,, 51, 52. The period of limitation of a right of entry upon land varies very mate rially 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. See the Appendix to Mr. Angell's learned, accurate, and valuable Treatise on the Limitation of Actions at Law and Suits in Equity. But after entry by the mortgagee, upon default or hy 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, hut is, as we have already seen, very much reduced.

166. Corbett v. Barker, 1 Anst. 138.

167. 1 Sim. 4 Stu. 471.

168. Blake v. Foster, 20 Ball & Beam. 575.

169. N. Y. Revised Statutes, vol. ii. 301. sec. 52.

170. According to the principle of the decision in Wells v. Prince, 9 Mass. Rep. 508. though a remainder-man 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 the tenant for life.

171. Hillary v. Waller, 12 Vesey, 239. Cooke v. Soltan, 2 Sim. s,• Stu. 154. Moore v. Cable, 1 Johns. Ch. Rep. 385. Giles v. Baremore, b Johns. Ch. Rep. 545. Jackson v. Wood, 12 Johns. Rep. 244, Ross v. Norvell, 1 Wash. 14.

172. Whiting v. White, Cooper's Eq. Rep. 1. Reeks v. Postlethwaite, ibid. 161. Barron v. Martin, ibid. 189. Hughes v. Edwards, 9 Wheaton, 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 lately 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.

173. Anon. 6 Madd. Ch. Rep. 15.

174. 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 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 up twenty-four weeks prior to the time of the sale, on the outward door of the nearest court-house of the county. Every such sale must be at public auction, and distinct farms, tracts, or lots, 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 suhsequent to the mortgage; but it is not to affect a mortgagee, or judgment creditor, whose title or lien accrued prior to the sale. The statute contains some further directions necessary to he attended to, concerning the contents and disposition of the affidavit of the sale. N. Y Revised Statutes, vol. ii. 545. tit. 15.

175. Doolittle v. Lewis, 7 Johns. Ch. Rep. 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's Rep. 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, etc.

176. Van Bergen v. Demarest, 4 Johns. Ch. Rep. 37. Nichols v. Wilson, ibid. 115.

177. Booth v. Rich, 1 Vern. 295. Mills v. Dennis, 3 Johns. Ch. Rep. 367.

178. Dove v. Dove, Dickens, 617, 10 fro, Ch. Cas, 375. 1 Cox's Cases, 101. S. C. Kershaw v. Thompson, 4 Johns. Ch. Rep. 60.9. Ludlow v. Lansing, 1 Hopkins, 231. Garretson v. Cole, 1 Hqrr. 4 Johns. 370. This power is confirmed by the N.Y. Revised Statutes, vol. ii. 191. sec. 152.

179. White v. Wilson, 14 Vesey, 151. Cunningham v. Williams, Amt. Rep. 344. Williamson v. Dale, 3 Johns. Ch. Rep. 290. Lan-sing v. McPherson, ibid. 424. Bland, Chancellor, in Anderson v. Foulke, 2 Harr. 6; Gill. 355, 356. 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 the 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's Ch. Rep. 15F 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 therefrom justly drawn.

180. Preston, on Conveyancing, vol. ii. 200, 201.

181. Lord Hardwicke, in Harrison v. Owen, 1 Atk. 520. 1 Sch. cc Lef. 176,177. Judge Trowbridge's Essay on Mortgages, 8 Mass. Rep. 557. 561, 3. appendix.

182. 5 Mason's Rep. 521.

183. Lord Hardwicke, in Richards v. gyms, 3 Eq. Cas. Abr. 617. Barnard's Ch. Rep. 90. S. C. Lord Mansfield, in Martin v. Mowlin, 2 Burr, 978, 979. Johnson v. Hart, 3 Johns. Cas. 322. 1 Johns. Rep. 580. S. C. Jackson v. Willard, 4 Ibid. 41. Renyan v.. Mersereau, 11 ibid. 534. Jackson v. Davis, 18 ibid. 7. Jackson v. Brown, 19 ibid. 325. Wilson v. Troup, 2 Cowen's Rep. 195. Jackson v. Blodget, 5 ibid. 202. Wentz v. Dehaven, 1 Serg. & Rawle, 312. Kinsey, Ch. J., in Den v. Spinning, 1 Halsted, 471. Morgan v. Davis, 2 Harr. 4 McHenry, 17. Paxon v. Paul, 3 ibid. 399. Story J., in Hatch v. White, 2 Gall. Rep. 155.

184. Judge Trowbridge's reading on the Law of Mortgage, 8 Mass. Rep. 554. appendix. Warden v. Adams, 15 ibid. 233. Parsons v. Welles, 17 ibid. 419. Vose v. Handy, a Greenleaf, i22. Den v. Dimon, 5 Halsted, 156. Phelps v. Sage, 2 Day's Rep. 151. Faulkner v. Brockenborough, 4 Rand. 225. Breckenridge v. Brook, 2,Marsh. Rep. 337. But in Gray v. Jenks, 3 Mason's Rep. 520., a satin= fled mortgage, under the law of the state of Maine, was so fir 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 expressed by the learned judge who decided that case. 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, adhere 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 arrear 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 lie 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 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 a creditor may take on execution. The cases of Morgan v. Davis, Paxton v. Paul, Jackson v. Davis, and Jackson v. Blodget, may be selected, as cases in which it has been adjudged in 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, there is a statute provision, which restores the lead to the mortgagor, by simple payment, or tender, after the condition is broken. Sweet v. Horn, 1 Adams, 332.

 

LECTURE 58

# 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 the nature and variety of contingent remainders. 4. Of the rule in *Shelley's case*. 5. Of the particular estate requisite to support a remainder. 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.[1] In the New York Revised Statutes,[2] it is defined to be an estate limited to 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. Mr. Cornish, after a careful analysis of Lord 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."[3]

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 diverse 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.[4]

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 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.[5]

If the whole fee be granted, there cannot, as a matter of course, be any remainder.[6] So, if an estate be granted to A. and his 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.[7] 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 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.[8] 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.[9] 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 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.[10] But if the remainder over to B. had been merely in the event of such issue 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.[11]

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 [12] The New York Revised Statutes[13] 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 R. have cross-remainders over by implication, and on the failure of either, the other, or his issue, takes, and the remainder to C. is postponed.[14] So, if different parcels of land are conveyed to different persons by deed, and by the limitation they are to have the parcel of each other when their respective interests shall determine, they take by cross-remainders; 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 succession between coparceners.[15]

(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 seizin.[16] The definition of a vested remainder in the New York Revised Statutes,[17] appears to be accurately and fully expressed. It is u 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 a remainder in fee to B., 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.[18]

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.[19] But though it may be uncertain whether a remainder will ever take effect in possession, it will nevertheless be a vested remainder 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 grant to A. for life, remainder try 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 remainder-man 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, that distinguishes a vested from a contingent remainder.[20] When the event on which the preceding estate is limited, must happen, and when it also may happen before the expiration of the estate limited in remainder, that remainder is 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.[21] A remainder, limited upon an estate tail, is held to be vested, though it must be uncertain whether it will ever take place.[22]

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. 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*,[23] 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.

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 divested by the execution of the power.[24] 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 many years as the minority of the devise might last.[25]

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 every thing, as well remainders and reversions, as 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 remainder-man whose estate was disturbed and displaced, may take advantage of the forfeiture, and enter.[26]

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 after-born children. The remainder vests in the persons first becoming capable, and the estate opens and becomes divested in quantity by the birth of subsequent children, who are let in to take vested proportions of the estate.[27]

(3.) *Of the nature and variety 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 uncertainty of enjoyment in future, but the uncertainty of the right to that, enjoyment, which marks the difference between a vested and contingent interest.[28] 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.[29] The definition of a contingent remainder embraces four species of them, and Mr. Fearne is of opinion, that every known instance of a contingent remainder may be reduced to one or the other of the following classes.

(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*, shall ever vest. Thus, if A. makes a feoffment to the use of B., till C. returns from Rome, and after such return the estate to remain over in fee, the remainder over depends entirely on the uncertain or contingent determination of the estate in B., by the return of C. from Rome.[30]

(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, 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 it is a dubious event which must precede, in order to give effect to the remainder in C.[31]

(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. [32]

(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 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.[33]

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 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 A., 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 twentyone 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 prevent the limitation over from being void as a freehold to commence *in futuro*.[34]

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 seized 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.[35]

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 be 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.[36]

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 vested, and they then open and become separate, in order to admit such limitations as they arise.[37]

 

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 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 or both equitable estates, and the limitation to the heirs will operate as a contingent remainder.[38]

The freehold in the ancestor, and the limitation to his 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.[39] 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.[40] This arises from the retrospective relation which appointments bear to the instrument containing the power.[41]

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 haeres viventis*.[42] There is also a class of cases under this branch of the 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[43] distinguishes such cases into 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.[44] Secondly; 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.[45] Thirdly; (imitations 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.[46]

(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 passed over without more particular attention. In *Shelley's case*,[47] 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, takes an estate of freehold, and in the 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,[48] 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, the limitation to the heirs entitles the ancestor to the whole estate.[49]

The words 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 seized in fee, and covenanted to stand seized 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.[50]

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 cases as being one precisely in point in favor of the rule.[51] Sir William Blackstone, in his opinion in the case of *Perrin v. Blake*,[52] 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.[53]

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. The feudal policy undoubtedly favored descents as much as possible. There were feudal burdens which attached to the heir when he took as heir by descent, from 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*,[54] 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*,[55] 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 inheritance, or a freehold with a perpetual succession to heirs without the other properties of inheritance. In *Doe v. Laming*,[56] Lord Mansfield considered the maxim to have been originally introduced, not only to save to the lord the fruits of 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.[57]

So, also, in decreeing the execution of executory trusts, 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 word heirs of the body of *cestui que trust*, although preceded by a limitation for life to the *cestui que trust*, are construed to be words of purchase, and not of limitation.[58] 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.[59]

In *Bagshaw v. Spencer*,[60] there was a devise to trustees in fee, in trust, and after diverse 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 fulfill 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.[61] 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*,[62] in 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*,[63] and by Lord Thurlow in *Jones v. Morgan*[64] 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 trust 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.[65]

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 not by the chattel interest of the ancestor.[66]

(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;[67] 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, or 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.[68]

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,[69] 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 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 effect 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 pre-eminence of the rule, so that even the testator's manifest intent could not control the legal operation of the word heirs, when 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.[30]

In *Perrin v. Blake*, the judges considered the intention 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.[71]

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 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. He insisted, also, that there was no sense in the distinction between the trust 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*[73] to bear upon the case with unqualified and imperative force.

The minds of the court were well prepared for such a decision, for in *Doe v. Laming*,[74] which arose a few years 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 ransacked most of the cases. The doctrine of the court was, that the rule in *Shelley's case* was to be 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*,[74] he admitted that the rule in *Shelley's case* might be controlled by the manifest intent 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, there. fore, 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 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.

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 word 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 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*[75]) that whoever 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.[76] All the great 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.[77] 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,[78] convenience and policy equally dictate an adherence to the old and established doctrine.

By turning the word heirs into a word of purchase, in limitations, to the father for life, remainder to his heirs, or heirs of the body, a contingent remainder is given to the heirs; and as it is impossible to say who will be the heirs until the father's death, it would be out of his power, in conjunction with any of his children, to make a secure and effectual settlement of the estate, either upon marriage, or upon any other occasion, and the inheritance must remain suspended during the father's life. This every grantor, and every testator, will be enabled, at his pleasure, to do, if we depart from Shelley's rule; and he may impose a strict, and very inconvenient clog, upon the alienation of property. It was always in the power of the owner, under the rule as it stood, by marriage settlements, and the creation of executory trusts, or springing uses, to guard an estate from prodigal waste by a dissipated son. The rule has no application to such cases.

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*,[79] that a devise to trustees, to stand seized 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*,[80] filling 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*,[81] Lord Kenyon took a distinction between a general and a 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 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 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 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.[82]

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,[83] 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*.[84] The rule was also fully admitted as a binding authority in Virginia, in the case of *Roy v. Garnett*,[85] 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*,[86] 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 seized 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 reference to whom the future succession was to be regulated. 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 very correct view of the 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 pretense 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*,[87] 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.

 

In Pennsylvania, in the case of *James' claim*,[88] 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 *Findley v. Riddle*,[89] there was a devise to A. for life, and if he died leaving 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*.[90] This was in 1804, but, recently, we are informed, that the rule has been abrogated by statute;[91] 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," etc. It is to be inferred, that the rule in *Shelley's case* exists in that state in full force as to deeds.

In New York, the rule, according to the English view of it, was considered, in the case of *Brant v. Gelston*,[92] to be of binding authority; and so it continued to be until the revisers 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. The New York Revised Statutes[93] have accordingly declared, 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 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, and it will tie up property from alienation during the life 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 settlor 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 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.[94]

 

(5.) *Of the particular estate requisite to support a remainder*.

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.[95] The latter cannot be created for a future time without an intervening

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 seizin, which must operate either immediately, or not at all. "If a man," said Lord Coke,[96] "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 passes." 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 remainder man is seized of his remainder at the same time that the tenant of the particular estate is possessed of his estate.[97] It was necessary to make livery of seizin 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 remainder man, as the particular estate and the remainder are but one estate.[98] It follows, from these principles, that an estate at will cannot support a remainder, for, livery to the tenant, at will, and the limitation over, would either of them determine the will.[99]

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,[100] 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.[101] 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 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 with the particular estate, and it was once vested by a good title.[102] In *Duo v. Brabant*,[103] 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 remainder-man 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.[104] 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.[105] 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.[106] 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 want of a freehold to support it.[107] But if the remainder had been to trustees during the life of B., remainder to the heirs of his body, in that case the contingent remainder had been good, because preceded by a vested freehold remainder to the trustees.[108] 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 praecipe, and answer for the services required.[109] It does not apply to contingent interests for years, for they were considered, in the case of *Corbet v. Stone*,[110] 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 seizin; 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*,[111] illustrates the distinction by saying, that if there be tenant for life with a contingent remainder over, and he be disseized, the whole estate is divested, but the right of entry remaining in the tenant will support the remainder; whereas, if, during the disseizin, the contingent remainder expectant upon the life estate, does not vest before five years after a descent cast, the remainder is gone for ever, for the right of entry is turned into a right of action.

(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 Ken. VIII. had upon contingent uses, was formerly a matter of 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 these 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 seized of the legal estate, and if they were disseized, no use could be executed until, by their entry, they had regained their seizin, for the statute only executed those uses which had a seizin to support them.[112] After the statute of uses there was great difficulty to ascertain where the estate which was to support the contingent uses resided. Soma held, that the estate was vested in the first *cestui que use*, subject to the uses which should be executed out of his seizin; but this opinion was untenable, for a use could not arise out of a use. It was again held, that the seizin to serve contingent uses was *in nubibus*, or in *custodia legis*, or had no substantial residence any where, 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 seizin, or a *scintilla juris* in the feoffees, or releasees to uses, to serve the contingent

 

uses as they arose.[113] The doctrine of *scintilla juris*, Mr. Sugden says, was first started in *Brent's case*,[114] in 16th 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 divested of the whole interest until the execution of 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 divested the feoffees of all the estate when the contingency arose by a person being *in esse* to take.

In *Manning and Andrew's case*,[115] 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 that they were divested of all estate. The statute drew the confidence out of the feoffees, and 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 any thing to the prejudice of the uses limited. In a few years *Chudleigh's case*[116] 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 settlor's eldest son, remainder to the grandsons of the settlor, successively in tail, with remainder to the right heirs of the eldest son. The feoffees seized to these uses after the death of the feoffor, 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 the 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 divested, and drawn out of the feoffees, and the future contingent uses destroyed.[117]

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 Moore. The seizin 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 divested all the estates, and the future uses; and they 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 inn esse, unless their possession was disturbed by disseizin or otherwise, and then they would have a right of entry, unless they did some act to bar it. One great principle of policy is said[118] to have governed the judges in this case, in holding that contingent remainders might be thus destroyed, was to prevent perpetuities, which were so odious in the ancient law. 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.[119]

The fiction of a *scintilla juris*, or possibility of entry in the feoffees, or releasees 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 cases.[120] 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* seized to the uses, the seizin is immediately transferred to the *cestui que use*, and the whole estate is divested 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 seized to the use, when the contingency arose, to enable the statute to operate. There must be a person seized, 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 has 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 be 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, has by entry or action regained the seizin, 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 divested, 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 seizin to support the contingent use, or this possibility of entry or scintilla; and if such seizin or scintilla be divested before the use arises, as was the fact in *Chudleigh's case*, the use is totally destroyed.[121]

This view of the subject has been met and opposed by some of the most distinguished writers on real property at the present day.[122]

Mr. Fearne 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 seizin 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 seizin. 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 extrajudicial dicta. he considers that the fiction operates mischievously, by requiring actual entry to restore the divested 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 seized, or perhaps by bargain and sale,[23] a use be limited to A. for life, remainder to trustees 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 or 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 support the contingent uses. The statute draws the whole estate in the land out of the feoffees, and they become divested, and the estates limited prior to the contingent uses, take effect as legal estates, and the contingent uses take effect as they arise by force of the original seizin of the feoffees. If there be any vested remainders, they take effect according to the deed, subject to divest, 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 seizin 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 estates in B. and C. were vested *sub modo* only, and would open, so as to let 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 seizin. 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.[124]

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 seizin, remains with the trustees. But 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.[125]

I am not aware that the English doctrine of remainders and uses has undergone any essential alteration in these 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, but the remainder takes effect when the contingency happens, in the same manner, and to the same extent, as if the precedent estate had continued.[126] This relieves us in New York, and 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[127] have abolished uses and trusts, except as authorized and modified in that article, and has 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 this state, 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.[128] But to proceed with the 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 trust.[129]

(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.[130] 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.[131] 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 for ever, for a freehold cannot, according to the common law, commence *in futuro*.[132]

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.[133] 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.[134] 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.[135] 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 the condition, the first estate, *ipso facto*, determines without entry, and the limitation over commences in possession.[136] 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.[137]

The New York Revised Statutes,[138] 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 was 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.[139] 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 of such term.[140] 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 two first persons named.[141] 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 in interest during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof.[142] 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.[143] 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.[144] 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 effects.[145] 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.[146] No expectant estate shall 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 disseizin, 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. 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 same extent, as if the precedent estate had continued to the same period.[147]

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, or the construction of deeds and instruments which took effect prior to

 

the first of January, 1830,[148] 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 preceding estate, whereby the remainder vests in his heirs.[149]

(8.) *Of the destruction of contingent remainders.*

If the particular estate determines, or be destroyed, before the contingency happens on which the expectant estate depended, and leaves 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[150], 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 in the tenant in tail, or for life, may be destroyed by feoffment or fine, for these conveyances gain a fee by disseizin, and leave no particular estate *in esse*, or in right, to support the contingent remainder.[151] 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.[152] A merger, by the act of the parties of the particular estate, is also equally effectual as a fine to destroy a contingent remainder.[153] 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[154] vindicates this distinction, and reconciles the jarring cases by it, and it has been since judicially established in *Crump v. Norwood*.[155] 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.[156] A court of equity does not countenance the destruction of 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.[157] 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 seized, bar contingent remainders, for none of them pass any greater estate than the grantor may lawfully convey.[158] There are also some acts of a tenant for life, which, though they amount to a forfeiture of the estate, and give the vested remainder-man a title to enter, yet they do not destroy the contingent remainder, unless advantage be taken of the forfeiture by some subsequent vested remainder-man. They do not, *ipso facto*, discontinue, divest, or disturb any subsequent estate, nor make any alteration or merger of the particular estate.[159] Though a right of entry, even after the

 

particular tenant be disseized, will support a contingent remainder, yet when once the right of entry is gone, it is gone for ever, 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 for life makes a feoffment in fee upon condition, and the 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.[160]

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 of 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. 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.[161] 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 trusts.[162] 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 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.[163]

(9.) *Of some remaining properties of contingent remainders.*

If a 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,[164] 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.[165] Though the fee descends, in the interim, to the heir, there shall be an hiatus, as was observed in *Plunkett v. Holmes*, to let in the contingency when it happens. It was fully and definitively settled by Lord Parker, on appeal from the Rolls, in *Carter v. Barnadiston*,[166] 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. 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;[167] but it is 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, 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.[168] Of the existence 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.[169] But a state of abeyance was always odious, and never admitted but from necessity, because, in that interval, there could not be any seizin of the land, nor any tenant to the praecipe, nor any one of ability to protect the inheritance from wrong, or to answer its burdens and services. This was the principal reason why a particular estate for years was not allowed to support a contingent remainder in fee.[170] 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 use 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.[171] 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 seizin 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[172] insists, that an estate 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 abstractedly just and reasonable, is without authority, and contrary to all settled technical rules. Another able writer[173] 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.[174]

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[175] divides estoppels into three kinds, viz. by matter of record, as by letters patent, fine, common recovery, and pleading; by matter in writing, or by deed indented; and by matter in pals, 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. Thus, if there be an estate to A. and B., and to the survivor in fee, a conveyance operating by way of 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.[176] The estate for life is the only tangible interest, and the other is a mere possibility, and estoppels exists where no interest passes from the party.[177]

 

All contingent and executory interests are assignable in equity, and will be enforced if made for a valuable consideration; and 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 transmissable by descent, and devisable. But 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.[178] 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.[179]

## NOTES

1. Co. Litt. 49. a. 143. a. 2 Blacks. Com. 163. Preston on Estates, vol. i. 90, 91.

2. N.Y. Revised Statutes, vol. i. 723. sec. 10, 11.

3. 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.

4. 2 Blacks. Com. 164.

5. 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, p. 3.

6. This is a clear principle of the common law; but the New York Revised Statutes, vol. i. 723. 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 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 maybe 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. Ibid. sec. 24.

7. 10 Co. 97. b. 1 Eq. Cas. Abr. 186. E. 1. vide supra, p. 10. in notis.

8. 2 Inst. 336. Fearne on Rem. p. 7, 8.

9. *Doe v. Ellis*, 9 East's Rep. 382. Tenny v. Agar, 12 ibid. 253. *Dansey v. Griffith*, 4 Maule & Selw. 61. The series of cases on this subject, as Mr. Humphreys expresses it, in his Observations on Real Property, have been "obscurely shading down from a fee simple to a fee tail." The N.Y. Revised Statutes, (vol. 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.

10. Luddington v. Kine, 1 Lord Raym. 203. Doug. Rep. 505. note,

11. Cornish on Remainders, p. 27-29.

12. Doug. *ub. sup.*

13. N.Y. Revised Statutes, vol. i. 724. sec. 25.

14. Chadock v. Cowly, Cro. J. 695. 2 Blacks. Com, 381.

15. Preston on Estates, vol. i. 94, 98.

16. Preston on Estates, vol. i. 64. 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? The distinction appears to be fanciful.

 

17. N.Y. Revised Statutes, vol. i. 723. sec. 13.

18. Fearne's Int. to his Treatise on Remainders.

19. 10 Co. 85. a.

20. Parkhurst v. Smith, Willes' Rep. 337. Fearne on Rem. 277.278. 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.

21. Fearne, 279-286.

22. Badger v. Lloyd, 1 Salk. 232. 1 Lord Raym. 523. S. C. Ives v. Legge, 3 Term Rep. 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 Lord Raym. 203. though the judges were not unanimous on the question, whether the remainder was vested or contingent.

23. Willes' Rep. 337.

24. Cunningham v. Moody, 1 Vesey's Rep. 174. Doe v. Martin, 4 Term; Rep. 39.

25. Doe v. Lea, 3 Term Rep. 41. Stanley v. Stanley, 16 Vesey's Rep. 491. Doe v. Nicholls, 1 Barnw. & Cress. 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.

26. Litt. sec. 416. Co. Litt. 252. a.

27. Fearne, p. 394-396. Doe v. Perryn, 3 Term Rep. 484. Lawrence v. Maggs, 1 Eden, 453. Doe v. Provoost, 4 Johns. Rep. 61. Right v. Creber, 5 Barnw. & Cress. 866. Annable v. Patch, 3 Pickering, 360.

28. Fearne on Rem. 3. Preston on Estates, vol. i. 71. 74.

29. The Mayor of London v. Alford, Cro. C. 576. 2 Co. 51. *Cholmley's case*. This difficulty is provided for by the N.Y. Revised Statutes, vol. 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.

30. 3 Co. 20. a. b. *Lovie's Case*, 10 Co. 85. a.

31. 3 Co. 20. a. Co. Litt. 378. a.

32. 3 Co. 20. a.

33. Cro. C. 102. 3 Co. 20. a. Fearne, p. 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 N. Y. Revised Statutes, vol. i. 723. sec. 13. is brief and precise. A remainder, says the statute, is contingent, whilst the person to whom, 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' Rep. 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, (vol. ii. 191.) though he had the classification of Mr. Fearne before him, followed that of his illustrious predecessor. Mr. Counish, in his recent work, severely criticises Mr. 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. Mr. Cruise, on the other hand, in his Digest, has closely copied the arrangement of Mr. 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.

34. Napper v. Sanders, Hutten, 118. Opinion of Lord Ch. J. Hale, in Weall v. Lower, Pollexfen, 67. Fearne, p. 17-23.

35. *Shelley's case*, 1 Co. 104. 2 Rol..Abr. 417.

36. Fearne on Rem. 32.

37. Fearne, 36.

38. Tippin v. Cosin, Carth. 272. 4 Mod. Rep. 380. S. C. Jones v. Lord Say and Seal, 8 Viner, 262. pl. 19. Shapland v. Smith, 1 Bro. 75. Silvester v. Wilson, 2 Term Rep. 444. Mr. Fearne on Remainders, p. 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 ail 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, (i Eden, 119.) yet the N.Y. Revised Statutes would operate to destroy such a trust, for it is declared, (vol. 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 N.Y. Revised Statutes, which have destroyed the rule in *Shelley's case*, root and branch. It is declared, (N.Y. Revised Statutes, vol.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, diver so 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.

39. Moore v. Parker, 1 Lord Raym. 37. where Lord Ch. J. Holt traces hack the distinction to 29 Edw. III. Doe v. Founereau, Doug. Rep. 487.

40. Butler's note, 261. to 2 Co. Litt. 299. b. The observations of Mr. Fearne, on this point, are with his usual acuteness.-Fearne on Rem. 85.

41. Mr. Preston, on Abstracts of Title, vol, 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, p. 45.

42. Burchett v. Durdant, 2 Vent. 311. James v. Richardson, 2 Jones' Rep. 99. 2 Lev. 232. S. C. Goodright v. White, 2 Blacks. Rep. 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. has 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 encumbered 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 Chan. 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 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.

43. Essay on Rem. p. 300.

44. Napper v. Sanders, Hutton, 119, Tracey v. Lethieulier, 3 Atk. Rep. 774. Amb. 204. S. C. Horton v. Whitaker, 1 Term Rep. 346.

45. Davis v. Norton, 2 P. Wms. 390. Doe v. Shippard, Doug. Rep. 75.

46. Scatterwood v. Edge, 1 Salk. Rep. 229. Avelyn v. Ward, 1 Vesey's Rep. 422. 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. p. 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 sifting dry facts and circumstances arising on wills and settlements, merely to arrive at some technical reasoning, adapted to promote the testator's or the settlor'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.

47. 1 Co. 104.

48. 1 Preston on Estates, vol. i. p. 263--419.

49. I have ventured to abridge the definition in a slight degree, and with some small variation in the expressions, without intending to impair its precision.

50. Pibus v. Mitford, 1 Vent. 372. Hayes v. Foorde, 2 Blacks. Rep. 698. Fearne on Rem.42. 52, 53.

51. The case of the Provost of Beverley, 40 Edw. III. Preston on Estates, vol. i. 304.

52. Harg. Law Tracts, 501.

53. Fitz. Abr. tit. Feoffment, p.109. Co. Litt. 22. b. 319. b. 2 Rol, Abr. 417.

54. Harg. Law Tracts, 489.

55. Ibid. 551.

56. 2 Burr. Rep. 1100.

57. Trevor v. Trevor, 1 Eq. Cas. Abr. 387. pl. 7. Jones v. Laughton, ibid. 392. pl. 2. Streatfield v. Streatfield, Cases temp. Talb. 176. Honor v. Honor, 2 Vern. 658. Bale v. Coleman, 1 P. Wms. 142 Highway v. Bonner, 1 Bro. 584.

58. Fearne. p. 141.

59. Yates J., in Perrin v. Blake.

60. 1 Vesey's Rep. 142. 2 Atk. Rep. 346. 570. 1 Coll. Jurid. No. 15. In this last work, the case is very fully reported, and taken from an original MS.

61. Fearne, 141. 175-181.

62. 2 Atk. Rep. 246. Str. 1125.

63. 1 Eden, 119. Fearne on Rem. 159-169.

64. 1 Bro. 206.

65. 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, remainder 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.

66. *Sir Thomas Tippen's case*, cited in 1 P. Wms. 359. Co. Litt. 319. b.

67. Burchett v. Durdant, 2 Vent. 311. Carth. 154. S. C.

 

68. *Archer's case*, 1 Co. 66. Lisle v. Gray, 2 Lev. 223. T. Raym. 315. S. C. Luddington v. Kime,1 Lord Raym. 203. Backhouse v. Wells, 1 Equ. Cas. Abr. 184. pl. 27. Doe v. Laming, 2 Burr. Rep. 1100. Mr. Justice Blackstone's argument in Perrin v. Blake, Harp;. Law Tracts, 504, 505.

69. 1 Col. Jurid. No. 10. 4 Burr. Rep. 2579.

70. The case of Perrin v. Blake was first brought into discussion before the K. B. in 1769, and decided there in February, 1770, but the litigation upon that will involving merely the validity of a widow's jointure of 1000 pounds 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 traveled, in two ejectment suits, through the Supreme Court, and the Court of Appeals and Error 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 Barg. Law Tracts, 489-493. in the notes.

71. *Archer's case,* 1 Co. 66. Waker v. Snowe, Palm. 359. Lisle v. Gray, 2 Lev. 223. and these two last cases arose upon deeds. Backhouse v. Wells, 1 Equ. Cas. Abr. 184. Luddington v. Kime, 1 Lord Raym. 203. Bagshaw v. Spencer, 1 Coll. Jurid. No. 15.

72. 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 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 Mans, field,) 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 in the latter case, in April, 1769, had been unanimous. (See 4 Burr. Rep. 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 debateable questions, the decision was reversed upon error.

73. 2 Burr. Rep. 1100.

74. Harg. Law Tracts, 489.

75. 1 Bro. 206.

76. My objection to the work of Mr. Preston is, that he has analysed, and divided, and subdivided the subject, already sufficiently intricate., until he has involved it still deeper in “involutions wild.”

77. 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.

78. Fearne on Rem. 223.

79. 1 Bro. 206,

80. Doug. Rep. 337.

81. 7 Term Rep. 531.

82. Doe v. Colyear, 11 East's Rep. 548. Doe v, Jesson, 2 Bligh, 2. Doe v. Harvey, 4 Barnw. & Cress. 610.

83. Dott v. Cunnington, 1 Bay, 453.

 

84. Carr v. Porter, 1 McCord's Ch. Rep. 60.

85. 2 Wash. Rep. 9.

86. 4 Harr. & Johns. Rep. 431.

87. 6 Harr. & Johns. Rep. 364.

88. 1 Dallas' Rep. 47.

89. 3 Binney's Rep. 139.

90. 1 Day's Rep. 299.

91. 5 Conn. Rep. 100. I have not seen the statute, and am not informed to what extent it goes with the rule.

92. 2 John. Gas. 384.

93. N.Y. Revised Statutes, vol. i. 725. sec. 28.

94. 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 for ever to the renowned discussions in *Shelley's Case*, which were so vehement and so protracted as to arouse the scepter of the haughty Elizabeth. He may equally take leave of the multiplied specimens of profound logic, skillful 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 Reeve. 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.

95. Plowd. 25. a. Dr. & Stud. Dial. 2. ch. 20. Moor v. Parker, 4 Mod. Rep. 316.

96. *Barwick's Case*, 5 Co. 94. b.

97. 2 Blacks. Com. 166.

98. Litt. sec. 60. Co. Litt. ibid. 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 disseize his tenant for life, and then grants 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 seizin 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 cequitas existit.*

99. Bacon's Abr. tit. Remainder and Reversion, G. This head of G willim's Bacon was taken from a MS. treatise, by Lord Ch. B. Gilbert, furnished by Mr. Hargrave.

100. Supra, p. 122.

101. Wms. Jones' Rep. 58. Co. Lint. 298. a. 1 Rot. Abr. 474. P.

102. Co. Litt. 298. a.

103. 3 Bro. C. C. 393.

104. Plowd. 35. a. Dyer, 140. b.

105. 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, byway of illustration, taken by Rolle from 9 Hen. VI. are relied on in Plowden, 35. a. 414. a. and in Comyn's Dig. tit. Estate, B. 14. in support of the same rule.

106. Co. Litt. 217. a. 1 Co. 130. 134. b.

107. Goodright v. Cornish, 1 Salk. Rep. 226.

108. Ellie v. Osborne, 2 Vern. Rep. 754.

109. Lord Mansfield, 1 Burr. Rep. 107.

110. T. Raym. 140.

111. 12 Mod. Rep. 174.

112. Delamere v. Sermon, Plowd. Rep. 346.

113. Sugden on Powers, 2d London ed. 13,14.

114. Dyer, 340. a. 2 Leon. 14.

115. 1 Leon. 256.

116. 1 Co. 120. 1 Anderson, 309. 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. p. 521

117. *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 this case abounds, it carries with it decisive evidence of the acuteness, industry, and patriotic views of the sages of the law at that day.

118. 1 Vent.306.

119. See Sugden on Powers, ch. 1. sec. 3. who has ransacked all these cases, and whose clear analysis of them has guided, and greatly assisted me. Mr. Preston, in his Treatise on Estates, vol. i. 160-171. has gone over the same cases, though riot in the same critical and masterly manner.

120. *Chudleigh's Care, ub. sup.* Wegg v. Villers, 2 Rol. Abr. 796. 11-16.22. Viper. 228. 229. S. C.

121. Preston on Estates, vol. i. 159. Cruise's Dig. tit. Remainder. ch.5 sec. 3. 5. ch. 6. sec. 37. 39.

122. Fearne on Rem. 377 - 380.

123. Mr. Sugden, in his Treatise on Powers, p. 38 says, that covenants to stand seized 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. Rep. 383.) speaks of covenants to stand seized, as one of the usual modes of raising uses in marriage settlements. It was said by Newdigate, J. in Heyns v. Villars, (2 Sid. Rep. 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, p. 398.) Lord Ch. 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. Schermerhorne v. Vanderheyden, 1 Johns. Rep. 139. Owings v. Owings, 1 Harr. 4 Gill, 484.) The consideration requisite is merely nominal. A peppercorn is a sufficient consideration to raise a use. (Anon. 2 Vent. 35.) 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. Blacks. Rep. 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 Wheat. Rep. 556. 11 ibid. 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. N.Y. Revised Statutes, vol. i. 727. sec. 45. Ibid. 725. sec. 35. Ibid. 738, 739. See. also, further on this subject, *infra*.

124. Sugden on Powers, ch. i. sec. 3.

125. Preston on Estates, vol. i. 164-184. It is very 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 once taking notice of such full and exhausting discussions in opposition to it, by such masters of the science as Preston and Sugden. Is it possible that he had never read these treatises? If not, pro pudor!

126. N.Y. Revised Statutes, vol. i. 725. sec. 34.

127. Ibid. vol. i. 727. sec. 45. 50. 55.

128. Ibid. vol. i. 728. sec. 49. See also, *infra*, under the head of Uses and Trusts.

129. Fearne, p. 383, 384. Preston on Estates, vol. i. 241. In Hopkins v. Hopkins, Cases temp. Talbot, 43., Lord Talbot considered such a limitation as good by way of executory devise, but, afterwards, in Chapman v. Blissett, ibid, 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, p. 123.) and in Doe v. Heneage, (4 Term Rep. 13.) both the bar and bench assumed a conditional limitation to be, what Mr. Cornish says (Essay on Remainders, p. 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!

130. Plowd. 25. 28. Co. Litt. 49. a. b.

131. Colthirst v. Bejuskin, Plowd. Rep. 25. *Archer's case*, 1 Co. 66. *Chudleigh's case*, 1 Co. 138.

132. 3 Co. 21. a. 2 Blacks. Com. 168. Preston on Abstracts, vol. i. 114.

133. Cogan v. Cogan, Cro. Eliz. 360. Plowd. Rep. 24. b. 29. a. b.

134. Plowd. Rep. 29. b.

135. Fearne, p. 332.

136. Fearne, 319.

137. See supra, p. 123

138. Vol. i. 725. sec. 27.

139. N.Y. Revised Statutes, vol. i. 723. sec. 16.

140. N.Y. Revised Statutes, vol. i. 724. sec. 16.

141. ibid. sec. 19. Vide supra, p. 17.

142. Ibid. sec. 20.

143. Ibid. sec. 21

144. Ibid. sec. 24.

145. Ibid. sec. 25, 26.

146. N.Y. Revised Statutes, p. 725. sec. 29.

147. Ibid. sec. 32, 33, 34.

148. Ibid. vol. i. 750. sec. 1l.

 

149. Bro. tit. Done and Rem. pl. 21. Matthews v. Temple, Comb. 467. Fearne, p. 393.

150. Fearne, p. 426. Lane v. Pannel, 1 Rol. Rep. 238. 317. 438. Harrison v. Belsey, T. Raym. 413.

151. *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.

152. 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 Blasse 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.

153. Purefoy v. Rogers, 2 Saund. Rep. 386.

154. Fearne on Rem. p. 432-434.

155. 7 Taunton's Rep. 362. This is one among a 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. It has become almost as laborious a task to undertake to master the science, as it would be to understand the scholastic subtleties of the schoolmen of the middle ages, or the mystical metaphysics of the modern Germans. I am more and more impressed with a sense of the great utility of the New York provision, rescuing contingent remainders by legislative authority, from all perplexing dependence on the particular estate.

156. Lord Hardwicke, in Lethieullier v. Tracy, 3 Atk. Rep. 730.

157. 5 Vesey's Rep. 648. This has been done, as we have already observed, in New York, by the N.Y. Revised Statutes, vol. i. 725. sec. 32. 34. rendering expectant estates or remainders no longer dependent on the continuance of the precedent estate. 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 Rem. 208.

158. Gilbert's Law of Uses, by Sugden, 312. Litt. sec. 600. Magennis v McCullough, Gilbert's Rep. 236.

159. Fearne, p. 405, 406.

160. Thompson v. Leach, 2 Salk. Rep. 576. Hale, Ch. J. in Purefoy v. Rogers, 2 Saund. Rep. 387. Fearne, p. 438, 439. 2 Woodd. Lec. 196, 197.

161. 2 Blacks. Com. 171. Fearne, 409, 410,

162. Mansel v. Mansel, 2 P. Wms. 678.

163. *Sir Thomas Tippen's case*, cited in 1 P. Wms. 359. Platt v. Sprigg, 2 Vern. Rep. 303. Frewin v. Charleton, 1 Equ. Cas. Abr. 380. pl 4. Symance v. Tattam, 1 Atk. Rep. 613. Fearne, 410-423. Biscoe v. Perkins, 1 Ves. & Beames. 485.

164. *Sir Edward Cleve's case*, 6 Co. 17. b. Davies v. Speed, Carth. Rep. 262. Purefoy v. Rogers, 2 Saund. Rep. 380. Plunkett v. Holmes, T. Raym. 28. Lord Parker. in Carter v. Barnadiston. 1 P. Wms. 516.

165. Preston on Estates, vol. i. 240. 242.

166. 1 P. Wms. 505.

167. In New York, the conveyances by feoffment, with livery, and by fines, and common recoveries, are abolished. N.Y. Revised Statutes, vol. i. 738. sec. 136. Ibid. vol. 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. (Ibid. 739. sec. 138. 142. Ibid. 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.

168. Fearne, p. 452-458. That an estate in abeyance is to be considered as in nubibus, was a doctrine frequently suggested and admitted in Plowden. (p 29. a. 35. a. 556. 563, 564.) and Lord Coke, in Co. Litt. 342. b. said, that an estate placed in such a nondescript situation, had the quality of fame-inter nubile caput. This does not help the matter, but such an occasional

 

glimpse at fairy land, serves at least to cheer us amidst the disheartening gloom of the subject.

169. Bro. tit. Done Rem. pl. 6.. Gawdy, J. in *Chudleigh's case*, 1 Co. 135.

170. Hob. 153

171. Hob. 153. Sir William Blackstone's argument in Perrin v. Blake. Preston on Estates, vol. i. 220. 249-255.

172. Preston on Estates, vol. i. 255. Preston on Abstracts, vol. ii. 103-106.

173. Cornish's Essay on Remainders, p. 175.

174. 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 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!

175. Co. Litt. 352. a.

176. Weale v. Lower, Pollex. Rep. 54. 61.

177. Co. Litt. 45. a.

178. Roe v. Jones, 1 H. Blacks. Rep. 30. Moor v. Hawkins, cited in 1 H. Blacks Rep. 33. Jones v. Roe, 3 Term Rep. 88. Roe v. Griffiths, 1 Wm. Blacks. Rep. 605.

179. Fearne, 459. Preston on Abstracts, vol. ii. 119. 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 N.Y. Revised Statutes, (vol. i. 723. sec. 9, 10. 13. ibid. 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.

 

LECTURE 59

# Of Executory Devises

Ax 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.[1] Lord Kenyon observed, in *Doe v. Morgan*,[2] 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.[3]

The history of executory devises presents an interesting view of the stable policy of the English common law, which abhorred perpetuities, and the determined spirit 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 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,[4] "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, provisoes 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.[5] Such perpetuities, said Lord Bacon,[6] would bring in use the former inconveniences attached to entails, 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 to be tied to the stake by such perpetuities."

Executory limitations were next resorted to, that men might attain the same object. Mr. Hargrave[7] has gleaned from the oldest authorities a few imperfect samples of an 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*.[8] 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.[9] That case was silent as to executory bequests of chattels, and Mr. Justice Doderidge was opposed to the doctrine of the decision, 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. Cutler*;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. Bickerstuffe*,[10] 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*,[11] on the doctrine 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 executory devises grew and enlarged, *pari passu*, in its application to terms for years, and to estates of inheritance. In *Scatterwood v. Edge*,[12] 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.[13] The question which arose about the same time, in *Lloyd v. Carew*,[14] was, whether a limitation could be extended for one year beyond co-existing 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*,[15] 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 a person, according to *Snow and Cutler's case*. At last, in *Stephens v. Stephens*, in 1736,[16] the doctrine was finally settled and defined by precise limits. The addition of twenty-one years to 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 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.[17] And thus, notwithstanding the constant dread of perpetuities, and the jealousy of executory devises, as being

 

an irregular and 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,[18]) as part of the system of our American testamentary jurisprudence.

(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.[19] (1.) Where the devisor parts with his whole estate, but, upon some contingency, qualifies the disposition of it, and limits an estate on that contingency. 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 1000 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.[20] ('L.) Where the testator gives a future interest to arise upon a contingency, 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.[21] (3.) At common law, as was observed in a former volume,[22] 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 ouch 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*;[23] 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.[24]

An executory devise differs from a remainder in three very material points. (1.) It need 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 seizin, and until the contingency happens the fee passes, in the usual course of descent, to the heirs at law. (Z.) 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 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.[25] 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.[26] 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 of 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.[27] 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 unalienable interest, and the first taker has only the use of the land or chattel pending the contingency mentioned inn the will. The executory devise cannot be divested even by a feoffment;[28] 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.[29] 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*;[30] 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.

We have seen, 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 settlor pleases, for the whole period is no more than the life of the survivor. This rule of the English law has been restricted by the New York Revised Statutes,[31] 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 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 be under the age of twenty-one years. 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. The New York statute has, in effect, destroyed all distinction between contingent remainders and executory devises. They are equally future or expectant estates, subject to the same provisions, and may be equally created by grant, or by will. The statute[32] 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 for 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,[33] 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, in the course of the present lecture, on the subject of executory devises, will have reference to the English law, as it existed in this state prior to the late revision, and as it still generally exists in the other states of the Unions.[34]

(3.) *Of executory devises limited upon a failure of heirs or issue*.

It' an executory devise be limited to take effect after a dying without heirs, or without issue, the limitation is held to be void, because the contingency is too remote, 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 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, without reference to any particular time, or any particular event; 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. 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 there should be a failure of issue of the first taker.[35] Lord Macclesfield declared,[36] 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 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*,[37] 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 remainder-man was not intended by the testator to take any thing 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*,[38] where there was a devise to the sons, and if either should die without lawful issue, his part to be divided among the survivors. Mr. Justice Carr declared, that the testator meant that the land riven 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 opinions 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 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 issue, 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.[39] The general course of American 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.[40] 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 dying without leaving issue;[41] nor, if the devise was to two or more persons, and if either should die without issue, the survivor should take.[42] 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*,[43] that the will meant issue living at the death of the first taker, and the limitation 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[44] or where the will, in a bequest of personal estate only, was to two, and upon either dying without children, then to the survivor;[45] or when the first taker should die and leave no issue, then to A. and B., who were *in esse*, or the survivor, and were to take life estates only;[46] or when the first taker should happen to die, and leave no child or children.[47]

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 on this subject, and to sustain the limitation over as an executory devise. In *Morgan v. Morgan*,[48] 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*,[49] 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. The case of *Anderson v. Jackson*[50] was discussed very elaborately in the courts in New York, and it was finally decided in the Court of Errors, that after a 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.[51]

In Virginia, by statute, in 1819, the rule of construction of devises, as well as 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, 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. So, also, by the New York Revised Statutes;[52] 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,[53] that where a future estate shall be limited to heirs, or issue, 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 away, at once, the whole mass of English and American adjudications on the meaning, force and effect of such limitations. The statute speaks peremptorily, and forces upon the courts the construction which it prescribes; and yet, perhaps, the next words, or next sentence in the will, might show a decided intention not to fix the period of the devisee's death for the contingency 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. And yet, after all, 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.[54]

The English courts long since took a distinction between an executory devise of real, and of personal estate, and held, that while the words dying without issue made an estate tail of real property, yet that, in respect to personal property, which was 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*,[55] 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 William Grant, is brought to bear against any such distinction. There is such an array of opinion on each side, 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 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.[56]

The New York Revised Statutes[57] 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 of 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.[58] And if the executory limitation, either of lands 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 on which the executory limitation depends, may exceed, in point of time, the authorized period, is fatal to it, though there are cases in which the limitation over has been held too remote only pra tanto, or in relation to a branch of the disposition.[59]

 

(4.) *Of other matters relating to executory devises.*

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.[60] 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.[61] 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.[62]

In the great case of *Thellusson v. Woodford*,[63] 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. The purpose of 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 to trustees in fee during 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 in venire sa mere, for 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 correspondent interest. 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.[64]

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 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 intolerable. It gave occasion to the statute of 39 and 40 Geo. III. c. 98. prohibiting thereafter any person 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 grantor or testator, or twenty-one years after his death, or during the minority of any person, who, under the deed or will directing the accumulation, would, if then of full age, be entitled to the rents and profits.

The New York Revised Statutes[65] have allowed the accumulating of rents and profits of real estate, for the benefit of one or more persons, by will or deed; but the accumulation must commence 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.

The intermediate rents and profits arising on an estate given by way of executory devise, will pass by a devise of all the residue of the estate.[66] But if these are not devised, then they are 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 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 descend to the testator's heir at law.[67] 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.[68]

## NOTES

1. *Carwardine v. Carwardine*, 1 Eden's Rep. 27

2. 3 Term Rep. 763.

3. Lord Ch. J. Willes, in *Goodtitle v. Wood*, Willes' Rep. 211.

4. *Duke of Marlborough v. Earl Godolphin*, 1 Eden's Rep. 417.

5. Vide supra, p. 126.

6. Use of the Law, in Bacon's Law Tracts, p. 145.

7. See his elaborate argument as counsel in the great case of *Thellueson v. Woodford*, 4 Vesey's Rep. 249-264. Lord Ch. J. Bridgman, in the ease 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 11 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 in ventre sa mere, was, in many cases, “of consideration in the law.”

8. Cro. Jac. 590.

9. 1 Lev. 135.

10. Pollex. Rep. 31. 1 Cases in Chancery, 4. 2 Freeman, 163. Lord Bridgman's MS. Report of the case, cited by Mr. Hargrave in 4 Ves. Rep. 258.

11. 3 Ch. Cas. 1. Pollex. Rep. 223. 2 Ch. Rep 229. “

12. l Salk. Rep. 229. 12 Mod. Rep. 278.

13. 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.

14. Prec. in Ch. 72. Shower's P. C. 137. S. C.

 

15. 1 Lord Raym. 203.

16. 2 Barnard, K. B. 375. Cases temp. Talbot, 228.

17. Atkinson v. Hutchinson, 3 P. Wms. 258. Goodman v. Goodright, 1 Blacks. Rep. 188. 2 Blacks. Com. 174. Long v. Blackall, 7 Term Rep. 100.

18. Supra, p. 17.

19. This is the classification made by Powell, J. in Scatterwood v. Edge, 1 Salk. Rep. 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 devise applicable to freehold interests, and two, at least, if not three sorts of executory bequests applicable to chattel interests. Preston on Abstracts of Title, vol. 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 possible.

20. Marks v. Marks, 10 Mod. Rep. 419. Prec. in Chan. 486.

21. Bate v. Amherst, T. Raym. 82. Lent v. Archer, 1 Salk. Rep. 226. Lord Ch. J. Treby, in Clarke v. Smith, 1 Lutw. 798.

22. Vol. ii. P. 285.

23. Cotton v. Heath, 1 Equ. Cas. Abr. 191. pl. 2.

24. Hoare v. Parker, 2 Term Rep. 376. Fearne on Executory Devices, 46.

25. 2 Blacks. Com. 173, 174.

26. Pells v. Brown, Cro. Jac. 590. Fearne on Executory Devises, 46. 51-58.

27. Jackson v. Bull, 10 Johns. Rep. 19. Attorney General v. Hall, Fitzg. 314. Ide v. Ide, 5 Mass. Rep. 500. Jackson v. Robin, 16 Johns. Rep. 537.

28. *Mullineux's case*, cited in Palm. 136.

29. Driver v. Edgar, Cowp. Rep. 379. Fearne, 66, 61. 107.

30. Cro. Jac, 590.

31. N.Y. Revised Statutes, vol. i. 728. sec. 14, 15, 16.

32. N.Y. Revised Statutes, vol. i. 724. sec. 24.

33. Ibid. vol. i. 727. sec. 45.

34. We may not be able to calculate with certainty upon the future operation of the changes which have been recently, made in the do trine 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 distinctions 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, and uniformity, and certainty of the law, to bring those various executory interests nearer together, and resolve them into a few 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 maybe given. The New York statute has carried the restriction too far.

35. Jeffery v. Sprigge, 1 Cox's Cases, 62.

36. Pleydell v. Pleydell, 1 P. Wins. 750.

 

37. 12 East's Rep. 253.

38. 5 Randolph, 273.

39. 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, ibid. 695. Holmes v. Meynel, T. Raym. 452. Forth v. Chapman, 1 P. Wms. 663. Brice v. Smith, Willes' Rep. 1. Hope v. Taylor, 1 Burr. Rep. 268. Attorney General v. Bayley, 2 Bro. 553. Knight v. Ellis, ibid. 570. Doe v. Fonnereau, Doug. Rep. 504. Denn v. Slater, 5 Term Rep. 355. Doe v. Rivers, 7 Term Rep. 276. Doe v. Ellis, 9 East's Rep. 38.2. Tenny v. Agar, 12 East's Rep. 253. Romilly v. James, 6 Taunt. Rep. 263. Bartow v. Salter, 17 Vesey's Rep. 479.

40. For the strict effect of the rule, see Ide v. Ide, 5 Mass. Rep. 500. Dallam v. Dallam, 7 Harr. & Johns. 220. Newton v. Griffith, 1 Harr. & Gill, 111. Sydnor v. Sydnor, 2 Munf. 269. Carter v. Tyler, 1 Call, 143. Hill v. Burrow, 3 ibid. 342. Bells v. Gillespie, 5 Randolph, 273. Broaddus v. Turner, ibid. 308. Denn v. Wood, Cameron & Norw. Rep. 202. Cruger v. Hayward, 2 Dessauss. 94

41. Forth v. Chapman, 1 P. Wms. 663. Romilly v. James, 6 Taunt. Rep. 263. Daintry v. Daintry, 6 Term Rep. 307. Croly v. Croly, 1 Batty, 1. Carr v. Porter, 1 McCord's Ch. Rep. 60. Newton v. Griffith, 1 Harr. & Gill, 111.

42. Chadock v. Cowly, Cro. Jac. 695. Newton v. Griffith, 1 Harr. & Gill, 111. Bells v. Gillespie, 5 Randolph, 273. Broaddus v. Turner, ibid. 308.

43. Cro.Jac.590.

44. Porter v. Bradley, 3 Term Rep. 143.

45. Hughes v. Sayer, 1 P. Wms. 533.

46. Roe v. Jeffrey, 7 Term Rep. 489.

47. Doe v. Webber, 1 Barnw. & Ald. 713.

48. 5 Day, 517.

49. 3 Halsted's Rep. 29.

50. 16 Johns. Rep. 382.

51. The decision of 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's Rep. 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. Jeffry, 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 Wheat. Rep. 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 decision. 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 Randolph, 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. The federal jurisprudence concerning real property, under the operation of the rule of decision assumed by

 

the Supreme Court of the United States, (and I do not well see how it could 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."

52. N.Y. Revised Statutes, vol. i. 722. sec. 4. Ibid. 724. sec. 22.

53. Ibid. p. 724. sec. 30, 31.

54. The great objection to legislative rules, and to all kinds of codification, when it runs into detail, is, that the rules are not malleable; they cannot accommodate 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 Ch. J. Wilmot, 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." The different bearings of the sections of the N.Y. Revised Statutes, vol. i. 748. sec. 2. and vol. i. 724. sec. 22. on this subject, present quite a contrariety of prescription. In the one, every instrument conveying an estate or interest, must be carried into effect according to the intent of the party, so far as that intent can be collected from the whole instrument, and is consistent with the rules of law. In the other, certain words shall be construed to mean heirs or issue living at the death of the person named as ancestor, when, perhaps, the other parts of the instrument would show clearly, that the words were not so meant; or when, perhaps, in a great majority of cases, without any further explanation, the testator, under a comprehensive view of the subject, never did so mean, and would have resented the imputation of such a construction.

55. 1 P. Wms. 663.

56. Fearne on Executory Devises, by Powell, 186. 239. 259. Doe v. Lyde, 1 Term Rep. 593. Dashiell v. Dashiell, 2 Harr. & Gill, 127. 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. Rep. 314.) Lord Thurlow, (1 Bro. 188. 1 Ves. jr. 286.) Lord Loughborough, (3 Vesey's Rep. 99.) Lord Alvanley, (5 Vesey's Rep. 440.) Lord Kenyon, (3 Term Rep. 133. 7 Term Rep. 595.) Sir William Grant, (17 Vesey's Rep. 479.) and the Court of K. B. in 4 Maule & Selw. 62. are authorities against the distinction. Lord Hardwicke, (2 Atk. Rep. 288. 2 Ves. Rep. 180. 616.) Lord Mansfield, (Cowp. Rep. 410.) Lord Eldon, (9 Ves. Rep. 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 mariner as mechanical forces of equal power, operating in contrary directions, naturally reduce each other to rest. 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 sustain the limitation over, and this is the extent to which they have gone with the distinction. Executors of Moffat v. Strong, 10 Johns. Rep. 12. Newton v. Griffith, 1 Harr.& Gill, 111. Royall v. Eppes, 2 Munf. Rep. 479.

57. N.Y. Revised Statutes, vol. i. 724. sec. 23. vol. i. 773. sec. 1 and 2.

58. Attorney General v. Bayley, 2 Bro. 553. Knight v. Ellis, ibid. 570. Lord Chatham v. Tothill, 6 Bro. P. C. 450. Britton v. Twining, 3 Merivale, 176.

59. Fearne on Executory Devises, 159, 160. Phipps v. Kelynge, ibid. 84.

60. *Pay's Case*, Cro. E. 878. Hayward v. Stillingfleet, 1 Atk Rep. 422. Hopkins v. Hopkins, Cases temp. Talbot, 44

61. Chapman v. Blissel, Cases temp. Talbot, 145. Duke of Bridgewater v. Egerton, 2 Vesey's Rep. 122.

62. Pinbury v. Elkin, 1 P. Wms. 563. Goodright v. Searle, 2 Wils. Rep. 29. Fearne on Executory Devises, 529-535. N.Y. Revised Statutes, vol. i. 725. sec. 35. Higden v. Williamson, Cases temp. Talbot, 131. 2 Saund. Rep. 388. k. note.

63. 4 Vesey's Rep. 227.

64. 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 100 years, as it may, the property will have amounted to upwards of one hundred millions sterling.

65. N.Y. Revised Statutes, vol. i. 726. sec. 37-40.

66. Stephens v. Stephens, Cases temp. Talbot, 228.

67. Clarke v. Smith, 1 Lutw. 798. Hopkins v. Hopkins, Forrest, 44.Gibson v. Lord Mountfort, 1 Vesey's Rep. 485. Mb. 93.

 

S.C.

68. Rogers v. Ross, 4 Johns. Ch. Rep. 388.

 

LECTURE 60

# 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.[1] 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. But the 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.

Uses 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 objects of the testator's bounty. But such a confidence was precarious, and was called by the Roman lawyers *jus precarium,* for it rested entirely iii 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 defenseless trusts, they were created under an appeal to him, as *rogote per salutem,* or *per fortunam Augusti*. Augustus was flattered by the appeal, and directed the praetor 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 *praetor fidei commissaries*.[2] 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 praetor, in cases where the trust 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.[3]

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.[4] When this evasion of law was met and suppressed by the statute of 15 Rich. II., uses were applied to save lands from the effects of attainders; for the use, being a mere right in equity to 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 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 became 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 future, or 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 seizin 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 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 differing from cases of possession."[5] 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 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.[6] 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 was exposed, in his estate, to the ordinary legal claims, debts, and forfeitures; but, to avoid this inconvenience, the feoffees were numerous, and when the number became reduced, a new feoffment was made to other feoffees to the subsisting uses. 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 divested 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 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 seized, 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, when it was a mere *nudum pactum*, without consideration. The same principle applied to the case of a release, which was a conveyance operating at common law.[7] 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.[8] 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.[9] Uses 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 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.[10] 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. 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 practiced by uses prior to the 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 seized 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, turned into 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. 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 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.[11] 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 seized 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.[12] 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,[13] 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.[14] In the *Duke of Norfolk's case*, Lord Nottingham 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 executory devise to be postponed. Uses and 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.[15] The statute intended to have destroyed 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 seizin 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.

(1.) Shifting or secondary uses, take effect in derogation of some other estate, and are either limited by the deed creating them, or authorized to be 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. 100 dollars, by a given time, the use to 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 A. is seized in fee with a power in C. of revocation and limitation of a new use.[16] 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 a perpetuity, and which is neatly defined by Sir Edward Sugden,[17] to be such a limitation of property as renders it unalienable beyond the period allowed by law. If, therefore, the object of the power be to create a perpetuity, it is void. 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, are valid, though not confined to the period allowed for suspending alienation, provided the estate be regularly limited in tail.[18] 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. (2.) Springing uses are limited to 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.[19] A springing use may be limited to arise within the period allowed by law in the case of an executory devise. A person may covenant to stand seized, or bargain and sell, to the use of another at a future day.[20] 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, fine, or deed of lease and release, the estate must be conveyed, and the use be raised out of the seizin 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.[21] 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 seizin, and executed by the statute. This is the case in covenants to stand seized, and in conveyances by bargain and sale. (3.) Future, or contingent uses, are limited to take effect as remainders. If lands be granted to A. in fee, to the use of B., on his return from Rome, it is a future contingent use, because it is uncertain whether B. will ever return.[22] (4.) If the use limited by deed expired, or could not vest, or was not to vest but upon a contingency, the use resulted back to the grantor who created it. 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.[23]

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. (i.) They render conveyances more complex, verbose, and expressive, than is requisite, and perpetuate 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 scisin, arising from a forfeiture or change of the estate of the person seized to the use. (3.) The difficulty 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 seizin, effectual to pass every estate and 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[24] 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, cognizable in the courts of law, except where it is otherwise provided in the chapter. 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.[25] 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 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 refinement, 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 changes which the law of trusts has been made to undergo, becomes extremely important.[26]

(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.

It was held, that the statute executed only the first use, and that a use upon a use was void. In a feoffment to A., to the use of B., to the use of C., the statute was held to execute only the use to B., and the use to C. did not take effect.[27] 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.[28] Shifting, or substituted uses, do not fall within this technical rule at law, for they are merely alternate uses. Thus, a deed to A. in fee, to the use of 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.[29] Chattel interests were also held not to be within the statute, because it referred only to persons who were seized, and a termor was held not to be technically seized; and so the statute did not apply to a term for years. 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. 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 modeled 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 whit h the statute of uses meant to avoid.[30]

Trusts have been made subject to the common law' canons of descent. They are deemed capable of the same limitations as legal estates, and curtesy was let in by analogy to legal estates, though, by a strange anomaly, dower has been excluded. 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 the intervention of the trustee. Any disposition of the land by the *cestui que trust*, by conveyance or devise, is binding upon the trustee.[31] In limitations of trusts, either of real or personal estates, the construction, generally speaking, is the same as in the like limitations of legal estates, though with a much greater deference to the testator's manifest intent.[32] 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 afforded an opportunity to the courts of equity of establishing a code of very refined and rational jurisprudence.[33]

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*,[34] 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 seized 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 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 interest 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.[35] The advantages of trusts in 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 children, and the security of creditors, are constantly felt, and they keep increasing in importance as society enlarges and refines. The decisions of the courts of justice bear uniform testimony to this conclusion.[36]

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 trust are satisfied.[37] Trusts are of two kinds, executory and executed. 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 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.[38]

Though there be no particular form of words requisite to create a trust if the intention be clear, yet the English statute of frauds, which is generally the adopted law throughout this country, requires the declaration, or creation of the trust, to be manifested and proved by some writing signed by the party creating the trust; and if the terms of it can be duly ascertained by the writing, it is sufficient. 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.[39]

In addition to the various direct modes of creating trust estates, there are resulting trusts implied by law 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. 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.[40] Lord Hardwicke said, that a resulting trust, arising by operation of law, existed, (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.[41] 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. Sanders has truly observed,[42] 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.[43] So, if a purchase be made by a trustee, with trust moneys, a trust will result to the owner of the money.[44] 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 entrusted to his charge, he becomes chargeable with the purchase as a trustee.[45] There 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.[46]

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. If a trust be created for the 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.[47] Collateral securities given by a debtor to his surety, are considered as trusts for the better security of the creditors' debt; and chancery will see that their intention be fulfilled.[48] 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.[49] And if a weak man sells his estate for a very inadequate consideration, equity will raise a trust in favor of him, or his family.[50] But it would lead me too far from my purpose 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. Humphrey, in his Observations on Real Property,[51] has 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.

The New York Revised Statutes,[52] 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. If any such passive trust be created by any disposition of lands by deed or devise, no estate or interest whatever vests in the trustee. This provision is founded in sound policy. The revisers have justly observed, that 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 u der certain restrictions calculated to prevent the revival of passive, in the shape of resulting trusts. It is, accordingly, provided,[53] 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, but the title shall vest in the alienee, subject to the claims of the existing creditors of the person paying the money.[54] 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 pro. per 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 estate should pass to the trustees.

Express trusts are allowed, (1.) To sell lands for the benefit of creditors; (2.) To sell, mortgage, or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon; (3.) To receive the rents and profits of lands, and apply them to the education or support of any person; or to accumulate the same for the purposes, and within 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, it' 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, remain in, or revert 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.[55] 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;[56] and when the trust is expressed in the instrument creating the estate, every act of the trustee in contravention of the trust, is void.[57] The statute further provides for the case of the death 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. 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.[58]

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 divest himself of it without performance, unless with the assent of the *cestui que trust*, or under the direction of chancery.[59] But the provision 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 is doubt and difficulty as to the transmission.[60] The object of the New York Revised Statutes was to abolish all trusts 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 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."

I am very doubtful whether the abolition of uses, and the reduction of all authorized trusts to those specially mentioned, will ever be productive of such marvelous results. The apprehension 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 4 abstruseness and uncertainty," so long as it leaves undefined 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 debateable 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." This provision reanimates 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 portion of their laws; opinion and habits coincide; they are accommodated to circumstances, and mold 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.

## NOTES

1. Gilbert on Uses, p. 1.

2. Inst. 2. 23. 1. Vinnius, h. t. Bacon on the Statute of Uses, Law Tracts, p. 315.

3. Inst. 2. 23.12.

4. 2 Blacks. Com. 323. Sanders on Uses and Trusts. p. 14.

5. Bacon's Law Tracts, 310. Lord Bacon's reading on the Statute of Uses, has a scholastic and quaint air pervading it; but it is very instructive to read, because it is profoundly intelligent.

6. Lord Bacon says, that these properties of an use were exceedingly well set forth by Walmsley, J., in a case in 36 Eliz. to which he refers.-Bacon's Law Tracts, 307.

7. Bacon on Uses, Law Tracts, p. 312. Sugden on Powers, p. 5, 6.

8. 1 Co. 87. b. 100. b.

9. Bro. Feof. al use, pl. 30. Jenk. Cent. 8. Ca. 52. Co. Litt. 237. a. Preston on Estates, vol. i. 154.

10. Bacon's Law Tracts, p. 316.

11. *Brent's case*, 2 Leon. 16. Manwood, J., 2 And. 75. Preston on Estates, vol. i. 155, 156. 158.

 

12. 2 Blacks. Com. 334. Fearne on Executory Devises. by Powell, 86. note.

13. Bacon on Uses, Law Tracts, 335. 340

14. Dyer, J. in Bawell and Lucas' case, 2 Leon. 221. Holt, Ch. J. in *Davis v. Speed*, 12,Mod. Rep. 38. 2 Salk. 675. S. C.

15. Willes' Rep. 180.

16. Bro. Feof al Uses, 339. a. pl. 30. *Mutton's case*, Dyer, 274. b. Gilbert on Uses, by Sugden, 152-5.

17. Gilbert on Uses, by Sugden, 260. note. *Spencer v. Duke of Marlborough*, 5 Bro. P. C. 592.

18. *Nicholls v. Sheffield*, 2 Bro. 218. *St. George v. St. George*, in the House of Lords, cited in Gilbert on Uses, by Sugden, 157.

19. *Woodliff v. Drury*, Cro. E. 439. *Mutton's case*, Dyer, 274. b.

20. *Roe v. Tranner*, 2 Wils. Rep. 75. Holt, Ch. J. 2 Salk. Rep.675.

21. Gilbert on Uses, by Sugden,163. 176.

22. Sir Edward Sugden, in a note to his edition of Gilbert on Uses, p. 152 to 176. has given a clear and methodical analysis, definition, and description, of these various modifications of future uses. In Mr. Preston's Abstract of Titles, vol. i. 105, 106, 107. and vol. ii. 151. we have also illustrations of the various shades of distinction between them.

23. Co. Litt. 23. a. 271. b. *Sir E. Clere's case*, 6 Co. 17. b. *Armstrong v. Wholesey*, 2 Wils. Rep. 19.

24. Vol. i. 727. sec. 45, 46.

25. N.Y. Revised Statutes, vol. i. 724. sec. 24. Ibid. 738, 739. sec. 137, 138. 142. 146. Ibid. 727. sec. 47.

26. Lord Hardwicke is reported to have said, in the course of his opinion in *Hopkins v. Hopkins*, (1 Atk. Rep. 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 200 years, that the bargain raised a use, and the statute transferred the possession to the use, was as cheap and harmless as any thing 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.

27. Dyer, 155. 1 And. 37. *Meredith v. Jones*, Cro. C. 244. *Lady Whetstone v. Bury*, 2 P. Wms. 146. *Doe v. Passingham*, 6 Barwn & Cress. 305.

28. *Jackson v. Cary*, 16 Johns. Rep. 302.

29. Preston on Abstracts, vol. i. 307-310,

30. Lord Mansfield, in *Burgess v. Wheate*, 1 W. Blacks. Rep. 160.

31. *North v. Champernoon*, 2 Ch. Cases, 78. Lord Alvanley, in *Philips v. Brydges*, 3 Vesey's Rep. 127.

32. Lord Hardwicke, in *Garth v. Baldwin*, 2 Vesey, 655. Sanders on Uses, 187. Phil. edit. 1830.

33. Sugden's Int. to Gilbert on Uses, contains an interesting summary of the rise and progress of uses, down to the statute of uses. A masterly sketch is given by Lord Mansfield, in his opinion in *Burgess v. Wheate*; but the historical view of this subject, by Sir William Blackstone, in his Commentaries, (vol. ii. 327-337.) is neat and comprehensive to a very superior degree.

34. 1 W. Blacks. Rep. 180.

35. *Gibson v. Mountfort*, 1 Vesey's Rep. 491. Lord Hardwicke, in *Villiers v. Villiers*, 2 Atk. Rep. 72. *Oates v. Cooke*, 3 Burr. Rep. 1684. *Fisher v. Fields*, 10 Johns. Rep. 495. Preston on Abstracts. vol. ii. 233, 234. Sanders on Uses, 215,216.

36. *Neville v. Saunders*, 1 Vern. 415. *Say & Seal v. Jones*, 1 Eq. Cas. Mr. 383. pl. 4. *Harton v. Harton*, 7 Term Rep. 652. *Bagshaw v. Spencer*, 1 Coll. Jurid. 378. *Benson v. Le Roy*, 4 Johns. Ch. Rep. 651

 

37. Sanders an Uses, 186.

38. Preston on Estates, vol. i. 190

39. Lord Alvanley, 3 Vesey's Rep. 707. Fisher v. Fields, 10 Johns. Rep. 495. Steeve v. Steeve, 5 Johns. Ch. Rep. 1. Movan v. Hays,1 ibid. 339. Rutledge v. Smith, 1 McCord's Ch. Rep. 119. 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. 131.

40. Willis v. Willis, 2 Atk. Rep. 71. Bartlett v. Pickersgill, 1 Eden, 515. Boyd v. MCLean, 1 Johns. Ch. Rep. 582. Botsford v. Burr, 2 ibid. 405. Sterret v. Sleeve, 5 ibid. 1. Dorsey v. Clarke, 4 Harr. & Johns. 551. Story, J. in Powell v. Monson and Brimfield Man. Company, 3 Mason's Rep. 362, 363. Start v. Cannady, 3 Littell, 399.

41. Lloyd v. Spillet, 2 Atk. Rep. 150:

42. Sanders on Uses, 227.

43. Ryal v. Ryal, 1 Atk. Rep. 59. Amb. 413. Bartlett v. Pickersgill, 1 Eden's Rep. 515. Lane v. Dighton, Amb. 409. Wray v. Steele, 2 Ves. & Beam. 338. Story, J., 3 Mason's Rep. 364.

44. Kirk v. Webb, Prec. in Chan. 84. Ryal v. Ryal, Amb. 413.

45. Holdridge v. Gillespie, 2 Johns. Ch. Rep. 30. Davoue v. Fanning, ibid. 252. and the various cases there referred to.

46. Randall v. Bookey, Prec. in Chan. 162. Emblyn v. Freeman, ibid. 541. Stonehouse v. Evelyn, 3 P. Wms. 252. Digby v. Legard, Cited in 3 P. Wms. 22, note.

47. Neilson v. Blight, 1 Johns. Cas. 205. Weston v. Barker, 12 Johns. Rep. 281. Small v. Oudley, 2 P. Wms. 427. Moses v. Murgatroyd, 1 Johns. Ch. Rep. 129.

48. Maure v. Harrison, 1 Equ. Cas.,Abr. 93. K. 5. Wright v. Morley, 11 Vesey's Rep. 12. 22.

49. Murray v. Ballou, 1 Johns. Ch. Rep. 566. Shepherd v. McEvers, 4 ibid. 136. Graves v. Graves, 1,Marshall's K. Rep. 166. Griggett v. Well, 2 ibid. 149. Marshall, Ch. J., 1 Cranch's Rep. 100.

50. Broaden v. Walker, 2 Harr. & Johns, 2P5. Rutherford v. Rus & Dess. Equ. Rep. 350.

51. P. 18, 17.

52. Vol. i. 727. sec. 47. 49.

53. N.Y. Revised Statutes, vol. i. 728. sec. 50-54.

54. This provision gives the like effect to such conveyances 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 Swanston. 106. Reade v. Livingston, 3 Johns. Ch. Rep. 431. 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.

55. N.Y. Revised Statutes, vol. i. 728, 729. sec. 55, 58, 60, 61, 62.

56. This is only declaratory of what was the law before. Preston un Abstracts, vol. ii. 230. Sanders 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. Rep. 241. and see supra, p. 172.

57. N.Y. Revised Statutes, vol. i. 730. sec. 64, 65.

58. Ibid. 730. sec. 68, 69, 70, 71.

59. Shepherd v. McEvers, 4 Johns. Ch. Rep. 136. Sir Wm. Grant, in 1 Jac. & Walk. 68.

60. 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. Rep. 231. Ex parte Sayers, 5 Vesey's Rep. 169. Dexter v. Stewart, 7 Johns. Ch. Rep. 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 Harr. & Munf. 11. Ridgely v. Carey. 4 Harr. & McHenry. 167.

 

LECTURE 61

## 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, and 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 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 seized, 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.[1] 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 general 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 it, and the appointee, or person in whose favor it is executed. Mr. Sugden, upon the authority of *Sir Edward Clere's case*,[2] 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.[3] The usual classification of powers is as follows: (1.) Powers appendant or appurtenant; and they enable the 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 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.[4] (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.[5]

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 very plain and intelligible division of powers, into general powers, and particular powers[6] and Mr. Humphrey[7] 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,[8] which have abolished the existing law of powers, and established new provisions for their creation, construction, and execution.[9] 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; and it must be granted by some person capable at the time of aliening such interest in the land. Powers, says the statute, are general of 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.[10] It is beneficial when no person other than the grantee has, by the terms of its creation, any interest in its execution.[11] 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 other than the grantee of the power, entitled to the proceeds or benefit thereof; or when any person other than the grantee, is designated as entitled to any benefit from the disposition or charge authorized by the power.[12]

(2.) *Of the creation of powers.*

No formal set of words are 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.[13] 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 exchanged.[14] A devise of an estate generally or indefinitely, with a power of disposition over it, carries a fee[15] but where the estate is given for life only, the devisee takes only an estate 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.[16] The rule is more inflexible where a specific mode of exercising the 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.[17] The New York Revised Statutes[18] 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 the 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.[19]

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.[20] and it received the sanction of Littleton, and Coke, and of the modern determinations.[21] A devise of the land to be sold by the executors, confers a power, and does not give any interest.[22] The New York Revised Statutes have interfered with these distinctions, though they have not settled them in the clearest manner. They declare,[23] that "a devise of lands 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 the fee.[24] If the trust be valid as a power, then, in every such case, [25] the lands to which the trust relates remain in, or descend to, the persons entitled, subject to the trust as a power." The statute[26] 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,[27] "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 executors to sell lands to pay debts or legacies, is not within the literal 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."

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 seized, 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 seized, because a

 

consideration must move from the lessee, or become a debt due from him at the time that the deed creating the power was executed, and this cannot take place when the lessee is not then designated, as is the case in a general power.[28] It is different in conveyances operating by way of transmutation of possession, as by fine or feoffment, because the feoffees become seized to uses, and are bound to execute them without reference to any consideration.[29]

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 seizin is raised to feed the uses created by it, and the statute will, in most cases, transfer the possession to them.[30] 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 seizin 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 seizin must be co-extensive 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.[31] 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 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;[32] 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 same manner as if the power had not been inserted.[33] 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*,[34] and settled, upon great consideration, that the estates so limited were vested, subject, nevertheless, to be divested by the execution of the powers. 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. Moody*,[35] and the doctrine is now definitively settled, and it applies equally to personal estates.[36]

(3.) *Of the execution of powers.*

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 further, and even allows an infant to execute a power simply collateral, and that only; 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 while sole or married. The concurrence of the husband is in no case necessary.[37]

By the New York Revised Statutes,[38] 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 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.

 

A naked authority 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.[39] There are, however, some material qualifications to the rule. The statute of 21 Hen. VIII. c. 4. very early corrected some of the inconveniences of the rule, by declaring that the executors who accepted their trust might sell, though one or more of the executors should refuse to act. This statute has probably been generally adopted in this country, and it has been repeatedly re-enacted in the successive revisions of the statute law of New York. The provision would seem now to be abolished by the New York Revised Statutes,[40] which, after declaring that a power may be granted by a devise in a will, adds, 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.[41] 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 is given to them nominatim as executors, the power does not survive without express words; but where it is given to several persons by their name of trust as a plural body, as to my executors or trustees, it will survive so long as the plural number remains.[42] If the will directs 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.[43] The power to sell cannot be executed by attorney when personal trust and confidence are implied, for discretion cannot be delegated.[44] 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;[45] 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 another shall appoint.[46] Should the appoint ment 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 seizin, and the use to B. would be void at law, though good in equity as a trust.[47]

The person who executes a power, whether it be reserved to the owner of the estate, or to a stranger, must pursue the authority reserved; and the appointee, so far as he comes in 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. It has been well observed in the New York Revised Statutes,[48] that no person can take under an appointment, who would not 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 seizin 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.[49] A general power of appointment enables the party to appoint the 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 divested, 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.[50]

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 required 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.[51] The deed for executing the power consists of two parts, an execution of the power, and a conveyance of the estate. If a person has 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.[52] And yet all this is useless machinery, for if the power be subsisting and valid, the execution of it would, per se, divest the estate. In every settlement taking effect through the medism 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 trustee, 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 seizin, and if the use be declared in his favor he continues seized. 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 repugnant 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 seizin 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.[53] 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.[54]

When the 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. 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 been uniformly and severely exact on this point.[55] If a deed be expressly required, the power cannot be executed by a will;[56] 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.[57] 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.[58]

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. It was a miserably lame and timid provision. The New York Revised Statutes have gone much bolder lengths, and have made some very valuable amendments to the existing law respecting the execution of powers; and while many of the provisions are merely 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.[69] The rule of law, before the statute, was the same 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.[70] 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.[71] 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 formalities shall not be necessary to a valid execution of the power.[62] If the conditions annexed 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, shall 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. 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 recited 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. [63]

It is the general rule, that a power cannot be exercised before the time in which it was the intention of the grantor of the power that it should be exercised. This was a principle assumed by Lord Coke;[64] and in *Cox v. Day*,[65] 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 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.[66] Nor does an appointment by way of mortgage, exhaust a power of revocation, for it is only a revocation *pro tanto*.[67]

 

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.[68] 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. 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 *factio cedit ueritati*.[69] In S*loane v. Cadogan*,[70] it was declared, by the 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.[71] 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 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.[72] 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.[73]

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.[74] 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.[75] 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 future execution, since it is allowed to be affected repeatedly 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.[76] The New York Revised Statutes[77] 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,[78] 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 tho 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[79] the grantor, in any conveyance, to reserve to himself any power, beneficial or in trust, which he might lawfully grant to another.

 

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.[80] The principle that the appointee takes under the original deed, was carried to the utmost extent in *Roach v. Wadharn*,[81] 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 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 divested 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.[82] It does not take effect, by relation, from the date of the power, so as to interfere with intervening rights.[83] The ancient doctrine was, that a naked power could not be barred or extinguished by disseizin, fine, or feoffment.[84] It was held, that if a power to sell lands be given to executors, and the heir enters and enfeoffs B. who dies seized, 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 descent.[85] 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.[86]

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.[87] 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. But 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 it power, it will not supply the total want of any execution of it. The Lord Keeper, as early as the case of *Lassells v. Cornwallis*,[88] declared, that where a person had a power to charge an estate for such uses as e 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 to 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 creditors were concerned. The same doctrine was afterwards repeatedly held by Lord Hardwicke.[89] Property over which such a dominion was exercised by virtue of a general power, was considered as 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. Cogshill*,[90] and Lord Erskine, afterwards, in the same case, on appeal,[91] 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 appointor 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 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.

The New 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 co-extensive 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.[92] It is further declared, that every trust power (being a power in which other persons 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 imperative, though the grantee has a right to select any, and exclude others of the persons designated as the objects of the trust.[93] 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.[94] 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.[95] 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 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.[96]

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 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*,[97] and Lord Eldon, in *Butcher v. Butcher*,[98] have so loudly complained, when they endeavored to ascertain the proportion of inequality that would amount to an illusory appointment. The rule of law is, 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.[99] 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.[100] 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. 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 immutable rule, that the non-execution of a naked power will never be aided,[101] 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.[102] 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 the 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.[103] 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 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 contain 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.[104] So, 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.[105] 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.[106] 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.[107] 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.[108] 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.[109] But, on the other hand, a power to appoint to children, will not authorize an appointment to grandchildren. This is the settled rule, and yet it naturally strikes the mind as a very strict and harsh construction.[110]

We have already seen,[111] 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.[112]

(3.) *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 the 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.[113] Nor can the donee of a power simply collateral, suspend or extinguish it by any act of his own.[114] But a total alienation of the estate extinguishes a power 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.[115] Even a conveyance of the whole life estate, by way of mortgage, extinguishes a power appendant or appurtenant. This is now the received doctrine, according to Mr. Sugden[116] but the opinion of Lord Mansfield, in *Ren v. Bulkeley*,[117] 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?[118] 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 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.[119] All these various powers, except the last, may 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.[120]

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*,[121] 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.[122] I apprehend that, by the N.Y. Revised Statutes,[123] the power is extinguished in such a case; for it is declared, that in all cases where an absolute power of disposition is given, and no remainder is limited on the estate of the grantee of the power, he takes an absolute fee; and every power of disposition 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.[124] 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 a conveyance of the fee to a grantee or releasee to uses, who is usually a stranger, and whose functions and interest 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 wile 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 settlor. The estate is subject to 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 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 main spring of this machinery.[125]

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 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. The evils are, probably, after all, vastly exaggerated by the zeal and philippics of the English political and legal reformers.[126]

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 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 much to excite 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 he 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 productions; and reservations, provisoes and exceptions, have been carefully inserted, in order that the meaning of the lawgiver may be generally, and easily, and perfectly understood. This has been the uniform legislative practice, in England, and in this country, from the date of Magna Carta down to this day. The intelligence of the great body of the legislature 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 authorized and modified, and “powers as they now exist,” and to substitute anothersystem 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.

## NOTES

1. Butler's note 231. to lib. 3. Co. Litt.
2. 6 Co. 17. b. Sugden on Powers, 82.

 

3. The N.Y. Revised Statutes have substituted the words grantor. and grantee, for the donor and donee of a power in the English law.

4. 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. Sugdenon Powers, p. 72. 74. 79.

5. Hale, Ch. B., Hardress, 415. Sugden on Powers. 46-49.,2d London ed.

6. See his long note to Fearne on Executury Devises, p. 347-388. which is a clear and able view of the doctrine of powers of revocation and appointment.

7. Observations on Real Property, p. 83.

8. N.Y. Revised Statutes, vol. i. 732.

9. The N.Y. 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.

10. Ibid. 732. sec. 74, 75, 76, 77, 78. There is the same definition of a general, and of a special power, in Sugden, p. 425. and in Rutler's note 231, to Co. Litt. 271. b.

11. N.Y. Revised Statutes, vol. i. 732. sec. 79.

12. Ibid. 734. sec. 94, 95.

13. Lord Mansfield, Doug. Rep. 293. Lord Ellenborough, 3 East's Rep. 441. *Jackson v. Veeder*, 11 Johns. Rep. 169.

14. Sugden on Powers, 96.

15. Dalison's Rep. 58. 1 Jones, 137. Co. Litt. 9. b.

16. 3 Leon. 7l. 4 Leon. 41. S. C. Liefe v. Saltingstone, 1 Mod. Rep. 189. Doe v. Thonby, 10 East's Rep. 438. Tomlinson v. Dighton, 1 Salk. Rep. 239. Crossling v. Crossling, 2 Cox, 396. Reid v. Shergold, 10 Vesey's Rep. 270. Jackson v. Robins, 16 Johns. Rep. 588. In the case of Flintham, 11 Serg. & Rawle, 16.

17. Sugden on Powers, 96-101.

18. Vol. i. 732. sec. 81, 82. 84.

19. Ibid. 732. sec. 85.

20. Year Book, 9 Hen. VI. 13. b. 24. b.

21. Litt. sec. 169. Co. Litt. 113. a. 181. b. Honell v. Barnes, Cro. C. 382. Yates v. Compton, 2 P. Wms. 308. Bergen v. Bennett, 1 Caines' Cases in Error, 16. Jackson v. Schauber, 7 Coven's Rep. 187.

22. 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 land to be sold by his executors, an interest passes. (Sugden on Powers, 104-108. Harg. Co. Litt. 113. a. note 146.) 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. a N. 1'. Revised Statutes, vol. i. 129. sec. 56.

23. N.Y. Revised Statutes, vol. i. 729. sec. 56.

24. Keene v. Deardon, 8 East's Rep. 248

25. .N.Y. Revised Statutes, vol. i. 729. sec. 59.

26. Ibid. sec. 55

27. Ibid. sec. 60.

28. Goodtitle v. Pettoe, Fitzg. 299.

 

29. Gilbert on Uses, by Sugden, 90, 91. Sugden on Powers, 191.

30. 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. to lib. 3. Co. Litt. 3. 5. Sugden on Powers, 130. note.

31. Gilbert on Uses, 127. Sugden on Powers, 135

32. Duke of Marlborough v. Earl Godolphin, 1 Eden, 404.

33. Sugden on Powers, 141.

34. 4 Term Rep. 39.

35. 1 Vesey's Rep. 174.

36. Sugden on Powers, 144.

37. Sugden, *ub. sup.* 148-155. 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.

38. Vol. i. 735. sec. 109, 110, 111. Ibid. p. 737. sec. 130.

39. Co. Litt. 112. b. 113. a. 181. b. Sheppard's Touch. tit. Testament p. 448. pl. 9. Bro. tit. Devise, pl. 31. Dyer, 177. Osgood v. Franklin, 2 Johns. Ch. Rep. 19.

40. N.Y. Revised Statutes, vol. i. 735. sec. 106. 112.

41. If this be the construction of the revised statutes, then I am free to say, that the provision in the statute of Hen. VIII. has been very injudiciously discontinued.

42. Sugden on Powers, 159.

43. Blatch v. Wilder, 1 Atk. Rep. 420. Davoue v. Fanning, 2 Johns. Ch. Rep. 254. See also, 1 Yeates' Rep. 422. 3 Ibid. 163. Mr. Sugden (Powers, p. 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 Dessaussure's Rep. 250. note. The N.Y. Revised Statutes, vol. 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 unnecessarily requiring a resort to chancery in every case where the executor, or other donee of the power, is not expressly named.

44. Combes' case, 9 Co. 75. b. Ingram v. Ingram, 2 Atk. Rep. 88. Cole v. Wade, 16 Vesey's Rep.27.

45. How v. Whitfield, 1 Vent. 338, 339. The N.Y. Revised Statutes, vol. 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.

46. Combes' case, 9 Co. 75. b.

47. Sugden on Powers, p. 170. 181, 182.

48. Vol. i. 737. sec. 129.

49. By the N.Y. Revised Statutes, vol. 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.

50. 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. I used, in my earlier days, to make short excursions into it, as into a kind of terra incognita, but I always returned with jaded spirits, and roused indignation

51. Sugden on Powers, p. 185.

52. Sugden, p. 190. note.

53. Fearne on Executory Devises, by Powell, note 379-387. Preston on abstracts, vol. 1 237-243.

54. Tyrrell v. Marsh, 3 Bingham, 31.

55. Hawkins v. Kemp, 3 East's Rep. 410. Doe v. Peach, 2 Maule & Selw. 576. Wright v. Barlow, 3 ibid. 512. Wright v. Wakeford, 17 Vesey's Rep. 454. 4 Taunt. Rep. 212. S. C. Sugden on Powers, 205, 206. 220. 229, 230. 252-.262. 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 re-entry, etc. was a due execution of a power to lease, so as there be contained in every lease a power of re-entry 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 re-entry, 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 re-entry. 1 Brod. 4 Bing. 97. 2 ibid. 473.

56. Woodward v. Hasley, MS. cited in Sugden, 208. Earl of Darlington v. Pulteny, Cowp. Rep. 260.

57. Whaley v. Drummond, MS. cited in Sugdcn, 209. Ibid. 209 - 220.

58. Sugden on Powers, 201.

59. N.Y. Revised Statutes, vol. i. 735, 736. sec. 113,114.

60. Tapner v. Merlott, Willes' Rep. 177. Lord Kenyon, 3 Term Rep. 765.

61. 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.

62. 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.

63. N.Y. Revised Statutes, vol. 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 Laney, 13 Johns, Rep. 537.

64. Co. Litt. 113. a.

65. 13 East's Rep. 118,

66. *Digge's case*, 1 Co. 173. Snape v. Turton, Cro. C. 472. Bovey v. Smith, 1 Vern. Rep. 84.

67. Perkins v. Walker, 1 Vern. Rep. 97.

68. Ex parte Caswall, 1 Atk. Rep. 559.

69. *Sir Edward Clere's case*, 6 Co. 17. b. Holt, Ch. J., Parker v. Kett, 12 Mod. Rep. 469. Hobart, Ch. J., in the Commendam case, Hob. 159, 160. Andrews v. Emmot, 2 Bro. 297. Standen v. Stan den, 2 Ves. jr. 589. Langham v. Nanny, 3 ibid, 467. Nannoek v. Horton, 7 ibid. 391.

70. Cited in Sugden on Powers, 282.

71. Bennet v. Aburrow, 8 Vesey's Rep. 609. Bradish v. Gibbs, 3 Johns.. Ch. Rep. 551. Doe v. Roake, 2 Bingham, 497. 6 Barnw. & Cress. 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.

 

72. Cox v. Chamberlain, 4 Ves. Rep. 631. Roach v. Wadham.6 East's Rep. 289.

73. Sugden, p. 301.

74. Ibid. p. 321.

75. Ward v. Lenthal, 1 Sid. Rep. 243. Hatcher v. Curtis, 2 Freem. Rep. 61. Hele v. Bond, Prec. in Ch.. 474. Sugden on Powers, App. No. 2. S. C.

76. Anon. 1 Ch. Cas. 241. Colston v. Gardner, 2 ibid. 46.

77. Vol. i. 735. sec. 108.

78. Ibid. p. 733. sec. 86.

79. Ibid. p. 735. sec. 105.

80. Litt. sec. 169. Ca. Litt. 113. a. Cook v. Duckenfleld, 2 Atk. Rep. 562-567. Marlborough v. Godolphin, 2 Vesey's Rep. 78. Middleton v. Crafts. 2 Atk. Rep. 661. Bradish v. Gibbs, 3 Johns. Ch. Rep. 550.

81. 6 East's Rep. 289.

82. Scrafton v. Quincey, 2 Vesey's Rep. 413.

83. Lord Hardwicke, in Marlborough v. Godolphin, 2 Vesey's Rep. 78. and in Southby v. Stonehouse, ibid. 610.

84. 1 Co. 110. 173. Edwards v. Slater, Hard. 410. Willis v. Sherral, 1 Atk. Rep. 479. 15 Hen. VII. fo. 11. b. translated in App. No. 1. to Sugden on Powers.

85. Jenk. Cent. 184. pl. 75. Bro. tit. Devise, pl. 36. Parsons. Ch. J., 5 Mass. Rep. 242.

86. Jackson v. Davenport, 20 Johns. Rep. 537.

87. Alexander v. Alexander, 2 Vesey's Rep. 640.

88. 2 Vern. Rep. 465. Prec. in Ch. 232. S. C.

89. Hinton v. Toye, 1 Atk. Rep. 465. Bainton v. Ward, 2 ibid. 172. Lord Townsend v. Windham, 2 Vesey's Rep. 9. Paek v. Bathurst, 3 Atk. Rep. 269. Troughton v. Troughton, ibid. 656.

90. 7 Vesey's Rep. 506.

91. 12 Vesey's Rep. 206.

92. N.Y. Revised Statutes, vol. i. 734. sec. 93.

93. N.Y. Revised Statutes, vol. i. sec. 96, 97.

94. Ibid. sec. 98, 99.

95. Ibid. sec. 100. 103. 131

96. Ibid, p. 735. 737. sec. 107.125-131.

97. 4 Vesey's Rep. 784.

98. 1 Ves. & Beam. 79.

99. The Master of the Rolls, in Kemp v. Kemp, 5 Vesey's Rep. 857.

100. Vanderzee v. Aclom, 4 Vesey's Rep. 771. Kemp v. Kemp, 5 ibid. 849. Astry v. Astry, Prec. in Ch. 256. Thomas v. Thomas 2 Vern. Rep. 513.

101. 2 P. Wms. 227. note. Tollet v. Tollet, ibid. 489.

102. Brown v. Higgs, 8 Vesey's Rep. 574.

 

103. Sugden on Powers. 341. to 421.

104. Liefe v. Saltingstone, 1 Mod. Rep. 189. The King v. Marquis of Stafford, 7 East's Rep. 521.

105. Waneham v. Brown, 2 Vern. Rep. 153. Long v. Long, 5 Vesey's Rep. 445.

106. Roberts v. Dixall, 2 Equ. Cas. Abr. 668. pl. 19. Lord Macclesfield, in Mills v. Banks, 3 P. Wms. 9.

107. *Whitlock's case*, 8 Co. 69. b. Phelps v. Hay, MS. App. to Sugden on Powers.

108. Sugden, p. 452, 453. Talbot v. Tipper, Skinner, 427. Earl of Tankerville v. Coke, Moseley, 146. Lord Hinchinbroke v. Seymour, 1 Bro. 395. Bristow v. Warde, 2 Vesey, jr. 336.

109. Sugden, 514, 515.

110. The Master of the Rolls, in Alexander v. Alexander, 2 Vesey's Rep. 642. Brudenell v. Elwes, 1 East's Rep. 442.

111. Vide supra, p. 107.

112. Peters v. Marsham, Fitzg. 156. Sir Thomas Clarke, in Alexander v. Alexander, 2 Vesey's Rep. 640. Adams v. Adams, Cowp. Rep. 651. Commons v. Marshall, 7 Bro. P. C. 111. See also, supra, p. 105. and the authorities there cited.

113. Goodright v. Cater, Doug. Rep. 477.

114. 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. 175. a. Willis v. Shorral, 1 Atk. Rep. 474. Sugden on Powers, 50. 67.

115. Lord Mansfield, in Ren v. Bulkeley, Doug. Rep. 292.

116. Sugden on Powers, 57.

117. Doug. Rep. 292.

118. The N.Y. 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.-N.Y. Revised Statutess vol. i. 733. sec. 88-91. See, also, supra, p. 107.

119. Sugden on Powers, 62-64.

120. 1 Vent. 228. Sugden, p. 66, 67. The power may be extinguished by a release under the N.Y. Revised Statutes, vol. i. 733. sec. 89. but the capacity to extinguish by fine or feoffment, has ceased with those conveyances.

121. 7 Vesey's Rep. 567.

122. *Sir Edward Clere's case*, 6 Co. 17. b. Peacock v. Monk,2 Vesey's Rep. 567. Lord Eldon, on appeal, in the case of Maundrell v. Maundrell, Sugden on Powers, p. 79-93. Sir Edward Sugden discusses the question upon the conflicting authorities with his usual acuteness. Vide supra, p. 50, 51.

123. Vol. i. 733. sec. 83. 85.

124. Sugden on Powers, p. 96.

125. 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. Rep. 250.) They continue the same in England to this day, with much increase in wary verbosity.

126. One of them (see the Jurist, vol. i. 447.) most extravagantly attempts to illustrate the jurisdiction of a court of equity over family estates placed under its protection, by the appalling inscription which Dante read over the gate leading to the infernal regions-Lasciate ogni speranza. Why did not the writer borrow his allusion from a greater genius at home, for his libel would have been equal in licentiousness, and improved in intensity? He might have referred to that “bottomless perdition” described by a far more daring and sublime imagination than Dante's, as the place where hope never comes that comes to all.

 

LECTURE 62

# Of Estates In Reversion

A REVERSION is the return of land to the grantor, and his heirs, after the grant is over;[1] or, according to the formal definition in the New York Revised Statutes,[2] 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[3] 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 has not departed with his whole estate. 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; and such a distinct interest arose, as we have already seen,[4] 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,[5] 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 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 to the Roman law, but it was regulated in the code of the ancient Hindus.[6]

The reversion arises by 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 seizin.[7] Reversions expectant on the determination of estates for years, are immediate assets in the hands of the heir;[8] 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*.[9] 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.[10] But in *Kinarton v. Clarke*,[11] Lord Hardwicke considered it inaccurate to say 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 seizin 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 while he had the estate.[12]

The reversioner having a vested interest in the reversion, is entitled to his action for an injury done to the inheritance.[13] 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.[14] 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 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.[15]

 

## NOTES

1. Co. Litt. 142. b.
2. Vol. i. 723. sec. 12
3. Co. Litt. 22. b.
4. See supra, p. 10.12.
5. 2 Comm. 175.
6. Gentoo Code, by Halhed, p. 153.
7. Litt. sec. 567, 568. Co. Litt. ibid. Co. Litt. 49. a. *Doe v. Cole*. 7 Barnw. & Cress. 243. Mr. Preston says, it is more usual to pass a reversion by lease and release, or bargain and sale. Preston on Abstracts, vol. ii. 85.
8. *Smith v. Angel*, 1 Salk. Rep. 354. *Villers v. Handley*, 2 Wils. Rep. 49.
9. Holt, Ch. J., in *Kellow v. Rowden*, Carth. Rep. 129. *Rook v, Clealand*, 1 Lord Raym. 53.
10. 1 Rol. Abr. 269. A. pl. 2. *Kellow v. Rouden*, Carth. 126. 3 Mod. Rep. 253. S. C.
11. 2.Atk. Rep. 204. Forrest. MS. cited in Cruise's Dig. tit. Reversion, sec. 26.
12. *Symonds v. Cudmore*, 4 Mod. Rep. 1. *Shelburne v. Biddulph*. 4 Bro. P. C. 594.
13. *Jesser v. Gifford*, 4 Burr. 2141.
14. *Jackson v. Peaked*,1 Maule & Selw. 234. *Randall v. Cleveland*. 6 Conn. Rep. 328.
15. Co. Litt. 143. a. 151. a. b.

 

LECTURE 63

## 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.

(I.) 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.[1] It is laid down in the text books as a general proposition, that the estate held 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.[2] But the proposition must be taken with some explanations. Two persons may have a joint estate for life,[3] with remainder to one of them in fee, and if he who has the fee first dies, the survivor takes the whole estate for his life. So, they may have an estate in joint tenancy for their lives, with several inheritances.[4] Lord Coke[5] said, that an estate of freehold, and an estate 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,[6] 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 well as by one and the same title.[7] 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.[8] 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.[9]

From this thorough and intimate connection between joint tenants, results the principle, that the beneficial acts of one of them respecting the estate, will enure equally to the advantage of all.[10] One joint tenant may distrain for rent, and appoint a bailiff for that purpose, unless the other expressly dissents.[11] 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.[12] Under these regulations, joint tenants are regarded as having one entire and connected right, and they must join, and be joined, in all actions respecting the estate.[13]

Joint tenants are said to be seized 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.[14] A joint tenant, in respect to his companion, is seized of the whole; but for the purposes of alienation, and to forfeit, and to lose by default in a praecipe, he is seized only of his undivided part or proportion.[15]

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 co-tenant.[16] The consequence of this doctrine is, that a joint tenant cannot devise his interest in the land, for the devise does not take effect 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.[17] If a joint tenant makes a will, and he then becomes solely seized by survivorship, the will does not operate upon the title so acquired without the solemnity of republication.[18] 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.[19] But the charges made by a joint tenant, and judgments against him, will bind his assignee, and him, as survivor.[20]

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.[21] But in *Hawes v. Hawes*,[22] 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.[23] The right of survivorship is also rejected in all cases of partnerships, for it would operate very unjustly in such cases.[24] In this country, the title by joint tenancy is veiI 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 February, 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[25] have re-enacted 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 abolished in the states of Connecticut, Pennsylvania,[26] Virginia, Kentucky, Indiana, Missouri, Tennessee, North and South Carolina, Georgia, and Alabama. In the states of Maine, New Hampshire, Massachusetts, Rhode Island, Vermont, New Jersey, and Delaware, joint tenancy is placed under the same restriction 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 Louisiana, and it exists in full force in Maryland and Illinois.[27]

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 seized 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.[28] 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.[29] But if the husband and wife had been seized 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.[30] 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.[31]

 

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.[32] The same consequence would follow, if one of three joint tenants was to release his share to one of his companions; there would be a tenancy in common as to that share, and the jointure would continue as to the other two parts.[33] The proper conveyance between joint tenants is a release, and each has the power of alienation over his aliquot share. 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 re-enacted or adopted in this country, and, probably, with increased facilities for partition. They were reenacted in New York the 6th of February, 1788; and the New York Revised Statutes[34] have made further and more specific and detailed provisions for the partition of lands, held either in joint tenancy, or in common, and they have given equal jurisdiction over the subject to the courts of law,, and of equity. In Massachusetts, also, by statute, the writ of partition is not only given, but partition may be effected by petition without writ.[35]

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.[36] 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 opportunity to try his title at law.[37] The same principle has been acted upon in the courts of equity in this country.[38] The New York Revised Statutes[39] have prescribed to the courts of law and the Court of Chancery, in respect to partition, that whenever there shall be a denial of the co-tenancy, 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 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. But the judgment does not affect persons having claims as tenants in dower, by the curtesy, or for life, in the whole of the premises subject to the partition.[40] It is likewise provided, in respect to 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 equity of the case.[41] This is the rule ill equity, independent of any statute provision, when owelty of partition cannot otherwise be made.[42]

(2.) An estate in coparcenary always arises from descent. At common law it took place when a man died seized 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 co-heirs in the same degree, or in unequal proportions, as co-heirs in different degrees.[43] 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.[44]

Coparceners resemble joint tenants in having the same unities of title, interest, and possession. The seizin of one coparcener is generally the seizin 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 seized like joint tenants per my et per tout; and yet each parcener has a devisable interest, and the doctrine of survivorship does not apply to them. The share of each partner descends 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.[45] He calls it a "cunning learning," and it is replete with subtle distinctions, and antiquated erudition. The statute of 8 and 9 West. 3. 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,[46] 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 a 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.[47]

(3.) 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.[48] 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 distinct freeholds, for that circumstance is a leading characteristic of tenancy in common. Each tenant is considered to be solely or severally seized 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 seized of the entirety.[49] 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 co-tenants or their assignees, even though it may bind him by way of estoppel. As against the co-tenants, such a deed is inoperative and void.[50] If tenants in common join in a lease, it is, in judgment of law, the distinct lease of each of them, for they are separately seized, 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.[51] They are deemed to be seized per my, but not per tout, and, consequently, they must sue separately in actions

 

that savour of the realty. But they join in actions relating to some entire and indivisible thing, and in actions of trespass relating to the possession, and in debt for rent, though not in an avowry for rent.[52] The ancient law raised this very artificial distinction, that tenants in common might deliver seizin 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 seized, but for that very reason they might release to each other; whereas, on the other hand, tenants in common might enfeoff each other, but they could not release to each other, because they were not jointly seized.[53] 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. The mere occupation of the, premises by one joint tenant, or tenant in common, would not, of itself, at common law, have entitled his co-tenant to call him to an account. He must have stood in the light of a bailiff or receiver, in order to be rendered responsible.[54] But the statute of 4 Anne, c. 16. rendered joint tenants, and tenants in common, liable in account as bailiff's for receiving more than their just share; and this provision was re-enacted in New York in 1788, and is now incorporated into the revised statutes.[55] 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.[56]

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.[57] So, one tenant in common 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 co-tenant disturbs him in his occupation, he becomes a trespasser.[58]

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 the 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.[59] In Massachusetts, it is 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.[60] To sustain the action there must be a request to join in the reparation, and a refusal, and the expenditures must have been previously made.[61] The doctrine of contribution, in such cases, rests on the principle, that where parties stand in *equali jure*; equality of burden becomes equity; 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 co-tenant 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.

## NOTES

1. 2 Blacks. Com.181. Litt. sec. 304
2. 2 Blacks. Com. 181. 2 Woodd. Lec. 127.

 

3. Litt. sec. 285.

4. Ibid. sec. 285.

5. Co. Litt. 188. a.

6. *Wiscot's Case*, 2 Co. 60. Litt. sec. 285.

7. 2 Blacks. Com. 181.

8. Co. Litt. 188, a. 1 Co. 101. 2 Blacks. Com. 182.

9. Preston on Abstracts, vol. 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 *Samme's case*, (13 Co. 54.) between a conveyance at common law, and one to uses; and it was said, that joint tenants must be seized to a use when they come to the estate at several times. See, also, *Aylor v. Chep*, Cro. J. 259. Sussex v Temple, 1 Lord Raym. 310. *Oates v. Jackson*, str. 1172. Stratton v. Best, 2 Bro. 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.

10. 2 Blacks. Com. 182.

11. *Robinson v. Hoffman*, 4 Bingham, 562.

12. The statutes of West. 2. 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, vol. ii. 184. note. Laws of N.Y. sess. 10. ch. 6. sess. 11. ch. 4. The N.Y. Revised Statutes, vol. i. 750. sec. 9. have given not only an action of account, 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. Rep. 538.

13. Litt. sec. 311.

14. Litt. sec. 288. Co. Litt. 186. a.

15. Go. Litt. 186. a. According to Mr. Ram, in his Outline of Tenure and Tenancy, p. 149, 150, 151. the only reasonable explanation of the common phrase, that a joint tenant is seized 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 Lo 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, vol. i. 136.

16. Litt. sec. 280, 281. 286. Co. Litt. ibid.

17. Co. Litt. 185. b.

18. Swift v. Roberts, 3 Burr. Rep. 1438.

19. See. supra. P. 37.

20. Preston on Abstracts, vol. ii. 65.

21. Holt, Ch. J. in Fisher v. Wigg, 1 Salk. Rep. 391.

22. 1 Wils. Rep. 165.

23. Lord Hardwicke, in Rigden v. Vallier, 2 Vesey's Rep. 258. 3 Atk. Rep. 731. Randall v. Phillips, 3 Mason's Rep. 378.

24. Lake v. Craddock, 3 P. Wms. 158.

25. Vol. i. 727, sec. 44.

26. The act of Pennsylvania of 3lst of March, 1812, expressly excepts trust estates.

 

27. Griffith's Law Register, h. t. Vide the statute laws of the several states on this point. The statute of Massachusetts of 1785, c. 62. declared, that tenancies in common were “more beneficial to the commonwealth, and consonant to the genius of republics.” If here was the dignus vindice nodus, the presence of the genius of republics ought to have produced greater effect, and absolutely prohibited parties from creating, at their own pleasure, joint tenancies, in like manner as statutes prohibit entailments, or perpetuities, or other mischiefs.

28. 2 Blacks. Com. 182. Doe v. Parratt, 5 Term Rep. 652. Mr. Ram, in his Outline of Tenure and Tenancy, (p. 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 seized per taut, 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 seized per tout, and they are called tenants by entireties to distinguish them from the joint tenants seized per my and per tout. This ingenious writer has pushed the subject into unprofitable refinements.

29. Litt. sec. 291. Co. Litt. 187, b. Lord Kenyon, 5 Term Rep. 654. Shaw v. Hearsey, 5 Mass. Rep. 521. Jackson v. Stevens, 16 Johns. Rep. 110. Thornton v. Thornton, 3 Randolph, 179. Den v. Hardenburgh, 5 Halsted, 42. See, also, vol. ii. 112. of the present work.

30. Co. Litt. 187. b. Moody v. Moody, Rmb. Rep. 649.

31. Preston on Abstracts, vol. ii. 41. Ibid. on Estates, vol. i. 132.

32. Litt. sec. 292. 294.

33. Litt. sec. 304.

34. Vol. ii. 315-332.

35. Mussey v. Sanborn, 15 Mass. Rep. 155. Cook v. Allen, 2 Mass. Rep. 462.

36. Harg. note 23. to lib. 3. Co. Litt. Calmady v. Calmady, 2 Vesey, jr. 570. Agar v. Fairfax, 17 Vesey's Rep. 533. Baring v. Nash, 1 Ves. & Beam. 551.

37. Bishop of Ely v. Kenrick, Bunb. 322. Cartwright v. Pultney, 2 Atk. Rep. 380. Bliman v. Brown, 2 Vern. 232.

38. Wilkin v. Wilkin, 1,Johns. Ch. Rep. 111. Phelps v. Green, 3 Ibid. 302. 4 Randolph, 493. Martin v. Smith, State Eq. Rep. S. C. 106.

39. Vol. ii. 320. sec. 16. Ibid. 329. sec. 79.

40. New York Revised Statutes, vol. ii. 322, sec. 35. 36. Ibid. 330. sec. 84.

41. Ibid. 330. sec. 83.

42. Clarendon v. Hornby, 1 P. Wms. 446.

43. Litt. sec. 241, 242.

44. Preston on Estates, vol. i. 138.

45. Co. Litt. tit. Parceners, 163-175.

46. Vol. i. 753. sec. 17.

47. In Virginia, the statute of descents calls all the heirs, male as well as female, parceners.

48. Litt. sec. 292. 294. 298. 302. 2 Blacks. Com. 192. Preston on Abstracts, vol. ii. 75, 76.

49. Preston on Abstracts, vol. ii. 277.

50. Bartlett v. Harlow, 12 Mass. Rep. 348. Mitchell v. Hazen, 4 Conn. Rep. 495. Griswold v. Johnson, 5 ibid. 363.

51. Bro. tit. Feoffment, pl. 45. Heatherley v. Weston, 2 Wile. Rep. 232.

52. Litt. sec. 311. 314. Co. Litt. ibid. Rehoboth v. Hunt, 1 Pick. Rep. 224. Decker v. Livingston, 15 Johns. Rep, 479.

53. Bro. tit. Feoffment, pl. 45. Butler's note 80. to Co. Litt. 193. a.

 

54. Co. Litt. 200. b.

55. Vol. i. 750. sec. 9.

56. See Jones v. Harraden, 9 Mass. Rep. 541. Brigham v. Eveleth, ibid. 538.

57. Co. Litt. 199. b. Fairclaim v. Shackleton, 5 Burr. Rep. 2604. Doe v. Prosser, Cowp. Rep. 217. Peaceable v. Read, 1 East's Rep. 568.

58. Keay v. Goodwin, 16,Mass. Rep. 1. Clowes v. Hawley, 12 Johns. Rep. 484.

59. F. N B. 127. a. Co. Litt. 54. b. 200. b. Bowles' case, 11 Co. 32. b.

60. Carver v. Miller, 4 Mass. Rep. 559.

61. Jackson, J., in Doane v. Badger, 12 Mass. Rep. 70. Mumford v. Brown, 6 Cowen's Rep. 475.

 

LECTURE 64

## 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 ownerships 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.[1] 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 *droit droit*, or the *jus proprietalis et possessionis*, which, according to the ancient English law, formed a complete title.[2]

All the modes of acquiring title to land, are reducible to title by descent, and by purchase. The one is acquired by operation of law, and the other by the act or agreement of the parties. Whether the agreement be founded upon a 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.[3] I shall treat of each of these sources of title in their order; but 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 succession, is the title whereby a person, on the death of his ancestor, acquires his estate by right of representation as his heir. The English law of descents 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 these 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 descents for itself. The laws of the individual states may agree in their great outlines, but they differ exceedingly in the details. There is no uniformity on this subject, and, according to the observation of a great master of this title in American law,[4] C 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." I shall not attempt to define and explain all the variations and shades of difference 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 these United States, which are of the most general application.

(1.) The first rule of inheritance is, that if a person owning real estate, dies seized, 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 of February, 1786, and it has been adopted by the New York Revised Statutes.[5] It prevails in all the United States, with this variation, that in Vermont the male descendants take double the share of females; and, 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, in each of those states, a moiety of the estate, In North and South Carolina, the claimants take, in all cases, *per stirpes*, though standing in the same degree.[6]

The transmission of property by hereditary descent, from the parent to his children, is the dictate of the natural affections, and Doctor Taylor holds it to be the general direction of Providence. 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 Jews 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 family of their father's tribe, in order to keep the inheritance within it.[7] In the Gentoo code, all the sons were admitted, with an extra portion to the eldest, under certain circumstances, and no attention was paid to the daughters, according to the usual and barbarous policy of the Asiatics.[8] The institutions of the Arabs also excluded females from the right of succession; but Mahomed 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.[9] 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.[10] Nothing can be conceived more cruel, says Sir William Jones,[11] 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.[12] The middle jurisprudence under the praetors departed from this simplicity, and fettered the inheritance of females. The Voconian law declared women incapable of inheriting; but, in the time of Cicero, the praetors extended or restrained the Viconian law at pleasure. It was gradually relaxed under the Emperors Claudius, and Marcus Antoninus,[13] 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.[14] 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.

 

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 parent would have taken, if living. This was adhering, in all cases, to the doctrine of representation *per stirpes*, and the states of North and South Carolina 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 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.[15] 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 oppression 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 praetor allowed him a certain time to deliberate whether he would accept or renounce the inheritance.[16] 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. 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.[17]

The French law of descent has followed the novel of Justinian, and the obligations, and the privileges of the heir, are the same as in the Roman law. The law of equal partition is of revolutionary growth, and it has been in operation in France near 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.[18] 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.[19] The equal partition which prevailed in the Roman law among all the children, prevails also in the law of Scotland in the succession of moveables, 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 moveables. A great privilege is, however, conferred upon the heir at law of an intestate estate, of allowing him to throw the heritable estate into a common stock with the moveables, and to demand, as one of the next of kin, his share, on an equal partition of the joint real and moveable estate with his brothers and sisters. This is termed his right to collate the succession.[20] 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, and as the lands of the clergy are unalienable, 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.[21] The right of primogeniture was derived from the martial policy of the feudal system, after it had attained its 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.[22] 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 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.[23]

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 all 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 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.[24] On the other hand, Dr. Smith, the author of the Wealth of Nations, severely condemns the policy of primogeniture, as being contrary to the real interest of a numerous family, though very fit to support the pride of family distinctions.[25] The Marquis Gamier, 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 Stael 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.[26]

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, 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 these 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 some of the 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 heir, in some of the states, is judiciously allowed to elect to take the whole estate to himself, on paying to the other heirs an equivalent for their shares in money.[27]

By the common law, the ancestor from whom the inheritance was taken by descent, must have had actual seizin 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. The heir, to have entitled him to take in that character, must have shown himself to be the nearest male heir of the whole blood, to the person who was last actually seized 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 seizin which makes a person the root or stock, from which all future inheritance by right of blood is derived. The maxim of the common law was, that *non jus sed seizina facit stipitem*. If, therefore, the heir on whom the inheritance had been cast. by descent, dies before he has acquired the requisite seizin, his ancestor, and not himself, becomes the person last seized of the inheritance, and to whom the claimants must make themselves heirs.[28] 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 seizin of the last possessor from whom he claimed as his heir of the whole blood, was considered 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.[29]

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 seizin; 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.[30] 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.[31] The possession of a tenant for years is the possession of the person entitled to the freehold;[32] and the seizin or possession of one parcener, or tenant in common, is the seizin 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 the technical *possessio fratris*, and transmit the inheritance to the sister of the whole blood.[33]

If the estate be out on 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 seizin 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 descend 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. He takes the inheritance, though he may be a stranger to all the mesne reversioners and remainder-men, through whom the inheritance had devolved.[34] 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.[35] 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 him a new stock, or root of inheritance. It would be deemed equal to an entry upon a descent.[36]

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 seized. It has been repeatedly held in this state, 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 seized 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 seized.[37] But the New York Revised Statutes[38] 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 seized 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. This completely abolishes the English maxim that *seizina facit stipitem*. So, likewise, in Massachusetts, Rhode Island, Connecticut, NewJersey, Pennsylvania, Delaware, Virginia, 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 seizin of the ancestor. Reversions and remainders vested by descent in an intestate, pass to his heirs in like manner as if he had been seized in possession, and no distinction is admitted in descents between estates in possession, and in reversion.[39] In the states of Vermont, New Hampshire, Maryland, and North Carolina, the doctrine of the *possessio fratris* would seem still to exist.[40]

Though posthumous descendants inherit equally as if they had been born in the lifetime of the intestate, and had survived him, yet 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*,[41] 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.[42] 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, New Jersey, Pennsylvania, and Missouri, would seem to be to the same effect, and admit of the same construction.[43]

2. The second rule of descent is, that if a person dying seized, 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.[44] 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 shares which their parents, if living, would have received. It way be illustrated by the following example: A. dies seized 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 )L, a daughter of C., who is also dead. Here would be descendants living in three different degrees of consanguinity, via. a son, two grandsons; and two great grandsons. The consequence would be, that B., the son, would take one half of the estate, DA and E., the grandsons, would take two thirds of the other half, and F. 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, therefore, 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 exception; already noticed, of South Carolina; and it agrees with the general rule of law in the distribution of personal property.[45] The law of descent, in respect to real and personal property, bear, in this respect, a striking resemblance to the civil law, as contained in the 118th novel of the Emperor Justinian.[46]

The rule of inheritance *per stirpes*, is rigidly adhered to in the English law of descent of real estates. Parceners, 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 has two daughters, and they both die in his lifetime, the eldest leaving three, and the youngest one daughter, these four granddaughters, although in equal degree, yet claiming by right of representation, they inherit *per stirpes*, and the one of them takes as large n portion as the other three.[47] 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.[48] Thus, for example, by the civil law, as well as by our American law of descents,

 

and of distributions, a brother and a nephew took *per stirpes*, but nephews alone took *per capita*.

3. 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 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 ease, unless it came to the intestate on the part of the mother, and then it passes to her, or to the maternal kindred; and this is according to the rule in the states of Maine, New Hampshire, Vermont,[49] Massachusetts, New York,[50] Indiana, Kentucky, and Virginia. 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, but 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. 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 the states of Rhode Island, Illinois, and Louisiana, the father and mother succeed equally as next of kin to the estate of the child dying intestate, and without issue. In Pennsylvania, the father takes for life only, if there be brothers and sisters of the deceased, and if none, then he takes a fee. In Missouri, the parents take equally with the brothers and sisters of the intestate. In South Carolina, in default of issue, or widow, (who takes a third, or moiety of the estate, as the case may be,) the father takes the estate in conjunction with the brothers and sisters. In Connecticut, New Jersey, Ohio, Tennessee, and Alabama, the father takes only in default of the brothers and sisters. In Delaware, the parents 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 take for life only in default of issue, and of brothers and sisters.[51]

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 laws, and to those of other nations which have been deduced from the feudal policy. 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 *antigtium ala pagers*, 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 seized.[52] The very artificial nature, and absurd results of the English rule, are strikingly illustrated by the well known case stated by Littleton,[53] 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 comes 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.[54]

By the Jewish law, on failure of issue, the father succeeded to the son,[55] And by the Roman law, on failure of lineal descendants, the parents, or lineal ascendants, succeeded, in conjunction with the brothers and sisters of the intestate, to his inheritance.[56] 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.[57] But the succession of parents, in the ascending line, was regarded, by the civil. Jaw, as a *luctuosa haereditas*, or *tristis successio*, and the natural order of mortality was held to be disturbed.[58]

The Napoleon code,[59] in imitation 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. Touillier[60] 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,[61] 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 Arch Deacon Paley refers the right of succession entirely to the law of the land.[62] 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 claim of parents 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.[63]

(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.

This is the rule in New York,[64] and it is the rule also in Pennsylvania,[65] but it cannot be said to be a general rule in this country. In New Jersey the mother is wholly excluded from the inheritance, 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. On the other hand, in Rhode Island, Illinois, and Louisiana, she is received on the most favorable terms, and, in default of issue, she takes the inheritance with the father, as next of kin, in preference to the brothers and sisters. In Georgia, the widow of the intestate takes a child's 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 sisters of the intestate, and a sister's portion is only half as much as a brother's portion. 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. The law in 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, 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, Indiana, Virginia, Kentucky, and South Carolina, in default of issue, and father, the mother shares equally with the brothers and sisters.; ands in Missouri, she shares equally with them; and the father, though he be living; and; in Connecticut, she shares equally with the father.

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 Isaeus on the estate of Hagnias. The exclusion was even broader, for the whole of the collateral, as well as the lineal ascendants, were excluded at Athens from the succession. Among the Jews, in default of issue, the father succeeded to the purchased estate of the son, excluding the brother.[66] The decemviral law at Rome, and which seems, in this instance, says Sir William Jones, to 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 praetors. Relief was promoted by the Senatus consultum Tertullianum, in the time of Hadrian; and completed, with some restrictions, by the Justinianean code.[67]

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 estate 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.[68]

4. 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. 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 such descendants to the remotest degree.

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, the ascending line, after parents, is postponed to the collateral line of brothers and sisters. The rule I have stated is declared by the New York Revised Statutes,[69] and it is universally the rule, with the exception in Louisiana, that brothers and sisters are preferred, in the order of succession, to grandparents, though the latter stand in an

 

equal degree of kindred. 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.[70] But there are very considerable differences in the laws of the several states, when the next of kin, in this 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 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 most of the states, nephews and nieces, and their descendants, take as there stated, but they do not take exclusively. Uncles and aunts take equally with nephews and nieces, as being of equal kin, in the states of New Hampshire, Vermont, (though in that state the claim of the males to double portions is preserved,) Rhode-Island, North Carolina, and Louisiana. 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, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Ohio, Indiana, Illinois, Missouri, Kentucky, Virginia, Tennessee, South Carolina, Georgia, Alabama, and Mississippi. 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 grandparent's stock. The principle on which the rule is declared to be founded, in the laws of Maine and Massachusetts, 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 New Hampshire, Vermont, Rhode Island, Connecticut, Ohio, Maryland, Georgia, Alabama, and Mississippi, there is no representation among collaterals, after brothers' and sisters' children, nor in Delaware, after brothers' and sisters' grandchildren. In some of the states, as in New Jersey, there does not appear to be any positive provision for the case; and in Louisiana, the ascending line must be exhausted, before the estate will pass over to the collateral line. In North Carolina, the claimants take, *per stirpes*, in every case, even though the claimants all stand in equal degree of consanguinity to the common ancestor.

The distinction between the claims of the whole and of the half blood, becomes of constant application in cases of collateral succession; and there is a wide difference in the laws of the several states in relation to that distinction. The half blood is 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 seized, affords the best presumptive proof that he is of the blood of the first feudatory or purchaser.[71] Our American law of descent would seem to be founded on more reasonable principles. The English rule of evidence maybe 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, Rhode Island,[72] New York, Illinois,[73] North Carolina,[74] Tennessee, and Georgia, there seems to be no 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,[75] Virginia, Kentucky, South Carolina, Alabama, and Louisiana, there is a marked preference (though more or less extensive in different states) given, by the law of descents, to the whole blood. The half blood is only postponed, and nowhere, unless perhaps in Indiana, and Louisiana, is it totally excluded.

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, Connecticut, New York,[76] New Jersey,[77] Pennsylvania,[78] Ohio, Virginia, Tennessee, and North Carolina. The distinction does not appear as a positive institution in many other states, as in Maine, New Hampshire, Vermont, Massachusetts, Georgia, Alabama, Mississippi, and Missouri. The estate, as I presume, descends in those states, and perhaps in some others, in the same path of descent, whether it came from the paternal or maternal ancestors, or was acquired by purchase.[79]

The English law requires the, claimant of the inheritance to be heir to the person last seized, and of the blood of the first purchaser, and of the whole blood of the person last seized. It gives a universal preference in collateral inheritances, as far as relates to the first purchaser, of the paternal to the maternal line; and this English doctrine is founded on the technical rule 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. The American law of descents does not go on the principle of searching out the first purchaser through the mists of 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 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.[80] The laws of all countries, and of our own in particular, are so different from each other on this 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 their 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 seized 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.[81]

5. 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,[82] for it 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 Virginia and. Kentucky, the claim of the grandmother is reduced, from its natural priority, to the rank of that of the aunt; but the. grandfather has his right to the inheritance preserved, as being nearer of kin than uncles and aunts. The grandfather takes the estate before uncles and aunts, in most of the United States, as being nearer of kin to the intestate;

 

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, Rhode Island, Connecticut, Pennsylvania, Delaware, Maryland, Ohio, Indiana, Illinois, South Carolina, Georgia, Alabama, Mississippi, and Louisiana. The rule is the same as that existing under the English statute of distributions of personal estates, by which it has been repeatedly held,[83] that the grandmother took the personal estate equal footing as to inheritance, except that amongst kindred, claiming through one and the same ancestor of the first purchaser, preference shall be given to the whole blood of the first purchaser but when that blood fails, the inheritance to pass as if the person last seized or entitled had been the purchaser, 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, remodeling the law of descent, the claim of kindred on the part of the grandparent had not been rejected.

6. 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 to 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,[84] and I presume it may be considered, with some slight variations in particular instances, as a general rule throughout the United States. 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, and in some other states, by the following rule

7. 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,[85] 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.

8. 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 distribution 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.

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, the next of kin must be the kin of the person last seized, 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 application to descent. In South Carolina, the widow, under this last rule, will take a moiety, or two thirds of the inheritance, according to circumstances. In Virginia, Kentucky, Maryland, and Alabama, 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. 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 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.[86] 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.[87]

The common law rules of descent were the law of the colony and state of New York, down to 1782. The law was then altered, and the statute altering it was re-enacted in an improved state, in 1786. The law still required the heir to be heir to the person dying seized, and the inheritance descended, (1.) to his 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 those five cases, the common law was left to govern. The Revised Statutes, as we have seen, have carried the innovation much farther; 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 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 estates of intestates, by the rules of the civil law. Instead of that we have retained in this state, 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 seized, 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, unless the land came from a female ancestor.[88] 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. 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 trial by jury, as being two titles showing, by their excellence, a very visible preference of the laws of England above all other laws.[89] So natural, and so powerful, is the impression of education and

 

habit, in favor of the long established institutions of one's own country.

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, as has been already mentioned,[90] 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.[91] It is equally the acknowledged principle in the English law, and for all the beneficial purposes of heirship, a child *in venire sa mere* is considered as absolutely born.[92]

2. 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 each person, as well in the ascending as descending lines. According to this rule of computation, the father of the 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, and which is 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.[93]

(3.) Under the English law, illegitimate children cannot take by descent, for they have not, in contemplation of law, any inheritable blood. Nor can they transmit by descent, except to their own offspring, for they have no other heirs.[94] The New York Revised Statutes[95] 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.

This introduction of a provision into the law of descents in New York, in favor of the mother of a bastard, falls short of the extent of the provision in relation to them in some of the other states. In the states of Maine, NewHampshire, Massachusetts,[96] Rhode Island, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina, Georgia, Alabama, and Mississippi, bastards are, indeed, placed under the disabilities of the English common law; though, in several of these states, as we noticed in a former volume,[97] bastards may be rendered legitimate by the subsequent marriage of their parents. But in the states of Vermont, Virginia, Kentucky, Ohio, Indiana, and Missouri, bastards can inherit from, and transmit to, their mothers, real and personal estates. The principle prevails, also, in Connecticut, Illinois, North Carolina, Tennessee, and Louisiana, with some modifications. Thus, it has been adjudged in Connecticut, that illegitimate 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.[98] It is not 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. In North Carolina, bastards can inherit as lawful children to their mothers, but it would seem,

 

that in default of their own issue, their mother does not take, but their brothers and sisters by the same mother. The rule in Illinois, and Tennessee goes as far as, that in North Carolina in respect to the capacity of the bastard to inherit, but I am not informed whether it be carried further; and, in Tennessee, the bastard does not inherit to the mother, unless she dies intestate without lawful issue. In Louisiana, the recognition of the rights of bastards is carried beyond any other example in the United States. They inherit from the mother if she has no lawful issue. They inherit from the father likewise, if he leaves no wife, or lawful heir. The father and mother inherit equally to their illegitimate offspring, and, in default of parents, the estate goes to the natural brothers and sisters of the bastard, and to their descendants.[99]

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.[100] 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.[101] 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 their parents who died without lawful heirs, and to rateable 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.[102] The French law, in imitation of the Roman, distinguishes between two classes of bastards; and while it allows to the child of alt adulterous and incestuous intercourse, only a bare subsistence, the other, and more fortunate class of illegitimate, 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 the tribunals.[103]

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.[104]

When the statute law of New York was recently 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 pretty extensively prevailed, that the law ought not to confer upon such 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.[105]

(4.) 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. 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 and 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.

This is the provision as declared in the New York Revised Statutes,[106] and it agrees, in substance, with that in the statute laws of the other states. 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. The statutes in Maine 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. 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.[107] In New Jersey, the statute uses the word issue, which is a word of more 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.[108] It 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.

In some of the states, as in Virginia, Kentucky, 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 distributive share; and this is technically said to be bringing the advancement into hotchpot. I do not find this privilege conceded by the laws of 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.) An estate by descent renders the heir liable for the debts of his ancestor, to the value of the property descended. By the hard and unjust rule of the common law, land descended, or devised, was not liable to simple contract debts of the ancestor or testator; nor was the heir bound even by a specialty, unless he was expressly named.[109] But, in New York, the rule has been altered, and by a provision in the 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.[110] 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 resorting to the executor or administrator, unless there be an express direction in the will to the contrary.[111]

The general rule of the English law is, that the personal estate is the primary fund for the discharge of the debts, and is to be first applied, 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 for the personal obligation.[112] The order of marshaling assets towards the payment of debts is, to apply, 1. The general personal estate; 2. Estates specifically devised for the payment of debts; 3. Estates descended; 4. Estates specifically devised, though generally charged with the payment of debts. It requires express words, or the manifest intent of a testator, to disturb this order.[113] 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 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 encumbered estate, he meant to take upon himself the mortgage debt as a personal debt of his own.[114] The last provision abovementioned, from the New York Revised Statutes, was an alteration of the antecedent rule, and makes a mortgage debt fall primarily upon the real estate.[115]

I assume, that the rule prevails, generally, in these United States, that the lands descended to the heirs are liable to the debts of the ancestor equally, in all cases, with the personal estate. In Massachusetts, the personal estate is first to be applied, and the land resorted to upon a deficiency of personal assets.[116] 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 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.[117]

## NOTES

1. 2 Blacks. Com. 199.

2. Bracton, lib. 2. fo. 32, b. lib. 5. fo. 372. b. Co. Litt. 266 a

3. Co. Litt. 18. a. b.

4. Reeve's Treatise on The Law of Descents, Prec.

5. New York Revised Statutes, vol. i. 751. sec. 1, 2. Ibid. 753. sec. 17. Ibid. 754. sec. 19.

6. Reeve's Law of Descents, passim. Griffith's Law Register, No. 6. under the head of each state. Civil Code of Louisiana, No. 898. *Stent v. McLeod,* 2 McCord's Ch. Rep. 354. The allowance of a double portion to the males was the law in Massachusetts prior to the American revolution, and, in several of the other colonies, the English law of primogeniture prevailed. It prevailed in Rhode Island until the year 1770, and in New York, New Jersey, Maryland, and Virginia, until the Revolution. In Connecticut and Delaware, the eldest son had formerly a double portion. In Pennsylvania, by the law of 1682, the law of primogeniture, and of the preference of males, were abolished.

7. Numb. ch. 27. Deut. ch. 21. v. 17. Jones's Com. on Isaeus, 177. Hale's Hist. Com. Law, vol. ii. 76.

8. Gentoo Code, by Halhed, 24. Jones's Institutes of Hindu Law, Ch. 9. art. 117.

9. Jones's Com. on Isaeus, p. 178.

10. Jones's Prefatory Discourse to his translation of Isaeus. 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.

11. Comm. on the Pleadings of Isaeus, p. 175. 176.

12. Sir Matthew Hale, (Hist, of the Common Law, vol. ii. 81.) 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 extabit, agnatus proximus familiam habeto. (5th Table, ch. 2.) But the general current of authority is in favor of the equal admission of the children, whether male or female. Jones's Com. on lsceus. Pothier's Com. on the Fragments of the Twelve Tables, p. 102. prefixed to his Pandectae Justinianece, tom. i. Montesquieu's Esprit des Loix, liv. 27. ch. 1. The children, and the descendants who lived under the power of the father, were called sui haredes; 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 haredes, or the agnati. were male or female.

13. Inst. lib. 3. tit. 4.

14. The chapter in the Spirit of Laws, b. 27. on the origin and revolutions of the Roman law of succession, developes that branch of their jurisprudence, as Mr. Butler has truly observed, with the greatest precision and perspicuity.

15. Touillier, Droit Civil Francais, tom. iv. 63.

16. Inst. 2. 19. 2. Dig. 29. 2. 11. Butler's note. 77. to lib. 3. Co. Litt. sec. 5. n. 3.

17. 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 lib. 3. Co. Litt. sec. 5. n. 3, 4, 5.

18. Code Civil, No. 745. 774. 793-802. See, also, Nouveau Style des Notaires de Paris, cited by Ch. J. Parker, in 5 Pickering, 74. as a practical exposition of the code in relation to successions. M. Touillier, (Droit Civil Francais, tom. 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. Touillier 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 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.

19. Van Leeuwen's Com. on the Roman Dutch Law, b. 3. ch. 10, 11, 12. Institutes of the Laws of Holland, by Vander Linden, translated by J. Henry, Esq. 1828. p. 150, 151. 158.

20. Bell's Com. on the Laws of Scotland, vol. i. 100, 101.

21. Bracton; lib. 2. fo. 69. a.

22. Tacitus de Mor. Ger. c. 20. Feud. lib. 1. tit. 8. Siquis igitur decesserit, filizs et filiabtas superstitibus, succedunt tantuni f lii aaqualiter. Hale's Hist. of the Common Law, vol. 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, p. 393, 394. shows, by references 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 this general rule in some of the barbarian codes, and females were not universally excluded from partaking of the inheritance.

23. Feud. lib. 1. tit. 8. De Successione Feudi. Wright on Tenures, 174. 178. Dalrymple, p. 163-166. 2 Blocks. Cam. 215. Sullivan on Feudal Law, sec. 14. Mr. Reeve, in his History of the English Law, vol. 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 lauds held in free socage, according to Glanville, b. 7. ch. 3. provided the lands had been antiquitus divisa. Mr. Spence, in his Inquiry, p. 398. states, on the authority of Wilkins on the Anglo-Saxon laws, that the first notice we have of the English law of primogeniture. is in the laws of Hen. 1.

24. See Edinburgh Review, vol. xl. p. 360-375. which refers to the agricultural tours of Arthur Young, James P. Cobbett, and Mr. Birkbeck. Arthur Young had traveled over France before the French revolution, and he then made strong and 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,

 

vol. ii. ch. 12.) He supposed, that more than one third of the kingdom was occupied by very small farms, cultivated by the owner. Mr. Southey, in his History of the Peninsular War, vol, i. 47, 48. (a work in which such a discussion seems rather out of place,) attributes the most beneficial results, both in a moral and political view, to the law of primogeniture. He goes to the extraordinary length of saying, that "the structure of social order rests upon that basis."

25. Wealth of Nations, vol. i, 382.

26. See N.A. Review, vol, xxvi. art. 8.

27. Statutes of Maryland of 1786 and 1802. See 6 Harr. & Johns. Rep. 156. 258. Statute of Connecticut. Griffith's Law Register, tit. Connecticut, No. 6. The question as to the policy of large or small farms, and of large or small capital to work them, in an economical point of view, does not belong to the present inquiry, nor does it fall within the range of my professional pursuits. But I became convinced, on reading the writings of Arthur Young, five and thirty years ago, that, in Europe, large farms, and convenient capital to manage them, were by far the most conducive to general improvement, independence, prosperity, and happiness.

28. Litt. sec. 8. Co. Litt. 11. b. 2 Blacks. Com. 209. Goodtitlev. Newman, 3 Wits. Rep. 516. 1 Simon. & Stuart, 260.

29. Reeve's Hist. of the English Law, vol. ii. 318

30. *Shelley's case*, l Co. 98. a. b. by Coke, who argued for the defendant, in whose favor judgment was rendered.

31. Potter v. Potter, 1 Vesey's Rep. 437.

32. Co. Litt. 15. a.

33. Litt. sec. 8. Co. Litt. 15. a. Goodtitle v. Newman, 3 Wils. Rep. 516. Doe v. Keen, 7 Term Rep. 386.

34. Co. Litt. 15. a. Doe v. Hutton, 3 Bos. & Pull. 643. 655. *Ratcliffe's case*, 3 Co. 41. b. 42. a. Kellow v. Rowden, 3 Mod. Rep. 253,

35. Co. Litt. 15, a.

36. Co. Litt. 15. a. Ibid. 191. b. Stringer v. New, 9,Mod. Rep. 363.

37. Jackson v. Hendricks, 3 Johns. Cas. 214. Bates v. Schroeder, 13 Johns. Rep. 260. Jackson v. Hilton, 16 Ibid. 96.

38. Vol. i. 751. sec. 1. Ibid. 754. sec. 27.

39. Reeve on Descents, p. 377-379. Cook v. Hammond, 4 Mason's Rep. 467. Hillhouse v. Chester, 3 Day's Rep. 166. Gardner v. Collins, 2 Peters' U. S. Rep. 59. Tucker's Blacks. Com. vol. ii. appendix, note B. The doctrine of the common law was fully, ably, and learnedly discussed by counsel, in the three last cases above mentioned.

40. 2 Peters' U. S. Rep. 625. Griffith's Law Register, tit. N. C. No. 6. Reeve on Descents, p. 377. The English real property commissioners, in their first report to Parliament, in May, 1829, objected to the rule that *seizina 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 seized of, or entitled to the estate or interest, to be taken by inheritance.

41. 3 Wils. Rep. 516.

42. Basset v. Basset. 3 Atk. Rep. 203.

43. N.Y. Revised Statutes, vol. i. 754. sec. 18. Griffith's Law Register, under the head of those states, No. 6.

44. N.Y. Revised Statutes, vol. i. 751. sec. 3, 4. Griffith's Law Register, passim.

45. See vol. ii. 342. of this week.

46. 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 I n.6.

47. 2 Woodd. Lec. 115.

48. Inst. 3. 1. 6. Novel, 118. 2 Blacks; Com. 217.

49. The rule only applies, in New Hampshire and Vermont, when the intestate, dying without issue, had been married, or

 

was of lawful age.

50. N.Y. Revised Statutes, vol. i. 751. sec. 5. Ibid. 753. sec. 12.

51. Griffith's Law Register. 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. N.Y. Revised Statutes. These are the works which I have mainly consulted for the law of descents in the several states; and I have stated the diversities among the states, not without some apprehension that I may, in certain cases, be misled, from the want of more full and precise information, as to matters of fact on particular points.

52. Wright on Tenures, 179-185. Sir William Blackstone, (Com. vol. ii. 211, 212) has followed implicitly the reasoning of Sir Martin Wright; and he charges Sir Edward Coke with having adopted the quaint reason 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 itaquce Jus quasi ponderosum quid cadens deornun recta linea vel transversali, et nunguam reasce it ea via qua descendit. A latere tamen ascendit alicui propter defectum haeredum inferius provenientium*.-(Bracton, lib. 2. ch. 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 *Ratcliffe'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; *haereditas naturaliter descendit, nunquam naturalitur ascendit*. This is clearly the course and dictate of nature. It is alluded to in one of the Epistles of St. Paul, (2 Cor. 12. 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.

53. Litt. sec. 3.

54. Eastwood v. Vincke, 2 P. Wins. 613.

55. Jones' Com. on, is Isaeus 181.

56. Novel 118. ch. 2.

57. Taylor's Elements of the Civil Law, 542.

58. 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 at Paris to the French nation, on the 6th April, 1814, when the Imperial scepter was falling from the hands of Napoleon. 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.

59. Sec. 746, 747, 748. 751.

60. Droit civil Francais, tom. 4. sec. 124. 126. note.

61. L'Esprit des Loix, liv. 26. ch. 6.

62. Principles of Philosophy, b. 3. part 1. ch. 4.

63. Grotius De Jure, B.& P. b. 2. c. 7. sec. 5. 11. Puff, Droit des Gens, par Barb. 4. 11. 13.

64. N.Y. Revised Statutes, vol. i. 752. sec. 6.

65. I have assumed, on the authority of Mr. Griffith's Law Register, tit. Pennsylvania, No. 6. that the mother, under the Pennsylvania statute, takes, eventually, a fee; but I have not perceived that provision in the statute published by Mr. Anthon, nor in Ch. J. Reeve's elucidations of the Pennsylvania law of descents.

66. 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 de Successionibus apud Hebraeos, ch. 12.

67. Jones's Iseeus, Pref. Discourse. His Commentary on Isaeus, p. 183. etc. Novel 118. ch. 2.

 

68. Vander Linden's Institutes of the Laws of Holland, by J. Henry, Esq. p. 159.

69. N.Y. Revised Statutes, vol. i. 752. sec. 7, 8, 9, 10.

70. See Vol. ii. 340, 341. of this present work.

71. 2 Blacks. Com. 223-231.

72. Gardner v. Collins, 2 Peters' U. S. Rep. 58. 3 Mason's Rep. 398. S. C.

73. N.Y. Revised Statutes, vol. i. 753. sec. 15.

74. In Seville v. Whedbee, 1 Badg.& Dev. Rep. 160. it was decided, that a paternal half brother was entitled as heir to his half brother, to an estate which descended to that deceased brother, ex parte materna. The case is brief and imperfect, but it is to be inferred that he would have equally succeeded, even if a remoter heir, on the part of the mother, had appeared.

75. 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 is by the statute of 1786. Hall v. Jacobs, 4 Harr. & Johns. 245. Maxwell v. Seney, 5 ibid 23

76. N.Y. Revised Statutes, vol. i. 752, 753. sec. 10, 11, 12. 15. The words in the 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 are still of the blood. 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 statute, and Ch. J. Reeve says it is peculiar to Pennsylvania.-Reeve's Law of Descents, 382.) The N.Y. 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 statute 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.

77. In Den v. Jones & Searing, 3 Halsted, 340. the half blood of the person dying seized was held entitled to inherit an ancestral estate, because he was of the blood of the ancestor.

78. In Bevan v. Taylor, 7 Serg. & Rawle, 397. 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.

79. 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 sources of information on this subject, to which I alluded in a former note, though very respectable, are still, in some respects, considerably deficient and obscure, and there is a want of information of the judicial decisions in the state courts on these points, 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. Thus, for instance, the law of descents in New York has undergone a thorough alteration in and by the Revised Statutes; and the views of the law of New York, in Mr. Griffith's Register, and in Ch. J.. Reeve's Treatise on Descents, have now become obsolete and useless. May it not be so in some other states? For these reasons, I do not feel entire confidence in the accuracy of all the details concerning the local laws of succession, in the ascending and collateral lines, though I hope that the inaccuracies that may occur will not be very many, or very material.

80. Inst. 3. 3. 5. Novel, 118. ch. 3.

81. The English real property commissioners, in their report to Parliament, in May, 1829, proposed several material alterations in the common law canons of inheritance. (1.) They proposed to abolish the rule, that the inheritance should not ascend, and to let in the lineal ancestors in default of descendants, and next after the lineal descending line. They proposed that the father should take before brothers and sisters, and the grandfather before uncles and aunts, for preference was to be given, in the ascending line, to proximity of blood to the person last seized or entitled; and the preference of the male line over the female line, without regard to proximity of blood, was to be preserved. (2.) That the rule excluding the half blood should be abolished, and the whole blood and the half blood should stand upon equal footing as to inheritance, except that amongst kindred, claiming through on and the same ancestor of the first purchaser, preference shall be given to the whole blood of the first purchaser; but when that blood fails, the inheritance to pass as if the person last seized or entitled had been the purchaser.

82. N.Y. Revised Statutes, vol. i. 752. sec. 10.

 

83. Blackborough v. Davis, 1 P. Wms. 41. Woodroff v. Wickworth, Prec. in Chan. 527.

84. N.Y. Revised Statutes, vol. i. 752. sec. 10. Ibid. 753. Sec. 13.

85. Ibid. sec. 10, 11, 12.

86. Civil Code of Louisiana, art. 901-904. The law of succession in Louisiana, is taken from the Code Napoleon, art. 746, 747.

87. N. Y: Revised Statutes, vol. i. 753. sec. 16.

88. 2 Blacks. Com. ch. 14.

89. Hale's Hist. of the Common Law, vol. ii. 74.

90. Supra, p. 385.

91. N.Y. Revised Statutes, vol. i. 754. sec. 18. and Griffith's Register, h. t. and the statute laws of the several states.

92. Statute 9 and 10 William III. c. 16. Doe v. Clarke, 2 H. Blacks. Rep. 399.

93. 2 Blacks. Com. 206. 224. 504.

94. Vol. ii. 175. of the present work.

95. Vol. i. 753. sec. 14. Ibid. 754. sec. 19.

96. Cooley v. Dewey, 4 Pick. Rep. 93.

97. Vol. ii. 173. note.

98. Heath v. White, 6 Conn. Rep. 228. This decision is not relished in the case of Cooley v. Dewey, 4 Pick. Rep. 493. because it extends the word children, in the statute of distributions, beyond its settled meaning in the English statute, and in those American statutes which are a transcript of that part of it.

99. Civil Code of Louisiana, art. 912-917.

100. Inst. 3. 3. 7 Ibid. 3. 4. 3. Code, 6. 57. 6. Nov. 18. 5. 5. Gibbon's Hist. Vol. viii. 67, 68.

101. Damat, vol. i. tit. Successions, part 2. sec. 12. Ibid. b. 1. tit. 1. sec. 3. Ibid. b. 2. tit. 2. sec. 11. 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 wore indulgent provision of the Roman law. Repertoire de Jurisprudence, par Merlin, tit. Bastard.

102. Code Napoleon, art. 756, 757, 758. 765.

103. Touillier's Droit Civil Francais, tom. 4. sec. 248-270. He gives a detail of some of those controverted points.

104. Institutes of the Laws of Holland, by Vander Linden, translated by Henry, p. 165. Commentaries of Van Leeuwen, p. 34. 287. edit. Lond. 1820. 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 Notce 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, nee levi nota insigniti; but he admits that the rule is different in Germany. They are excluded from the inheritance, and bear the mark of disgracesemper levi nola adspersi fuisse videntur. Heineccins then enters into an eulogium on this branch of Germanic 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, tom. 2. Exercitatio 7. sec. 32. 54.

105. See the remarks of Ch. J. Parker, in 4 Pick. Rep. 95. Lord Ch. 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, 17.

106. Vol. i. 754. sec. 23, 24, 25, 26. Ibid. vol. ii. 97. sec. 76, 77, 78, 79.

107. N.Y. Revised Statutes, vol. i. 737. sec. 127.

 

108. Wyth v. Blackman, 1 Vesey's Rep. 196. Royle v. Hamilton, 4 Vesey's Rep. 437.

109. 3 Blacks. Com.. 430. Co. Litt. 209. a.

110. N.Y. Revised Statutes, vol. ii. 452. sec. 32, 33, 34, 35.

111. N.Y. Revised Statutes, vol. i. 749. sec. 4.

112. Harg. & Butler's Co. Litt. 208. b. note 106. Howel v. Price, 1 P. Wms. 291. and the learned note of Mr. Cox. 3 Johns. Ch. Rep. 257. 9 Serg. & Rawle, 73.

113. Stephenson v. Heathcote, 1 Eden, 38. Lord Inchiquin v. French, 1 Cox's Cas. 1. Webb v. Jones, ibid. 245. Bootle v. Blundell, 1 Merivale, 193. Livingston v. Newkirk, 3 Johns. Ch. Rep. 312.

114. Cumberland v. Cumberland, 3 Johns. Ch. Rep. 229.

115. 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."

116. 3 Mass. Rep. 527. 536. 4 Ibid. 358.

117. Gibson. Ch. J.. 13 Serg. & Rawle, 14.

 

LECTURE 65

## 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 or agreement of the party.[1] But titles by escheat and forfeiture, are also acquired by the mere act of law; and Mr. Hargrave this, 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[2] have added an additional title, and one unknown to 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 seized 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 extinction of tenure.[3] The opinions given in the great case of *Burgess v. Wheate*,[4] concur in this view of the doctrine of escheat. 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 every where declared and asserted, that when the title to land fails from defect of heirs, it necessarily reverts, or escheats, to the people, as forming part of the common stock to which the whole community is entitled.[5] 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.[6] No inquest of office is requisite ill such cases;[7] and, by the New York Revised Statutes,[8] the Attorney General is authorized 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 an escheator, whose duty it was to assert the right of the emperor to the haereditas jacens, or caduca, when the owner left no heirs or legatee to take it.[9] 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.[10] It was, as early as the age of Bracton, regarded as a part of the *jus gentium — ubi non apparet dominus rei, quae olim fuerunt inventoris, de jure naturali, jam efficiuntur principis de jure gentium.*[11] The principle lies at the foundation of the right of property, that when 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.[12] In New York, all escheated lands, when held by the state, or its grantee, are declared to be subject to the same trusts, encumbrances, charges, rents, and services, to which they would have been subject had they descended.[13] 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 subject to the trusts to which the escheated lands were previously liable. The statute of 39 and 40 Geo. III. c. 88. mitigated the rule, by the provision which enabled the king, by warrant or grant, to direct the execution of the trust. In the case of Sir George Sands,[14] 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.

(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.[15] 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 escheat went, indeed, upon feudal principles, beyond the law of forfeiture. It extinguished, and blotted out for ever, 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 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 practice in this country, and the corruption of blood is, I apprehend, universally abolished.[16] 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 forfeitures, upon the death of the ancestor, "natural, unnatural, casual, or judicial," were abolished for ever.[17]

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 divested by the forfeiture of the particular estate.[18]

Besides the forfeiture of property to the state, for the conviction of crimes, estates 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 tenth, in its nature, to divest 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.[19] 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 nearly, or quite obsolete in this country; and the just and rational principle prevails, that the conveyance by the tenant operates only upon the interest which he possessed, and does not affect the persons seized of ulterior interests.[20] An act of assembly in Pennsylvania gives to all deeds and conveyances of land, proved, or acknowledged, and recorded, the same force and effect as to possession, seizin, and title, as deeds of feoffment with livery; and yet it has been held,[21] that such a deed worked no forfeiture, on the common law doctrine of alienation by tenant 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.[22] This was pressing the severe doctrine of the common law, in the case of such a species of conveyance, beyond what we should naturally have expected

 

in this country; and I apprehend that the solidity of the decision may be justly questioned, and that the precedent will never become contagious.

There are other causes of forfeitures, 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, is a sequestration of the profits of the land by writ of levari facial, or the possession of a moiety of the lands by the writ of elegit, and, in certain cases, of the whole of it by extent. In all these cases, the creditor holds the land in trust until the debt is discharged by the receipt of the rents and profits. 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, Mr. Dane says,[23] it is still the practice in Massachusetts. But though the statute of George 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 1705, lands were, by colonial statutes, rendered liable to sale on execution for debt.[24]

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, and found insufficient. In New York, until within 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. This would appear to be the practice still in the states of New Jersey, Maryland, North Carolina, Tennessee, South Carolina, Georgia, Alabama, and Mississippi.[25] 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.[26] A certificate of the sale is to be delivered by the sheriff to the purchaser, and another certificate filed in the clerk's office of the county within ten days; and redemption of the lands 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 rateable share of the laced 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 trustee, within three months after the expiration of the year, may redeem the land, on paying 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 sheriff's sale; for the sheriff is then to execute a deed to the person entitled, and the title so acquired becomes absolute in law.[27] I apprehend, that the sheriff's deed, when executed, will be good by relation, and cover the intervening period from the sale. This is the case as to the enrolment of a bargain and sale, in England, within the six months.[28] The filing of the sheriff's certificate is equivalent to a deed taken and recorded, so far as respects the purchaser's security from any intervening claims, other than the right of redemption.

In many of the states, the lands 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 payment on the judgment to the amount of the valuation. The debtor is likewise allowed a reasonable time to redeem. This is the case in Maine, New Hampshire, Vermont, and Massachusetts; and the debtor is allowed a year to redeem, except in Vermont, where it is only six months, and on paying twelve per cent: interest. In Rhode Island, and Connecticut, the previous appraisement is requisite, and the sale or assignment of the lands to the creditor is at the appraised value but there is no time allowed to redeem.[29] 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, and possession given to the creditor, in the manner practiced upon the elegit in England; but if not so found, the lands are to be sold without redemption.[30] The lands are not to be sold under the amount of two thirds of the previously appraised value, in the states of Ohio and Illinois, and of three fourths in Kentucky, and of one half of the same in Indiana. In Missouri, and Louisiana, if the lands do not bring, or 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. 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, and then they are to be first appraised, and sold on credit, with security, if they will not bring three fourths of their appraised value.

In those states in which the sheriff sells the land, instead of extending it to the creditor, he executes a deed to the purchaser 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.[31] In some of the southern states, as, for instance, in Georgia, Alabama, and Mississippi, the sales are required-to be at the court house of the county. 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,[32] and no deed is executed, for the title rests upon matter of record. In New York, the judgment or decree is a lien on the real estate of the debtor from the docketing of the same, and it affects 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.[33] 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. In Kentucky and Mississippi, lands are only bound, like chattels, from the delivery of the execution. In Pennsylvania, the judgment is a lien on the lands owned at the time by the debtor, but it does not bind after-acquired lands until the execution has issued. This distinction is established by the decision in *Calhoun v. Snider*,[34] in which the antiquity and authority of the rule of the English common law, that a judgment binds after-acquired lands, has been ably questioned, though, I think, not successfully shaken. The distinction taken in Pennsylvania, would seem to exist also in the states of Virginia and Illinois. There is another and peculiar distinction taken in North Carolina. Lands are held to be bound from the judgment, provided the creditor sues out an elegit, but they are only bound by execution if the creditor elects to sell the land by *fieri facias*.[35] The judgment becomes a lien, as completely as in New York, in the states of New Jersey, Delaware, Maryland, Ohio, Indiana, Missouri, Tennessee, South Carolina, Georgia, Alabama, and Louisiana. The lien, after all, amounts only to a security against subsequent purchasers and encumbrancers; for the Master of the Rolls, in *Brace v. Duchess of Marlborough*,[36] said, it was neither *jus in re*, nor *jus ad rem*; and though the judgment creditor should release all his right to the land, he might afterwards extend it by execution.

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 interest residing in his debtor, is by 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.[37]

When we consider how reluctantly and cautiously real property, in England, has been subjected to the process of execution, and how reasonable it is that provision should he 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.

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 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 in particular, they are specially detailed in the revised statutes, with cautious provisions to guard against irregularity and abuse.[38]

## NOTES

1. Litt. sec. 12. Co. Litt. ibid. note 106.

2. Ch. J. Swift, in his Digest of the Laws of Connecticut, and Mr. Dane, in his Abridgment of American Law.

3. Wright on Tenures, 115-117. 2 Blacks. Com. 244, 245.

4. 1 Wm. Blacks. Rep. 123.

5. N.Y. Revised Statutes, vol. i. 282. tit. 12. Ibid. 718. sec. 1, 2, 3. Swift's Digest, vol. i. 156. Tucker's Blackstone, vol. ii. 244, 245. note. Statute of Pennsylvania, 29th September, 1787. b Binney's Rep. 375. Dane's Abridg. vol. iii. 140. sec. 24. Ibid.

 

vol. iv. 538. 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, stand in his place under an act of confiscation, and the lands remain, of course, subject to escheat. See Harr. & McHenry's Rep. index, tit. Escheat. Passim. *Ringgold v. Malott*, 1 Harr.& Johns. 299.

6. Vol. ii. of this work, p. 47.

7. 4 Co. 58. a. Comyn's Digest, tit. Prerogative, D. 70.

8. 1 Vol. i. 282.

9. Code, 10. 10. 1.

10. Domat, vol. i. 592. sec. 6. 616. sec. 4. Vanderlinden's Institutes, by Henry, 165. Code Napoleon, sec. 723.

11. Bracton, lib. 1. ch. 12. sec. 10.

12. This was the case with the ancient Germans, when their institutions were studied by Caesar and Tacitus. They had not then any private property in land; it was vested in the community or tribe. Caesar, de Bell. Gal. lib. 4. c. 1. Tacit. de Jtlor. Germ. c. 26.

13. N.Y. Revised Statutes, vol. i. 718. sec. 2.

14. 3 Ch. Rep. 19.

15. Wright on Tenures, 117, 118.

16. See Vol. ii. of this work, p. 318. N.Y. Revised Statutes, vol. i. 284. sec. 1.Ibid. vol. ii. 701. sec. 22.

17. Dane's Abr. vol. v. p. 4. Mr. Dane says, that forfeiture of estates for crimes is scarcely known in our Americas practice or laws. Ibid. p. 11.

18. Case of Capt. Gordon, Foster's Crown Law, 95. Borland v. Dean, 4 Mason's Rep. 174. Dalrymple on Feudal Property", ch. 4. p. 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.

19. Wright on Tenures, p. 203. Co. Litt. 251. a. b.

20. See supra, p. 34. 81, 82.

21. McKee v. Prout, 3 Dall. Rep. 486.

22. Commonwealth v. Welcome, cited in 5 Dane's, Ibr. 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.

23. Abr. of American Law, vol. v. p. 20.

24. Province Act of Massachusetts, 1696, cited in 5 Dane's Abr. 23, note. Province Acts of Pennsylvania, 1700, and 1705, cited in 6 Binney's Rep. 145.

25. Griffith's Register, h. t. No. 3.

26. New York Revised Statutes, vol. ii. 183. sec. 104. Ibid. 363. sec. 2. ibid. 367. sec. 24. Ibid. 368. sec. 34. Ibid. 369. sec. 38.

27. New York Revised Statutes, vol. ii. p. 370. to 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.

28. Preston on Abstracts, vol. iii. 90. Shep. Touchstone, 226.

29. Dune's Abr. vol. v. 22. 25. Swift's Digest, vol. i. 154, 155. Griffith's Register.

30. 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 Dalf. Rep. 75.

31. Simonds v. Catlin, 2 Caines' Rep. 60. Barney v. Patterson, 6 Harr.& Johns. 182. The N.Y. Revised Statutes, vol. ii. 374. require a regular conveyance from the sheriff.

32. Den v. Abingdon, Doug. Rep. 473.

33. N. Y Revised Statutes, vol. ii. 182. sec. 96 Ibid. 359. sec. 3.

34. 6 Binney's Rep. 135.

35. Jones v. Edmonds, 2 Murphy, 43.

36. 2 P. Wms. 491.

37. N.Y. Revised Statutes, vol. i. 744. sec. 4, 5. 6.

38. N.Y. Revised Statutes, vol. ii. 99-113.

 

LECTURE 66

# 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.[1]

1. *Of the history of the law of alienation.*

The alienation of property is among the earliest suggestions flowing from its existence. The capacity to dispose of it becomes material to the purposes of social life, as soon as property is rendered secure and valuable, in the progress of nations from a state of turbulence and rudeness, to order and refinement. It is stated, by very respectable authorities, that, in the time of the Anglo-Saxons, lands were alienable either by deed or by will. When conveyed by charter or deed, they were distinguished by the name of *boc*, or *bookland*, and the other kind of land called *folcland*, was held and conveyed without writing.[2] 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, was subject, as it is in every country, and in every stage of society, to the restraints and modifications suggested by convenience, and dictated by civil institutions.[3] 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, 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.[4] 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 has 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 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.

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;[5] 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 feudatories, because they contributed to their owl 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 which were ancestral.[6] In the time of Glanville,[7] 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.[8]

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 Carta; 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 West. 2. 13 Edw. I. ch. 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 on alienation by the king's tenants in capite, and substituting a reasonable fine in its place; (and which Lord Coke says,[9] was only an exposition of Magna Carta;) and this gives us a condensed view of the progress of the common law right of alienation from a state of servitude to freedom.[10]

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 seized 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,[11] 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.[12] Every grant of land, except as a release, is void, if, at the time, the lands are in the actual possession of another person, claiming under a title adverse to that of the grantor. This principle has always been received as settled law in New York, and it has been recently incorporated into the revised statutes.[13] 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.

The ancient policy which prohibited the sale of pretended titles, and held a 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,[14] "under color thereof pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed." The repeated statutes which were passed in the reigns of Edw. I. and Edw. III. against champerty and maintenance, arose from the embarrassments which attended the administration of justice in those turbulent times, from the dangerous influence and oppression of men in power. 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 re-enacted literally in New York, in 1788; but the penal provisions are altered by the New York Revised Statutes,[15] which have abolished the forfeiture, but 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.. 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,) should have in him, at the time, a right of possession. A feoffment was void without livery of seizin; and without possession a man could not make livery of seizin.[16] This principle is not peculiar to the English law. It was a fundamental 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.[17] It seems to be the general sense and usage of mankind, that the transfer of real property should not be valid, unless the grantor has capacity, as well as the intention, to deliver possession. Sir William Blackstone says,[18] that it prevails in the code 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.[19] But as between the parties to the deed, it might operate by way of estoppel, and bar the grantor. This is the language of the old authorities, even as to a deed founded on champerty or maintenance.[20]

 

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, and probably in most of the other states.[21] There are other states, such as Pennsylvania, Kentucky, and Tennessee, in which the doctrine does not exist, and a conveyance by a disseizee would seem to be good, and pass to the third person all his right of possession, and of property, whatever it might be.[22] I am not particularly informed as to the rule on this point in other parts of the Union.

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 void, if made with a knowledge of the suit, and not in consummation of a previous bargain.[23] The statutes of West. 1. c. 25. West. 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,[24] 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 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.

3. *Of the due execution of a deed.*

A deed, duly executed, must be written on paper or parchment, and signed, sealed, delivered, and recorded.

(1.) <u>The deed must be in writing, and signed, and sealed</u>.

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 eaters much more deeply 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., alt estates and interests in lands, (except leases not exceeding three years,) created, granted, or assigned, by livery and seizin only, or by parol, and not in writing, and signed by the party, were declared to have no greater force or effect than estates at will only. This statute provision has been either expressly adopted, or assumed as law, throughout the United States. 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.[25] Nor is a parol promise to pay for the improvements made upon land, within the statute of frauds. They are not an interest in land, but only another name for work and labor bestowed upon it.[26] So, a sale for a crop of growing potatoes, has been held not to be such a contract for the sale of any interest in land, as to require a writing, within the statute of frauds.[27]

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.[28] 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, 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 for one year. There is probably similar statute provisions in other states; and where there is 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.[29] It had been adjudged in New York, in 1814,[30] 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 statutes[31] 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 deed is an instrument in writing, upon paper or parchment, between parties able to contract, and duly sealed and delivered.[32] As a seal is requisite to a deed, the definition, and the character of it, are well settled. 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 cera sine impressione non est sigillum.[33] 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.[34] In the eastern states, sealing, in the common law sense, is requisite; but in the southern and western states, from New Jersey inclusive, the impression upon wax has been disused to such an extent, as to induce the courts to allow 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.[35] 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 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[36]

(2.) <u>It must be delivered</u>.

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.[37] Generally, an escrow takes effect from

 

the second delivery, and is to be considered as the deed of the party 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.[38] It has further been held, that if the grantor deliver a deed as his deed, to a third person, to be 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.[39] The delivery to the 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 R. did so, and though C. refused to accept of it, the deed was held_ to ensure from the first delivery; because the deed was not delivered. as an escrow, or upon, a condition to be performed.[40] 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, consummated, without any conditions or qualifications annexed, it is still a complete and valid deed, notwithstanding it be left in the custody of the grantor.[41]

(3.) <u>It must be recorded</u>.

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. If not recorded, they are good only as against the grantor and his heirs, and they are void as to subsequent bona fade purchasers, whose deeds shall be first recorded. The English 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 as a bona fade purchaser.[42] In several of the states, as, for instance, in New Hampshire, Vermont, Rhode Island, Connecticut, Georgia, Ohio, 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. There is, likewise, a fixed period of time allowed, in many of the states, for to have the deed recorded, as, for instance, two years in North Carolina; one year in Delaware, Illinois, Tennessee, and Georgia; eight months in Virginia; six months in Pennsylvania, Maryland, South Carolina, and Ohio; three months in Missouri, and Mississippi; and fifteen days in New Jersey. 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, I presume 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.

The mode of proof, and of 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 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[43] 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. 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. 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,[44] and it applies to conveyances of chattels real, as well as of freehold estates, 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.[45]

In England, the practice of recording deeds is of local, and very limited application. It applies to the Bedford level tract, 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 register& 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 are retained, and the sasine, or symbolical tradition of the land, in practice. 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 reciting the transaction, is recorded, and that constitutes the title.[46]

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 interest conveyed, and, lastly, the conditions, reservations, and covenants, if any there be.

(1.) Of the form of the deed.

“ The Saxons, in their deeds,” said Sir Henry Spelman,[47] “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,[48] by a general appeal to all men to whom the contract might be presented, for its truth and authenticity.[49] 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, are very brief, and require but few words. If a deed of feoffment, according to Lord Coke,[50] be without premises, *habendum, tenendum, reddendum*, clause of warranty, etc. it is 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.

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 seizin, 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 1st 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 seizin, was made effectual, provided the intention was clearly declared.[51]

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: 1 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, etc. the words, and his heirs, may be omitted,) the lot of land, (describe it,) witness my hand and seal, etc." 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 L assurance double sure," that, generally, in important cases, the purchaser would rather be at the expense of exchanging a paper of such insignificance 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 to depart from the formal and orderly parts of a deed, which have been well considered and settled.

(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 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.[52] So, a grant to the inhabitants of a town not incorporated, is void.[53] 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 cerium, quod potest reddi certum*.[54]

(3.) Of the consideration.

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 consideration must be good or valuable, and not partaking of any thing 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*.[55] A good consideration is founded upon natural love and affection between near relations by blood; but a valuable one is founded on something deemed valuable, as money, goods, services, or 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.[56] The consideration need not be expressed in the deed, but it must exist. 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.[57] 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 the deed be brought in question, the consideration may be averred in pleading, and supported by proof. The receipt of the consideration money is usually mentioned in the deed; and Mr. Preston says;[58] that if the receipt of it be not endorsed 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 endorse on the deed the receipt of payment, for that ceremony is not now the American practice.

(4.) The description of the premises.

In the description of the 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. If there be nothing to control the course and distance, the line is run by the needle.[59] 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 amount.[60] Whenever it appears by the 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.[61] 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.[62]

(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 divesting an estate already vested by the deed, for it is void if it be repugnant to the estate granted.[63] 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 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.

(6.) Of the usual covenants in a deed.

The ancient warranty was a covenant real, whereby the grantor of an estate of freehold, and his heirs, were bound to warrant the title; and either upon voucher, or by judgment in a writ of *warrantia chartae*, to yield other lands to the value of those from which there had been an eviction by a paramount title.[64] 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 the 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.[65] 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 possession. The statute of Anne was re-enacted in New York in 1788; but the revised statutes[66] 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 only upon the covenant or agreement of the ancestor or testator, to the extent of the lands descended or devised. The statutes have further declared,[67] that no covenants shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not. 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 distinguished 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 chart&,, 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.

The remedy by the ancient warranty never had, as I presume, any existence in any part of the United States, and personal covenants have superseded the old warranty. The remedy is by an action of covenant against the grantor, or his real or personal representatives, to recover a compensation in damages for the land lost upon eviction for failure of title. The usual personal covenants inserted in

 

a conveyance of the fee, are, 1. That the grantor is lawfully seized; 2. That lie has good right to convey; 3. That the land is free from encumbrances; 4. That the grantee shall quietly enjoy; 5. That the grantor will warrant and defend the title against all lawful claims. The covenants of seizin, and of a right to convey, and against encumbrances, 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. But the covenant of warranty, and the covenant for quiet enjoyment, are prospective, and an eviction is necessary to constitute a breach of them. They are, therefore. in the nature of real covenants, and they run with the land conveyed, and descend to heirs, and vest JP assignees.[68] The distinction taken in the American cases is supported by the general current of English authorities, which assume the principle that covenant does not lie by an assignee, for a breach done before his time.[69] On the other hand, it was recently decided by the K. B., in *Kingdom v. Mottle*,[70] that a covenant of seizin did run with the land, and the assignee might sue, on the ground that want of seizin 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. I1 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 all of the covenants. He is the most interested, and the most f t 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 voucher, or *warrantia* charge. The ancient remedy is inadequate and inexpedient, and has become entirely obsolete.[71] The distinction between the covenants that are in gross, and covenants that run with the land, would seem to rest principally on this ground, that to make a. covenant run with the land, there must be a privity of estate between the covenanting parties. 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.[72] All covenants of title run with the land, with the exception of those that are broken before the land passes.

In Pennsylvania, Delaware, and Missouri, it is declared by statute, that the words grant, bargain and sell, shall amount to a covenant that the grantor was seized of an estate in fee, freed from encumbrances done or suffered by him, and for quiet enjoyment as against his acts. But, in *Grantz v. Ewalt*,[73] 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 two states,) did not amount to a general warranty, but merely to a covenant that the grantor had not done any act, nor created any encumbrance, whereby the estate might be defeated. Upon this construction, the words of the statute are 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. In New York, it was decided, in *Frost v. Raymond*,[74] 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.[75]

 

But this doctrine, though deemed sound and 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 provisions in the revised statutes. In North Carolina, the words '1 give, grant, bargain, sell," etc. have been denied to imply any warranty of title[76] 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 charge, the demandant recovered of the warrantor, or heir, other lands, of equal value with the lands from which the feoffee was evicted. The value was computed as it existed when the warranty was made, so that, though the land had afterwards became 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.[77] 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 seizin, 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 made by the purchaser, who cannot recover any damages, either for the improvements or the increased value.[78] But on the covenant of warranty, the measure of damages, in Massachusetts, is the value of the land at the time of eviction.[79] 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 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.[80] If the subsisting encumbrances 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 seizin and of warranty. The uniform rule is, to allow the consideration money, with interest and costs, and no more. If the encumbrance 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.[81] If, however, the grantor had notice to remove the encumbrance, 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.[82] The 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.

If the eviction be only of a part of the land purchased, the damages to be recovered under the covenant of seizin, are a rateable 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.[83] 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.[84] The measure of compensation for a deficiency in the quantity of land, in the case of a sale by the acre, unattended with special circumstances, has been assumed, in some cases, to be the average, and not the relative value.[85] 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 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 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.[86] The Code Napoleon[87] 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[88] 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.

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,[89] 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 wealthy or enterprising purchaser, or in the vicinity of a growing town, without the chance of absolute ruin.[90] The want of title in cases of good faith, is usually 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 seizin, it is sufficient to allege the breach by negativing the words of the covenant. But the covenants for quiet enjoyment, and of general warranty, re quire the assignment of a breach by a specific ouster, or eviction by a paramount legal title. So, in the case of the covenant against encumbrances, the encumbrance 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 the breach of a covenant against encumbrances, but only that it is a valid and subsisting encumbrance. A paramount title, in a third person, is an

 

encumbrance within the meaning of the covenant.[91]

5. *Of the several species of conveyances*.

Sir William Blackstone[92] divides conveyances into two kinds, viz. conveyances at common law, and conveyances which receive their force and efficacy from the statute of uses. The first class is again subdivided into original or primary, and derivative or secondary conveyances.

As some of those conveyances have grown obsolete, and as the principles which constitute and govern all of them, have been 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.

(1.) Of feoffment.

Feoffment was the mode of conveyance in the earliest periods of the common law. It signified, originally, the grant of a feud or fee; but it became, 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 seizin. 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 seizin of all the lands contained in the deed. The ceremony was 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 seizin.[93]

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 seizin 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 actual entry afterwards, in the time of the feoffor, took place, it was a good livery in law.[94]

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 transcendent efficacy of passing a fee by reason of the livery, and of working an actual disseizin of the freehold. It cleared away all defeasible titles, divested 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.[95] In this respect the feoffment differed essentially from a fine, or common recovery, for the conusor in the fine, and the tenant to the praecipe, must be seized of the freehold, or of an estate in fee, or for life, otherwise the fine or recovery may be avoided.

 

The doctrine of disseizin 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 left too incomplete, without taking some notice of this ancient and vexatious learning.

Seizin 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. Disseizin was the violent termination of this seizin, 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 disseizor, by which he put himself in the place of the disseizee, and in the character of tenant of the freehold, made his appearance at the lords' court. A wrongful entry was not a disseizin, 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 seizin was adjudged to be in the rightful owner.[96] It was the ouster, or tortious expulsion of the true owner from the possession, that produced the disseizin. There was a distinction between dispossession and disseizin, for disseizin 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.[97]

There were two kinds of disseizin, the one was a disseizin in fact, and the other a disseizin by construction of 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 disseizin was effected by actual expulsion, or by a constructive ouster, the legal consequences upon the title were the same.[98] But the doctrine of disseizin 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 disseized, has been extensively applied to these disseizins 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 disseizin, and the advocates for the melioration of that theory in its adaption to the state of modern manners and improvements 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*;[99] 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 disseized, 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 sufferance, was equally the possession of the freeholder. Persons in possession, without any right as tenants by disseizin, deforcement, abatement, and intrusion, could also transfer the possession and freehold by livery of seizin. 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 lord's court, (pares curie,) and the entry of the feoffee was recorded in the lord's court. When this solemnity and notoriety were 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 *Atkyns 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 disseizor or intruder, he was, nevertheless, considered to be in the seizin of the fee, and to be enabled by feoffment and livery to transfer it to another. The disseizor became a good tenant to the demandant's privcipe, and a freeholder *de facto*, in spite of the true owner.[100] The same efficacy, by means of the possession in the feoffor, and livery of seizin to the feoffee, was imputed to the feoffment by Perkins, Coke, and others;[101] and the ancient doctrine, as it existed when Bracton wrote, has been continued to modern times, giving to the feoffment its primitive operation. Disseizins by elections are those acts which are no disseizins unless the party chooses to consider them to be such, and which are not in themselves disseizins. The disseizin which is produced by a feoffment, answers every description of an actual disseizin. Whether the feoffment be made by a person seized 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 disseizin gave to the feoffee against every person but the disseizee, 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 a descent to the heir of the feoffee tolled the entry of the disseizee. The tenant was expelled from his fee, and the feoffee usurped his feudal place and relation, and he became a good tenant to the prcecipe 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 disseizins by feoffments, considers the feoffee as having an immediate estate of freehold, and as having acquired a seizin in fee as against strangers. The disseizin produced by a feoffment, meant, according to Mr. Butler and Mr. Preston, an actual disseizin, and not one at the election of the party; and the feoffee continued vested with the freehold until the disseizee, 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 disseizin, according to the ancient and strict notion of them, were ably illustrated and supported by Mr. Knowler, in his argument in *Taylor v. Horde*.[102] 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 disseizin. According to Mr. Preston,[103] whenever a person enters into land without title, and claims a fee, he is a disseizor, and acquires a seizin in fee. So, if a termor makes a feoffment, he gains a freehold by disseizin. 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 disseized 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 disseized; 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 not disseized, provided his entry was not taken away. In *Jerritt v. Weare*,[104] the Court of Exchequer were disposed to follow the spirit of the case of *Taylor v. Horde*, and disarm the doctrine of disseizin of much of its ancient severity, and formidable application. They adopted the doctrine in *Blunden v. Baugh*,[105] that whether there was an actual disseizin 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 disseizin only at the election of the owner; and, in the Exchequer case, a lease by a stranger and entry tinder it by the lessee, was put upon the same ground. Every disseizin is a trespass, but every trespass is not a disseizin. 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 disseizin.

In *Goodright v. Forester*,[106] the court censured and condemned the-ancient doctrine of estates arising by disseizin, 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*.[107] 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 disseizin 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 disseizin. They now require something more than mere feoffments and leases, to work, in every case, the absolute and perilous consequences of a disseizin in fact. Those acts are a disseizin 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 seizin and disseizin,[108] 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 that it would be deeply to be lamented, if we were obliged, at this day, to call into practice the extravagant consequences of disseizin, after feudal tenures, and the assurance by feoffment itself, and the reasons which gave such tremendous effects to disseizin, had all become lost, and buried in oblivion.[109]

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 disseizin, founded on the operation of a feoffment, as

 

much efficacy as it was entitled to receive, in this improved age of the English law.[110]

The conveyance by feoffment, with livery of seizin, 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[111] have expressly abolished the mode of conveying lands by feoffment, with livery of seizin.

(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 seizin. Such rights were said to lie in grant, and not in livery, and they were conveyed simply by deed.[112] There was this essential difference between a feoffment and a grant; while the former carried destruction in its course, by operating upon the 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.[113] 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 seignory without the consent of the tenant.[114] The necessity of the attornment was partly avoided by 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. The New York Revised Statutes[115] 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.[116]

The New York Revised Statutes have given to deeds of conveyance of the inheritance or 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.[117] 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, would be sufficient.[118] 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.[119]

It will be unnecessary to enlarge upon conveyances, of a special or secondary character, as exchange, partition, confirmation, surrender, assignment, and defiance; 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 the covenant to stand seized to uses.

By this conveyance, a person seized of lands, covenants that he will stand seized of them to the use of another. On executing the covenant, the other party becomes seized 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 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.[120] The existence of another consideration, in addition to that of blood or marriage, will not impede the operation of the deed. Covenants to stand seized are a species of conveyance no longer in use in England.[121] 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 seized be founded on the requisite consideration, it would be good as a grant, for there could be no dispute about the intention; and it is admitted, that in a covenant to stand seized, any words will do, that sufficiently indicate the intention.[122] 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 instrument 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 seized, 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 covenant to stand seized, provided there be the requisite consideration.[123]

(4.) Of lease and release.

This is the usual mode of conveyance in England, because it does 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 re-enacted 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 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 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.[124]

(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, prior to the introduction of the grant, by the revised statutes, in January, 1830. A bargain 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 a use, which the bargainor was bound in equity to perform.[125] Nothing can be more liberal than the rules of law, as to the words requisite to create a bargain and sale.[126] There must be a valuable consideration, and then any words that will raise a use, will amount to a bargain and sale. After the statute of uses was passed, a use was raised, and vested in the bargainee, by means of the bargain, and the statute annexed the possession to the use; and by that operation the bargain became at once a sale, and complete transfer of the title.[127]

A use may be raised by feoffment, as well as by bargain and sale, or covenant to stand seized to uses. But when raised by feoffment, the feoffor, having parted with the legal estate, cannot stand seized to the use of the feoffee, as the bargainor and covenantor, who retain in themselves the legal estate, do in the other cases.[128] Bargain and sale, and covenant to stand seized, 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 had not contributed to the consideration when the conveyance was made.[129] 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, or 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.

(6.) Of fines and recoveries.

Alienation by matter of record, as by fines and common recoveries, make 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 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,[130] fines and common recoveries are now abolished. 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 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 1S Edw. I., "the fine is so high a bar, and of so great force, and of a 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 re-enacted 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.[131] In our large cities, where land is exceedingly valuable, and large, durable, and very expensive erections are constantly making, it may be desirable that the certainty of the title should he 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, the formal proposition to abolish fines was not to have been anticipated. The circumstances of the two countries are totally different. I 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

 

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.[132]

## NOTES

1. Litt. sec. 12, Co. Litt. ibid.

2. Wright on Tenures, 154. note. Reeve's Hist. of the English Law, vol. i. p. 5. 10, 11. Spelman on Feuds, ch. 5. Ibid. on Deeds and Charters, b. 7. c. 1. 2 Blacks. Com. 375.

3. 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. L. L. Alfred, ch. 37. Lambard's Arch. p. 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.

4. Feud. lib. 2. tit. 39.

5. Vol. iii. 405-407.

6. Lambard's Arch. p. 203.

7. Lib. 7. ch. 1. and see vol. iii. 406.

8. Vide supra, p. 11-13.

9. 2 Inst. 66.

10. These successive periods in the progress of the law of alienation, may be found distinctly and fully stated in detached parts of Reeves' 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 Law, sec. 15 and 16, and in Dalrymple's Essay on Feudal Property, ch. 3. The latter unites with it a history of the recovery of the right of alienation in Scotland. The subject is-also sketched by Sir William Blackstone, in his Commentaries, (vol. 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 lie 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.

11. Vol. i. 719. sec. 8, 9, 10.

12. Montague, Ch. J. in *Partridge v. Strange*, 1 Plowd. Rep. 88. a.

13. N.Y. Revised Statutes, vol. i. 739. sec. 147, 148.

14. Co. Litt. 214. a

15. Vol. ii. 691. sec. 6.

16. Perkins, sec. 220.

17. 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. 38.

18. Com. vol. ii. 311.

19. *Williams v. Jackson*, 5 Johns. Rep. 489. Wolcott v. Knight. 6 Mass, Rep. 418. Brinley v. Whiting, 5 Pick. Rep. 348.

20. Bro. tit. Feoffments, pl. 19. Fitzherbert, J. in 27 Hen. VIII, fo. 23. b. 24. a. Co. Litt. 369. Beaumond, J. in Cro. E. 445.

 

Hawk, b. 1. c. 86. sec. 3.

21. In Connecticut, by the colony act of 1727, the seller forfeits half the value of the land. 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. Rep. 348.

22. Stoever v. Whitman, 6 Binney's Rep. 420. Aldridge v. Kincaid, Act of Tennessee, 1805, c. 11. 2 Littell, 398. Until 1798, a deed, conveying land in the adverse possession of another, was void by the law of Kentucky.

23. Jackson v. Ketchum, 8 Johns. Rep. 479. Mr. Dane says, there is no statute on the subject in Massachusetts, but that champerty is an offense in that state at common law. Dane's Jib, vol. vi. 741. sec. 4.

24. Vol. ii. 691. sec. 5.

25. N.Y. Revised Statutes, vol. ii. 134. sec. 6.

26. Lower v. Winters, 7 Cowen's Rep. 263.

27. Evans v. Roberts, 5 Barnw. & Cress. 829.

28. London Waterworks v. Bailey, 4 Bingham, 283.

29. Civil Code of Louisiana, art. 2415. 2417.

30. Jackson v. Wood, 12 Johns. Rep. 73.

31. N.Y. Revised Statutes, vol. i. 738. sec. 137.

32. Co. Litt. 35. b.

33. 3 Inst. 169. This definition of Lord Coke is supported by all the ancient authorities. See Perkins, sec. 134. Bro. tit. Facts, 17. 30. *Lightfoot and 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.

34. Genesis 38:18. Exodus 28:11. Esther 8:8-10. Jeremiah 32:10, 11. Cicero, Acad. Q. Lucul. 4. 26. Heinece. Elem. Jur. Civ.497.

35. Force v. Craig, 2 Halsted's Rep. 272. Alexander v. Jameson, 5 Binney's Rep. 258. Temple v. Logwood, 1 Wash. Rep. 42. But in Virginia, there must be evidence of an intention to substitute the scroll for a seal. 1 Munf. 487. And it is understood that the scroll is, by statute, in Delaware, Virginia, Illinois, Missouri, and Tennessee, made tantamount to an actual seal.

36. Warren v. Lynch, 5 Johns. Rep. 239. 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. p. 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.

37. Jackson v. Catlin, 2 Johns. Rep. 248. Perkins, sec. 137, 138, 142.

38. Perkins, sec. 138. *Butler and Baker's case*, 3 Co. 35. b. 38. a. Frost v. Beekman, 1 Johns. Ch. Rep. 288. Littleton v. Boss, 3 Barnw. & Cress. 317.

39. Perkins, 143, 144. Holt, Ch. J. 6 Mod. Rep. 217. Parsons, Ch. J. 2 Mass. Rep. 452. The distinction on this point is quite subtle, and almost too evanescent to be relied on.

40. Taw v. Bury, 2 Dyer, 167. b. *Alford and 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 and 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 those 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 Barnw. & Cress. 671.) 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. 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, as an imperfect instruent, 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, 2 Jacob & Walk. 573. The deed may operate by a presumed assent, until a dissent

 

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.

41. Souverbye v. Arden, 1 Johns. Ch. Rep. 240. Jones V. Jones, 6 Conn. Rep. 111. Doe v. Knight, 5 Barnw. & Cress. 671. 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.

42. State of Connecticut v. Bradish, 14 Mass. Rep. 296. Griffith's Register. 4 Greenleaf, 20. By the N.Y. Revised Statutes, vol. 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. Rep. 457.

43. Vol. i. 756--763.

44. Jackson v. Burgott, 10 Johns. Rep. 457. and vide supra, p. 164,

45. Wickes v. Caulk, 5 Harr. & Johns. 36.

46. Erskine's Inst. 208. sec. 36. Bell's Com. vol. i. 674--680.

47. Spelman's Works, by Bishop Gibson, p. 234.

48. Litt. sec. 372.

49. Spelman. p. 237.

50. Co. Litt. 7. a.

51. Story, J. in Durant v. Ritchie. 4 Mason's Rep. 57.

52. Jackson v. Cory, 8 Johns. Rep. 385.

53. Hornbeck v. Westbrook, 9 ibid. 73.

54. Co. Litt. 3. a.

55. Aubert v. Maze, 2 Bos. & Pull. 371. Ribbans v. Crickett, ibid. 264. Watts v. Brooks, 3 Vesey's Rep. 612. Bank of the United States v. Owens, 2 Peters' U. S. Rep. 527.

56. Lloyd v. Spillet, 2 Atk. Rep. 148. Jackson v. Alexander, 3 Johns. Rep. 491. Preston on Abstracts, vol. iii. 13, 14.

57. Fisher v. Smith, JIIoor, 569. Jackson v. Schoonmaker, 2 Johns. Rep. 230. Jackson v Alexander, 3 ibid. 491. Cheney v. Watkins. 1 Harr, & Johns. 527.

58. Abstracts, vol. i. 72. 299. Ibid. vol. iii. 15.

59. Jackson v. Staats, 2 Johns. Cas. 350. Trammell v. Nelson, 2 Harr.& McHenry, 4. Pernam v. Weed, 6. Mass. Rep. 131. McIver v. Walker, 9 Cranch's Rep. 173. Preston v. Bowmar, 6 Wheat. Rep. 580.

60. Mann v. Pearson, 2 Johns. Rep. 27. Smith v. Evans, 6 Binney's Rep. 102. Powell v. Clark, 5 Mass. Rep. 355. and see 1 Aiken's Rep. 325. to the same point. Jackson v. Moore, 6 Cowen's Rep. 706

61. Stebbins v. Eddy, 4 Mason's Rep. 414.

62. Preston on Abstracts, vol. iii. 206-210. has collected the nice distinctions on this subject, of the requisite description of the premimises; but to notice them all would lead me too far into detail.

63. 2 Blacks. Com. 298. Goodtitle v. Gibbs, 5 Barnw. & Cress. 709.

64. Co. Litt. 365. a.

65. 2 Blacks. Com. 301, 302.

66. Vol. i. 739. sec. 141.

 

67. N.Y. Revised Statutes, vol. i. sec. 140.

68. Greenby v. Wilcocks, 2 Johns. Rep. 1. Booth v. Stark, 1 Conn. Rep. 244. Mitchell v. Warner, 5 ibid. 497. Withy v. Mumford, 5 Cowen's Rep. 137. Birney v. Hann, 3 Marshall's Rep. 324. Parsons, Ch. J. in Marston v. Hobbs, 2 Mass. Rep. 439. Bickford v. Page, ibid. 455. Chapman v. Holmes, 5 Halsted's Rep. 20.

69. Lewis v. Ridge, Cro. E. 863. Comyn's Dig. tit. Covenant, B. 3. Andrew v. Pearce, 4 Bos. & Pull. 158.

70. 1 Maule & Selw.53

71. Parsons, Ch. J. in Gore v. Brazier, 3 Mass. Rep. 544, 545. and in Marston v. Hobbs, 2 ibid. 438. Townsend v. Morris, 6 Cowen's Rep. 123. and Tilghman, Ch. J. in Bender v. Fromberger, 4 Dalk Rep. 442.

72. 1 Powell on Mortgages, 187. 12 East's Rep. 469.

73. Binney's Rep. 95.

74. 2 Caines' Rep. 188.

75. The case of Grannis v. Clark, 8 Cowen's Rep. 36. is to the same effect, relative to the words grant and demise; and in an action on those covenants, it is not necessary to aver an eviction.

76. Prickets v. Dickens, 1 Murph. 343. Powell v. Lyles, ibid. 348.

77. Bracton, De Warrantia, lib. 5. ch. 13. sec. 3. Bro. tit. Voucher, pl. 69. Ibid. tit. Recouver in Value, pl. 59. Year Book, 30 Edw. III. 14. b. Aid. 19 Hen. VI. 46. a. 61. a. Ballet v. Ballet, Godb. 151.

78. Staats v. Ten Eyck, 3 Caines' Rep. 111. Pitcher v. Livingston 4 Johns. Rep. 1. Bennett v. Jenkins, 13 ibid. 50. Marston v. Hobbs, 2 Mass Rep. 433. Caswell v. Wendell, 4 ibid. 108. Bender v. Fromberger, 4 Dal. Rep. 441.

79. Gore v. Brazier, 3 Mass. Rep. 523. Parker, J. in Caswell v. Wendell, 4 ibid. 108. Bigelow v. Jones, ibid. 512. This was formerly the rule also in South Carolina. Liber v. Parsons, 1 Bay, 19. Guerard v. Rivers, ibid. 265. Witherspoon v. Anderson, 3 Dess. Eq. Rep. 245. But the rule is now settled in South Carolina, according to the English common law doctrine. Henning v. Withers, 2 Tred. Const. Rep. 584. Ware v. Weathnall, 2 McCord's Rep. 413.

80. Talbot v. Bedford, Cooke's Tenn. Rep. 447. Lowther v. The Commonwealth, 1 Harr. & Munf. 202. Crenshaw v. Smith, 5 Munf. 415. Stout v. Jackson, 2 Rand. 132. Stewart v. Drake, 4 Halsted's Rep. 139. Bennet v. Jenkins, 13 Johns. Rep. 50. Phillips v. Smith, North Carolina Law Repository, 475. Cox v. Strode, 2 Bibb. 272 Booker v. Bell, 3 ibid. 175. 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 Harr. & Munf. 164. it was the value at the time of the contract. But I apprehend the later doctrine to be that stated in the text.

81. Prescott v. Trueman, 4 Mass. Rep. 627. Delavergne v. Norris, 7 Johns. Rep. 358.

82. Funk v. Voneida, 11 Serg. & Rawle, 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 chartae qui timet implicari.

83. Morris v. Phelps, 5 Johns. Rep. 49. Guthrie v. Pugsleys, 12 ibid. 126. See, also, Beauchamp v. Damory, Year Book, 29 Edw. III. 4. and 13 Edw. IV 3. Gray v. Briscoe, Noy, 142. Dig. 21. 2. 1 13. Ibid. 1. 64. sec. 3. Pothier, Traité du Cont. de Vente, No. 99. 139. 142. all which cases are cited in Morris v. Phelps.

84. Code Napoleon, art. 1636, 1637. Civil Code of Louisiana, No. 2490.

85. 2 Harr. 4 Munf. 178. 4 Munf. 332.

86. Pothier's Traité du Cont. de Vente, No. 132-141. Inst. Droit Francois par Argou, tom. ii. liv. 3. ch. 23.

87. Code Napoleon, art. 1630-1641.

88. Art. 2482-2490.

89. Principles of Equity, vol. i. 289.

90. Ibid. vol. i. 288-303.

91. Prescott v. Trueman, 4 Mass. Rep. 627.

 

92. Com. vol, ii. 309.

93. Co. Litt. 48. a. 2 Blacks. Com. 315, 316.

94. Litt. sec. 419. 421. Co. Litt. 48. b.

95. Co. Litt. 9. a. 49. a. 367. a. Litt. 599. 611. 698. West. Symb. sec. 251. Sheppard's Touchstone, 203, 204. Butler's note 285. and note 317. to lib. 3. Co. Litt.

96. Litt. sec. 701.

97. Litt. sec. 279. Holt, Ch. J.Anon. 1 Salk. 246. Taylor v. Horde, 1 Burr. Rep. 60. Cowp. 689. S. C. William v. Thomas, 12 East's Rep. 141. Jerrit v. Weare, 3 Price, 575. Smith v. Burtis, 6 Johns. Rep. 147. Proprietors of Kennebec Purchase v. Springer, 4 Mass. Rep. 416. Proprietors v. Laboree, 2 Greenleaf, 283. Varick v. Jackson, 2 Wendell, 166. Prescott v. Nevers, 4 Mason's Rep. 326.

98. If one tenant in common enters under a recorded deed upon land, claiming the entirety in fee, and exercises notorious and avowed acts of exclusive ownership, such acts of ownership amount to a disseizin of his co-tenants. Prescott v. Nevers, 4 Mason's Rep. 326.

99. 1 Burr. Rep, 60.

100. Bracton, lib. 2. c. 5. sec. 3, 4.

101. Co. Litt. 48. b. 49. a. 2 Inst. 412, 413. Bullock v. Dibler, Popham, 38. Perkins, sec. 222.

102. 1 Burr. Rep. 60. Mr. Preston says, that the argument of Mr. Knowler, and not the doctrine of Lord Mansfield, states the law most correctly.

103. Preston on Abstracts, vol. ii. 390. 392.

104. 3 Price's Ex. Rep. 575.

105. Cro. C. 302.

106. 1 Taunt. Rep. 578

107. 3 Barnw. & Cress. 388.

108. Preston on Abstracts, vol. ii. 279-296.

109. 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. Rep. 578.) In that case, Sir James Mansfield, in delivering the judgment of the court, observed, that if the doctrine of estates, arising by disseizin, 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 Jerrit v. Weare, before the Court of Exchequer, in 1317. (3 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 disseizin in its unmitigated force. Mr. Preston was not dismayed or 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 disseizin, 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 disseizin, and creating a wrongful fee; and the K. B., in Doe v. Lynes, (3 Barnw. & Cress. 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.

110. It is to be regretted that the learned judge, who delivered the opinion in Prescott v. Nevers, (4 Mason's Rep. 326.) did not then find a proper occasion to investigate the subject of disseizin 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 fervour and force, and leaving it completely exhausted.

111. Vol, i. 738. sec. 136.

 

112. Co. Litt. 9. b. 172. a.

113. Litt. sec. 608, 609.

114. Wright on Tenures, 171. Mr. Butler, in his note 272. to lib. 3. Co. Litt., 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 were 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, vol. i. 102. Sir Martin Wright 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.*

115. Vol. i. 739. sec. 146.

116. N.Y. Revised Statutes, vol. i. 744. sec. 3.

117. Ibid. 738. sec. 137, 138. 142, 143.

118. 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, etc.; and it is in the election of the 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.

119. Mr. Humphreys, in his Outlines of a Code, proposed that the name of all deeds should be conveyance, and the operative word convey. What restlessness does this exhibit

120. *Lord Paget's case*, 1 Leon, 195. 1 Co. 154. a. *Wiseman's case*, 2 Co. 15. Smith v. Ridley, Cro. C. 529. Hore v. Dix, 1 Sid. 25. Jackson v. Sebring, 16 Johns. Rep. 515.

121. Vide supra, p. 237. note.

122. Doe v. Salkeld, Willes' Rep. 673.

123. Doe v. Salkeld, Willes' Rep. 673. Preston on Abstracts, vol. i. 71. 312. Ibid. vol. iii. 23, 24. Cheney v. Watkins, 1 Harr. & Johns. 527.

124. Lutwich v. Mitton, Cro. J. 604. Barker v. Keat, 6 Mod. Rep. 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.

125. *Chudleigh's case*, 1 Co. 121. b.

126. 2 Inst. 672. Jackson v. Fish, 10 Johns. Rep. 456, 457. and see ibid. 505. to S. P.

127. 2 Blacks. Com. 338.

128. Thatcher v. Omans, 3 Pick. Rep. 532. See also, supra, p. 296.

129. See supra, p. 237. note.

130. Vol. ii. 343. sec. 24.

131. Tucker's Blacks. vol. ii. 355. note.

132. Besides the extended view of the law of fines and recoveries in all the abridgments of the law, there are the distinct treatises in Sheppard's Touchstone, and of Pigott, Wilson, Cruise, and Preston, on fines and recoveries, and probably other works with which I am not acquainted. Mr. Brougham, in his celebrated speech on the present state of the English law, recommended the abolition of fines and recoveries; and he observed, that he should not drop a tear over the curious learning, and musty records, which would, in that care, be swept away. But while he exposed to just ridicule the fictitious action of a common recovery, as an instrument of conveyance, he entered into no discussion concerning the merit or demerit of fines. 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 are abroad in the land. When a free people have their constitution and system of laws pretty 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."

 

LECTURE 67

# 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.[1] The definition of a will or testament, given by Modestinus in the Roman law, has been justly admired for its precision. *Testamentum est voluntitis nostrae justa sententia de eo quod quis post mortem suam fieri velit*.[2]

(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, require, that every man should have the free enjoyment and disposition of his own property. 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 with the laws of Lycurgus, and with the Athenians before the age of Solon.[3] 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.[4]

Prior to the time of the decemvirs, no Roman citizen 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 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 praetors, placed under the burdensome check of seven witnesses, who were required to affix their seals and signatures.[5] The power of 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.[6]

It seems to be the better opinion, that lands were devisable, to a qualified extent, with the Anglo-Saxons. The bocland was held in independent right, and devisable by will.[7] But, 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 nonalienation 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 gavel-kind lands.[8]

 

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 considered a devise of the land. 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, 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.[9]

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 United States; and the statute regulations on the subject are substantially the same, and they have been taken from the English statute of 32 Hen. VIII. and 29 Charles II. 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 competency 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.[10] 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 declaration of trust. She may devise by way of execution of a power.[11] But the will that she makes, in such a case, must be executed with the same solemnities as if she had executed the will while sole.[12] 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.[13]

Testaments of chattels may be made by infants of the age of fourteen if males, and twelve if females. This is the English rule.[14] The laws of the several states are not uniform on this point, and by the New York Revised Statutes,[15] 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.[16]

But infants, *femes covert*, and persons of non-sane memory, and aliens, may be devisees, for the devise is without consideration.[17] 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 particular devise to him was omitted out of the will. The title by descent has, in that case, precedence to the title by devise.[18] The test of the rule, says Mr. Crosley, is to strike out of 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.[19] 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.[20] 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, froth 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.[21] But, under the statute of 43 Elizabeth, commonly called the statute of charitable uses, a devise to a corporation for a charitable use is valid.[22] The New York Revised Statutes[23] 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 the corporation be expressly authorized to take by devise. There was, however, the same construction of the pre-existing statute;[24] and though the English statute of charitable uses has not been re-enacted either in New York, New Jersey, Pennsylvania, or Maryland, nor probably in any of the United States; 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 cypress.[25]

Witnesses to a will are rendered incapable of taking any beneficial interest under it, except it be creditors whose debts, by the will, are made a charge on the real estate. This was by the statute of 25 Geo. II. and it has probably been generally adopted in the United States as a salutary provision. The English statute was the consequence of the decision of the K. B. in *Holdfast v. Dowsing*,[26] 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,[27] threatened to shake most of the titles in the kingdom that depended on devises by will. The statute has been recently re-enacted in New York, with some qualifications.[28] The restoration of the competency of subscribing witnesses, by declaring their beneficial interest under the will void, put an end to a greatly litigated question, which arose in the time of Lord Mansfield. The question was, whether a witness was competent to prove 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[29] 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,[30] though the majority of the court over which he presided followed, and very reasonably, the decision of the K. B., and which was founded upon a proposition which would seem to be too plain for discussion.

(3.) *Of things devisable.*

It is the settled rule of the English law, that the testator must be seized of the lands devised at the time of making the will. 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. The testator must likewise continue seized at the time of his death.[31] In *Goodright v. Forester*,[32] 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, in *Jones v. Roe*,[33] that executory devises, and all possibilities coupled with an interest, were devisable. But 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.[34] 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.[35]

The comprehensive views of the right of testamentary disposition, contained in the case of *Jones v. Roe*, have, I prime, been generally adopted in this country. The statute of New York of 1787, gave the power of devise to persons seized 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 seized, and gave the power of devising to persons having estates of inheritance; and in *Jackson v. Varick*,[36] 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 seized of the lands devised at the time of making the will, and to continue seized at the time of his death, continued to be the law of New York, down to the recent revision of the statute law.[37] There is the same language in the statute law of New Hampshire, Vermont, Massachusetts, and Rhode Island, and probably in other states. The general rule of the English law was admitted, in Maine, in the case of *Carter v. Thomas*.[38] 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 seized of, at the time of making the will.[39] An auxiliary consideration may be founded on the interest which the law always takes in heirs; and the rule is received in Massachusetts as an explicit and inflexible rule of law.[40] 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 the 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.[41] The law in Pennsylvania and Virginia is the same as that now in New York as to rights of entry, which are devisable even though there be an adverse possession or disseizin; and in Virginia the will will extend prospectively, and carry all the testator's lands existing at his death, if so evidently intended.[42] This is also understood to be the law in Kentucky.[43] We have, therefore, in some parts, at least, of the United States, this settled test 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; 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 jointtenant has an interest, which first attaches at the death of the joint-tenant making the will; and he insists, that there is priority of time in an instant; and Mr. Butler refers to another case, in which that subtlety was applied.[44] 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 devise 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. The regulations in the several states, differ in some unessential points; but generally they have adopted the directions given by the English statutes of frauds, of 29 Charles II. By the New York Revised Statutes,[45] 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; but the omission to do it will not affect the validity and efficiency of their attestation. In Vermont, the will is required to be sealed; but this is peculiar to that state. Three witnesses, as in the statute of frauds, are required, in Vermont, New Hampshire, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Maryland, South Carolina, Georgia, Alabama, and Mississippi. Two witnesses only are requisite, in New York, New Jersey, Delaware, Virginia, Ohio, Illinois, Indiana, 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. So, in Virginia, two subscribing witnesses do not seem to be indispensable, provided the will has been wholly written out, and signed by the testator. In North Carolina and Tennessee, a will of lands may be good, under special circumstances, without any subscribing witnesses.[46]

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. The revised statutes have so far altered the former law, as to require the signature of the testator, and of the witnesses, to be at the end of the wall; 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. The statute drops the direction that the witnesses are to subscribe in the presence of the testator.[47]

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*.[48] 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.[49] 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 the statute.[50] 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.[51] It is necessary, however, that the witnesses should riot only be in the testator's presence, but that the testator should have mental knowledge of the fact; and in *Right v. Price*,[52] 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 all together. 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.[53] 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.

At common law, a will of chattels was good without writing.[54] 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 to extreme cases, and held to be justified only upon the plea of necessity.[55] They were found to be liable to great frauds and abuses; and a case of frightful perjury in setting up a nuncupative will,[56] gave rise to the statute of frauds of 29 Charles II. ch. 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; or unless it was made in the testator's last sickness, and be reduced to writing within six days after the testator's death. This regulation has been incorporated into the statute law of this country; but even these legislative precautions were insufficient to prevent the grossest frauds and perjury, in the introduction of nuncupative wills.[57] And, as a further and more effectual remedy, the New York Revised Statutes[58] have 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. 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.[59] 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.[60]

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, in the presence of three, or five witnesses, according to circumstances, and to be signed by the testator and 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. No woman can make a will, and no person can be a witness who takes under the will, except it be a mystic testament. These forms are not requisite in testaments of certain descriptions of people made abroad. 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.[61] 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, 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.

A will duly made according to law, is, in its nature, ambulatory during the testator's life, and can be revoked at his pleasure.[62] 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 executed in the same manner; or else by burning, canceling, tearing, or obliterating the same by the testator himself, 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.[63]

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,[64] 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;[65] 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 rumpiuntur agnatione posthumi*;[66] and there is not, perhaps, any code of civilized 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, 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.[67] The rule was next applied in the case of *Lugg v. Lugg*;[68] and it was shown by Dr. Hay, in *Shepherd v. Shepherd*,[69] 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.

The rule was applied in chancery to a devise of real estate in *Brown v. Thompson*,[70] but it was received with doubt and hesitation by Lord Hardwicke, and Lord Northington.[71]

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.[72] The great point was finally and solemnly settled, in 1771, by the Court of Exchequer, in *Christopher v. Christopher*,[73] that marriage and a child, were a revocation of a will of land. The Court of K. B. have since decided,[74] after great deliberation, that marriage, and the birth of a posthumous child, were an implied revocation of a will of real estate.

 

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 parol evidence. This was so held by the K. B. in *Brady v. Cubitt*,[75] but the rule was subsequently questioned,[76] 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. Scraften*,[77] 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.[78]

The English law on this subject was reviewed in this state in the case of *Brush v. Wilkins*;[79] 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. But 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*,[80] and by the Court of K. B. in *White v. Barford*.[81] Sir John Nicholl, in *Johnston v. Johnston*,[82] 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 conclusion. 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 further 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,[83] 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.

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, 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.[84] 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, Connecticut, New York,[85] 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.[86] The statute law in Maine, New Hampshire, Massachusetts, and Rhode Island, goes further, and applies the same relief to all children, and their legal representatives, who have no provision made for then} by will, and who have not had their advancement in their parent's life. 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, Connecticut, New York, Maryland, and, probably, in other states, if the devisee dies in the lifetime of the testator, his lineal descendants are entitled to his share. This is confined, in Connecticut, to a child, or grandchild; in Massachusetts and Maine, to them, or other 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.[87]

By the New York Revised Statutes,[88] 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,[89] 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 is to rebut the presumption of a revocation, and thereby relieving the courts from all difficulty on that embarrassing point.

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.[90] If the wife survives her husband, the will, according to the opinion of Sergeant Manwood,[91] 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;[92] 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,[93] assigns very good reasons why the will cannot be deemed to have revived by the death of the husband. The provision in the New York Revised Statutes,[94] 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 be found to have contained one or the other, it is no revocation of a former will.[95] Any alteration of the estate 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.[96]

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.[97] A bargain and sale without enrolment, feoffment without livery of seizin, a conveyance upon a consideration which happened to fail, or a disability in the grantee to take, have all been admitted to amount to a revocation, because so intended.[98] If, however, the testator substitutes a new disposition of the land, and intends to revoke the land by means of that substitution, and to make way for it, and to give it effect, and not otherwise, in that case, if the instrument cannot have that effect, and the substitution fails, there is no revocation.[99] 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.[100] The law requires, that the same interest which 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.[101] Lord Hardwicke, in *Parsons v. Freeman*,[102] 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.[103] The unreasonableness of the rule, holding an act to be a revocation, which was not so intended, and even when 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.[104]

The doctrine, hard and unreasonable as it appears in some of its excressencies on this subject, and powerfully as 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.[105] The revocation is upon the technical ground, that the estate has been altered, or new modeled, 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, 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.[106] These doctrines of the English cases have been reviewed in this country, and assumed to be binding, as part of the settled 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.[107] It

 

has also been held;[108] 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. 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.[109] 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 first will is said to be revived.[110] 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.[111] The mere act of cancelling a will does not amount to any thing, unless it be done *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.[112] 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 escapes destruction, is sufficient evidence of the intention to revoke.[113] An obliteration of part of a will, is only a revocation *pro tanto*.[114] The New York Revised Statutese[115] 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. These statutes. have essentially changed the law on the subject of these constructive 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, either at 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 encumbrance, 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 encumbrance. 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 divested, be deemed a revocation; but 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.[116]

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.[117] 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 over 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 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.[118]

(5.) *Of the construction of wills.*

It will not be consistent with the plan of this work, to do more than state the leading principles 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 interpretation 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 unskillfully, 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.

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. The control which is given to the intention by the rules of law, is to be understood to apply 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, or to annex a condition that the devisee shall not alien. To allow the testator to interfere with the established rules of law, would be to permit every man to make a law for himself, and disturb the metes and bounds of property.

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.[119] So, if an estate be given to a person generally, or indefinitely, with a power of disposition, it 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 the estate to a fee.[120] If it distinctly appears to be the intention to give a greater estate than one for life, as a devise to B. for ever, or to him and his assigns for ever, or to him and his blood, or to him and his successors, such expressions may create a fee in the devisee.[121] So, a devise of the rents and profits of land, is a devise of the land itself.[122]

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. If the testator devises land to another generally, as a devise of lot No. 1, to B., without using words of limitation, or any expression which denotes anything more than 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 an almost endless series of English authorities to this point, and the rule has been recognized in this country as of settled and binding obligation.[123]

 

This rule has been broken in upon in South Carolina,[124] 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 land. [125] The New York Revised Statutes[126] have swept away all the established rules of construction of wills, in respect to the quantity of interest conveyed. It is declared, that every devise of real estate, or any interest therein, shall pass all the estate or interest of the testator, sinless the intent to pass a less estate or interest, shall appear by express terms, or be necessarily implied. And if the will, by any terms, denotes the testator's intent to devise all his real property, the will shall be construed to pass all the real estate which the testator was entitled to devise at the time of his death. 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.[127] 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*.

In most of the other states, the rules of the English law continue 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. But 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 meaning ought to be adhered to, for the sake of uniformity, and of security in the disposition of landed property.[128]

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.[129] Another general rule is, that if the testator creates a charge upon the devisee, 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 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,

 

as a devise to A. of his lands, after the debts and legacies are paid, the devisee takes only an estate for life.[130] *Colyer's cases*[131] settled this principle, and it applies to 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, and it becomes necessary. that the devise be enlarged to a fee. The distinction created by this rule has likewise ceased under the operation of the New York statute which has been mentioned. Introductory words to a will cannot vary 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.[132] 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 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.[133]

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, the latter does not pass to the residuary devisee, but descends to the heir at law. The reason given is, that a devise operates only upon land whereof the testator was seized 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 devise.[134] 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 the lapsed devise, but the residuary devisee may take in the latter case, if the terms of the residuary clause be sufficiently clear and comprehensive.[135] This distinction 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*,[136] 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 devisee was held, in *Hayden v. Stoughton*,[137] 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 those distinctions, and give greater consistency and harmony to the testamentary disposition of real and personal estates.[138]

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 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 any thing approaching to a full and correct view of the practice of the courts in the several states; nor would the value of such a work 'be worth the effort: The remedies, m 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 has been essentially altered by the late revision of the statute law; 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 hopes of revival. 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 England, 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 the manner of the execution.

THE END.

## NOTES

1. Howard, in his Dict. de la Cout. de Norm. vol. i. 197. gives the true derivation of the word devise:-" *devise (divisa) marque de division de Partage de terres; ce mot vient du Latin dividere.*" Crosley on Wills, p. 1. note.

2. Dig. 28. 1. 1. Vinnius thinks, however, that it would be a more perfect definition, to say, *Testamentum est suprema contestatio in id solenniter facts, ut quem volumus, post mortem nostram habeamus haerer dem*.-Vinn. Com. in Inst. lib. 2. tit. 10. Etym. sec. 2.

3. *Successores sui cuique liberi, et nullum Testamentum*.-Tacit. M. G. c. 20. Taylor's Elem. of the Civil Law, 522. 524. Jones' Cons. on Isaeus. According to Vinnius, in his Com. 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.

4. Plutarch's Life of Solon, by J. & W. Langhorne. Jones' Isaeus, Pref. Dis. on the Attic Laws. The speeches of Isaeus 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. The profound and searching history of Mitford, and the testimony of St. Paul, afford equally 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 comes down every good and every perfect gift?

5. Inst.2.10.2,3. Dig. 50. 16. 120. 8. Gibbon's Hist. 78. Esprit des Loix, Liv. 27.

6. Inst. 2. 18. pr. Ibid. sec. 1, 2, 3. See supra, vol. ii. 264.

 

7. Spelman on Feuds, ch. 5. Wright on Tenures, 171.

8. *Launder v. Brooks*, Cro. C. 561. Co. Litt. 111. b.

9. 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.

10. N.Y. Revised Statutes, vol. ii. 56. sec. 1.

11. See Vol. ii. of this work, p. 143, 144. and N.Y. Revised Statutes, vol. i. 735. sec. 110.

12. *Casson v. Dade*, 1 Bro. 99.

13. N. Y Revised Statutes, vol. i. 735. sec. 111

14. 2 Blacks. Com. 497.

15. Vol. ii. 60.

16. 2 Blacks. Con. 498. Steadman v. Powell, 1 Addams' Rep. 58.

17. Though an alien may be a devisee as well as purchaser, he takes a defeasible estate. See vol. ii. 53. The N.Y. Revised Statutes, vol. ii. 57. sec. 4. have judiciously declared such devises void, if to persons who are aliens at the death of the testator.

18. *Hurst v. Earl of Winchelsea*, 1 W. Blacks. Rep. 187.

19. Crosley's Treatise on Wills, edit. London, 1828, p. 101.

20. *Allan v. Heber*, Str. 1270. Hurst v. Earl of Winchelsea, 1 W. Blacks. Rep. 187.

21. Lord Hardwicke, 1 Vesey's Rep. 223.

22. 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, p. 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. H. was a new statute of mortmain, which has since corrected this construction, and rendered all devises for charitable uses void, except to the two universities and certain colleges.

23. Vol. ii. 57. sec. 3.

24. Jackson v. Hammond, 2 Caines' Cases in Error, 337.

25. Orphan Asylum Society v. McCartee, 9 Cowen's Rep. 437. Witman v. Lex, 17 Serg. & Rawle, 88. Lord Redesdale, in Attorney General v. Mayor of Dublin, 1 Bligh, 347. The case of Dashiell v. Attorney General, 5 Harr. & Johns. 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. See the additional authorities cited, supra, vol. ii. 229-232. where this point is also mentioned and discussed. 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, corporations were not excepted out of their statute of wills; and if it be the law still, the question cannot arise in that state.-Dr. Tucker's Blackstone, vol. ii. 375. note.

26. Str. 1253.

27. 2 Com. 377.

28. N.Y. Revised Statutes, vol. ii. 57. sec. 6. Ibid. 63. sec. 50, 51. The statute, p. 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.” 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.

29. Windham v. Chetwynd, 1 Burr. Rep. 464.

30. Doe v. Kersey, C. B. East, 1765. Powell on Devises, 131. 1 Day's Conn. Rep. 41. note.

31. Bro. Abr. tit. Devise, pl. 15. Butler v. Baker, 3 Co. 25. a. Bunker v. Coke, 1 Salk. Rep. 237. 1 Bro. P. C. 199. S. C.

32. 8 East's Rep. 552. 1 Taunt. Rep. 578.. S. C.

33. 3 Term Rep. 88. 1 H. Blacks. Rep. 30. S. C.

34. Lord Hardwicke, in Avelyn v. Ward, l Vesey's Rep. 423. Pres. ton on Abstracts, vol. 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.

35. Doe v. Tomkinson, 2 Maule & Selw. 165.

36. 7 Cowen's Rep. 238. S. C. 2 Wendell, 166.

37. Minuse v. Cox, 5 Johns. Ch. Rep. 441.

38. 4 Greenleaf, 341.

39. 2 Blacks. Com. 378.

40. Parker, Ch. J., 5 Pick. Rep. 114.

41. N.Y. Revised Statutes, vol. ii. 57. sec. 2. 5.

42. Turpin v. Turpin, 1 Wash. Rep. 75. Hyer v. Shobe, 2 Munf. 200. Tilghman, Ch. J., 4 Serg. & Rawle, 433.

43. Griffith's Law Register, tit. Kentucky.

44. Litt. sec. 287. Co. Litt. 135. b. Perkins, sec. 500. Butlers note 68. to lib. 3. Co. Litt.

45. Vol. ii. 63. sec. 40, 41.

46. Anthon's Collection of Statutes. Griffith's Register. Dr. Tucker's note to 2 Blacks. Com. 379.

47. N.Y. Revised Statutes, vol. ii. 63. sec. 40.

48. 3 Lev. 1.

49. Sheeres v. Glascock, 2 Salk. Rep. 688. Casson v. Dade, 1 Bro. 99. Todd v. Earl of Winchelsea, 2 Carr. & Pay, 488. Russell v. Falls, 3 Harr. & McHenry, 457. Edelen v. Hardy, 7 Harr. & John. 61.

50. Stonehouse v. Evelyn, 3 P. Wms. 254. Grayson v. Atkinson, Vesey's Rep. 454. Ellis v. Smith, 1 Vesey, jr.1

51. Bond v. Seawell, 3 Burr. Rep. 1773.

52. Doug. Rep. 241.

53. Cook v. Parsons, Prec. in Chan. 184. Jones v. Lake, 2 Atk. Rep. 176.

54. Swinb. on Wills, p. 6.

55. Perkins, sec. 476. Swinburne, p. 32.

56. Coles v. Mordaunt, 28 Charles II. 4 Vesey's Rep. 196. note.

57. See the case of Prince v. Hazleton, 20 Johns. Rep. 502. which affords memorable proofs of such practices.

58. Vol. ii. 60. sec. 22. Ibid. 63. sec. 40.

59. 5 Vesey's Rep. 285.

60. Lemann v. Bonsall, 1 Addams' Rep. 389.

 

61. Civil Code of Louisiana, art. 1567-1614.

62. *Vinyor's case*, 8 Co. 81. b.

63. See the N.Y. Revised Statutes, vol. ii. 64. sec. 42. Griffith's Law Register. Collection of Statutes, by J. Anthon. Esq.

64. De Orat. 1. 1. c. 38.

65. 1 Dig. 28. 5. 92.

66. Cic. de Orat. 1. 57. Inst. 2. 13. 1. Ferriere Com. h. t. 1 Huber, 2. 13. 5. Ibid. tit, 17. sec. 1.

67. Overbury v. Overbury, 2 Show. 253.

68. 1 Ld. Raym. 441. Salk. Rep. 592.

69. 5 Term Rep. 51. note.

70. 1 Eq. Cas. Abr. 413. pl. 15. 1 P. Wms. 304. note by Mr. Cox.

71. Parsons v. Lanoe, 1 Vesey's Rep. 189. Amb. 557. Jackson v. Hurlock, 2 Eden, 263.

72. Wellington v. Wellington, 4 Burr. Rep. 2165.

73. Dickens' Rep. 445.

74. Doe v. Lancashire, 5 Term Rep. 49.,

75. Doug. Rep. 31.

76. Lord Alvanley, 4 Vesey's Rep. 848.

77. 2 East's Rep. 530.

78. Ex parte the Earl of Ilchester. 7 Vesey's Rep. 348.

79. 4 Johns. Ch. Rep. 506.

80. 5 Term Rep. 51. note.

81. 4 Maule & Selw. 10.

82. 1 Phillimore, 447.

83. Gibbons v. Cross, 2 Addams' Rep. 455.

84. Denn v. Gaskin, Cowp. Rep. 657. Jackson v. Schauber, 7Cowen'.s Rep. 187. S. C. 2 Wendell, 1.

85. N.Y. Revised Statutes, vol. ii. 65. sec. 49.

86. It would appear, by the reading of the statute of Connecticut, of 1801, that an after-born child, and no provision for it, revokes the whole will. In Pennsylvania and Delaware, marriage, or an after child not provided for, is a revocation *pro tanto* only. In Ohio, the birth of a child avoids the will, if it was made when the testator had no child.

87. Laws of the several States, in Mr. Anthon's collection. Griffith's Law Register, h. t. 6 Harr. & Johns. 54. N.Y. Revised Statutes, vol. ii. 66. sec. 52. It is not improbable that I may be involved in some little inaccuracies in respect to the variations in the laws of the several states. The regulations cross each other so constantly, that it is difficult to be perfectly exact, without giving a very minute detail of the laws of each state, and which the limits of the present work would not permit

88. Vol. ii. 64. sec. 43.

89. The statute must mean here to refer equally to the posthumous issue.

90. *Forse and Hemblig's case*, 4 Co. 60. b. Supra, vol. ii. 143. S. P,

91. Plowd. Rep. 343. a.

 

92. Hodsden v. Lloyd, 2 Bro. 534. Doe v. Staple, 3 Term Rep. 684.

93. Vol. ii. 69.

94. Vol. ii. 64. sec. 44.

95. Hitchins v. Bassett, 3 Mod. Rep. 203. Goodright v. Harwood, Cowp. Rep. 86.

96. Cotter v. Layer, 2 P. Wms. 622. Rider v. Wager, ibid. 332. Mayer v. Gowland, Dickens' Rep. 563. Knollys v. Alcock, 5 Vesey's Rep. 654. Vawser v. Jeffery, 2 Swanst. Rep. 268. Walton v. Walton, 7 Johns. Ch. Rep. 258.

97. Montague v. Jeffereys, 1 Rol. Abr. 615.

98. Roper v. Radcliffe, 10 Mod. Rep. 230. Lord Hardwicke and Lord Eldon, 3 Atk. Rep. 748. 803. 7 Vesey's Rep. 273. 2 Swanst. Rep. 288.

99. Lord Eldon, 7 Vesey's Rep. 373.

100. Dister v. Dister, 3 Lev. 108. Darley v. Darley, 3 Wils. Rep. 6.

101. Trevor, Ch. J. in Arthur v. Bockenham, Fitzgib. 240.

102. 3 Atk. Rep. 748.

103. 3 Burr. Rep. 1491. Doug. Rep. 722.

104. Charman v. Charman, 14 Vesey's Rep. 584. Vawser v. Jeffery, 2 Barnw. & Ald. 463.

105. Goodtitle v. Otway, 1 Bos. & Pull. 576. 7 Term Rep. 399. S. C. 3 Vesey's Rep. 650.

106. Sparrow v. Hardcastle, 3 Atk. Rep. 798. S. C. 7 Term Rep.416. n. Bridges v. The Dutchess of Chandos, 2 Vesey, jr. 417. Cave v. Holford, 3 Vesey's Rep. 360. 7 Term Rep. 399. 1 Bos. & Pull. 576. S. C. Harmood v. Oglander, 6 Vesey's Rep. 221.

107. Walton v. Walton, 7 Johns. Ch. Rep. 258.

108. Ballard v. Carter, 5 Pick. Rep. 112.

109. Brant v. Wilson, 8 Cowen's Rep. 56

110. Goodright v. Glazier, 4 Burr. Rep. 251

111. Burtonshaw v. Gilbert, Cowp. Rep. 49. Semmes v. Semmes, 7 Harr. & Johns. 388. There are contradictory opinions of Lord Mansfield, as given in Cowp. Rep. 53. and 92., on the point whether, if the first will be not cancelled, in point of fact, but he revoked by the terms of the second will, and the second will be cancelled, the first will to be thereby restored, without republication.

112. Onions v. Tyner, 1 P. Wms. 393. Burtonshaw v. Gilbert, Cowp. Rep. 49. Jackson v. Holloway, 7 Johns. Rep. 394. Sir John Nichols, in Rogers v. Pittis, 1 Addams' Rep. 30.

113. Bibb v. Thomas, 2 Blacks. Rep. 1043.

114. Sutton v. Sutton, Cowp. Rep. 812. Larkins v. Larkins, 3 Bos. & Pull. 16. Short v. Smith, 4 East's Rep. 419.

115. Vol. ii. 66. sec. 53.

116. N.Y. Revised Statutes, vol. ii. 64. sec. 45-48.

117. Co. Litt. 111. a.

118. Townson v. Tickell, 3 Barnw. & Ald. 31. Doe v. Smyth, 6 Barnw. & Cress. 112. To give the devise effect, as against the heir, the N Y Revised Statutes. (vol. i. 748. sec. 3.) 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.

119. Comyn's Dig. tit. Devise, n. 4. Doe v. Morgan, 6 Barnw. & Cress. 512. Sheppard's Touchstone, by Preston, 439. Preston on Estates, vol. ii. 68-173. Mr. Preston has given a very extended citation 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, (p. 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. 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. (Ibid. p. 130.) The whole of the sixth chapter, in the second volume of Preston on Estates, p. 68. to 288., is a very laborious and complete 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. we have then a full view of the immense accumulation of English cases on the subject. In the latter work they are very clearly classified and arranged.

120. Jackson v. Coleman, 2 Johns. Rep. 391. Herrick v. Babcock, 12 ibid. 389. Jackson v. Robins, 16 ibid. 587, 588. Case of Flintham, 11 Serg. & Rawle, 16.

121. Com. Dig. tit. Devise, n. 4. Preston, *ub. sup.* Beall v. Holmes, 6 Harr. & Johns. 205.

122. Co. Litt 4. b. 8 Co. 95. b. 2 Ves.& Beame, 68. 1 Johns. Ch. Rep. 499. 9 Mass. Rep. 372. Andrews v. Boyd, 5 Greenleaf, 199.

123. Denn v. Gaskin, Cowp. Rep. 657. Jackson v. Wells, 9 Johns. Rep. 222. Jackson v. Embler, 14 ibid. 198. Ferris v. Smith, 17 ibid. 221. Hawley v. Northampton, 8 Mass. Rep. 38. Morrison v. Semple, 6 Binney's Rep. 94. Steele v. Thompson, 14 Serg. & Rawle, 84. Wright v. Denn, 10 Wheat. Rep. 204. Beall v. Holmes, 6 Harr.& Johns. 209, 210.

124. Whaley v. Jenkins, 3 Dess. Eq. Rep. 80. Jenkins v. Clement, Slate Eq. Rep. S. C. 72. Dunlap v. Crawford, 2 McCord's Rep. 171. By statute in South Carolina, of 1824, words of inheritance are declared not to be necessary to pass a fee.

125. Sargent v. Towne, 10 Mass. Rep. 303.

126. Vol. i. 748. sec. 1. Ibid. vol. ii. 57. sec. 5.

127. 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. & Johns. 228. by Ch J.Buchanan, who gave an elaborate and powerful 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. & Gill's Rep. 138, note.

128. Judge Paterson, in Lambert v. Paine, 3 Cranch's Rep. 134. Lord Kenyon, in Doe v. Wright, 8 Term Rep. 66. Nott, J. in Carr v. Porter, 1 McCord's Ch. Rep. 71, 72. Parsons, Ch. J. in Ide v. Ide, 5 Mass. Rep. 501.

129. Hogan v. Jackson, Cowp. Rep. 299.

130. Jackson v. Bull, 10 Johns. Rep. 148. Jackson v. Martin, 18 ibid. 35. Gibson v. Horton, 5 Harr. & Johns. 177. Beall v. Holmes, 6 ibid. 208. Lithgow v. Kavenagh, 9 Mass. Rep. 161. Story, J.10 Wheat. Rep. 231. 3 Mason's Rep.209-212. Cruise's Digest, tit. Devise, ch. 11. sec. 49-70. Preston on Estates, vol. ii. 207. 217-220. 228. 235. 243-250.

131. 6 Co. 16.

132. Preston on Estates, vol. ii. 188.192.206. Beall v. Holmes,6 Hair. & Johns. 205. where this point is thoroughly examined.

133. Bro. tit. Devise, pl. 52. Willis v. Lucas, 1 P. Wms. 472. Frogmorten v. Holyday, 3 Burr. Rep. 1618. Doe v. Cundall, 9 East's Rep. 400. 1 Simons & Stuart, 547. 550. Preston on Estates, vol. ii. 252. Cassell v. Cooke, 8 Serg. & Rawle, 290.

134. Doe v. Underdown, Willes's Rep. 293. Lord Hardwicke, in Durour v. Motteux, 1 Vesey's Rep. 322.

135. Doe v. Sheffield, 13 East's Rep. 526. Doe v. Scott, 3 Maule & Selw. 300.

136. 6 Conn. Rep. 292.

137. 5 Pick. Rep. 528.

138. The law of legacies has grown into a copious system, and has been well digested 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.

 