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PRACTICAL TREATISE

ON

ABSTRACTS

AND

EXAMINATIONS OF TITLE

TO

REAL PROPERTY.

BY

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AUTHOR OF A TREATISE ON VENDOR AND PURCHASER, PRINCIPLES OF THE LAW OF REAL PROPERTY, ETC.

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TO

HON. JOSEPH V. QUARLES,

OF MILWAUKEE, WIS.,

ONE OF THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES, THIS VOLUME IS INSCRIBED, AS A TRIBUTE OF RESPECT BY

THE AUTHOR.

PREFACE.

In presenting a third edition of this work I have made no change in either the method of arrangement or general treatment of the subject pursued in the first edition. The text has been enlarged by the introduction of new topics and a more extended discussion of old ones, and a number of additional practical forms have been incorporated. I have not attempted to compile a work on Real Property, nor even upon the Title to Real Property, and notwithstanding that this latter topic receives constant mention throughout the volume it is yet but an incident to my main purpose. My object has been the furnishing of practical aids and suggestions to those who prepare and examine abstracts of title, and to this end I have devoted much space to what may be regarded as the mere mechanical execution of the work. The statements of law are necessarily brief, and, for the most part, elementary.

It is now about twenty-five years since the first edition appeared. The uniform favor with which successive editions have been received by the profession emboldens me to hope hope that this revision will be equally acceptable, and that in the practical work of the demonstration of land titles it may be found a helpful assistant.

G. W. W.

CHICAGO, Oct. 1, 1907.

PREFACE TO FIRST EDITION.

I have no apology to make for the appearance of this book, but a word or two of explanation may be in order.

The subject which I have here undertaken to elaborate, is new to the legal literature of the United States, although abstracts of title have long been employed by the profession in all matters pertaining to title of real property. But with each successive year it has assumed vaster proportions, and, as the country continued steadily to develop, it has gradually been shaping itself into a distinct branch of legal science, that calls for a high degree of technical skill and special learning. And this has reference both to conveyancers and lawyers; the one to properly and systematically compile, and the other to interpret, the evidences of title which go to support claims of ownership in land.

No American author has heretofore seen fit to epitomise, for the special use of conveyancers and the legal profession, the questions of law which arise during the perusal of an abstract, or to direct the attention of either class toward a systematic method of presenting those questions. Eminent writers on real property have passed the subject in silence, and the few American writers on conveyancing who have heretofore ventured to touch upon it, have dismissed it with the fewest possible words, and, as a rule, whatever remarks they may have made were usually but servile echoes of English writers.

Several works, of more than ordinary merit, have appeared in England, in which the subject, from an English standpoint, is very thoroughly and ably discussed, but the irreconcilable differences in our laws and institutions have rendered them comparatively worthless to the American practitioner, and they are rarely met with on this side of the Atlantic. The

methods of English conveyancers and solicitors, while admirably adapted to the exigencies of their own laws and customs, and highly conducive to the end desired, are but ill suited to our wants and furnish little assistance in tracing the devious courses of an American title.

In view, therefore, of the constantly increasing importance of abstracts of title, and the present inadequate means of information concerning the same, I have been prompted to write this book. It combines, not only the result of my own experience, both in the preparation of abstracts and in passing titles therein presented, but also the experience of a number of eminent conveyancers and lawyers whom I have freely consulted during its preparation.

I have endeavored to give a general outline of what I consider the best methods of compiling the abstract so as to insure the most satisfactory results; a general system for the arrangement of the several parts and formal divisions; and the latest approved plans for presenting the essential matter of deeds, instruments and proceedings affecting title necessary to be shown. I have further made a few suggestions relative to laying out and keeping a set of abstract indices, the great utility of which must be apparent without comment. To reduce the work within the smallest allowable space, as well as to prevent confusion, I have made but few allusions to local statutes, while the statements of law have been confined mainly to broad and commonly accepted doctrines. It is expected that the careful practitioner will be fully posted on the laws of his own State relative to descent, purchase, etc., and hence the rules here given are of general application only. As this book is intended for the use of conveyancers, as well as for the legal profession, it has been deemed best, in many instances, to elucidate only those principles which are elementary in their nature, and to avoid subtilties or extended discussions.

Though this work is entirely the result of my own personal labor, I am under many obligations to gentlemen of the bar for advice and suggestion, and particularly would I express my thanks to S. M. Henderson, Esq., and Messrs. Haddock, Val-

lette & Rickcords, of Chicago, for the very valuable assistance rendered in the preparation of many of the forms.

I trust that my work may meet the favor of the profession, and be of real utility and assistance to them; that it may serve to assist in creating a better understanding between conveyancer and counsel, by acquainting each with the methods of the other; and that it may be instrumental in building up a symmetrical system of title abstracts in this country.

G. W. W.

CHICAGO, Sept. 1, 1883.

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ABSTRACTS

AND

EXAMINATIONS OF TITLE.

CHAPTER I.

PRELIMINARY OBSERVATIONS.

§ 1. Introductory.
2. Abstracts defined.
3. Origin of abstracts.
4. Essentials of the abstract.
5. The English method.
6. The American method.
7. Abstracts and examinations distinguished.
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10. Character of examiner's liability.
11. Duty of furnishing abstract.
12. Taxation of abstract books.
13. Exemption of abstract books.

§ 1. **Introductory.** Within comparatively recent years the business of furnishing abstracts of title to real property has grown to enormous proportions in the United States, calling for a class of highly skilled conveyancers with special training and qualifications for the work, while the examination of titles has practically created a new department of legal labor. To assist, in an humble way, this large and constantly increasing class of practitioners, by a statement of the most approved methods of compiling and arranging the abstract, the sources of information and the aids derived from indices and references, together with a brief review of the general principles of law applicable to the examination of titles, will be the object of this work. In the latter respect it is necessarily brief, and con-

sequently elementary, and is intended rather as a series of hints and suggestions that may incite the examiner to more extended inquiry, than as a full elucidation of the law on the subjects discussed.

§ 2. **Abstracts Defined.** An abstract may be defined as a condensed history of the title to land, consisting of a synopsis or summary of the material or operative portion of all of the various instruments of conveyance which in any manner affect said land, or the title thereto, or any estate or interest therein, together with a statement of all liens, charges or liabilities to which the same may be subject, and of which it is in any way material for purchasers to be apprised. It is usually arranged in chronological order and is intended to show the origin, course and incidents of the title without the necessity of referring to the original sources of information.

§ 3. **Origin of Abstracts.** Although the use of abstracts of title has now become universal, where free alienation of land is permitted and property rights are recognized, but little can be said as to the origin of the practice. The earliest English works on the subject, published during the first half of the last century, treat of the abstract as an established fact, but make no mention of the period at which it first began to be used.

During the earlier years of the United States, but little attention was paid to title in purchases of real property. Ordinarily the buyer was fully satisfied with the vendor's "warrantee" deed, the covenants thereof being taken as conclusive evidence of all they recited. No inquiry was made with respect to the past, present possession being considered a sufficient guarantee of ownership, and no thought was taken as to the future. Transfers of land were frequently accompanied by the vendor's purchase deeds and other muniments upon which the title was based, and such may still be the custom in some parts of the country. But, with the flood of years, the increasing commercial activity of the age, the removal of property disqualifications and other impediments to alienation, has come a vast accumulation of evidences of title, frequently involving complex interests that call for a high degree of skill to arrange and

classify, as well as to interpret and adjust. Land, too, in many localities has acquired an almost fabulous value and purchaser's now part warily with their money and only on strong assurance of title. It is no longer practical, save in rare instances, to examine title by specific inspection of the original documents, were such always available, or to laboriously follow on the records the various mutations through which it has passed. Yet, as purchasers take at their peril, save as they may find protection in the covenants of their deeds, it is necessary that they should be apprised of whatever may affect the validity of the title or estate they take, of which the law charges them with actual or constructive notice. To satisfy this demand has been developed the modern abstract of title, together with its incident, the examiner.

§ 4. **Essentials of the Abstract.** Without going into detail at this time it may be stated generally, that the abstract should furnish all the material information contained in the original documents and records from which it is compiled, and that, as fully and completely as if they had been specifically inspected. It should show, when from the source of title, the inceptive measures; the foundation of title; the devolution of same to date of examination, including all transfers of any and every interest; the incidents of the land itself, divisions and subdivisions; any and all adverse titles or claims; all liens or charges, however created, including judgments against the person during the period the law makes them a lien on land; taxes, special assessments, and statutory liens; and every other matter or thing appearing of record that may affect, implicate or impair the title. To these, in proper cases, may be added any matter *in pais,* that to the examiner may seem pertinent or material.

§ 5. **The English Method.** According to Preston,[1] it is the custom in England when land, or other property which does not pass by mere delivery but is held by a title depending on documental evidence, is sold, for the solicitor for the vendor

[1] 1 Preston on Abstracts, 1.

to prepare an abstract of the title, and the solicitor for the purchaser to compare the abstract so furnished, with the deeds, wills, etc., that constitute the chain, to see that it contains a correct and faithful statement of all circumstances disclosed by them relevant to the title, or depending on extraneous facts; as marriages, burials, baptisms, descents, etc. The abstract is prepared from the original documents, and is delivered to the purchaser who founds on it such "requisitions" by way of further inquiry or objection as he thinks proper; the purchaser must then send in his objections and queries within a limited time from the date of delivery of the abstract, and in default of such requisitions or objections he will be deemed to have accepted the title. The objections and queries, when made, are answered by statements and observations, signed by the solicitor or party making them, and form a part of the abstract.[2] The method of abstracting the instruments and arranging the chain, differs in no material respect from that now commonly employed in the United States.

§ 6. **The American Method.** Aside from an arrangement of indexes and references, there is no system of title abstracts that can be said to be distinctively American, the methods varying somewhat in different sections, though preserving a general similitude. The spirit and operation of our laws preclude the adoption of the English methods to any appreciable extent, although it would seem that the abstract makers of the Eastern States still follow as closely as possible in the footsteps of their English predecessors, and their work is usually constructed upon the regulation English model. In the Middle and Western States, the operation of the United States land laws, the later methods of survey and subdivision, and the almost total annihilation of many of the old common-law rules relative to the acquisition and transfer of estates in land, have caused a wide departure from the conventional system expounded by Preston, Moore and other English writers, as well as that now, or formerly, used in the Colonial States. The

2 Deane's Conveyancing, 325; Lee on Abstracts, 20.

American abstract is not prepared from the original documents, but from recorded evidences thereof found in the offices of registration, courts, and other legal depositories, and, as a rule, shows only such title as is deducible of record. It is not identical with the English "abstract," as will be seen, and by way of distinction is frequently termed an "examination." Both terms, however, are used interchangeably by the profession and are practically synonymous.

In compiling an abstract, the examiner simply collects, condenses and arranges the information found of record, without any expression as to the rights of any of the parties named therein. The work is then turned over to counsel, who critically examines each instrument shown, or statement made; decides upon the sufficiency and legal effect of the conveyances, noting any defects or irregularities therein, or in any of the proceedings necessary to divest or acquire title; determines the relative rights and legal relations of the parties to the land in question and to each other; and finally formulates his views in a written opinion which is annexed to the abstract, and on the strength of which future sales or other dispositions of the property are usually made.

§ 7. **Abstracts and Examinations Distinguished.** As before stated the terms *abstract* and *examination* in their ordinary acceptation are synonymous, but for the purpose of defining the broad scope of their inquiry, as compared with the narrowness and singleness of the English method, American abstract makers frequently prefer the latter term to designate their work. The English abstract is largely personal in its object. That is, it seeks to show only the title of some particular individual, rather than the general condition of the title and is usually expressed in the caption to be, "An abstract of the title of John Doe, Esq., to that certain messuage," etc. The nature of English land tenures and the peculiar conditions attending the ownership of real property in that country preclude a showing of the origin or course of title for any considerable period, nor would that, perhaps, be necessary. An English abstract generally commences with some specific document, as a deed

or will, or frequently with a descent, and from this point, called the "root of title," and, covering a period of at least sixty years, shows the successive links that connect the present title of the person proposed with the "root." [3] Obviously, such an abstract, however well it might serve the purpose in England, would be most inadequate in the United States, where several persons frequently claim title through different channels from the same source, not to mention the many adverse titles springing from independent sources. "A perfect abstract of title," says Preston, "means a perfect title in the vendor," and "a condition that vendor shall deliver an abstract of title, means," says Sugden, "the delivery of an abstract showing a good title." [4] The American abstract, though confined, as a rule, to matters of record, presents a far wider range. While intended primarily to show the present state of the vendor's title, it does not in terms purport such purpose, but is a general inquiry into every matter or thing in any way affecting title to the land, in whomsoever it may rest and however arising or acquired. A "perfect abstract," as that term is understood in the United States, shows the true state of the title, even though it defeats that of the vendor, and one that is defective in any of the particulars heretofore noted is not "perfect" even though it may show "a perfect title in the vendor." The caption of the American abstract expresses its true purpose: "an examination of title to the N. E. ¼," etc. It has none of the personal features that characterize the English abstract, and is decidedly an examination *in rem*.

§ 8. **Qualifications of the Examiner.** In a recent Minnesota case, Flandrau, J., reviewing the labor and skill necessarily displayed in the compilation of an abstract, says: "That the making of a perfect abstract of title to a piece of land, with all the incumbrances which affect it, involves a great exercise of legal learning and careful research, no one will dispute. The person preparing such an abstract must understand fully all the laws on the subject of conveyancing, descent and inher-

[3] 3 Deane's Conveyancing, 325; 1 Preston on Abstracts, 5.

[4] 2 Sugd. V. & P. 27.

itances, uses and trusts, devises, and in fact every branch of the law that can affect real estate, in its various mutations from owner to owner, sometimes by operation of law, and again by act of the parties." [5] Should the abstract maker, or as we may term him for short, the "examiner," possess the varied accomplishments enumerated by the learned judge, he will find it much to his advantage in the prosecution of his work, yet it by no means follows that he may not become proficient while lacking many of the essentials above described. The abstract maker is, in the full sense of the word, a conveyancer, equally with him who draughts and prepares the original instruments. The difference is in degree, not in kind. The same laws which control and direct the conveyancer in the preparation of the originals, operate with equal effect in the compilation of the abstract, and a general knowledge of such laws and their application is an indispensable requisite, as are also the principles of surveying and platting. The effect of laws relative to conveyancing, the transfer of estates, the devolution of titles, and the manifold and perplexing questions concerning the rights and interests of parties that may arise under them, are subjects which should properly be left to counsel who is to examine the abstract and pass an opinion upon the title. Occasionally the same person fills both offices, though this is rare save in smaller places or sparsely settled districts, and, as a rule, the union is not productive of good results.

§ 9. **Examiner's Liability for Error.** The degree of intelligence and skill required of a man by the law, depends much upon his calling. A professional man must be specially educated or fitted for the duties of his vocation, and in addition to the requisite technical knowledge must have reasonable skill in its application. So the understanding implied from persons engaged in the business of searching the public records, examining titles to real property, and making abstracts thereof for compensation is, that they are possessed of the requisite knowledge and skill and will exercise due and ordinary care in

[5] Banker *v.* Caldwell, 3 Minn. 94.

the performance of their duties.[6] For a failure in either of these respects, resulting in damages, the party injured is entitled to recover.[7] Nor can the examiner limit his liability by a clause in the certificate appended to the abstract without specially calling his client's attention to it.[8] It does not seem, however, that the employment involves any elements of guaranty or indemnity further than that raised by the undertaking to bring to the discharge of the duty reasonable skill and diligence.[9] Thus, he should make a full and true search; should examine the record of every matter shown upon his own or the public indices which affects the land in question; should accurately abstract or digest every instrument or other matter so found and should supplement his search by an explicit statement or certificate of all matters covered by it. He has no right to rely upon index entries or marginal references, but should inspect the record itself, and should he assume the information furnished by index entries or marginal references to be correct he does so at his peril.[10]

But to fix the liability of the examiner there must, as a rule, be privity of contract with the injured party, for he can be held answerable for his errors only to the person who has employed him,[11] and where, in the absence of fraud, collusion or falsehood, the examiner has made an erroneous certificate, upon the strength of which a third person has loaned and lost money, or suffered other injury, no liability will attach, not-

6 Chase *v.* Heaney, 70 Ill. 268; Lattin *v.* Gillette, 95 Cal. 317.

7 So held where the examiner had omitted to note on the abstract a judgment against the property for taxes, and its subsequent sale to satisfy same: Chase *v.* Heaney, 70 Ill. 268; and where a pending attachment suit, which afterward culminated in a judgment, was omitted: Security Co. *v.* Longacre, 56 Neb. 469; and see, Clark *v.* Marshall, 34 Mo. 429; Bank *v.* Ward, 100 U. S. 195; Wakefield *v.* Chowen, 26 Minn. 379; Smith *v.* Holmes, 54 Mich. 104.

8 Chase *v.* Heaney, 70 Ill. 268.

9 Dundee Mtg. Co. *v.* Hughes, 20 Fed. Rep. 39; Houseman *v.* Girard Loan Ass'n, 81 Pa. St. 256; Schade *v.* Gehner, 133 Mo. 252.

10 Wacek *v.* Frink, 51 Minn. 282.

11 Savings Bank *v.* Ward, 100 U. S. 195; Dundee Mtg. Co. *v.* Hughes, 20 Fed. Rep. 39; Mechanics' Bldg. Ass'n *v.* Whitacre, 92 Ind. 547; Houseman *v.* Bldg. Ass'n, 81 Pa. St. 257; Morano *v.* Shaw, 23 L. A. Ann. 379.

withstanding the fact that the money was advanced on the assurances of the abstract, and to the person who had caused the same to be made.[12] On the other hand, the owner of land seldom incurs the expense of procuring an abstract of title except for the purpose of thereby furnishing information to some third person who is to be influenced by the information thus provided. Hence, it is contended, if the abstract maker shall in all cases be held responsible only to the person under whose employment he performs the service it is manifest that the loss, if any, occasioned thereby, must, in many cases, be without remedy. Acting upon this line of reasoning we may observe a tendency in some of the cases to extend the abstracter's liability and to give to anyone, who in good faith relies upon the statements of the abstract, a remedy against him for any loss that may have resulted from his errors or omissions.[13] The general rule, however, and that sustained by the weight of authority, is as first stated, and in most of the cases that may seem to militate against it there are special circumstances tending to create privity, or such other relation as gives to the injured third party a right of redress.[14]

Where a cause of action is permitted to lie against an ab-

12 Savings Bank *v.* Ward, 100 U. S. 195; Talpey *v.* Wright, 61 Ark. 275; Schade *v.* Gehner, 133 Mo. 252. In this latter case the examination having been made for a purchaser, and under employment by him, it was held that a right of action for such negligence did not exist in favor of the purchaser's widow and sole devisee and legatee. The court, referring to cases cited in support of a contrary view, said that they would be found to hold that the particular circumstances of those cases brought the party injured, though not the party directly employing the abstracter, into privity with his contract, and created a duty to him as well as to his immediate employer.

13 Dickle *v.* Abstract Co., 89 Tenn. 431.

14 As where a lender, before making a loan, informs the abstract maker that he will rely upon the abstract, and is told by the latter that he may. Brown *v.* Sims, 22 Ind. App. 317; and see Slewers *v.* Commonwealth, 87 Pa. St. 15, where it was said that for the accuracy and truthfulness of his search and certificate a prothonotary was responsible to the persons who employed him to render the service, and not to others; yet where the certificate was given to the borrower, but the agent of the lender, not being satisfied, to ascertain whether the certificate was correct asked the prothonotary whether

stracter who has furnished an erroneous search or given a wrong certificate of title, the right accrues at the time of the delivery of the abstract and not at the time the negligence is discovered or the consequential damages may arise.[15] Hence, it would seem that the statute of limitations may be pleaded in defense when the statutory bar has intervened.

It has further been held, that the examiner is under no obligation to show anything not arising within the dates of his examination, even though it be at the time a valid and subsisting lien upon the land; nor is he bound to inquire or state whether the title vested in any grantee during the period covered by his examination was affected by any prior conveyance, or any estoppel growing out of any covenants therein.[16]

As a general proposition, it may be said that the relation of confidence which subsists between parties engaged in the business of making abstracts of title and those who employ them is not unlike that existing between attorney and client, and they are equally held to a strict responsibility in the exercise of the trust and confidence which are reposed in them.[17]

With respect to this branch of our subject a distinction must further be kept in mind between persons engaged in the business of compiling abstracts as an ordinary occupation and public officers who furnish same as a part of their official duty. Abstracts are frequently made by recorders, clerks and prothon-

it was correct, and the latter replied that it was, and took the certificate, and again made the search, and returned the certificate to said agent, saying that it was correct, and that there were no other judgments, and the agent then, relying on the certificate, lent the money, it was held that this was a republication of the certificate, a renewal and delivery thereof to the lender, and that the officer was liable for his negligence in the search.

15 Lattin *v.* Gillette, 95 Cal. 317, and see, Russell *v.* Abstract Co., 87 Iowa, 233.

16 Wakefield *v.* Chowen, 26 Minn. 379. In this case the examiner failed to show a judgment rendered against one who at the time (prior to the commencement of the examination) had no interest in the subject of the examination, but who subsequently, and during the period covered by the search, acquired title to the same.

17 Vallette *v.* Tedens, 122 Ill. 607. With respect to the liability of attorneys for erroneous opinions, see Chap. XXXII, post.

otaries, and in some States their liability is prescribed and regulated by statute. Under these statutes such officers are often declared liable for all loss or damage which may happen by reason of any false or erroneous certificate of search, not only to the person or persons to, for, or upon whose order the said certificate was made or given, but also to any person claiming title through, from or under them, or who may suffer loss by reason of the making of such false or erroneous certificate. But where an officer is not bound to make searches of the records of his office his liability would seem to be measured by the same rules that apply to abstracters generally.[18]

§ 10. **Character of Examiner's Liability.** There exists some confusion with respect to the character of the liability of an examiner who has made an erroneous search resulting in injury to the client, as well as to the remedies that may be resorted to in such a case. The better opinion, however, and that which seems to be supported by legal reason, is that such liability is strictly contractual, and, notwithstanding that the examiner may have violated a duty which he owed to the client, and that such violation was an act of culpable neglect, yet such neglected duty was alone imposed by the contract and does not involve a tort in the proper interpretation of that term. Upon an undertaking of this kind the examiner owes no duty to the client apart from the contract, and the fact that the contractual act has been negligently performed does not change the situation or alter the relation of the parties.[19]

§ 11. **Duty of Furnishing Abstract.** In England a purchaser may, it seems, require to be furnished with an abstract of the seller's title, even though he may have already agreed

18 Thus, a clerk of court, not being bound to make searches of the records of his office for liens, is not liable to one who purchased land on the faith of his certificate erroneously stating that there were no liens against it. Mallory *v.* Ferguson, 50 Kan. 685.

19 Russell *v.* Abstract Co., 87 Iowa, 233, and see, Thomas *v.* Carson, 46 Neb. 765, where it is held, that an abstracter who gives an abstract which recites that the abstracter has carefully examined the records of the offices of the county clerk, the clerk of the district court, and the county treasurer, and that there were of record in said offices

to accept the same, and he may retain such abstract during the negotiations upon, and even after rejection of, the proffered title, until the dispute is finally settled, for the purpose of showing the grounds of such rejection.[20] It will be remembered, however, that an English abstract is generally only a digest of the title deeds and muniments relied on by the vendor to establish his claim, and which invariably accompany the abstract for examination and comparison. The abstract so furnished, therefore, is rather in the nature of a well-arranged index to accompany documents, and is prepared primarily for their more convenient and systematic perusal. An American abstract, on the contrary, is intended to furnish within itself a full exposition of title, and to obviate the necessity of referring to the original sources of information. In the former case the deeds and muniments are in the hands or under the control of the vendor, and the reason of the English rule is obvious from this fact alone. But in the United States the changed conditions of the evidences of title, the system of registration, the actual and constructive notice imparted thereby, and the access which the purchaser has to information concerning the title, would seem to render inoperative the English rule by removing the reason which occasioned it; and, while it is customary in this country, as in England, for the vendor to prepare and furnish an abstract of title, either pending or after consummation of the sale, it does not appear that this can be demanded as a matter of right, but is rather the result of the contract or conditions of sale.

In England, where titles are not registered,[21] the vendor, in

no liens on the property except as mentioned in the abstract, is not liable on his bond because of the omission from the abstract of a prior mortgage of record in the office of the register of deeds, though the omission was the result of a conspiracy to defraud between the abstracter, the mortgagor, and the prior mortgagee.

20 See 2 Sugd. Vend. *39; Dart. Vend. (Am. Ed.) 130.

21 Certain kinds of deeds, as a bargain and sale, were by an early statute required to be "enrolled." Of late years registration has become more general but there is no system in vogue in that country which corresponds with that observed in the United States.

order to show performance or an offer to perform on his part, whether in an action at law for the purchase money or a suit in equity to compel performance by the vendee, must affirmatively prove his title. In this country, where titles are matters of record, and at all times open for inspection, a different rule prevails. This doctrine has often been announced in actions by the vendor for the purchase money,[22] and it has been expressly held, in equity, that a vendor may rely upon his tender of conveyance without producing the evidences of his title, the burden being upon the purchaser to show such a defect as would justify him in refusing to accept the deed.[23]

But while the furnishing of an abstract can not be said to be demandable as a matter of legal right, even where a custom to that effect may prevail, it is nevertheless made a condition precedent, in most sales, by the express agreement of the parties. Where parties make a contract for the sale or exchange of lands which provides for the exhibition of an abstract showing title in the proposing parties by a day named, this is a condition precedent to be performed before either party in case of an exchange, or the vendor in case of sale, can call upon the other to perform the agreement; and, if the abstract is not satisfactory or fails to show the title agreed to be made, the other may elect to consider the contract at an end.[24]

If, on the sale of land, it devolves on the vendor to furnish an abstract, on the delivery and acceptance of the deed it becomes the property of the purchaser,[25] and so, where the owner of land, about to execute a mortgage, delivers to the mortgagee an abstract of title to the premises, it becomes part of the security for the loan, and the mortgagor is not entitled to the possession of it until the mortgage is paid or discharged.[26]

§ 12. **Taxation of Abstract Books.** Are the indices, and other books of the examiner, employed by him in the prep-

[22] Little *v.* Paddleford, 13 N. H. 167.

[23] Espy *v.* Anderson, 14 Pa. St. 308; Daily *v.* Litchfield, 10 Mich. 28.

[24] Howe *v.* Hutchison, 105 Ill. 501.

[25] Chapman *v.* Lee, 55 Ala. 616.

[26] Holm *v.* Wust, 11 Ab. Pr. (N. Y.) N. S. 113.

aration of abstracts, subject to taxation? Unfortunately, the question has not received a uniform answer from the several courts to which it has been presented. There is no dispute with respect to the general proposition that unpublished manuscripts are not subject to taxation, but the difficulty seems to lie in the character to be accorded to such manuscripts. The statute, generally, requires that all property shall be returned and assessed at its fair cash value, except in the case of specific exemptions. Abstract books are certainly property. But, it is said, the provision of the statute means, not only a thing that may be put to valuable uses, but that which has a recognizable pecuniary value inherent in itself, which is not enhanced or diminished according to the person who owns or uses it. Hence, it is contended, abstract books have no intrinsic value. They are valuable only for the information they contain, which is conveyed by consultation or by extracts, and such value is maintained only by their completeness and continued correction. Indeed, except as they are used they have no value.[27] It is further held, that they resemble in their nature the books which are consulted by any person who makes an income from his acquired knowledge, as a surveyor's notes, a lawyer's briefs, a druggist's recipes, and many analogous things. Therefore, while they may be, and are, very serviceable, yet they are not things which the law makes subject to seizure or assessment.[28]

On the other hand, we find cases which hold that notwithstanding abstract books are manuscripts and are not made for publication in the general sense, and which concede that such publication would defeat the very purpose of their production, yet maintain that they are the means, in a sense the instruments, for carrying on a business; that they have a commercial value, and that where a commercial value attaches to an object it becomes property; that being property they come within the terms of the statute, and, like other property not specifically exempt are subject to the burdens of taxation.[29]

[27] Perry *v.* Big Rapids, 67 Mich. 146.

[28] Dart *v.* Woodhouse, 40 Mich. 399; Perry *v.* Big Rapids, 67 Mich. 146.

[29] Leon Loan, etc., Co. *v.* Equali-

It will be seen, therefore, that the question is one of doubt, to be solved by local policy or positive law.

§ 13. **Exemption of Abstract Books.** Analogous to the question discussed in the last paragraph is the further question: To what extent, if any, are the books used by an examiner of titles in his business exempt from forced sale on execution? To this question no decisive answer can be given. It is entirely a matter of local law and statutory construction. In those States where the statute exempts the necessary tools and instruments of "any person," used in his trade or business, or by other general terms includes all kinds of occupations and the means whereby such occupations are pursued, the books of an abstract maker will be exempt.[30] On the other hand, in those States where the exemption privilege is specifically confined to certain classes of occupations, unless the business of abstract making distinctly falls within one of the enumerated classes the books used in such business are not distinguishable from other non-exempt property, and may be seized and sold to satisfy a judgment against the owner.[31]

zation Board, 86 Iowa, 127; Booth v. Phelps, 8 Wash. 549.

30 Davidson v. Sechrist, 28 Kan. 324.

31 See, Tyler v. Coulthard, 95 Iowa, 705; Bank v. Abstract Co., 15 Wash. 487.

CHAPTER II.

TITLE TO REAL PROPERTY.

§ 14. Estate and title distinguished.
15. Acquisition of title.
16. Classification of title.
17. Sources of title.
18. Nature of title in the United States.
19. Estates under allodial titles.
20. Uses and trusts.
§ 21. Powers.
22. Homesteads.
23. Dower and curtesy.
24. Terms of years.
25. Easements and servitudes.
26. Color of title.
27. Evidence of title.
28. Alienation and descent.

§ 14. **Estate and Title Distinguished.** A well defined and strongly marked distinction has been made by the elementary writers, between the property or interest which one has in lands, tenements and hereditaments, and the authority whereby same are held, or the mode by which they are acquired. This property or specific degree of interest in lands, of whatever kind or nature, is described in the comprehensive term *estate*. The method of acquiring and right of holding same is denominated *title*. The subject of estates, with their quantities, qualities, extent and other attributes, belongs to a treatise on real property, and will be alluded to in this work only as they incidentally occur in treating of the manner by which such estates are acquired or held.

In the paragraphs immediately following a brief mention will be made of the fundamental principles and broad specialized rules which affect the transfer of proprietary rights in land and the devolution of title thereto, and which are incidentally involved in the compilation of abstracts and examination of titles.

§ 15. **Acquisition of Title.** It may be stated as an elementary proposition, to which all writers and jurists agree, that there exist but two modes of acquiring title to real property:

namely, by *descent* and by *purchase,* the latter term including every legal method of acquisition, except that by which an heir, on the death of an ancestor, succeeds to the estate of the latter by operation of law.[1] The common law estates of dower and curtesy have been regarded by some writers as properly coming within the doctrine of descents,[2] while others make a distinction, in respect to estates acquired by purchase, between titles created by act of the law, and those created by act of the parties.[3]

§ 16. **Classification of Title.** Blackstone makes an elaborate division of title considered in relation to its progressive development, and formulates the following stages: Naked possession; right of possession; right of property without possession, and right of property united with possession.[4] This classification, which has been followed and approved by most English and many American writers, seems needlessly prolix and a trifle confusing. Judge Walker in alluding to it says: "Such refinements serve to perplex rather than inform the mind. The truth is, title means the same thing as ownership. A man may be in possession of a thing which he does not own, and he may own a thing of which he is not in possession," and draws the inference "that the perfection of title consists in the union of possession, with the right of possession." [5]

For purposes of comparison only, titles are sometimes classified as bad, doubtful, good and perfect; the latter being also known as a *marketable* title, or one which a court of equity considers so clear that it will enforce its acceptance by a purchaser. A doubtful title on the contrary being one that the court will not go so far as to declare invalid, but only that it is subject to so much doubt that a purchaser ought not to be compelled to accept it.[6] The doctrine of marketable titles is

1 2 Blk. Com. 241; James *v.* Moore, 2 Cow. 290; Green *v.* Blanchar, 40 Cal. 194.

2 3 Cruise Dig. 317.

3 See 3 Wash. Real Prop. 4; Warvelle, Real Prop. 130.

4 2 Blk. Com. 195.

5 Walker's Am. Law, 317.

6 2 Bou. Law Dict. 596; Richmond *v.* Gray, 3 Allen, 25.

purely equitable and of modern origin; at law, every title not incurably defective is marketable. It must be distinctly understood, however, that the foregoing classification represents merely convenient colloquialisms. The law knows nothing of "good" or "bad" titles. In fact, they cannot be said to have any legal existence. Title is simply title. A person is without title or he has title. His title may be perfect or impaired, but "bad" title is merely a vulgarism. The fact that many lawyers employ the term does not make it any the less a vulgarism. Nor are there any degrees of comparison in titles, for "good" title suggests a "better," or, possibly, a "best."

A more pronounced distinction is made in the case of *legal* and *equitable* titles, and their application to estates is of frequent occurrence in actual practice. Though originally applied only to estates in land, the terms are now extensively used to designate the manner of acquiring and holding same as well. The equitable title usually carries with it the beneficial interest in the land, together with the incidents of ownership, the legal title being held as a mere naked trust, and is illustrated in the relations of the government and a purchaser of public land before patent issues; a grantee under a land contract after payment made and before execution of deed. Where a trust imposes active duties on the trustee he takes the entire interest in the land and the beneficiary has no title of any kind. The abstract, as a rule, shows only the legal title, unless an equitable title appears from the recitals of the instruments or is plainly deducible from facts appearing on their face.

§ 17. **Sources of Title.** By a fiction of the English law, the king, as the head and sovereign representative of the nation, is regarded as the original proprietor, or lord paramount of all the land in the kingdom, and the true and only source of title.[7] From him all the lands in the realm are held, either mediately or immediately, by a tenure, of which fealty is the great characteristic. Under the feudal system this element of fealty was inseparably incident to the reversion, which could never be lost to the ultimate lord.

[7] 3 Kent Com. 487; 2 Blacks. Com. 51.

The feudal system contemplated a prince — the sovereign, and the people — the subjects, but with the assumption of American independence, the people in their collective capacity became sovereign, and as such succeeded to the rights and prerogatives formerly possessed by the king. As a consequence all valid individual title to land in the United States is derived only from the grant of the Federal government, in the case of public lands; from the State governments of such of the States as entered the Union as sovereign bodies possessed of lands; or, from foreign powers prior to the Revolution, or the subsequent acquisition of the territory by the government, the vested rights of the land owner being recognized in the latter case by treaty stipulations at the time of the cession, or by subsequent confirmation.[8] The king not only possessed the original but also the ultimate title, an assumption that has never been made by the Federal government, which parts with all its title by its grant or patent. The people of the States, however, in their sovereign capacity, are declared to possess the ultimate property in and to all lands within the jurisdiction of the State, the title to which shall fail from defect of heirs,[9] though the character in which the State takes is not properly that of a reversioner but rather that of a statutory heir, who succeeds to the property on default of known kindred of the decedent.[10]

§ 18. **Nature of Title in the United States.** When by the Revolution, the domination of the mother country was thrown off, the State, in its sovereign capacity, succeeded to the titles of the king and became the proprietor of all the lands.[11] But instead of lending them like a feudal lord to an enslaved tenantry, it sold them for the best price they would bring, or, with more than princely generosity, conferred them upon its citizens as a reward for industry and courage in the develop-

8 3 Kent Com. 488; Jackson *v.* Ingraham, 4 Johns. 163; Jackson *v.* Hart, 12 Johns. 77.

9 3 Kent Com. 488; People *v.* Livingston, 8 Barb. 253.

10 Wallace *v.* Harmstad, 44 Pa. St. 492.

11 Commonwealth *v.* Alger, Cush. 82; Johnson *v.* McIntosh, 8 Wheat. 584.

ment and settlement of the country, or in recognition of valor and patriotic devotion in its defense. Its patents all acknowledge a pecuniary or valuable consideration, and stipulate for no fealty or other feudal incident. "The State is lord paramount as to no man's land."[12] Though here, as in England, individual ownership in lands can be deduced only from the sovereign — the Crown, the ante-revolutionary, United States, or State governments,— yet, when so acquired it is held in pure and free *allodium,* being the most ample and perfect interest that can be obtained in land and denoting a full and absolute ownership;[13] "a time in the land without end"[14] with no duties to a superior lord, or services or fealty incident thereto. The allegiance which the citizen owes to the State is frequently spoken of as fealty,[15] but this is an obligation arising from political status, and is as binding on him who owns no land as on him who counts his acres by the thousands. It is an obligation, reciprocal to protection, resulting from our political relations, and in no way affects the title to land more than to chattels.[16]

It is, however, a well-settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability, that its use may be controlled and regulated by the State in such a manner as not to interfere with the equal enjoyment by others of their property, nor be injurious to the rights of the community,[17] and subject to such laws as the legislature may enact to regulate the mode of conveyance, descent, right of dower or other rights growing out of the domestic relations.[18] All property is held subject to

12 Wallace *v.* Harmstad, 44 Penn. St. 492; Van Rensellær *v.* Smith, 27 Barb. 157.

13 1 Bou. Law Dict. 115; 1 Wash. Real Prop. 16.

14 Plowden, 555.

15 2 Bou. Law Dict., 585 Art., "Tenure."

16 Wallace *v.* Harmstad, 44 Penn. St. 492; Carlisle *v.* United States, 16 Wall. 146.

17 Commonwealth *v.* Alger, 7 Cush. 53; Commonwealth *v.* Tewkesbury, 11 Met. 55.

18 Barker *v.* Dayton, 28 Wis. 367.

those general regulations established by law, which are necessary to the common good and general welfare.

§ 19. **Estates under Allodial Titles.** The highest estate held by an allodial title is denominated a *fee simple;* a name borrowed from the land system of Great Britain, but of far greater import here than there. It signifies an absolute estate of inheritance, clear of any restrictions to particular heirs, and is the largest estate and most general interest that can be enjoyed in land, being the entire property therein, and confers an unlimited power of alienation.[19]

Though usually described as above, the estate is comprised in the word "fee," the addition of the word "simple" adding nothing to the force and comprehensiveness of the term.[20] A sale of the fee does not include, in the term itself, a sale free from incumbrances, but denotes only the nature of the estate as distinguished from a lessor or restricted one, and land may be sold in fee subject to incumbrances, the expression involving no inconsistency.[21]

The fine distinctions of the English law in respect to estates have little application in the United States, and the American doctrines on this subject, though regulated by statute in the different States and hence differing some in detail, are comparatively simple. In addition to the fee, or inheritance, we have estates for life, for years, at will and by sufferance. The estate in fee tail is practically abolished, the entail being limited to the first taker, while the remainder carries the fee. Estates of inheritance and for life are generally denominated *freeholds;* estate for years, *chattels real.*

With respect to the time of their enjoyment, they are further divided into estates in *possession* and in *expectancy;* the latter being again divided into estates commencing at a future day, called *future estates,* and *reversions.* A future estate is one limited to commence in possession at a future day, either with or without the intervention of a precedent estate, or on

19 Haynes *v.* Bourn, 42 Vt. 686; Warvelle, Real Prop. 70.

20 Jecks *v.* Toussing, 45 Mo. 167.

21 Caal *v.* Higgins, 23 N. J. Eq. 308.

the determination, by lapse of time or otherwise, of a precedent estate, created at the same time. When preceded by a particular estate they are generally known as *remainders.*

A reversion 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.

Future estates, or remainders, are also classed as *vested* or *contingent.* They are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent while the person to whom or the event upon which they are limited to take effect, remains uncertain. As a general rule contingent interests are assignable, devisable and descendible the same as vested interests.[22]

In respect to the number and connection of their owners, estates are divided into estates in *severalty,* in *joint tenancy* and in *common.*[23] The estate in joint tenancy has now become very infrequent and is generally confined to interests held by a number of persons as trustees. It may still be created, however, by the employment of apt words.

As a rule, every conveyance or devise of lands is to be deemed a fee simple, if a less estate is not limited by express words, or does not appear otherwise by construction or operation of law,[24] and future estates are alienable in the same manner as estates in possession, by deed of bargain and sale without covenants.[25]

§ 20. **Uses and Trusts.** The ancient doctrine of uses and trusts prevails to a limited extent in the United States, though its effect is by no means uniform. A majority of the States,

22 Kenyon *v.* See, 94 N. Y. 563; Winslow *v.* Goodwin, 7 Met. (Mass.) 363.

23 Estates, in the United States, are essentially creations of the statute, preserving a general harmony in all the States, but frequently widely divergent in detail. The statute should always be consulted in construing them.

24 Leiter *v.* Sheppard, 85 Ill. 242. This is the general statutory rule but in a few States the old common-law ideas seem to have been retained and a grant or devise without words of inheritance creates only a life estate in the grantee. See, Pate *v.* Bushong, 161 Ind. 533.

25 Goodel *v.* Hibbard, 32 Mich. 47; Kenyon *v.* See, 94 N. Y. 563.

following the example of New York, have abolished passive trusts where the trustee holds only the naked formal title, the whole beneficial interest being vested in the *cestui que trust,* the statute, in such case, confirming to the beneficiary a legal estate therein of the same quality and duration, and subject to the same conditions, as his beneficial interest.[26]

The doctrine of resulting trusts has been much modified, and, as a rule, no implied or resulting trust is effectual to defeat or prejudice the title of a purchaser for a valuable consideration, and without notice of such trust.

Express trusts are usually regulated by statute, and are created for the sale of land for the benefit of creditors, legatees, etc., or for the purpose of satisfying any charge thereon; for the collection and application of the rents and profits of land; and for the beneficial interests of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument. Where the classes of express trusts are specifically enumerated by statute, the creation, for any purpose, of any trust not so enumerated vests no estate in the trustee, though if valid as a power the lands to which the trust relates remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power. No particular form of words is necessary to create a trust, and effect will always be given to the intention of the parties.[27]

§ 21. **Powers.** Closely allied to trusts, and partaking somewhat of their nature, are *powers,* the creation, construction and execution of which, are, in a majority of the States, governed by express statutory provisions. A power, as defined, is 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 no person is capable, in law, of granting a power,

[26] The above statements are substantially true of all the States whose procedure is the same as, or similar to, the N. Y. Revision, and conveyances to use are generally abolished in all the States: 4 Kent's Com. 308; Verdin *v.* Slocum, 71 N. Y. 345.

[27] Fisher *v.* Fields, 10 Johns. 495; Saylor *v.* Plaine, 31 Md. 158.

who is not at the same time capable of alienating some interests in the lands to which the power relates. Powers are *general* or *special,* and *beneficial* or *in trust.*[28]

A power is general when it authorizes the alienation in fee, by deed, will, or charge of the lands embraced in the power, to any alienee whatever; and is a simple form of familiar occurrence. It is special, when the appointee is designated; or where it authorizes a conveyance of a particular estate or interest less than a fee. A general or special power is beneficial, when no person other than the grantee, has, by the terms of its creation, any interest in its execution. A general power is in trust, when any person, other than the grantee, is designated as entitled to the proceeds, or other benefits to arise from the alienation of the lands. A special power is in trust, when the disposition which it authorizes is limited to be made to any particular persons other than the grantee; or when any class of persons, other than the grantee, is entitled to any benefit from the disposition or charge authorized by the power.

A power may be granted by a suitable clause contained in the instrument of conveyance of some estate in the lands to which same relates, or by devise contained in a last will and testament, and may be vested in any person capable in law of holding lands, but can not be executed by a person not capable of alienating lands holden by such person.

A power, technically speaking, is not an estate, but is a mere authority, enabling a person, through the medium of the statute, to dispose of an interest in real property, vested either in himself or in another person,[29] and where a power is executed, the person taking under it takes under him who created the power, and not under him who executes it.[30]

A power to sell land can only be exercised in the manner and

28 Kent Com. 319; 2 Bou. Law Dict. 356. The classification above given is that which is now generally observed in this country, though it differs somewhat from the common law classification.

29 Burleigh *v.* Cloughs, 52 N. H. 268; 2 Prest. Abstracts, 275.

30 Legget *v.* Doremus, 25 N. J. Eq. 122.

for the precise purpose declared and intended by the donor, and when the purpose becomes wholly unattainable, the power ceases.[31] In the construction of powers, the intention of the parties, if compatible with law, must govern; and the intention is to be determined from the instrument creating the power.[32]

§ 22. **Homesteads.** The statutes of all the States have injected into the law of real property, as applied in this country, a new quality, unknown to the common law, denominated "homesteads." The homestead is usually a constitutionally guaranteed right annexed to land, whereby the same is exempted from sale under execution for debt. No uniform rule can be given for its ascertainment, it being variously measured either by a definite money value, or a specific appropriation of land. Nor can any general definition of its character be given other than the above, as the authorities are by no means harmonious in prescribing its limits, or defining its effect.

In some of the States the homestead is an estate,[33] limited only as to its value, and not by any specific degree of interest or character of title in the particular property to which it attaches, and when the worth of the property does not exceed the statutory valuation, the estate embraces the entire title and interest of the householder therein, leaving no separate interest in him to which liens can attach or which he can alien distinct from the estate of homestead.[34] Such estate has also been regarded as a determinable fee.[35]

The right of homestead, in a majority of the States, is held to be but a privilege of occupancy against creditors,[36] the continuance of which depends upon the continuance of prescribed conditions.[37] When once acquired it is a vested right,[38] though

31 Hetzel *v.* Barber, 69 N. Y. 1.

32 Guion *v.* Pickett, 42 Miss. 77; Jackson *v.* Veeder, 11 Johns. 169.

33 Littlejohn *v.* Egerton, 77 N. C. 379; Eldridge *v.* Pierce, 90 Ill. 474; Jenkins *v.* Volz, 54 Tex. 636.

34 Merritt *v.* Merritt, 97 Ill. 243.

35 Poe *v.* Hardie, 65 N. C. 447; Haslam *v.* Campbell, 60 Ga. 650.

36 Brame *v.* Craig, 12 Bush (Ky.), 404; Casebolt *v.* Donaldson, 67 Mo. 308; Drake *v.* Kinsell, 38 Mich. 232.

37 Hill *v.* Franklin, 54 Miss. 632.

38 Barret *v.* Messner, 30 Tex. 604; Barber *v.* Roarbeck, 36 Mich. 399.

it seems it may be impaired by subsequent legislation,[39] and can be lost only by abandonment.[40] The homestead law does not vest in the owner any new rights of property but simply imposes restrictions on the creditor in seeking satisfaction for his debt,[41] and the protection afforded by it attaches to an equitable title with the same force as to the legal title.[42] Where there is an abandonment, with a fixed intention not to return, the homestead may be subjected to the demands of creditors, but the question is almost exclusively one of intent, and absence for an indefinite period is not sufficient to establish the fact of an abandonment, unless accompanied with proof of intent not to return.[43]

In every State special restrictions have been placed on the alienation of the homestead, it being in contemplation of law the last retreat and shelter of the family; and though its sale is permitted the voluntary act of either husband or wife, or both, would be ineffectual for that purpose, except in the manner provided by statute,[44] and, as a rule, the alienation of homestead property by either spouse without consent of the other is an absolute nullity, the purchaser acquiring no title whatever.[45] When a party derives title to property in good faith, and in the prescribed methods, through one who has a homestead right therein, he will, it seems, succeed to his grantor's rights, and take the property exempt from his grantor's debts.[46] In many examinations the questions raised with respect to homesteads are very important.

§ 23. **Dower and Curtesy.** One of the common law in-

39 Harris *v.* Glenn, 56 Ga. 94.

40 Carr *v.* Rising, 62 Ill. 14; Crook *v.* Lunsford, 2 Sea (Tenn.) 237.

41 Bank *v.* Green, 78 N. C. 247.

42 Allen *v.* Hawley, 66 Ill. 164; Smith *v.* Chenault, 48 Tex. 455.

43 McMillan *v.* Warner, 38 Tex. 410; Potts *v.* Davenport, 79 Ill. 455.

44 Fiege *v.* Garvey, 47 Cal. 371; Balkum *v.* Wood, 58 Ala. 642.

45 Rogers *v.* Renshaw, 37 Tex. 625; Abell *v.* Lathrop, 47 Vt. 375; Barnett *v.* Mendenhall, 42 Iowa, 296; Richards *v.* Green, 73 Ill. 54; Bank *v.* Lyons, 52 Miss. 181; Miller *v.* Marx, 55 Ala. 322.

46 Shackelford *v.* Todhunter, 4 Ill. App. 271; Adrian *v.* Shaw, 82 N. C. 474; Leupold *v.* Kruse, 95 Ill. 440; Carhart *v.* Harshaw, 45 Wis. 340; Holland *v.* Kreider, 86 Mo. 59.

cidents of real property is *dower,* being that provision which the law makes for a widow out of the lands or tenements of her deceased husband, for her support and the nurture of her children.[47] The common law right of dower no longer exists, however, in a majority of the States, the rights of the surviving wife in the real estate of her deceased husband being those created by statute alone, and questions arising upon them must be determined solely by reference to the statute.[48] No uniform measure, either as to quantity or quality, has been adopted, but in the main the estate conferred conforms to that of the common law and consists of the use by the widow, during her life, of one third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage.

During the lifetime of the husband, the wife has only an inchoate right, which is not an estate in the land but a mere contingent interest that attaches to the land as soon as there is the concurrence of marriage and seizin. This interest becomes fixed and certain upon the death of the husband, and after the assignment of dower develops into a freehold estate in land.[49] During the marriage no act of the husband alone could, at common law, bar or extinguish this interest, which in England was accomplished only by levying a fine or suffering a common recovery.[50] In the United States a woman may be barred of her dower by jointure settled on her before marriage, or by joining with her husband in a deed of conveyance, properly acknowledged.[51]

Before dower has been assigned, it can be released only to the owner of the fee, or to some one in privity with the title by his covenants of warranty. But where the former owner of the fee in land in which dower rights still exist, has conveyed the same with warranty, he may purchase the right for the

47 2 Black. Com. 130; 4 Kent Com. 35.

48 Gaylord *v.* Dodge, 31 Ind. 41.

49 Elmdorf *v.* Lockwood, 57 N. Y. 322.

50 2 Black. Com. 137; 4 Kent's Com. 51.

51 4 Kent Com. 60; Elmdorf *v.* Lockwood, 57 N. Y. 322.

benefit of his grantee, however remote, and thus prevent a breach of the covenants.[52]

The release of dower which a married woman makes by joining with her husband in a conveyance of his land, operates against her only by estoppel, and can be taken advantage of only by those who claim under that conveyance,[53] and if the conveyance is void, or ceases to operate, she is again clothed with the right which she had released.

During coverture, the wife's inchoate right of dower is incapable of being transferred or released, except to one who has already had, or by the same instrument acquires an independent interest in the estate.[54] The right is not such an estate as can be leased or mortgaged,[55] neither can a married woman bind herself personally by a covenant or contract affecting her right of dower during the marriage. Hence, a deed executed by husband and wife with a covenant of warranty, does not estop the wife from setting up a subsequently acquired title to the same lands.[56] The inchoate right of dower not being the subject of conveyance in any of the usual forms by which real property is transferred, and the doctrine of estoppel by which subsequently acquired titles are made to inure to the benefit of former grantees being inapplicable, it follows that a grantee or mortgagee claiming under an instrument executed by a woman during coverture acquires no title or interest in the dower of the grantor or mortgagor when the estate becomes absolute, whether dower has been assigned or not.[57] But in all cases where the wife unites with her husband in a conveyance, properly executed by her, which is effectual and operative against the husband and which is not superseded or set aside

52 La Framboise *v.* Crow, 56 Ill. 197.

53 Malloney *v.* Horan, 49 N. Y. 111; Lockett *v.* James, 8 Bush (Ky.), 28; French *v.* Crosby, 61 Me. 502.

54 Robinson *v.* Bates, 3 Met. 40; Tompkins *v.* Fonda, 4 Paige, 448.

55 Croade *v.* Ingraham, 13 Pick. 33.

56 Jackson *v.* Vanderheyden, 17 Johns. 167.

57 Marvin *v.* Smith, 46 N. Y. 571; Carson *v.* Murray, 3 Paige, 483. It will be understood that the statement of the text has no reference to lands held by a married woman in her own right.

as against him or his grantee, her right of dower is forever barred and extinguished, for all purposes and as to all persons.[58]

Tenancy by the curtesy has been generally abolished and the husband takes a statutory allowance from the deceased wife's estate, the quantity and quality varying in the different States. Tenancies in dower or curtesy stand, like all other estates of freehold for life, necessarily subjected to the charges, duties and services to which the estate may be liable, in proportion to the interest therein.[59] In the examination of titles dower is an important incident and always raises an inquiry in every conveyance not of an official nature.

§ 24. **Terms of Years.** Next to a fee simple, the most common estate known to our law is an estate *for years,* being a right to, or contract for, the possession and profits of lands in consideration of a recompense, called rent.[60] Estates for years, for life, and at will or by sufferance, are frequently called "tenancies," because the holders thereof are regarded as mere occupants, while the ultimate title remains in the proprietor of the fee. This, however, is not strictly exact, as every owner of an estate is, in law, a tenant, that is, a holder, without reference to the quantity or quality of the interest. But in common parlance the owner of leasehold interests are generally called tenants as distinguished from owners of indeterminate interests or estates.

In estates for years, the time as well as the estate itself are both called a *term.* Such an estate is not an interest in the land, but only a right to the use and possession thereof for a definite period, hence a tenant is not said to be seized of the land, but only possessed of the term. The estate is of frequent occurrence in the examination of titles, and often rivals in dignity and importance the fee itself. It is created by an instrument called a *lease,* and is terminated by its own limitation; by forfeiture, in consequence of a breach of some express stipulation or covenant; or by operation of law termed a *merger,* where the tenant by any means becomes seized of the fee

58 Elmdorf v. Lockwood, 57 N. Y. 322.

59 Peyton v. Jeffries, 50 Ill. 143.

60 4 Cruise, Dig. 51.

of the reversion. The tenancy may also be terminated by a surrender of the lease to the landlord, or where the subject-matter of the lease wholly perishes. The tenant is never permitted, for reasons of sound public policy, to controvert his landlord's title, or to set up against him a title acquired by himself during his tenancy which is hostile in its character to that which he acknowledged in accepting the demise.

§ 25. **Easements and Servitudes.** An easement has been defined, as "a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner."[61] This, perhaps, is as good a definition as can be framed. Easements are as various as the exigencies of domestic convenience or the purposes to which buildings and land may be applied, and are created by grant, confirmation, reservation or prescriptive user. The owner in fee of land may impose upon it any burden, however injurious or destructive, not inconsistent with his general right of ownership, if such burden be not in violation of public policy and does not injuriously affect the rights or property of others.[62]

An easement may be created, or reserved by an implied grant, when its existence is necessary to the enjoyment of that which is expressly granted or reserved, upon the principle that, where one grants anything to another, he thereby grants him the means of enjoying it, whether expressed or not,[63] but easements exist as appurtenant to a grant of lands only by reason of a necessity to the full enjoyment of the property granted.[64] Nothing passes by implication, or as incident or appurtenant, except such rights or privileges, as are directly necessary to the proper enjoyment of the granted estate, and the necessity measures the extent and duration of the right. When the necessity ceases, the rights resulting from it cease.[65]

61 Wash. Real Prop. 25; Meek *v.* Breckenridge, 29 Ohio St. 642.

62 Van Rensselær *v.* R. R. Co., 1 Hun (N. Y.), 507.

63 Lanier *v.* Booth, 50 Miss. 410; Pingree *v.* McDuffe, 56 N. H. 306; Dillman *v.* Hoffman, 38 Wis. 559.

64 Woodworth *v.* Raymond, 51 Conn. 70.

65 Hancock *v.* Wentworth, 5 Met. 446; Carey *v.* Rae, 12 Rep. 523.

It must be an actual and a direct necessity. A mere convenience is not sufficient to create or convey a right or easement, or impose burdens on lands, other than those granted, as incident to the grant.[66]

Easements of necessity, when the title to the dominant estate and to the servient estate unite in a common owner, are merged and lost. On separate conveyances of the estates by the common owner, such easements are not revived, nor treated as having existed during the time the two estates were in the common owner, but are re-created by the conveyance of the estates separately, and arise from the application of the rule above stated.[67]

In respect to the acquisition of easements by user, no universal rule of law as to the effect of evidence of particular facts can be laid down, and when established by prescription, or inferred from user, such easements are limited to the actual user. A right claimed by user is only co-extensive with the user.[68]

Special easements are created by grant or confirmation, or may be reserved by special reservation in a conveyance of lands, and easements created in this manner do not cease, even though the necessity for them may have ceased.[69]

A *license* is an authority to enter upon the lands of another and do a particular act or series of acts, without possessing any interest in the land. A claim for an easement must be founded upon a grant, by deed or writing, or upon prescription which presupposes a grant, for it is a permanent interest in another's land; but a license, conveying no estate or interest, may be by parol. It is founded in personal confidence, is not assignable, and if executory is revocable at the pleasure of the grantor. The distinction, however, is quite subtle,

[66] Ogden *v.* Jennings, 62 N. Y. 526; Holmes *v.* Seely, 19 Wend. 507; Warren *v.* Blake, 54 Me. 276; Carey *v.* Rae, 12 Reporter, 523.

[67] Miller *v.* Lapham, 44 Vt. 416.

[68] Brooks *v.* Curtiss, 4 Lans. (N. Y.) 283.

[69] Atlanta Mills *v.* Mason, 120 Mass. 244.

and it becomes difficult, in many cases, to discern a substantial difference between them.[70]

In the examination of titles easements of record are readily ascertained, but, as an easement may exist without an express grant, the attention of clients should always be directed to the incidents, situation and condition of the land, and particularly to the rights of persons in possession or exercising acts of ownership.

§ 26. **Color of Title.** A title may be actual or merely colorable. A person is properly said to have color of title to lands when he has an apparent though not a real title to the same, founded upon a deed which purports to convey them to him,[71] and a claim to real property under such a conveyance, however inadequate it may be to carry the true title, or however incompetent the grantor may be to convey such title, is strictly a claim under color of title.[72] Possession under color of title for the period of statutory limitation, confers upon the holder a perfect title in law, and where one takes possession under a deed giving color of title, his possession may be transferred to subsequent parties, and the possession of the different holders may be united so as to make up the statutory period, the operation being technically called *tacking*.[73] Titles acquired in this manner must, however, show connected possession, and a privity of grant or descent. Those who hold lands independently of previous holders, their several possessions having no connection, can not so tack their possession as to avail themselves of that which has gone before.[74]

§ 27. **Evidences of Title.** There is, strictly speaking, but one species of title to lands, and that the *legal* title. Individuals may possess equities of recognized potency, but such equities, after all, do not constitute title, although they may carry with them the right to the title and the entire beneficial

70 Mumford *v.* Whitney, 15 Wend. 380; Thompson *v.* Gregory, 4 Johns. 81; 3 Kent Com. 452.

71 Seigneuret *v.* Fahey, 27 Minn. 60; Rigor *v.* Frye, 62 Ill. 507.

72 Edgerton *v.* Bird, 6 Wis. 527; Hinkley *v.* Greene, 52 Ill. 223.

73 Cooper *v.* Ord, 60 Mo. 420.

74 Crispen *v.* Hannavan, 50 Mo. 536.

interest. Courts of equity may grant relief to the holders of such equities, but at law the legal title must always prevail.[75]

A sale of real property, whether judicial or voluntary, does not pass title, but only gives a right to a conveyance of the land according to the terms of sale,[76] and the purchaser can not be treated as the legal owner of the property, until it has been duly transferred to him by a deed executed by proper authority.[77] The evidences of legal title consist of voluntary grants by the sovereign, or individual; conveyances resulting from judicial proceedings, or made in the exercise of the taxing power of the State; deeds executed by trustees or other ministerial officers; regular descents in the manner provided by law; or continuous possession which presupposes some one of the other methods.

§ 28. **Alienation and Descent.** The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the government, and under this provision the sale of the public lands has been placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty, a bureau has been created, at the head of which is the commissioner of the General Land Office, with many subordinates. To them, as a special tribunal, Congress has confided the execution of the laws which regulate the disposal and general care of these lands, and has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen.[78] Congress has the sole power to declare the effect and dignity of titles emanating from the United States,[79] and the States can not interfere with the primary disposition of the soil by the general government. Whether a title to a tract of public land has passed from the

75 Bagnel *v.* Broderick, 13 Pet. 436; Fenn. *v.* Holme, 21 How. 481.

76 Semple *v.* Bank, 5 Sawyer (C. Ct.) 394.

77 Page *v.* Rogers, 31 Cal. 294; Smith *v.* Colvin, 17 Bark. 157.

78 United States *v.* Schurz, 102 U. S. 378.

United States, is a question depending solely upon statutes enacted by Congress.

After title has passed from the government the land becomes subject to the laws of the State in which it lies,[80] and to the laws of such State recourse must be had for the rules which govern its descent, alienation and transfer, as well as for the effect and construction of its conveyances.[81] All the means by which the title to real property is transferred, whether by deed, by will, or by judicial proceeding, are subject to, and may be governed by, the legislative will of the State in which it lies,[82] except where such law impairs the obligation of a contract, and all the laws of a State existing at the time a conveyance or contract is made, which affect the rights of the parties to the same, enter into and become a part of it.[83] The State possesses the sole power to regulate the modes of transfer and the solemnities which accompany them, and title can be acquired, transferred or lost only in accordance with such regulations,[84] though it would seem that in the interpretation of deeds personal covenants can not be implied if not authorized by the laws of the State where the deed was made,[85] while in some States the rule as above stated has been so modified by statute that lands may be as effectively conveyed by conforming to the law of the place where the deed is executed and acknowledged.[86] In the latter case proof of such conformity should accompany the deed or other instrument of conveyance.

79 Bagnell *v.* Broderick, 13 Pet. (U. S.) 436.

80 Wilcox *v.* Jackson, 13 Pet. (U. S.) 498.

81 McGoon *v.* Scales, 9 Wall. (U. S.) 23; Clark *v.* Graham, 6 Wheat. 577; McCormick *v.* Sullivant, 10 Wheat. (U. S.) 192.

82 Osborn *v.* Adams, 18 Pick. (Mass.) 245.

83 Brine *v.* Ins. Co., 96 U. S. 627; Bronson *v.* Kinzie, 1 How. 311.

84 Story's Conf. Laws, 708.

85 Bethel *v.* Bethel, 54 Ind. 428.

86 Hoadley *v.* Stephens, 4 Neb. 431.

CHAPTER III.

TITLE BY DESCENT.

§ 29. Nature of the title.
30. Rules of descent.
31. Consanguinity.
32. Affinity.
33. Adoption.
34. Proof of heirship.
35. Proof of death.
36. Conveyances by heirs.

§ 29. **Nature of the Title.** Descent, or hereditary succession, is the title whereby one person, upon the death of another, succeeds to or acquires the estate of the latter as heir at law, the estate so derived being called an *inheritance.*[1] Though of universal observance, inheritance is not a natural right but is purely statutory, and therefore arbitrary, absolute and unconditional.[2] An heir at law is the only person who, by the common law, becomes the owner of land without his own agency or assent, the law casting the title upon him without regard to his wishes or election, and when the right of inheritance is fully established by strict compliance with the law relating to descents, proof of heirship, etc., the title thus conferred is of the highest dignity and effectual for all purposes. In the absence of probate proceedings or a judicial determination of the rights of the heirs, titles depending on descent are to be viewed with jealousy and accepted with caution, and particularly will this be the case where title is asserted through descent, by an heir in a remote degree from the intestate or common ancestor.

The title to the land of an intestate vests immediately in the heir who holds same in his own right, but charged with the payment of the ancestor's debts,[3] and until finally settled

1 2 Black. Com. 201; 4 Kent Com. *374.
2 Tyler *v.* Reynolds, 53 Iowa, 146.
3 Walbridge *v.* Day, 31 Ill. 379; Chubb *v.* Johnson, 11 Tex. 469.

in the probate court the estate is liable to be defeated by a sale made in due course of administration, becoming absolute only after the debts are extinguished.[4]

The heirs are said to take *per capita* or *per stirpes,* that is direct, or in their own right, they standing in equal degree, and receiving equal shares; or, by right of representation, where the descendants of a deceased heir take the same share or right in the estate of another person that their ancestor would have taken if living. Posthumous children are considered as living at the death of their parents and participate as such.[5]

Inheritance only accrues to the issue of lawful wedlock, but all the presumptions of law are in favor of legitimate birth,[6] and an illegitimate child is generally considered as the heir of its mother.[7] The descent of real property and the order of succession is governed by special statutes known as "rules of descent," and which vary in every State.

§ 30. **Rules of Descent.** "The English law of descent" says Chancellor Kent,[8] "is governed by a number of rules, or canons of inheritance, which have been established for ages, and have regulated the transmission of the estate from the ancestor to the heir, in so clear and decided a manner, as to preclude all uncertainty as to the course which the descent is to take. But in the United States, the English common law of descents, in its most essential features has been universally rejected, and each State has established a law of descent for itself." The laws of the several States, while preserving a general agreement in their essential outlines, yet differ materially in detail, and it is doubtful if any two of them are exactly alike, a circumstance that has induced a distinguished writer on this subject to say, that "this nation may be said to have no general law of descents, which probably

4 Vansycle *v.* Richardson, 13 Ill. 171; Wilson *v.* Wilson, 13 Barb. 252.

5 4 Kent Com. 412; Morrow *v.* Scott, 7 Ga. 535.

6 Fox *v.* Burke, 31 Minn. 319.

7 Miller *v.* Williams, 66 Ill. 92. This matter is statutory.

8 4 Kent Com. *374.

has not fallen to the lot of any other civilized country." [9] No attempt will be here made to summarize or explain the regulations of descent in the various States, but in the course of his investigations, the examiner will frequently have to refer to them for assistance in unraveling knotty points or snarls in the tangled skein of title.

The transmission of property by hereditary descent, from the parent to his children, is the dictate of the natural affections, and forms the first rule of inheritance in every State, varied in some cases, however, by the equal participation of the widow. From this point on there is no uniformity, but, as a rule, the lineal kindred take in preference to the collateral. If the descendants all stand in the same degree of consanguinity they take equally, otherwise by right of representation, and if there be no heirs, the property escheats to the State. The degrees of kindred are usually computed in the United States, according to the rules of the civil law; and the kindred of the half-blood inherit equally with those of the whole blood, in the same degree, unless the inheritance be ancestral, in which case, as a general proposition, those who are not of the blood of such ancestor are excluded. The last mentioned rule has been enacted substantially in most of the States, but is held to refer to the immediate and not to a remote ancestor.[10]

§ 31. **Consanguinity.** The relation subsisting among all the different persons descending from the same stock or common ancestor, is called *consanguinity,* and is the medium through which, in the descent of real property, the several degrees of kindred are computed and deduced. Consanguinity is *lineal* or *collateral;* the former being the relation which exists among persons where one is descended from the other, as between father and son, in the direct line of descent; the latter is the relation subsisting between persons descended from the common ancestor, but not from each other, as between brother and sister. There are two methods of computing the

[9] Reeve on Descent, pref.

[10] Buckingham *v.* Jacques, 37 Conn. 402; Curren *v.* Taylor, 19 Ohio, 36; Larder *v.* Collins, 2 Pet. 58; Cramer's Appeal, 43 Wis. 167; Ryan *v.* Andrews, 21 Mich. 229.

degrees of consanguinity, known respectively as the civil, and common law methods, the latter being also the same as the canon law.

The rule of the civil law is generally used in this country, and is preferable for that it points out the actual degree of kindred in all cases. This mode of computation begins with the intestate, and ascends from him to the common ancestor, and descends from such ancestor to the next heir, reckoning a degree for each person, both ascending and descending, and the degrees they stand from each other is the degree in which they stand related. According to this rule of computation it will be seen, the father of the intestate stands in the first degree, his brother in the second, his nephew in the third, etc.

By the common law method of computation, different relations may stand in the same degree, and the degrees are counted the same whether lineal or collateral. The mode of the common and canon law is to discover the common ancestor, and beginning with him to reckon downwards, and the degree the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them.[11] By this means the father and brother of the intestate, or person proposed, stand in the same degree. By the civil law the father stands in the first degree, the brother in the second. So by the common law the first cousin stands in the second degree; by the civil law he would stand in the fourth.

The line of ancestry is classed as *ascending* or *descending,* taking the person proposed as the unit, and is further classified as *paternal* or *maternal,* according as the examination may lead through the father or the mother. In England, a fair ability to trace genealogy is an indispensable requisite of the examiner, as, owing to the non-probate of real estate wills until very recent years, a pedigree always accompanys an abstract showing a descent. The matter is of much less importance in the United States, as in all properly conducted probate proceedings a table of heirship is always found. As an illustration of the subject under discussion, a diagram of the

11 1 Bou. Law Dict. 327; 2 Black. Com. 202.

degrees of consanguinity, according to the civil law, is given on the succeeding page.

§ 32. **Affinity.** The relationship or connection arising in consequence of marriage, which exists between each of the married persons and the kindred of the other, is termed *affinity*, and is distinguished from consanguinity which is used to denote the ties of blood. At common law the relationship of affinity is not sufficient to obtain legal succession or inheritance, but by statute, in some States, the surviving husband or wife has been endowed with inheritable qualities and either may take as an heir of the other according to the prescribed rules of descent; and in the sense that an heir at law is simply one who succeeds to the estate of a deceased person, the surviving wife may be said to be an heir of her deceased husband.[12]

§ 33. **Adoption.** Adoption is a juridical act creating between two persons certain relations, purely civil, of paternity and filiation. The legal adoption by one person of the offspring of another, giving him the status of a child and heir of the parent by adoption, was unknown to the common law, although long recognized by the civil, and is of comparatively recent date in the United States. The act of adoption is the creation of an artificial relation, made in conformity with and regulated by positive statute, in the light of which the new rights and obligations thus derived are to be solely construed.[13]

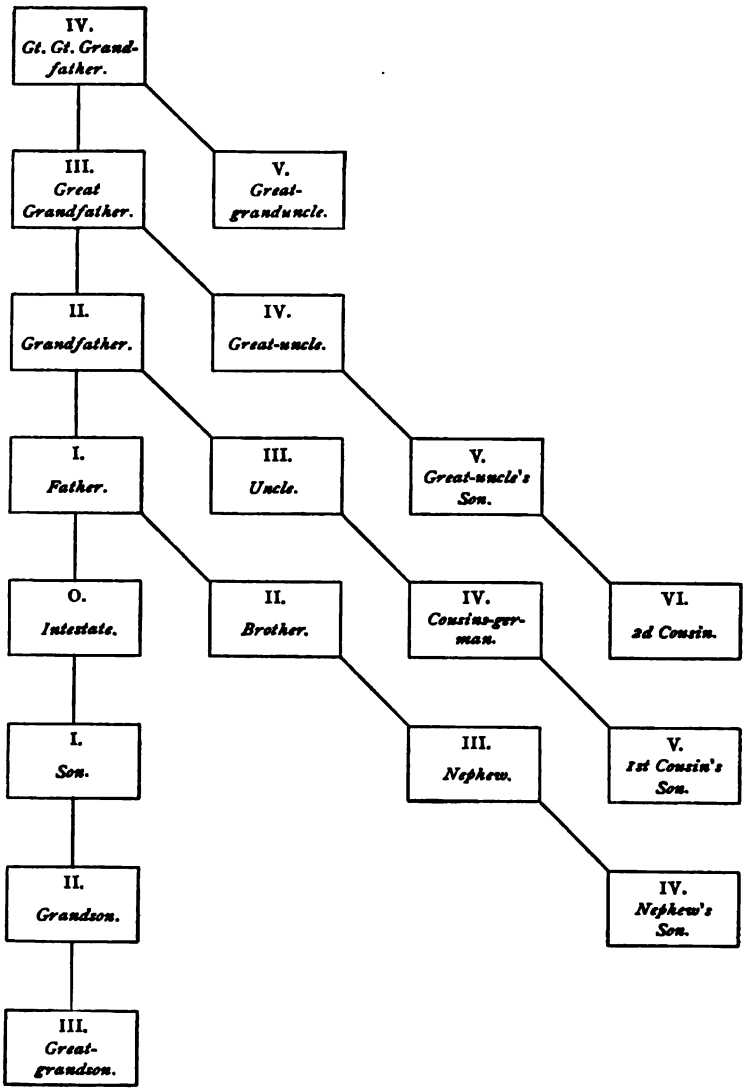
There is a lack of uniformity in the statutes enacted by the States, yet, in the main they agree in conferring on the person so adopted the rights of inheritance and succession, and other legal consequences and incidents of the natural relation of parent and child, the same as if such child had been born in lawful wedlock of such parent by adoption, but, as a rule, restrict such child from taking property expressly limited to the body or bodies of the parents by adoption, and in some instances from taking from the lineal or collateral kindred of the

12 McKinney *v.* Stewart, 5 Kan. 384; Steel *v.* Kurtz, 28 Ohio St. 192.

13 Keegan *v.* Geraghty, 101 Ill. 26; Long *v.* Hewitt, 44 Iowa, 363; Tyler *v.* Reynolds, 53 Iowa, 146.

DEGREES OF CONSANGUINITY ACCORDING TO THE CIVIL LAW.

(Paternal Line.)



parents by right of representation. The right of inheritance thus secured is further restricted to the adopted parent and precludes an inheritance from the actual children of such adopted parent,[14] while the right of inheritance by the adoptive parents from the child is confined to such property as he had received through them, and, as a rule, they are expressly prohibited from inheriting any property which the child received from his own kindred by blood.[15] As against the adopted child, the statute should be strictly construed, being in derogation of the general law of inheritance, which is founded on natural relationship, and is a rule of succession according to nature, which has prevailed from time immemorial.

It will thus be seen how important a succession through adoption may become in the determination of land titles, and the strictness necessary on the part of examiner and counsel in the investigation of questions of this nature. Where title is claimed through a descent by adoption, a general summary of the proceedings creating the relation should appear and the full and perfect title of the adoptive heir should be deducible of record and in strict conformity to the statute. The rights of inheritance acquired by an adopted child under the laws of a particular State are recognized and upheld in every other State, so far as they are not inconsistent with its own laws and policy,[16] but in the absence of statutory directions the general rules of descent must govern as in other cases.[17]

§ 34. **Proof of Heirship.** Though title vests in the heir by operation of law immediately on the death of the ancestor, yet purchasers desire, and should have, affirmative evidence that the person asserting such title is justified in so doing, and this is furnished by the proceedings of the probate court. In all abstracts the interval of title between the deed by which the decedent became seized and that which purports to be a

14 Barnhizel *v.* Ferrell, 47 Ind. 335; Keegan *v.* Geraghty, 101 Ill. 26.

15 Keegan *v.* Geraghty, 101 Ill. 26; see, also, Reinders *v.* Kappelmann, 68 Mo. 482.

16 Ross *v.* Ross, 129 Mass. 243.

17 Reinders *v.* Kappelmann, 68 Mo. 482.

conveyance by the heirs, should be filled by a summary or abridgement of the proceedings in probate, showing the death of the intestate, proof of heirship by those asserting title, and a satisfactory settlement of the estate, for until all this has been accomplished the title of the heirs is liable to be defeated by a sale made by the administrator, as will also the title of one purchasing from them.[18] This is a necessary result of the rule of law, that the intestate's property is primarily holden for the payment of his debts, and may be sold by his administrator for that purpose. Such a sale necessarily defeats all hereditary titles.

§ 35. **Proof of Death.** The recitals of the essential facts necessary to confer jurisdiction, in the decrees and judgments of courts of exclusive though of limited jurisdiction, are *prima facie* evidence of the facts so recited. Upon this principle it has been repeatedly declared that the grant of letters testamentary or administration is competent evidence of the death of the testator or intestate,[19] and in support of titles claimed by descent is of the highest character of evidence of title in the heir. Usually no other proof will be required or need be shown.

§ 36. **Conveyances by Heirs.** Few titles are to be accepted with greater caution, than those asserted, and purported to be conveyed, by persons claiming to be the heirs at law of the person last seized, in the absence of full compliance with prescribed regulations concerning the descent and distribution of intestate estates. Too frequently, from various motives, no probate is ever had, and the children, or other heirs, of the decedent unite to convey their interests describing themselves in such conveyance as "children and heirs at law" of such decedent. In England, a pedigree would accompany a conveyance of this character, fixing, by reference to the rules of descent, the nature and extent of the interest owned by each heir. In the United States, the paucity of family records and the

18 Hill *v.* Treat, 67 Me. 501.

19 Comstock *v.* Crawford, 3 Wall. 396; Belden *v.* Meeker, 47 N. Y. 307; Welch *v.* R. R. Co., 53 N. Y. 610; Jeffers *v.* Radcliff, 10 N. H. 242.

method of compiling same, would render a pedigree of little value, even were they in use, and the examining counsel, if doubts arise, usually resorts to the doubtful alternative of an affidavit to prove the fact of heirship and bolster up the title, the affidavit, in many instances, being entitled to less credence than the deed it supplements. A title resting on no better foundation than a deed of this character, unless reinforced by the statute of limitations, is entitled to little consideration, and is liable to be defeated at any time before the bar of the statute has interposed. Nor can the purchaser know, unless personally cognizant of the facts, that all the heirs have united in the conveyance, or that they are qualified to convey; or that a widow's dower may not greatly depreciate the value of the property thus acquired.

In this country, where all the heirs are allowed an equal representation, partition is frequently made by the heirs between themselves without the intervention of a court, and while such partitions are regarded as valid, yet when made of an unprobated estate confusion and uncertainty are greatly augmented, and purchasers should decline the title thus derived as affording no measure of safety. Where affidavits are resorted to to prove heirship, death of ancestor, etc., they should be well authenticated as well as positive in their averments; but however well framed they may be, they afford evidence of the lowest order only. Where partition is the result of a regular judicial proceeding the foregoing observations do not apply, even though there has been no probate of the ancestor's estate. In all properly conducted suits for partition a proof of heirship is required before division and the fact of heirship must be found by the decree entered in the suit.

CHAPTER IV.

TITLE BY PURCHASE.

§ 37. Nature of the title.
38. Deed.
39. Devise.
40. Public grant.
41. Estoppel.
42. Technical estoppel.
43. Equitable estoppel.
44. Relation.
45. Prescription and limitation.
46. Accretion and reliction.
47. Avulsion.
48. Riparian titles.
49. Dedication.
50. Confirmation.
51. Occupancy.
52. Abandonment.
53. Eminent domain.
54. Title acquired by eminent domain.
55. Escheat.
56. Confiscation.
57. Forfeiture.

§ 37. **Nature of the Title.** Purchase is a generic term which includes every mode of coming to an estate, except by inheritance, though in its more limited sense it is applied only to the acquisition of lands by way of bargain and sale for money or other consideration. Neither law writers nor courts seem to have ventured on a more extended definition, if indeed one can be framed, and the one above given has come down unchanged from Blackstone, who in turn borrowed it from earlier writers.

There are four principal methods recognized of acquiring title by purchase, to wit: by deed, devise, prescription or limitation and escheat. To these may be added title accruing through operations of nature; as accretion, reliction and avulsion, as well as such as result from our political and civil relations; as eminent domain, confiscation and forfeiture. Some writers still farther extend the list by the addition of abandonment, occupancy and estoppel. The two former of these are not known in the United States, while the latter is not, strictly speaking, a method of acquiring title at all, but simply a recognition of existing titles.

In the paragraphs following, no attempt has been made at systematic treatment of the topics above mentioned, and only those general features of interest to the examiner of titles will be presented.

§ 38. **Deed.** Title by *deed* is the most common form of purchase, and that by which the great bulk of all the real property in the country is directly held. The term "deed" is very comprehensive in its signification, and denotes not only all classes of instruments for the conveyance of land, but any instrument in writing under seal, whether relating to land or any other matter. In its popular acceptation, however, it is confined to conveyances of land, or estates or interests therein, and is still further restricted in its meaning to absolute sales, as distinguished from mortgages, indicating conditional sales, though the latter are as essentially deeds as the former. In its broad signification it is the highest form of expression of title known to the law.

§ 39. **Devise.** Next to deeds, testamentary conveyances form the most common vehicle for the transfer of interests or estates in land, the instrument for affecting a transfer being called a *will;* the subject-matter as well as the title by which same is acquired, a *devise;* and the recipient of the testator's bounty, a *devisee.* A will, which is effective as a conveyance only at the maker's death, is from its own nature ambulatory and revocable during his life, and it is this ambulatory quality which forms the chief characteristic of wills; for though a disposition by deed may postpone the possession or enjoyment, or even the vesting of an estate until the death of the disposing party, yet the postponement in such cases is produced by express terms and does not result from the nature of the instrument. Title by devise is of the highest dignity, and effective for all purposes, yet it may be defeated in the same manner as a title by descent, when in the course of administration it becomes necessary to sell the testator's land for the payment of his debts.

§ 40. **Public Grant.** For purposes of convenience a distinction is made between conveyances by the sovereign and deeds

of the individual. Public grants, when forming the foundation of title, are usually classed separately from other forms of conveyance and constitute a special department in all works treating of titles or estates. The original divesture of title by the government may be effected in a variety of ways, either of which will be sufficient for the purpose intended. The usual method is by *patent* issued in conformity to prescribed legal formalities, though government may make a grant by a law as effectually as by a patent issued in pursuance of a law;[1] and a confirmation by law of a claim of title in public lands is to all intents and purposes a grant of such lands.[2] The original grant, whatever may be its form, is the first link in the chain of title, and whenever practicable should constitute the initial of the abstract, as the basis upon which all after-acquired titles and derivative interests rest.

§ 41. **Estoppel.** Title by estoppel, as defined by Washburn, "is where equity, and in some cases the law, in order to accomplish the purposes of justice which can not be otherwise reached, draws certain conclusions from the acts of one party in favor of another, in respect to the ownership of lands, which it does not allow the first to controvert or deny."[3] Strictly speaking, a title is rather presumed than acquired by estoppel, which can operate neither to divest nor transfer an estate, and the parties are precluded by former acts from asserting anything to the detriment of the title.

Estoppels are not favored in law, for the object of the administration of justice is to discover and apply the truth; but there are cases in which the courts are bound to say to a litigant that he has to his own advantage, or to the injury of his adversary, asserted that which is false, and that, having done so, he must be forever forbidden to unfold for his own benefit the truth of the matter.[4]

1 Hall *v.* Jarvis, 65 Ill. 302; Strather *v.* Lucas, 12 Pet. 411; Mayo *v.* Libby, 12 Mass. 339.

2 Challefoux *v.* Ducharme, 4 Wis. 554.

3 3 Wash. Real Prop. (4th Ed.) 70.

4 Abbott *v.* Wilber, 22 La. Ann. 368; Gray *v.* Pingree, 17 Vt. 419.

Mutuality is an essential ingredient of estoppels, and it follows from the very principle on which the whole doctrine rests, that they operate neither in favor of nor against strangers, but affect only the parties, and their privies in blood, estate, or in law. A third party derives no advantage from, nor can he be bound by an estoppel, and this rule applies equally whether the estoppel arises by record, deed, or matter *in pais*.[5] Estoppels are classified, according to their nature, as *technical*, or by record or deed, and *equitable*, or *in pais*. Courts at the present day incline to restrict the doctrine of technical estoppel, and to favor and extend equitable estoppel.[6]

§ 42. **Technical Estoppel.** The estoppel arising from deeds and records is that which directly concerns an examiner of titles, and is really the only question of this nature on which he can be called to pass. Matters *in pais*, from their nature, are not presented to him, nor are they effective in questions of title until presented for determination to some competent tribunal, when they become matters of record and operative, if at all, as technical estoppel.

Estoppel by record is based upon the rulings and determinations of the courts, and proceedings had therein, which are considered at length in other portions of the work. Verdicts and judgments are conclusive by way of estoppel, only as to facts without the proof or admission of which they could not have been rendered,[7] or of matters material to the decision of the cause, and which the parties might have had decided, although not actually litigated,[8] but not as to facts not essential to, although consistent with the general verdict or decree entered in the case.[9] The estoppel of a judgment extends only to the question directly involved in the issue, not to any incidental or collateral matters, although they may have arisen and been passed on,[10] and is effective only as between the orig-

5 Chope *v.* Lorman, 20 Mich. 327; Simpson *v.* Pearson, 31 Ind. 1; McDonald *v.* Gregory, 41 Iowa, 513.

6 State *v.* Pepper, 31 Ind. 76.

7 Burlen *v.* Shannon, 99 Mass. 200.

8 Lindsley *v.* Thompson, 1 Tenn. Ch. 272; Buck *v.* Collins, 69 Me. 445.

9 Burlen *v.* Shannon, 99 Mass. 200.

10 Lewis' Appeal, 67 Penn. St.

inal parties thereto or their privies.[11] It must equally estop both parties thereto, or it can not be set up by either,[12] and is not available for or against a stranger.[13] The reversal of a judgment destroys its efficacy as an estoppel.[14]

Estoppel by deed arises from the provisions contained in instruments for the conveyance of land, either by recital, admission, covenant or otherwise, whether in express terms or by necessary implication, and parties giving and receiving such deeds, together with their privies, are estopped from denying the operation thereof according to the manifest intent.[15] In controversies concerning the title to land the question of estoppel arises most frequently in construing the effect of covenants. Thus, if a person having no title to land conveys the same with a general warranty and afterward acquires title, such acquisition will inure to the benefit of the grantee, because the grantor is estopped to deny, against the terms of his own warranty, that he had the title in question.[16] The mischief of the rule is where a grantor who has conveyed without having title subsequently acquires same and then conveys to a third party. Usually, such third party would look no farther than the acquisition of title by his grantor, and, relying on such fact, would pay the purchase price and take a deed. Yet, the deed, in such a case, would convey no title, if the prior deed of his grantor was then of record, for, by the rule of estoppel, the title passed, or inured, to the first grantee the moment the grantor became clothed therewith.[17] But this effect does not extend to any other covenants than that of warranty. The other covenants

153; Dixon *v.* Merritt, 21 Minn. 196; Providence *v.* Adams, 11 R. I. 190.

11 McDonald *v.* Gregory, 41 Iowa, 513.

12 Stoddard *v.* Burton, 41 Iowa, 582.

13 Mayo *v.* Wood, 50 Cal. 171.

14 Smith *v.* Frankfield, 77 N. Y. 414.

15 Taggart *v.* Risley, 4 Oreg. 235; Tobey *v.* Taunton, 119 Mass. 404; Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35; Foster *v.* Young, 35 Iowa, 27; Scoffin *v.* Grandstaff, 12 Kan. 467.

16 Burtners *v.* Keran, 24 Gratt. (Va.) 43; Wiesner *v.* Zaun, 39 Wis. 188; Clark *v.* Baker, 14 Cal. 612; Robinson *v.* Douthitt, 64 Tex. 101.

17 Morrison *v.* Caldwell, 5 T. B. Mon. (Ky.) 426; Wilson *v.* Thraup, 2 Cow. (N. Y.) 195; Kirkaldie *v.* Larrabee, 31 Cal. 455. See the re-

are personal only. Nor does the rule extend to covenants by a married woman, except in States where married women have been expressly enabled by statute to enter into covenants.[18]

Although a grantor can not set up a hostile title existing at the time of his conveyance, because he is estopped by his covenants, yet if the deed be a mere quitclaim, without covenants, and purports to convey nothing but the present interest of the grantor in the premises, whatever that interest may be, without defining the character of the interest, or affirming that he has an interest in the premises, he is not debarred from subsequently acquiring, and setting up, any other title, whether existing at the time of his conveyance or subsequently created.[19] It has been held, in a late case, that the doctrine of covenants for title, inuring on principles of estoppel in favor of a subsequent grantee, is not to be carried so far as to charge a purchaser, or his attorney examining title for him, with constructive notice of deeds recorded before the vendor has any record title, and that such purchaser, finding an apparent title of record, may rely upon it, and is not required or expected to look further,[20] yet such decision seems to be founded on doubtful authority and is opposed to the great bulk of American cases on the subject.[21]

§ 43. **Equitable Estoppel.** An estoppel *in pais* rests upon the principle that a party has misled another to his prejudice, under such circumstances that it would be a fraud for him to assert what may be the truth. Hence, to raise an estoppel from former declarations or admissions by a party to prevent him from setting up his title to property, the facts

marks of Mr. Rawle in opposition to the doctrine. Rawle on Couts. (5th Ed.), § 259.

18 Wilson *v.* King, 23 N. J. Eq. 150.

19 Bruce *v.* Luke, 9 Kan. 201; Read *v.* Whittemore, 60 Me. 479; Sydnor *v.* Palmer, 29 Wis. 229; Shumaker *v.* Johnson, 35 Ind. 33; Graham *v.* Graham, 55 Ind. 23.

20 Dodd *v.* Williams, 3 Mo. App. 278; see also State *v.* Bradish, 14 Mass. 296.

21 Logan *v.* Steel, 4 Mon. 433; Mitchell *v.* Pettee, 2 W. Va. 470; Bates *v.* Norcross, 17 Pick. 14; Clark *v.* Baker, 14 Cal. 612; DeWolf *v.* Hayden, 24 Ill. 525.

must show: (1.) That when making the statements or admission relied upon he was apprised of the true state of his own title. (2.) That he made the statement or admission with the express intention to deceive, or with such careless or culpable negligence as to amount to constructive fraud. (3.) That the other party had neither knowledge of the true state of the title nor convenient means of acquiring such knowledge by the use of ordinary diligence. (4.) That he relied upon such statement or admission, and will be injured by allowing its truth to be disproved.[22] It will be seen that the important and primary ground of estoppel *in pais* is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted,[23] but no man can set up another's act or declaration as the ground of an estoppel, unless he has himself been deceived by it,[24] and a party can never be estopped by an act that is illegal and void.[25]

An estoppel *in pais,* unlike that by deed, operates only on existing rights. Thus a person who, while having no title in himself, induces another to purchase land at a sheriff's sale, by his representations that an unimpeachable title will pass by such sale, is not precluded from setting up afterward an adverse title in himself.[26]

At law, the doctrine of equitable estoppel can not be applied to work a transfer of property, which, by the statute of frauds, can be effected only by a writing, and the legal title must always prevail,[27] yet, although a party can not divest himself of an estate by parol, he may, without writing so conduct himself

22 Martin *v.* Zellerbach, 38 Cal. 300; McCabe *v.* Raney, 32 Ind. 309; Nugent *v.* Cincinnati, etc., R. R. Co., 2 Dinsey (Ohio), 302; Halloran *v.* Whitcomb, 43 Vt. 306; Horn *v.* Cole, 51 N. H. 287; Clark *v.* Coolidge, 8 Kan. 189; Mallony *v.* Horan, 49 N. Y. 111.

23 Rice *v.* Bunce, 49 Mo. 231.

24 Simpson *v.* Pearson, 31 Ind. 1; McKinzie *v.* Steele, 18 Ohio St. 38; Devries *v.* Haywood, 64 N. C. 83.

25 Mattox *v.* Hightshue, 39 Ind. 95.

26 Donaldson *v.* Hibner, 55 Mo. 492.

27 Kelly *v.* Hendricks, 57 Ala. 193; Hayes *v.* Livingston, 34 Mich. 384.

with reference to it that he will be estopped afterward to assert a claim thereto; and this principle is applied without reference to the statute of frauds.[28]

The doctrine of estoppel does not ordinarily apply to a State as it does to individuals. The sovereign power is but a trustee for the people. It acts by its agents and the people should not be bound by any statement of facts made by those agents. For their benefit the truth may always be shown, notwithstanding any former statement to the contrary.[29] This principle rests, in part at least, upon the general doctrine that the State can not part with its title to land except by grant or other record evidence.[30] An apparent exception has been said to arise in those cases in which the act sought to be made binding was done in its sovereign capacity by legislative enactment or resolution,[31] but this is not so much an exception to the general doctrine of estoppel, by acquiescence in an authorized act of a mere subordinate agent, as it is an original binding affirmative act on the part of the State itself, made in the most solemn manner in which it can give expression to the sovereign will.[32]

§ 44. **Relation.** The doctrine of relation is applied in conveyances of land to equitable titles which subsequently mature, either by operation of law or act of the parties, into legal titles, and where several acts concur to make a conveyance, estate, or other thing, the original act will be preferred, and to this the other acts will be said to have relation.

The fiction of relation is, that the intermediate *bona fide* alienee of the incipient interest may claim that the grant inures to his benefit by an *ex post facto* operation. In this way he receives the same protection at law that a court of equity could afford him. Thus, the assignee of a certificate of the purchase of school land, the purchase money being all paid, conveyed the

28 R. R. Co. *v.* Ragsdale, 54 Miss. 200.

29 Fannin Co. *v.* Riddle, 51 Tex. 360; Farish *v.* Coon, 40 Cal. 50; Johnson *v.* U. S., 5 Mason C. C. 425.

30 Saunders *v.* Hart, 57 Tex. 8.

31 Alexander *v.* State, 56 Ga. 486; Enfield *v.* Permit, 5 N. H. 285; Commonwealth *v.* Andre, 3 Pick. 224.

32 Saunders *v.* Hart, 57 Tex. 8.

premises by quitclaim deed; a few days afterward he received the patent, and it was held that the legal title passed to his grantee. So, where a deed is made in pursuance of a recorded land contract, it relates back to the date of the contract, and conveys the title as it stood at the time the contract was recorded.[33] The same doctrine also applies to grants of unlocated land, the subsequent location operating by relation to the original grant.[34]

The doctrine of relation is a fiction of law adopted by the courts, solely for the purpose of justice, where several proceedings are required to perfect a conveyance of land; it is only applied for the security and protection of persons who stand in some privity with the party that initiated the proceedings and acquired the equitable claim or right to the title. It does not affect strangers not connecting themselves with the equitable claim or right by any valid transfer from the original or any subsequent holder.[35]

§ 45. **Prescription and Limitation.** Prescription is that title which arises from long and continued possession of property, and is founded upon the presumption that the party in possession would not have been allowed by other claimants to hold same without a just and paramount right. Prescription, in the ancient sense of the word, rests upon the supposition of a grant, and the use or possession on which such title is founded must be uninterrupted and adverse, or of a nature to indicate that it is claimed as a right, and not the effect of indulgence, or of any compact short of a grant.[36] Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or

33 Welch *v.* Dutton, 79 Ill. 465; Snapp *v.* Pierce, 24 Ill. 156.

34 Dequindre *v.* Williams, 31 Ind. 444.

35 Gibson *v.* Chouteau, 13 Wall 92.

36 Gayetty *v.* Bethune, 14 Mass. 49; Odiorne *v.* Wade, 5 Pick. 421.

an admission of an existing adverse title in, the party in possession.[37]

The period of legal memory, or prescription, does not, at common law, extend farther back than sixty years,[38] while forty years is usually a sufficient length of time to establish a prescriptive title,[39] and, in general, it is the policy of the courts to limit the presumption of grants to periods analogous to those of the statute of limitations, in cases where the statute itself does not apply.[40] A title founded upon prescription or limitation, accompanied by an adverse user or enjoyment, is recognized as valid and substantial, as against all save the sovereign power,[41] and in the older States of the Union, where it is often difficult to trace title to its source, property is freely conveyed on the assurance furnished by time and the statute of limitations.

Twenty years is the period ordinarily fixed by the statute in which to perfect an adverse possession of lands, while in case the occupant claims a title exclusive of any other right, founding such claim upon some written instrument, judgment or decree, ten years is frequently sufficient, and in some States even a shorter period.[42]

§ 46. **Accretion and Reliction.** Accretion is the increase of land, caused by the addition made by the washing of the sea, a navigable river, or other water course to which the land is contiguous, whenever the increase is so gradual that it can not be perceived at any one moment of time.[43]

37 Gayetty *v.* Bethune, 14 Mass. 49; Rooker *v.* Perkins, 14 Wis. 79; Taylor *v.* Watkins, 26 Tex. 688.

38 Coolidge *v.* Learned, 8 Pick. 504; Odiorne *v.* Wade, 5 Pick. 421.

39 Melvin *v.* Whiting, 10 Pick. 295.

40 Hunt *v.* Hunt, 3 Met. 175.

41 Gardiner *v.* Miller, 47 Cal. 570.

42 Consult local statutes for the periods of limitation, and the character of the occupancy necessary to perfect title.

43 Lovingston *v.* St. Clair Co., 64 Ill. 56; Krant *v.* Crawford, 18 Iowa, 554; Benson *v.* Morrow, 61 Mo. 352. This definition has its origin in the Institutes of Justinian, see Lib. II, Tit. I, Sec. 20, and has been followed by courts and writers ever since. See, Lammers *v.* Nissen, 4 Neb. 245; St. Louis, etc., Ry. Co. *v.* Ramsey, 53 Ark. 314; Jefferis *v.* Land Co., 134 U. S. 178.

The increase or deposit obtained by accretion is technically called *alluvion,* and whether produced by natural or artificial causes inures to the benefit of the adjacent territory.[44] It is held by the same title, and under the same grant, as the land which it adjoins, and is subject to the same liens and benefited by the same incidents that appertain to such adjacent land.[45] Upon all rivers not navigable by common law the owner of the land adjoining is *prima facie* owner of the soil to the central line or thread of the stream subject to the public right of navigation.[46] The presumption will prevail in all cases in favor of the riparian proprietor, unless controlled by some express words of description which exclude the bed of the river, and in all cases where the river itself is used as a boundary, the law will expound the grant as extending to the center or thread.[47]

Upon navigable lakes and rivers, where the public easement is not interrupted, the question of navigability, as at common law, does not arise, and the riparian proprietor will still be entitled to all accretions without regard to navigability.[48]

The general rule above stated applies as well to land which by erosion becomes riparian, and where through the gradual washing away of intervening land an originally remote tract becomes riparian all of the rights of accretion will at once attach thereto.[48*]

In applying the principle that land formed by alluvion is the property of the adjoining owner, it is quite immaterial, on non-navigable streams, whether this alluvion forms at or against the shore so as to cause an extension of the bank, or in the bed of the stream and becomes an island,[49] and where an

[44] St. Clair Co. *v.* Lovingston, 23 Wall. (U. S.) 46, affirming 64 Ill. 56; Adams *v.* Frothingham, 3 Mass. 352; People *v.* R. R. Co., 42 N. Y. 315; Lockwood *v.* R. R. Co., 37 Conn. 387; Lammers *v.* Nissin, 4 Neb. 245.

[45] Campbell *v.* Gas Co., 84 Mo. 352; Gale *v.* Kinzie, 80 Ill. 132.

[46] Hubbard *v.* Bell, 54 Ill. 110; Olson *v.* Merrill, 42 Wis. 203. At common law only tide waters are navigable.

[47] Braxon *v.* Bressler, 64 Ill. 488; Ross *v.* Faust, 54 Ind. 471.

[48] Lovingston *v.* St. Clair Co., 64 Ill. 56; Schurmeir *v.* R. R. Co., 10 Minn. 82; Magnolia *v.* Marshall, 39 Miss. 111.

[48*] Wells *v.* Bailey, 55 Conn. 292.

[49] Deerfield *v.* Arms, 17 Pick 41; Granger *v.* Avery, 64 Me. 292.

island is so formed in the bed as to divide the channel and form partly on each side of the thread, the opposite sides belong to the different proprietors and the island should be divided according to the original thread.

The increase on streams, rivers and water fronts should be divided between the owners of the shore, according to their respective frontage, so as to secure to each the benefits which his original frontage gave him, and for this purpose the following rule may be employed:

Measure the whole extent of the ancient line on the river and ascertain how many feet, rods, etc., each proprietor owned on the line; divide the newly formed line into equal parts and appropriate to each proprietor as many portions of this new river line as he owned feet on the old. Then to complete the division, lines are to be drawn from the parts at which the proprietors respectively bounded on the old, to the points thus determined as the new points of division on the newly formed shore. The new lines, thus formed, it is obvious, will be either parallel, divergent or convergent, according as the new shore line of the river equals, exceeds or falls short of the old.[50] This mode of distribution secures to each riparian proprietor the benefit of continuing to hold to the river shore whatever changes may take place in the condition of the river or the accretion. The rule will require modification under particular circumstances, as for instance, if the ancient margin has deep indentations or sharp projections the general available line on the river ought to be taken, and not the actual length of the margin as thus elongated by the indentations or projections.

A more familiar rule, and one of general application in the West, is to extend the original water frontage of the respective parcels of land, as nearly as practicable at right angles with the original shore line, or with the course of the river to the thread of the stream.[51]

50 Deerfield *v.* Arms, 17 Pick. 41; Batchelder *v.* Keniston, 51 N. H. 496; Thornton *v.* Grant, 10 R. I. 477; Jones *v.* Johnson, 18 How. 150.

51 Miller *v.* Hepburn, 8 Bush (Ky.), 326.

The usual incidents of title attend property acquired by accretion.[52] The right to alluvial formation is a vested one, inherent in the property itself, and forms an essential attribute of it in consequence of the local situation of the land.[53] *Reliction* differs from accretion only in that it results from the gradual subsidence of waters, the effect being the same.[54] Accretion or reliction follows the title of the land contiguous to the alluvion, but will appear of record only when surveys or divisions have been made in the manner above indicated.

§ 47. **Avulsion.** Avulsion is the reverse of accretion, being the sudden removal or deposit of land by the perceptible action of water; and the term is also applied to the derelict left by the sudden subsidence of water on the seashore or on navigable rivers. The authorities are not altogether harmonious, but the majority, following the common law, place the title to such derelict in the sovereign.[55] In the case of inland navigable streams, the title depends upon local laws, some States claiming the title of the bed of the stream, while others concede it to the riparian proprietor, subject only to the public right of navigation. When title extends to the middle of the stream the boundary remains as it was, irrespective of changes in the channel.[56]

§ 48. **Riparian Titles.** By the common law of England the title to land under water, as well as the shore below ordinary high water mark in navigable rivers and arms of the sea, is vested in the sovereign for the public use. But as the rivers of England were comparatively small, tide waters only were regarded as navigable, and the confusion of navigable with tide waters, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the

52 Gale *v.* Kinzie, 80 Ill. 132.

53 Kennedy *v.* Municipality No. 2, 10 La. Ann. 54; St. Clair Co. *v.* Lovingston, 23 Wall. (U. S.) 46.

54 Warren *v.* Chambers, 25 Ark. 120; Boorman *v.* Sunnuchs, 42 Wis. 235.

55 2 Black. Com. 262; Dikes *v.* Miller, 24 Tex. 417.

56 St. Louis *v.* Rutz, 138 U. S. 226; Bonewits *v.* Wygant, 75 Ind. 41.

American continent and the British islands. Congress, by special provision, has fixed the status of all navigable streams and water ways in what was formerly a portion of the public domain, by declaring that they shall be deemed to be and remain public highways, yet it is clear that Congress did not employ the words navigable or non-navigable in the sense of being affected by the ebb or flow of the tide. On the contrary, it is obvious that the words were employed without respect to the tide, and were applied to territory situated far above tide waters, and in which there were no salt water streams. Viewed in the light of these considerations, the federal courts have adopted the rule that proprietors, under titles derived from the United States, bordering on streams not navigable, unless restricted by the terms of the grant, hold to the center of the stream, while in case of navigable rivers the title of the riparian proprietor stops at the stream.[57]

Nor will the common law apply to our great fresh water lakes, for here there is neither flow of the tide nor thread of the stream, and local law appears to have assigned the shores down to ordinary low water mark as the boundary of the riparian proprietor.[58]

§ 49. **Dedication.** A dedication is an appropriation of land to public use;[59] the public and not merely a public corporation must be the chief beneficiary,[60] and, properly speaking, there can be no dedication to private uses.[61] Dedication is *express,* as when made by deed or other unequivocal act or

57 R. R. Co. *v.* Schurmeir, 7 Wall. (U. S.) 272; Forsyth *v.* Small, 7 Biss (C. Ct.) 201; Barney *v.* Keokuk, 4 Otto (U. S.), 324.

58 Wheeler *v.* Spinola, 54 N. Y. 377; Canal Commrs. *v.* People, 5 Wend. (N. Y.) 423. Riparian rights upon the great lakes have been held to be, in theory, the same as upon navigable streams, and are not governed by any such proprietary divisions as high and low water mark. The submerged lands are appurtenant to the upland, so far as their limits can be reasonably identified. Lincoln *v.* Davis, 53 Mich. 375.

59 1 Bou. Law Dict. 443.

60 Todd *v.* R. R. Co., 19 Ohio St. 514.

61 M. E. Church *v.* Hoboken, 33 N. J. L. 13. But reservations for private use may be made, which confer much the same rights upon the beneficiaries as do dedications upon the public generally.

declaration; or, *implied,* or presumed from an acquiescence in the public use.[62] The law requires no particular form or solemnity to constitute a valid dedication, the intention of the owner being the vital principle, and this may be evidenced by the owner's acts or declarations and the circumstances under which the user has been permitted.[63]

The question of dedication arises most frequently, in the examination of titles, in the construction of plats and subdivisions, and must be determined by reference to local law, as the common law dedication has in many of the States been supplemented by statute which vests the legal title to the dedicated tract in the municipality.[64] At common law, when the right of the public to the use of land rests upon no other foundation than a dedication to public uses, the easement vests in the public while the fee remains in the original owner, and may be conveyed by him to third persons; but, in such case, the right of the public to the use is paramount to the title of the owner of the fee, and does not require the fee for its protection.[65]

§ 50. **Confirmation.** Confirmation, at common law, is a species of conveyance whereby an estate which was voidable or inchoate is made valid and certain, or where a particular interest is increased. It is not an original method of passing title, and only operates on an existing estate or right in lands by strengthening the title of one who already has, or claims, some right or interest therein.

Though deeds of confirmation are in use between individuals, the term, as indicative of a form of title, is usually applied to those confirmatory acts of government whereby inchoate or uncertain rights derived from the national government or from foreign powers, are ratified and approved, and relates to the origin of title. From the earliest period in the history of

62 Robertson *v.* Wellsville, 1 Bond, 81.

63 Wood *v.* Hurd, 34 N. J. L. 87; Buchanan *v.* Curtis, 25 Wis. 99; McIntyre *v.* Storey, 80 Ill. 127; Shear *v.* Stothart, 29 La. Ann. 630.

64 Chicago, etc., R. R. *v.* Joliet, 79 Ill. 25; Downer *v.* R. R. Co., 22 Minn. 251.

65 M. E. Church *v.* Hoboken, 33 N. J. L. 13; Cincinnati *v.* White, 6 Pet. (U. S.) 431; compare Wilson *v.* Sexton, 27 Iowa, 15.

the country, claims to tracts of land, upon which persons had settled and made improvements in advance of the public surveys and before the lands had been offered for sale, sometimes upon the express invitation of the public authorities and sometimes upon their supposed acquiescence, have been presented for the equitable consideration of the government. Such claims, in great numbers, have also arisen under other governments from which we have acquired territory, with treaty stipulations for their protection. Sometimes such claims have been submitted to boards of commissioners for approval or rejection; sometimes they have been referred to the judicial tribunals for determination, and sometimes they have been directly acted upon by Congress. A confirmation can not strengthen a void title, but only one that is voidable, and is conclusive only as between the Government and the confirmee.[66]

Confirmation, as a basis of title, relates mainly to imperfect grants of the French, Spanish or Mexican Governments, made prior to the annexation of the territory to the United States, and may consist of the judgment or determination of a board of commissioners organized for that purpose, a judgment or decree of the federal courts, or a special act of Congress. Though it has been held, that a confirmation by law of a claim of title in public lands is to all intents and purposes a grant of such lands,[67] yet it seems that the legal title to lands confirmed to a private person by act of Congress, or by action of Government tribunals, remains in the United States until a patent has issued therefor, and, until then, the confirmee has only an equitable title.[68]

66 Meader *v.* Norton, 11 Wall. 442.

67 Challefoux *v.* Ducharme, 4 Wis. 554.

68 LeBean *v.* Armitage, 47 Mo. 138; Amesti *v.* Castro, 49 Cal. 328. In the settlement of these claims the law has generally provided that a patent of the United States should be issued to the claimant when his claim should have been recognized as valid and entitled to confirmation, yet the patent, in such cases, is only documentary evidence of the existence of the title, or of such equities respecting the claim as to justify recognition and confirmation. Morrow *v.* Whitney, 5 Otto (U. S.), 551; Langdeau *v.* Hanes, 21 Wall. (U. S.) 521.

§ 51. **Occupancy.** Title by occupancy forms a sub-head in Mr. Washburn's admirable work on real property,[69] but this method of acquisition does not now seem to be recognized in the United States, if indeed it ever existed. In its broad sense, it is the right or title derived from an original state of nature; hence the American Indian holds the use and enjoyment of his lands by occupancy, and though this title is respected by the courts until legitimately extinguished, it does not extend to property in the soil and can not be made the subject of transfer, while the Government has ever reserved the exclusive right to extinguish this title by purchase or conquest.[70] In its technical sense it was applied to a method of acquisition once in vogue in England, where one was tenant for the life of another who outlived him. The estate being a freehold did not go to his personal representatives, but not being an inheritance could not go to his heirs; and, as a consequence, no one having a legal right to the remnant of the estate, whoever first occupied it acquired such a title by possession and occupancy that no one could dispossess him. This

69 3 Wash. Real Prop. (4th Ed.) 50.

70 Johnson *v.* McIntosh, 8 Wheat. 543; Fletcher *v.* Peck, 6 Cranch. 87. Immediately after the inauguration of President Washington, he laid before Congress a report from the Secretary of War, acknowledging the Indian right of occupancy, and recognizing the principle of acquiring their claims by purchase for specific consideration according to the "practice of the late English colonies and government in purchasing the Indian claims," and the rule in that respect laid down in the proclamation of Oct. 7, 1763, by the King of Great Britain, interdicting purchases of land by private individuals from Indians and declaring that "if at any time any of the said Indians should be inclined to dispose of said lands," the same "shall be purchased only" for the Crown, the ultimate dominion and sovereignty being held to reside in the discoverer colonizing upon the continent. In accordance with this principle, beginning with the treaty of 1795, at Greenville, the Indian title of occupancy has been gradually extinguished by the United States in all of the States east of the Mississippi, and in nearly all of the States and Territories west of same, leaving, in some cases, remnants of tribes, who have been invested by Congress with allodial titles.

was a title by occupancy.[71] Provision is made in most of the States for an emergency of this kind.

§ 52. **Abandonment and Relinquishment.** This method of acquiring or losing title may be found noted in nearly all works on real property, yet it seems to occupy a most uncertain and indistinct position. Easements and incorporeal rights annexed to land, may be lost by abandonment. So may a homestead. So may an incipient right to land, as a location and survey, or other merely equitable title not perfected into a grant or vested by deed, but legal rights, when once vested, must be divested according to law.[72] "Yet," says one authority, "if a person having the disposing power absolutely, does an act sufficient in itself, legally to divest his title with the express intention of relinquishing and abandoning the property, it is not easy to perceive why he may not do so. Abandonment, it is said, is the relinquishment of a right; the giving up something to which one is entitled. If the owner sees proper to abandon his property, and evidences his intention by an act legally sufficient to vest or divest ownership, why may he not do so in the case of land, as well as of a chattel? It might go to the Government instead of the first occupant, upon the principle upon which land escheated or became derelict." [73] It has been observed, that a man shall be held to intend what necessarily results from his own acts. Consequently, when property is abandoned under such circumstances as to leave no doubt of the fact, no one who has taken possession of it can be required to relinquish it; but abandonment is a question of fact for which no rule can be formulated, and must be decided by the circumstances of each case.[74] It would seem that there is nothing in principle to prevent the owner from abandoning his right of property in land, provided the intention to do so be evidenced by an act or deed legally sufficient to operate a di-

[71] 3 Wash. Real Prop. (4th Ed.) 50.

[72] 4 Kent Com. 448; Picket *v.* Dowling, 2 Wash. (Va.) 106; Dikes *v.* Miller, 24 Tex. 417.

[73] Dikes *v.* Miller, 24 Tex. 417. In this case the owner filed a deed of relinquishment in the General Land Office.

[74] Corning *v.* Gould, 16 Wend. 543; Holmes *v.* R. R., 8 Am. Law Reg. 716.

vestiture of the title, yet this will so seldom occur that a discussion of it seems unnecessary. Ordinarily when title is asserted through this method, it will be found to depend more on long continued adverse possession and rights conferred by the statute of limitations.

Examples of relinquishment may be found in the actions of Congress where property, instead of being granted, is relinquished to the donee, either with or without conditions annexed, yet all of the acts of this character which have come under the observation of the writer, may properly be classed as dedications, notwithstanding the express term "relinquishment" is used as the operative word. This is particularly true where provision is made for reverter.[75]

§ 53. **Eminent Domain.** One of the sovereign attributes of the State, is the right to subject the private property of its citizens to public uses,[76] but with the concurrent obligation to make just and full compensation therefor.[77] Such right is inherent in the State, though usually reserved as well in the organic law — the Constitution; and where it is lodged to any extent in corporations, is limited by the uses for the furtherance of which, on the ground of public policy, it is conferred. Whatever exists, in any form, whether tangible or intangible,[78] is subject to the exercise of this right including the property and franchises of incorporated companies as well as individuals.

The exercise of the right of eminent domain is primarily and mediately the act of the State; and corporations to which it has been delegated, and by which it is immediately exercised, are but instrumentalities of the State, although they may have, and generally do have, corporate interests intermingled and growing out of the exercise of this sovereign prerogative.[79] Though the power can only be exercised for a public use, it has never been deemed essential that the entire community or any considerable portion, should directly enjoy or participate in the

75 See 19 U. S. Stat. 127.

76 United States *v.* Jones, 109 U. S. 513; Johnson *v.* R. R. Co., 23 Ill. 202.

77 Chicago *v.* Larned, 34 Ill. 203.

78 Rigney *v.* Chicago, 102 Ill. 64.

79 Hatch *v.* R. R. Co., 18 Ohio St. 92.

benefits to be derived from the purpose for which the property is appropriated. It is enough if the taking tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the State, or leads to the growth of towns and the creation of new channels for the employment of private capital and labor, such results contributing indirectly to the general welfare and prosperity of the whole community.[80] Compensation is always a condition precedent to the appropriation of the property,[81] and when land is acquired by the public for one particular use no additional burden can be superadded without further compensation.[82]

§ 54. **Title Acquired by Eminent Domain.** The general rule in this country is, that the exercise of the power of eminent domain, particularly when exerted in behalf of corporations, extends only to the use of the property appropriated, and does not include the fee.[83] The easement, however, is usually regarded as perpetual, and as such forms the basis of compensation; but should the use be abandoned, the land, disencumbered of the easement imposed by the appropriation, will revert to the holder of the fee. It is a cardinal rule that every statute in derogation of the right of property, or that takes away the estate of a citizen, is to be construed strictly,[84] and no implication can be indulged in that a greater interest or estate is taken than is absolutely necessary to satisfy the language and object of the statute making the appropriation.[85]

But a fee may be taken as well as a lesser right or interest. It is not necessary that exact or technical language should be

80 Talbot *v.* Hudson, 82 Mass. 417; In Re Gas Co., 63 Barb. 437.

81 Eidemiller *v.* Wyandotte City, 2 Dill. 376; Cameron *v.* Supervisors, 47 Miss. 264; Paris *v.* Mason, 37 Tex. 447; Cook *v.* South Park Commissioners, 61 Ill. 115. This, however, is a constitutional limitation of the right. United States *v.* Jones, 109 U. S. 513.

82 State *v.* Laverack, 34 N. J. L. 201; Hatch *v.* R. R. Co., 18 Ohio St. 92; Craig *v.* R. R. Co., 39 N. Y. 404.

83 Morris *v.* Turnpike Road, 6 Bush (Ky.), 671; R. R. Co. *v.* Burkett, 42 Ala. 83; Cooley's Const. Lim. 559.

84 Sharp *v.* Spear, 4 Hill. 76.

85 Cemetery *v.* R. R. Co., 68 N. Y. 591.

used in a statute, for taking private property for public use, in order to vest the fee in the public, but it must clearly appear that it was the intention of the Legislature, as disclosed by the act itself, to take a fee. If any remaining private ownership is inconsistent with the use for which the land is taken, and compensation is made for the fee, which is also necessary for the full use of the property under the act, a fee will be deemed to have been taken in the absence of express words.[86] In some of the States the fee passes as an incident,[87] and excludes any remaining rights in the former owner, but usually the extent of interest, or quantity and duration of the estate acquired by the exercise of this power, is derived from the specific act of appropriation.

The power is a legislative one, subject to constitutional restrictions, and the only conditions requisite to its exercise are the needs of the public and compensation to the owner; when these conditions exist, the right of the State to withdraw property from private control and subject to public use whatever interest or estate is necessary to accomplish the intended purpose, is complete and perfect,[88] and this interest, according as the Legislature may determine, may consist of an estate for years, for life, a mere easement, a conditional fee, or a fee simple absolute.[89] It would therefore appear that the act of appropriation, whenever the title has passed by the exercise of this power, together with such of the condemnatory proceedings as may be necessary to show the extent of land taken, are necessary links in the chain of title, and should be duly set forth in the abstract.

§ 55. **Escheat.** In its original acceptation, *escheat* was the right of the lord of the fee to enter same when it became vacant by extinction of the blood of the tenant. It was one of the incidents of feudal tenure, and is still occasionally men-

86 Park Commissioners *v.* Armstrong, 45 N. Y. 234.

87 Troy *v.* R. R. Co., 42 Vt. 265; Challis *v.* R. R. Co., 16 Kan. 117.

88 Dingley *v.* Boston, 100 Mass. 544; Haldeman *v.* R. R. Co., 50 Pa. St. 425; Giesy *v.* R. R. Co., 4 Ohio St. 308.

89 Heyward *v.* New York, 3 Seld. 314; Cooley's Const. Lim. § 558.

tioned as marking the feudal origin of American land titles. Nothing but the name, however, is feudal, and is only another instance in which, in our land system, a word is applied in a sense far different from its original meaning, suggesting ideas which have long been exploded.

Escheat, in the United States, depends upon positive statutes. It does not follow as a matter of right, but of expediency. The lord of the fee, holding the ultimate title, might with propriety assert his ownership, but no such right can be claimed by the State, nor is the idea compatible with the full property in land held under an allodial title. It is, however, a universal rule of civilized society that when the deceased owner has left no heirs, his property should vest in the public and be at the disposal of the Government,[90] and by the general rule of the common law, all real property capable of use and possession, and having no other acknowledged owner, is in theory vested in the king as the head and sovereign representative of the Nation; so the State, in its right of sovereignty, is said to possess the ultimate property of all lands within its jurisdiction. When the owner dies intestate and leaving no inheritable blood, the lands vest immediately in the State by operation of law;[91] but some proceeding is necessary on the part of State to assert the title thus acquired, which is accomplished by a procedure sometimes termed "inquest of office," the various steps being prescribed by statute, and culminating in a decree.[92] This decree, together with the preliminary proceedings, forms the record evidence of title derived in this manner. The State on taking lands by escheat, takes the same title as the person last seized, and none other, subject to the same trusts, incumbrances, charges and services to which the property would have been subject had it descended to heirs,[93] the State

90 Bou. Law Dict. 537; 4 Kent Com. *425.

91 People v. Conklin, 2 Hill. 67; Sands v. Lynham, 27 Gratt. (Va.) 291.

92 An escheat may be asserted by an action of ejectment in the usual form.

93 Trust Co. v. People, 1 Sandf. Ch. 139.

being for this purpose a statutory heir in default of known kindred.[94]

§ 56. **Confiscation.** Closely allied to escheat, but resting on a different foundation, is *confiscation,* being the right to appropriate to the use of the State, the property of alien enemies during war. Respecting this power of the Government, no doubt can be entertained. That war gives to the sovereign full right to take the persons and property of the enemy wherever found is conceded. The mitigation of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself.[95] Save in a few instances, during the revolutionary period, this right has been restricted to seizure of personal property until the late civil war, when by act of Congress of July 17, 1862, the right of confiscation of real estate was again asserted. But concurrently with the passage of this act, Congress also adopted a joint resolution explanatory of it, whereby it was resolved that no punishment or proceedings under the act should be construed so as to work a forfeiture of the real estate of the offender beyond his natural life, and courts when passing upon the question have uniformly decided that confiscation proceedings in effect, reach only the life estate of the owner.[96] The condemnation goes to the whole estate, however, and extinguishes all the rights possessed by the original owner, leaving in him no estate or interest of any description which he can convey by deed, and no power which he can exercise in favor of another. The forfeiture is complete as long as it lasts, and the proviso, by way of grace, gives back the land to his heirs upon his death.[97]

94 Wallace *v.* Harmsted, 44 Penn. St. 492.

95 Brown *v.* United States, 8 Cranch (U. S.), 110.

96 Biglow *v.* Forrest, 9 Wall. (U. S.) 339; Dewey *v.* McLain, 7 Kan. 126; Day *v.* Micon, 18 Wall. (U. S.) 156.

97 Wallach *v.* VanRiswick, 2 Otto (U. S.), 202; French *v.* Wade, 12 Otto (U. S.), 132; Pike *v.* Wassell, 94 U. S. 711. In England attainder of treason worked corruption of blood and perpetual forfeiture of the estate of the person attained to the disinherison of his heirs. When

§ 57. **Forfeiture.** The term forfeiture is used, as between individuals, to denote the method by which an interest or estate in lands reverts to a former owner by operation of law, as by a breach of condition in a deed or lease. Forfeitures are not favored in law, and courts eagerly seize hold of any circumstances by which they may be defeated, and where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture upon such compensation being made.[98]

In its more common acceptation it is the means by which the property of the citizen inures to the benefit of the State through the violation of law, and in the United States occurs only in case of confiscation or seizure for taxes. In either case it is in the nature of a penalty, and results as a necessary incident from our reciprocal duties and obligations. As a method of acquiring title it is viewed with disfavor and is of doubtful effect. It is attended with greater formalities than any other form of purchase, and the title derived through it is liable to be defeated by a vast number of contingencies. Ordinarily, titles resting solely on rights derived through forfeiture, for non-payment of taxes or otherwise, are to be viewed with suspicion and accepted with caution, experience having demonstrated in many cases their unsubstantial nature.

the Federal Constitution was formed, this was felt to be a great hardship, and even rank injustice. For this reason it was ordained that no attainder of treason should work corruption of blood or forfeiture of estate, except during the life of the person attained.

98 Life Ins. Co. *v.* Norton, 6 Otto (U. S.) 234.

CHAPTER V.

SOURCES OF INFORMATION.

§ 58. Records.
59. Depositories of records.
60. The right of inspection of records.
61. Doctrine of notice.
62. Constructive notice.
63. Actual notice.
64. Registration.
65. Effect of recording acts.
66. Loss or destruction of records.
§ 67. Official aids to search.
68. Grantor and grantee indexes.
69. Notice *lis pendens*.
70. Plaintiff and defendant indexes.
71. Tax records.
72. Official certificates.
73. Church and parish records.

§ 58. **Records.** An abstract of title, as compiled in the United States, is an abridgment of the public records, to which it also bears the relation of a special index, they being the great repositories of title, and the source from whence the examiner draws the greater part of his information.

A record, it has been said, is a written memorial made by a public officer, authorized by law to perform that function, and intended to serve as evidence of something written, said, or done.[1] The acts of Congress and of the State Legislatures are the highest types of records, while the proceedings and determinations of the courts are scarcely less in dignity, and by statutory enactment the enrollment of deeds, though made primarily to perpetuate the memory of the facts which they recite, is given the operation and effect of records. These records are of controlling efficacy in the State where made, and by the Constitution of the United States it is declared that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." In matters of sales and conveyances of land, records acquire a

1 2 Bou. Law Dict. 424.

new importance from the peculiar American doctrine of constructive notice, which casts a knowledge of their contents and import upon subsequent purchasers, and forms one of the chief incentives to the production of abstracts.

§ 59. **Depositories of Records.** Under the general name of records are classed all official acts of the public officers in relation to title; the adjudications and determinations of the courts; ministerial acts of officers in furtherance of the taxing power, and incidentally all papers, whether filed or engrossed, which affect title by relation and through the operation of law. Popularly the term is applied to the registry of deeds rather than to the other classes mentioned; but all come within its signification, so far, at least, as the purpose of abstract making is concerned, and from all of these varied sources the examiner draws the details which go to make up a full exposition of the title. The registry of deeds furnishes the most fruitful field, and the great bulk of the examination is compiled therefrom, but recourse must also be had to the government archives, the transactions of the State Legislature, the files of all the courts, State and Federal, ordinances of the municipality, and acts of the officers exercising the ministerial duties of taxation. Though easily enumerated, these sources cover a wide field, and one which requires no ordinary ability to fully encompass.

§ 60. **The Right of Inspection of Records.** The right to inspect and copy or abstract the public records is undoubted to those who have a direct interest therein.[2] Not only does such a right result from the plain intendment of the recording acts with reference to the matter of notice, but it has also been assured, in a majority of the States, by statutory enactments providing for the "free examination" of such records by all persons having occasion to inspect them for any lawful purpose. But until very recent years the question has usually arisen only where the right claimed was to inspect or obtain a copy of some particular document, or of documents relating to a given transaction of title. With respect to the right of the

[2] Brewer *v.* Watson, 61 Ala 310; Lum *v.* McCarty, 39 N. J. L. 287; People *v.* Richards, 99 N. Y. 620; Boylan *v.* Warren, 39 Kan. 301.

abstract maker to copy or abstract the entire records of a county for speculative purposes, the question may be considered of such modern origin as not to have been contemplated or covered by the common law authorities relating to the inspection of records;[3] and, while it has been raised to some extent by recent decisions, it has not yet become shaped into any general definite rule or policy of law.

It must be remembered that the abstract maker does not ask for an inspection of a record and abstract thereof, relating to lands in which he claims to have title or interest, or concerning which he desires information in contemplation of acquiring some right or interest, either by purchase or otherwise, and, except when pursuing some special examination, he is not the agent or attorney of parties seeking information because interested or likely to become so. On the contrary, the right is based upon neither a present nor prospective interest in lands, either personally or as a representative of others who have, but is for his own future gain in furnishing information therefrom to third parties for a consideration. In view of these facts the volume of authority seems to lean toward a denial of any right in the abstract maker to demand the inspection and free use of public records, holding that the statutes permitting free inspection were not designed to allow individuals the privilege of copying or abstracting the entire records of a public office in which they have no direct or special interest, or of using them continuously for the purpose of obtaining information to be used for speculation and gain in their private business.[4]

[3] In England, the occasions which generally have required the exercise of the power of the court to enforce inspection of public documents have been those where a party has sought evidence for the prosecution or defense of his rights in pending litigation.

[4] Bean *v.* People, 7 Colo. 200; Cormack *v.* Wolcott, 37 Kan. 391; Boylan *v.* Warren, 39 Kan. 301. In Buck *v.* Collins, 51 Ga. 391, it was said, that the right to make abstracts is a perversion of the purpose for which the books are kept, and in Randolph *v.* State, 82 Ala. 527, the court says, that the right of free examination is the rule, and the inhibition of the privilege when the purpose is speculative, is the exception. So in Brewer *v.* Watson, 71 Ala. 299, it is said:

It is difficult, however, to reconcile the reasoning in some of the cases with the spirit and general policy of the law, or with the just claims of business convenience. The great utility of the professional examiner is a recognized fact, and with the constantly increasing complication of land titles his assistance in their proper adjustment has, in many localities, become an absolute necessity. The position which he occupies in the world of commerce is second to none in importance and responsibility, and the free and unhindered inspection of the records should be accorded him as a matter of public policy and in furtherance of great public interests, if not as a matter of legal right.

Not the least among the reasons assigned in the foregoing class of cases is solicitude for the preservation of the sources of information. The public records, it is said, are the repositories of the rights of persons and of property, and in many cases hold the only evidence of either, and the law imposes upon courts and ministerial officers the duty of their secure

"It is not the unqualified right of every citizen to demand access to, and inspection of the books or documents of a public office, though they are the property of the public and preserved for public uses and purposes. The right is subject to the same limitation and restriction as the right to an inspection of the books of a corporation, which strangers can not claim, and which is only allowed to the corporators, when a necessity for it is shown, and the purpose does not appear to be improper; * * * and the individual who claims access to public records and documents can properly be required to show that he has an interest in the document which is sought, and that the inspection is for a legitimate purpose.

In other States the same general doctrine has been announced in equally emphatic terms. Thus, The Prince George's County Abstract Company was incorporated by an act of the legislature of Maryland, which provided "that said corporation may make and may procure copies and abstracts from the public records of the State and gather information therefrom, and from other sources relating to conveyance of property, real and leasehold, make indexes of all deeds, mortgages, judgments, decrees and other records within the State of Maryland and may examine and guarantee titles to property, real and personal." Under this liberal legislation the Supreme Court of Maryland, in Belt *v.* Abstract Co., 73 Md. 289, declared that said company had not the right to make searches and abstracts of title for their business without payment to the clerk of his statutory fees.

and careful protection and preservation; a protection and preservation which might be greatly jeopardized if every citizen at his will and pleasure should be permitted to inspect, examine and copy them in his own way.[5] It must be admitted that the argument is weak when applied to any particular class as contradistinguished from the general public, and fanciful when applied to actual facts as they are presented in every county in the country. Mutilations of records are rare, and when instances of this kind do occur, it will almost invariably be found that the mutilation has been accomplished by some person having a special interest therein — in other words, by one whom the law says may inspect them. It is a significant fact that the case in which this theory was first advanced,[6] and which has served as the keynote for every subsequent decision of similar import, has since been overruled in the court where it was pronounced.[7] As a matter of fact, no class of the community are more directly interested in the preservation and integrity of the records than the compilers of abstracts, and on more than one occasion their indices and references have been brought into requisition to protect public interests and prevent confusion of titles.[8]

A more liberal view has been taken of this matter in some States and the rule has been announced that, as the records are public, every person has the right to inspect, examine and copy them, at all reasonable times and in a proper way; that ministerial officers charged with the custody of books and records can not deny access to their offices or the books therein

5 Webber *v.* Townley, 43 Mich. 534; Bean *v.* People, 7 Colo. 200; Cormack *v.* Wolcott, 37 Kan. 391; Buck *v.* Collins, 51 Ga. 391; In Re McLean, 8 Reporter 813. In the latter case the judges afterward granted, as an act of grace, what they denied the petitioner to be entitled to as a matter of right. See, also, Re Caswell's Request, 18 R. I. 835.

6 Webber *v.* Townley, 43 Mich. 534.

7 Burton *v.* Tuite, 78 Mich. 363; 29 Am. L. Reg. 60.

8 A notable example is afforded by the great fire in Chicago, in 1871. This conflagration entirely destroyed the public records, and the ante-fire indices of the local abstract makers now furnish the only connected history of land titles in the county prior to that event.

contained to any person coming there at a proper time and in an orderly manner,[9] and that any person so desiring has a right to examine such books and records without charge, not as a privilege or favor, but as a matter of right.[10] Such officers should have the right to make reasonable restrictions as to the manner in which the books shall be examined, and to exercise a discretion as to the matter of the admission of persons to examine and copy when their presence, by reason of numbers, would interfere with the performance of official duties or the convenience of the general public,[11] but this should be the extent of their powers of discrimination or refusal.

In some of the cases in which the right of free inspection, and privilege of copying has been declared, the privilege has been restricted to such persons as are employed to examine or guarantee a particular title, and while, as to such persons, the right is freely conceded it is denied to others.[12]

With respect to the public records of the United States the necessity of interest, as at common law, has been done away with by statute,[13] and any person may examine them or take memoranda therefrom,[14] while the courts of some States have made a distinction between court records and county records, holding that the judicial records of the State should always be accessible to the people for all proper purposes, under reasonable restrictions as to the time and manner of examining them.[15] In the absence of any statute regulating the matter, there can be no doubt as to the power of a court to prevent an improper use of its records, and hence it may deny a request to examine same from motives of mere curiosity, or to gratify spite, or for the purpose of creating public scan-

9 People v. Richards, 99 N. Y. 620; State v. Rachac, 37 Minn. 372; Burton v. Tuite, 78 Mich. 363.

10 Lum v. McCarty, 39 N. J. L. 287; Townshend v. Reg. of N. Y., 7 How. Prac. (N. Y.) 318; Burton v. Tuite, 78 Mich. 363; Hansen v. Eichstaedt, 69 Wis. 538; Newton v. Fisher, 98 N. C. 20; and see State v. Rachac, 37 Minn. 372.

11 People v. Richards, 99 N. Y. 620.

12 Barber v. Guaranty Co., 53 N. J. Eq. 158.

13 9 U. S. Stat. 292.

14 Re Chambers, 44 Fed. Rep. 786.

15 Re Caswell's request, 18 R. I. 835.

dals;[16] but when the object is legitimate and serves a proper purpose, there is no good reason for denying the right of inspection, and this is particularly true after the final hearing or determination of a cause.[17]

§ 61. **Doctrine of Notice.** The principle is well established, that a purchaser of land is chargeable with notice, by implication, of every fact affecting the title, which could be discovered by an examination of the deeds or other muniments of title of his vendor, and of every fact, as to which the purchaser, with reasonable prudence or diligence, ought to become acquainted. If there is sufficient contained in any deed or record, which a prudent purchaser ought to examine, to induce an inquiry in the mind of an intelligent person, he is chargeable with the knowledge or notice of the facts so contained, and generally, a party in possession of certain information will be chargeable with a knowledge of all facts which an inquiry suggested by such information, diligently prosecuted, would have disclosed to him.[18] The purchaser must be presumed to investigate the title, and to examine every deed or instrument forming a part of it, especially if recorded,[19] and to make inquiries *in pais* as well as look at records.[20]

Notice is classified as either *actual* or *constructive;* but there is no difference between them in regard to the legal consequence or effect.[21]

§ 62. **Constructive Notice.** It is scarcely possible to declare *a priori* what shall be deemed constructive notice, because unquestionably that which may not affect one man may be abundantly sufficient to affect another, and Sugden observes, "that every one who has attempted to define what it

16 Schmedding *v.* May, 85 Mich. 1; Cowley *v.* Pulsifer, 137 Mass. 392.

17 See cases last cited.

18 Cambridge Bank *v.* Delano, 48 N. Y. 326; Wilson *v.* Hunter, 30 Ind. 466.

19 Acer *v.* Wescott, 46 N. Y. 384; Chicago & R. R. *v.* Kennedy, 70 Ill. 350.

20 Littleton *v.* Giddings, 47 Tex. 109.

21 Hill *v.* Epley, 31 Pa. St. 335; Morrison *v.* Kelly, 22 Ill. 610; Ellison *v.* Wilson, 36 Vt. 67.

is, has declared his inability to satisfy even himself."[22] The accepted legal definition is, that constructive notice is a legal inference from established facts.[23] Where a party has actual notice of anything by which the title to property is affected, or has the means of knowing the same, he is charged with constructive notice of facts and instruments to a knowledge of which he would have been led by inquiry, and which would have revealed the true state of the title.[24] Such would also be the case when a party has designedly abstained from inquiry for the very purpose of avoiding notice; for the policy of law, and the safety of the public, forbids a person to deny knowledge, while he is so dealing as to keep himself ignorant, and if he omit to make examination and inquiry in a proper case he is conclusively charged with negligence, and with notice of the defects in the title.[25]

In this country it has been uniformly held that the record of a conveyance, executed in conformity to law, operates as constructive notice to all subsequent purchasers or incumbrancers, claiming under the same grantor, of any estate, either legal or equitable, in the same property, provided the conveyance be one which the law requires or authorizes to be recorded;[26] and such purchaser is charged with the duty of exercising diligence in making proper examination touching the rights and equities of others, where the record shows that others have such rights, in the lands he is about to purchase.[27]

A subsequent purchaser is not chargeable with constructive notice of all instruments of record, by whomsoever made, but only of such as lie in the apparent chain of title, or have been made by one in some way connected with the property involved in interest, and brought to his notice.[28]

[22] 2 Sugden on Vendors, 570 (Am. Ed.).

[23] Birdsall *v.* Russell, 29 N. Y. 220.

[24] Knap *v.* Bailey, 79 Me. 195; Carter *v.* Hawkins, 62 Tex. 393.

[25] Barnard *v.* Campau, 29 Mich. 162; Cunningham *v.* Pattee, 99 Mass. 248; and see, 1 Warvelle on Vendors, 316, and cases cited.

[26] 1 Story Eq. Jur. § 403; Tilton *v.* Hunter, 29 Maine, 29; Crockett *v.* McGuire, 10 Mo. 34.

[27] Brush *v.* Ware, 15 Pet. (U. S.) 110.

[28] Carbine *v.* Pringle, 90 Ill. 302.

Hence he is not bound to look for conveyances by or judgments against one in whom the record shows no title.

The doctrine of constructive notice under registration laws has always been regarded as a harsh necessity, and the statutes which create it have always been subjected to a rigid construction.[29] Therefore, only the facts as they appear on the face of the record are deemed binding on subsequent purchasers, and if, from any cause, the real facts are there misstated, as if the wrong land is by mistake described, or the sum for which a mortgage is given is inadvertently omitted, a subsequent purchaser in good faith, relying upon what is shown, will not be affected by the error or omission.[30]

The recording acts, for the purpose of information and constructive notice, have not altered or abolished the rules of equity in relation to actual or constructive notice by other means than the recording acts.[31]

§ 63. **Actual Notice.** That which a person actually sees; or which is specifically brought to his attention, creates an actual notice of the fact. But the general doctrine of actual notice is much broader than this. Where a purchaser has knowledge of any fact sufficient to put a prudent man upon an inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of some right or title in confiict with that he is about to purchase, it is his duty to make the inquiry, and if he does not make it, he is guilty of bad faith or negligence to such an extent that the law will presume that he did make it, and will charge him with the actual notice he would have received if he had made it.[32]

Open, notorious and exclusive possession of land imparts notice of the title of the person in possession,[33] and of every

29 Chamberlain *v.* Bell, 7 Cal. 292.

30 Chamberlain *v.* Bell, 7 Cal. 292; Sanger *v.* Craigul, 10 Vt. 555; Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 288.

31 Bourland *v.* Peoria, 16 Ill. 588.

32 Cambridge Bank *v.* Delano, 48 N. Y. 326.

33 Greer *v.* Higgins, 20 Kan. 420; Mechan *v.* Williams, 48 Penn. St. 241; Cabeen *v.* Breckenridge, 48 Ill. 91; Tuttle *v.* Churchman, 74 Ind. 311; Hawley *v.* Morse, 32 Mo. 287.

fact which the purchaser might learn by inquiry,[34] but this rule does not apply to a vendor remaining in possession, so as to require a purchaser from his grantee to inquire whether he has reserved any interest in the land conveyed. So far as the purchaser is concerned, the vendor's deed is conclusive on that subject.[35] While it is true, that the law regards the actual occupancy of land as equivalent to notice of the claim of the occupant, to all persons dealing with the title, yet this is not an absolute proposition, which is to be taken as true in all possible relations, other than the one last noticed. The known circumstances may be such that the occupancy will not suggest to a purchaser an inquiry into the title or claim of the occupant, and when the inquiry may be omitted in good faith and in the exercise of ordinary prudence, no one is bound to make it. Possession out of the vendor and actually in another person ordinarily suggests an inquiry into the claim of the latter, and a failure to make such inquiry evinces gross neglect, but the question in such cases is one of actual notice, and such notice will be imputed only where it is a reasonable and just inference from the visible facts.[36]

As distinguished from constructive notice, actual notice consists in express information of a fact brought home to a party, or a knowledge of circumstances which should lead him to a knowledge of such fact. Its existence is always a question of fact, open to rebuttal or explanation, while, on the other hand, constructive notice is a presumption of law which can not be rebutted.[37]

§ 64. **Registration.** The system of registration practiced in the United States is unknown to the common law and is essentially a creation of the statute. It is doubtless derived from the English statute of enrollments, which was enacted to coun-

[34] Tankard *v.* Tankard, 79 N. C. 54; Pritchard *v.* Brown, 4 N. H. 397.

[35] Van Keuren *v.* R. R. Co., 38 N. J. L. 165; Tuttle *v.* Churchman, 74 Ind. 311; *contra*, White *v.* White, 89 Ill. 460.

[36] Pomeroy *v.* Stevens, 11 Met. 244; Dooly *v.* Walcott, 4 Allen, 406; Jackson *v.* Elston, 12 Johns. 425.

[37] Tufts *v.* King, 18 Pa. St. 157; Bradbury *v.* Falmouth, 18 Me. 65; Birdsall *v.* Russell, 29 N. Y. 220.

teract the evil effects resulting from the practice of secret conveyances under the statute of uses. This statute provided that every bargain and sale of an inheritance or freehold should be by deed indented and enrolled within six lunar months from its date, either in one of the courts of Westminster, or before the justices and clerk of the peace in the county where the lands were situate. The enrolling of a deed did not make it a record, however, but it was recorded "to be kept in memory." [38]

By the American system of registration, deeds of conveyance of any estate or interest in land, when duly recorded in conformity with the law of the State where such land is situate, have the dignity and effect of records, and to them much of the stability of our land titles is attributable. Such record not only serves as a means of preservation of the muniments and evidences of title, but also has the effect of giving to the transfer that notoriety formerly obtained by livery of seizin, to which it is made equivalent in some of the States by statute.[39] The statutes of registration bear a close similitude in all the States, and provide generally for the recording of every instrument in writing, by which any estate or interest in land is created, aliened, mortgaged or assigned, or by which the title to land may be affected either in law or equity.

§ 65. **Effect of Recording Acts.** It is a familiar provision of the recording acts, that every conveyance which shall not be recorded as provided by law, shall be void against any subsequent purchaser in good faith, and for a valuable consideration, of the same land, or any portion thereof, whose deed of conveyance shall be first duly recorded; and further, that every instrument recorded in the manner prescribed by statute, shall, from the time of filing same for record, impart notice to all persons of the contents thereof. It would seem, however, that the constructive notice afforded by the record of a deed, ap-

[38] Jacob's Law Dict. 457; Tiffany on Registration. It will be perceived that only one class of deeds was required to be enrolled, to-wit: bargain and sale of an inheritance. This developed the form of conveyance by lease and release, which for many years was the popular mode of conveyance in England and which required no enrollment or other form of publicity.

[39] Higbee *v.* Rice, 5 Mass. 344.

plies only to those who are bound to search for it; as subsequent purchasers, and all others who deal with or on the credit of the title, in the line of which the recorded deed belongs.[40] That such record imparts notice, is to be understood also, in the sense that the contents of the deed are correctly spread upon the record,[41] for the recording acts can not be made by equitable construction to embrace cases not within them, or to give constructive notice of things the records do not show; and where a mistake is made in recording, a subsequent purchaser has a right, in the absence of actual notice of the mistake, to rely on the records as showing the exact facts.[42] But incorrect registration can not avail a party who is not misled thereby.[43]

It would further seem, that instruments to impart notice, must be recorded in the proper books. Thus, where separate books are provided for deeds and mortgages it has, in some instances, been held that a mortgage recorded in a book of deeds will not furnish constructive notice.[44] So also, the registry of an instrument not required by law to be recorded is notice

40 Maul *v.* Rider, 59 Pa. St. 167; Corbin *v.* Sullivan, 47 Ind. 356; Gillett *v.* Gaffney, 3 Col. 351.

41 Terrell *v.* Andrew County, 44 Mo. 309; McLouth *v.* Hurt, 51 Tex. 115.

42 Frost *v.* Beekman, 1 John. Ch. 288; Barnard *v.* Campan, 29 Mich. 162; Wait *v.* Smith, 92 Ill. 385; compare Riggs *v.* Boylan, 4 Biss. 445. As was said by the court in Terrell *v.* Andrew County, 44 Mo. 309: "A person in the examination of titles, first searches the records, and if he finds nothing there he looks to see if any instruments are filed and not recorded. If nothing is found, and he has no actual notice, so far as he is concerned the land is unincumbered. If he finds a conveyance, he goes no further; he never institutes an inquiry to find whether the deed is correctly recorded or the contents literally transcribed. Indeed to attempt to prosecute such a search would be idle and nugatory. Grantees do not usually leave their deeds lying in the Recorder's office for the inspection of the public. After they are recorded they take them away and keep them in their own possession. In a large majority of cases, it would not only entail expense and trouble, but it would be useless to attempt to get access to the original papers."

This is a vexed question; the text states the preponderating view but in several States a contrary doctrine is held. See Mangold *v.* Barlow, 61 Miss. 593; Mines *v.* Mines, 35 Ala. 23; Throckmorton *v.* Price, 28 Tex. 605; Clader *v.* Thomas, 89 Pa. St. 343.

43 Gaskill *v.* Badge, 3 Lea (Tenn.), 144.

44 Cady *v.* Purser, 131 Cal. 552.

to no one,[45] and, in the absence of statutory provisions to the contrary, a deed is not constructive notice, because copied into the registry, if it has not been duly executed, acknowledged or proved, so as to entitle it to registration,[46] though such an instrument is effective as to all parties who have actual notice of its contents.[47]

Registration in legal intendment is conclusive notice to the parties to be affected by it. But notice of a prior unrecorded deed, communicated to a purchaser, will prevail over a subsequent recorded deed,[48] and as between the immediate parties no registration is necessary, an unrecorded deed having the effect to carry the legal title as against all persons having actual notice of its existence.[49]

It will often happen that in sparsely populated localities a large area will be devoted to the purposes of a single county. As the country develops and population increases this area is divided into possibly several counties. In such event, unless there has been a provision for the transfer of records, it may become necessary to extend searches into more than one county, or into counties other than that in which the land in question is situate. This results from the rule, now very generally observed, that a change of county boundaries does not impose the duty of re-recording deeds where lands are thrown into a new or different county from the one of which they originally formed a part, and where an instrument has once been properly lodged for record in the county where the land is then situate, it will continue to impart constructive notice to all persons subse-

[45] Galpin *v.* Abbott, 6 Mich. 17; Sigourney *v.* Larned, 10 Pick. 72.

[46] Loughridge *v.* Bowland, 52 Miss. 546; Pringle *v.* Dunn, 37 Wis. 449; Blood *v.* Blood, 23 Pick. 80; Bishop *v.* Schneider, 46 Mo. 472; Parrett *v.* Shabhut, 5 Minn. 323; Washburn *v.* Burnham, 63 N. Y. 132; Jones *v.* Roberts, 65 Me. 273.

[47] Bass *v.* Estill, 50 Miss. 300; Musick *v.* Barney, 49 Mo. 458; Musgrove *v.* Bonser, 5 Oreg. 313. Where upon the records a defective deed is found and is seen, this must be regarded as actual notice, such as every reasonable and honest man would feel bound to act upon. Hastings *v.* Cutler, 25 N. H. (4 Fost.) 483.

[48] Claiborne *v.* Holmes, 51 Miss. 146.

[49] Musgrove *v.* Bonser, 5 Oreg. 313.

quently dealing with the land notwithstanding such land has been attached to another county and no record of the conveyance has been made in such latter county.[50]

66. **Loss or Destruction of Records.** The obligation of giving the notice required by law rests upon the party holding the title, and if his duty is imperfectly performed, he, and not an innocent purchaser, must suffer the consequences;[51] yet in a majority of the States that duty is effectively performed by filing the deed or instrument for record, and when this has been accomplished, the party has done all that the law requires.[52] Where a party has in all respects complied with the law the total or partial destruction of the record will not, it seems, impair any rights which may have accrued thereunder nor affect the constructive notice afforded by the filing or recording of the instruments, which still remain of binding force and effect upon subsequent purchasers.[53] In the event of the destruction of the record, as well as of the original instrument, an abstract, shown to have been made in the ordinary course of business, and delivered to the parties interested in the land, is, as to such lost instrument, competent evidence of the facts therein recited, either by comity, or, in some States, by express enactment;[54] but where such abstract is unintelligible without the aid of some proof to explain the meaning of abbreviations and initial letters used therein, unless some stipulation has been made which determines what effect shall be given to them, it would seem that the abstract is insufficient to establish title.[55]

For this reason, among many others that could be adduced, an abstract should always be so written that its contents may be read and understood by anyone. Abbreviations, as far as possible, should be avoided.

50 Geer *v.* Mining Co., 134 Mo. 85; Koerper *v.* Ry. Co., 40 Minn. 132.

51 Terrell *v.* Andrew County, 44 Mo. 309.

52 Riggs *v.* Boylan, 4 Biss. 445; Hook *v.* Fenner, 18 Colo. 283; Beebe *v.* Morrell, 76 Mich. 114.

53 Meyers *v.* Buchanan, 46 Miss. 397; Gammon *v.* Hodges, 73 Ill. 140; Steele *v.* Boone, 75 Ill. 457; Deming *v.* Miles, 35 Neb. 739.

54 Russell *v.* Mandell, 73 Ill. 136.

55 Weeks v. Dowing, 30 Mich. 4.

§ 67. **Official Aids to Search.** No perfect abstract can be compiled without the assistance of a carefully prepared tract index, the details of which will be fully considered in another place; and should the county records be supplemented with this indispensable adjunct, the searcher will have less difficulty and experience more satisfactory results. Presuming, however, that no books of this character are provided by the public authorities, recourse must be had to such doubtful aids as by law the various officers are required to keep. These consist ordinarily of a series of alphabetically arranged indexes with brief descriptions of the property. Well kept, they will be of much assistance; if otherwise, they will prove very misleading. In all sales of real estate, where no better methods are available, these indexes should be carefully consulted and a rough chain obtained, which, by reference to the records, can be amplified into an abstract.

§ 68. **Grantor and Grantee Indexes.** The grantor and grantee indexes of the Registry of Deeds, will show the successive conveyances and incumbrances under the names of the various parties who at different times have held the title, where there has been no break in the chain, together with the volume and page of the record on which the instruments may be found. Adverse deeds, unless within the knowledge of the examiner, can rarely be found by this method, or if found are usually the result of accident rather than design. If only an index to grantors is provided it will be almost impossible to detect adverse deeds. Should a brief description of the property be carried out, as is usually the case, ending with the section, town and range, in proper columns, these columns should always be carefully run down for any conveyances that may have escaped the searcher's attention, while going over the names.

While it may be the duty of the recorder to keep a proper index of his books of registration, so that one searching the records may easily find what is contained therein, yet a deed of conveyance properly filed and copied on the records is recorded within the meaning of the law, and imparts notice to subsequent

purchasers, notwithstanding the failure of the recording officer to index it. The index is no part of the records.[56]

In a very few States, perhaps, these latter statements may not apply, for in several instances it has been held, under statutes which require the recorder to keep indexes, that a deed cannot be considered as legally recorded until the proper entries of at least its essentials have been made in the general index,[57] while some decisions go so far as to declare that the index itself is an essential part of the record.[58]

Index entries are, however, frequently held sufficient to charge notice,[59] and this too, even though no description of the property is entered, but simply the words, "see record"[60] or "certain lots of land;[61] nor is it necessarily and essentially a prerequisite to a valid registration that the index should contain a description of the lands conveyed,[62] and if it discloses enough to put a careful and prudent examiner on inquiry, and if, on such inquiry an adverse title would have been ascertained, the party will be held to have received notice.

[56] Bishop *v.* Schneider, 46 Mo. 472; Chatham *v.* Bradford, 50 Ga. 327; Board of Commissioners *v.* Babcock, 5 Oreg. 472; Ins. Co. *v.* Dake, 87 N. Y. 257; Curtis *v.* Lyman, 24 Vt. 338; Glading *v.* Frick, 88 Pa. St. 460. The index is not, as a rule, made essential by statute, and though the courts in some instances seem to have indicated that it is a material part of the records the reasons therefor do not seem to be sound or in consonance with the general doctrine on this subject. "The principle," observes White, J., "that would justify the holding the index to be essential to the effective character of the record in the case of conveyances, would seem to require that the index to be kept by the clerk should be regarded as essential to the lien of judgments; yet no one, we suppose, would claim that the effect of a judgment was dependent on the act or omission of the clerk in making the index." Green *v.* Garrington, 16 Ohio St. 548; but see Howe *v.* Thayer, 49 Iowa, 154; Lombard *v.* Culbertson, 59 Wis. 433.

[57] Hiles *v.* Atlee, 80 Wis. 219; Hewitt *v.* Week, 59 Wis. 444; and see, Howe *v.* Thayer, 49 Iowa, 154.

[58] Ritchie *v.* Griffiths, 1 Wash. 429.

[59] Pringle *v.* Dunn, 37 Wis. 449; Maxwell *v.* Hartman, 50 Wis. 667.

[60] White *v.* Hampton, 13 Iowa, 260.

[61] Bostwick *v.* Powers, 12 Iowa, 456.

[62] Barney *v.* Little, 15 Iowa, 535. Local statutes will go far in the solution of this vexed question. In most cases where index entries are given effect as records there will be found statutes which have shaped the decisions of the courts.

§ 69. **Notice Lis Pendens.** As a further precaution careful search must always be made for notices *lis pendens,* and attachments. These are usually kept in books separate from the records of deeds and mortgages, and very frequently are not noted on the reception or alphabetical indices, particularly in smaller counties where less method is observed than in larger and more active places. When filed according to law they create liens upon the land to which they relate, and afford notice to all subsequent purchasers. Whoever takes a title to property in litigation will be bound by the judgment or decree that may be rendered in the suit.[63]

§ 70. **Plaintiff and Defendant Indexes.** The plaintiff and defendant indexes of the courts, when such are kept, should be further consulted for judgments against any of the parties, who at any time during the period that judgments are a lien on land, have held title to the property in question. The matter of pending suits, in which the title to land is involved, may also be ascertained from the defendant's index. Where no notices *lis pendens* are required to be filed with the recorder of deeds, as is the case in many States, this, perhaps, will be about the only way in which the examiner can ascertain the facts. The index generally shows the present status of the case and refers to other records or files where its history may be obtained.

These books will be found far more satisfactory in their results than the indexes of the recorder's office, though not always available to detect adverse matters. Should these useful books not form a part of the machinery of the clerk's office, recourse must be had to the judgment docket.

§ 71. **Tax Records.** A further search must also be made in the records of the county clerk's or auditor's office for delinquent taxes, tax sales, forfeitures and judgments, the indices and aids by way of reference in this department being usually very ample, and affording all the information necessary.

§ 72. **Official Certificates.** It is frequently the custom of the examiner to append to an abstract of this character, the

63 Crooker *v.* Crooker, 57 Me. 395; Leitch *v.* Wells, 48 N. Y. 585; Jackson *v.* Warren, 32 Ill. 331.

certificates of the officers having the custody of the records examined, yet in a majority of cases such certificates do not materially enhance the value of the examination as evidence, and unless forming a part of their official duty create no responsibility on the part of the certifying officers.

§ 73. **Church and Parish Records.** It is not customary for examiners of title to extend their inquiries beyond the public records kept pursuant to law, nor will the exigencies of many cases demand a wider scope. The admirable system of registration which exists in every State is amply sufficient for almost every purpose connected with the development of title and the preservation of the muniments by which same is evidenced. But occasionally a missing link — birth, death, or marriage — can only be supplied by evidence *aliunde* the record, and to effect this, recourse must be had to less reliable testimony.

Church or parish records are frequently resorted to in the determination of doubtful questions of pedigree — proof of birth, or death of ancestor, as well as to settle questions of legitimacy in matters of succession. Nor is there any good reason why a parish register should not be received and credited. It has been held that they serve a purpose equivalent to that served by family records, and are fairly to be dealt with as equivalent to corporation records, which are generally taken as evidence of such matters as are recorded in the usual course of affairs.[64] While there is not much authority on the subject in this country, yet all the analogies and reasons which apply to other presumptively correct documents apply to these.[65]

[64] Hunt *v.* Chosen Friends, 64 Mich. 671.

[65] The question was decided in favor of such entries in an early case in the Supreme Court of the United States, where the entries of burial in a church in Philadelphia were held admissible in a land controversy in Kentucky, tried in one of the United States Courts. It was there expressly held that they were competent testimony. Lewis *v.* Marshall, 5 Pet. (U. S.) 470.

CHAPTER VI.

INDICES AND REFERENCES.

§ 74. Importance of indexes.
75. Patent systems.
76. The Government tract book.
77. Field notes of Government surveys.
78. The original entry books.
79. Document number index.
80. Long form entries.
81. The tract index.
§ 82. The irregular index.
83. The tax index.
84. The judgment index.
85. Decrees and sales in chancery.
86. Vowel index.
87. Laying out the books.
88. Resume.

§ 74. **Importance of Indexes.** In many portions of the United States no indexes are kept by the examiner of titles, who relies, in the preparation of his abstract, solely upon such meager facilities and aids as are usually afforded by the public offices, the details of which were considered in the preceding chapter. A perfect and complete abstract however, can be compiled only with the assistance of properly prepared indices and references. By the aid which they afford the examiner will be enabled to produce a perfect chain of recorded title, however intricate or complicated it may be, while without them diligence and learning will avail but little, and the abstract, as a necessary consequence, will be incomplete and lacking in many important particulars.

§ 75. **Patent Systems.** In this age of labor-saving inventions it is not strange that many schemes should have been devised to lighten and abridge the labors of the examiner in the preparation of abstracts of title. These "systems" are usually protected by copyright or letters patent, and are warranted by their respective originators and proprietors to be fully adequate for every purpose and equal to all the exigencies that can possibly arise. Not infrequently some of these patent systems possess elements of merit, and, in a limited way, may encom-

pass the end for which they are designed. Experience has not demonstrated their usefulness, however, but on the contrary, in most cases, has shown their utter inutility. As a rule they are highly chimerical, and in practice generally prove a fraud, a delusion and a snare.

There is no royal road to abstract making, and the examiner who desires to produce only just and perfect work will derive but little assistance from any method that seeks to dispense with conscientious labor or to avoid the deep and thorough investigation essentially necessary to a full and accurate development of title. An abstract prepared by any of the patent methods which have been brought to the attention of the writer, if at all complicated or involving intricacies of title, must needs be imperfect, and hence unreliable, and counsel should reject such compilations, or at most pass only a qualified opinion. The methods detailed in this volume are neither patent nor copyright systems. They are the results of years of practical experience, and are those now employed by the abstract makers of Chicago, where this science has been more fully developed than in any other place in the world. They are freely given to the profession and may be used by any person.[1]

We may now direct our attention to the necessary equipment of a well appointed abstract office and the books that will be required for the proper and expeditious transaction of the business of abstract making.

§ 76. **The Government Tract Book.** Among the permanent archives of a local government land office are a series of township plats and tract books, upon which it is the duty of the Register to note a proper entry of the fact of the sale of any land in the district. These tract books are arranged in the regular order of townships in a range, and of sections in the township, or fractional township, and afford all the necessary particulars of the method of the disposal of the land in

1 This book is fully protected by copyright, and no person may appropriate any part thereof without permission of the author. But the various methods herein described are given to the profession and may be used by any person.

the district; description of land sold; name of purchaser; price paid; number of certificate, etc. Where the land office is still in operation these particulars can be obtained from the Register, and in districts where same has been discontinued, the archives are usually deposited, in pursuance of an act of Congress, in the office of the Secretary of State, or some other designated officer of the State, in which the land office was situate. A copy, or compilation, of the Government Land Office records forms the foundation of the examiner's indices, and will be found an invaluable adjunct, if not an indispensable requisite, to all effective examinations showing the entire course of title. This index should briefly indicate the governmental description of the land; the name of the purchaser; the character of the entry, as sale, homestead, etc.; the date of entry; number of certificate, and note of cancellation[2] and re-entry, if any; and finally the issuance of patent, with date and name of patentee. Recourse for the latter information must be made to the General Land Office at Washington, if necessary, as the possession of the information is essential and will save much time, annoyance and many perplexing questions to client and counsel, owing to the usual loose methods of early proprietors and the imperfection of county records.

§ 77. **Field Notes of Government Surveys.** The field notes of the government surveyors afford the elements from which the plats and calculations in relation to the public surveys are made, and are the source wherefrom the description and evidence of locations and boundaries are officially delineated and set forth. They contain a minute record of all the official acts of the surveyor in relation to the measurement of the public lands, establishing of boundaries, etc., and present, as far as possible, a full and complete topographical description of the country surveyed. A copy of these notes, as well as of the official township plats made in connection therewith, should

[2] The Commissioner of the General Land Office has power, for cause, to cancel entries of public lands. See, Parsons v. Venzke, 4 N. Dak. 452, for a very full and lucid discussion. And see, Jones v. Meyers, 2 Idaho, 793.

be found in every abstract office, for the field notes of the original survey enter into and form part of the description of land in all the certificates of entry and patents from the government, and are of controlling importance in determining the true location of public lands.[3]

The original monuments, as long as they can be ascertained, afford the most satisfactory if not conclusive evidence of the lines originally run, which are the true boundaries of the tract surveyed, whether they conform to the plat and field notes or not, on the principle that monuments always control courses, distances, quantity, etc. These monuments are regarded as facts, while the field notes and plats indicating courses, distances and quantities, are but descriptions which serve to assist in ascertaining the facts,[4] yet when such monuments become lost or obliterated by time, accident or design, the notes and plats are all that remain to fix the original location of the monuments and determine true boundaries.[5] No description can be more definite, certain and satisfactory than according to government survey.[6]

§ 78. **The Original Entry.** The books used in the business of abstract making resemble, in many particulars, those in common use in mercantile transactions, the day book and ledger of the merchant bearing a strong analogy to the original entry and index of the examiner. The series of books designated as "original entries," comprise an epitome of the transactions of the day in the various record offices of the county, so far as the same may in any way affect or implicate the title to land, set forth with whatever degree of fullness the exigencies of the occasion will admit, or the inclination of the examiner may dictate. There is no special method of arranging these books, the convenience of the compiler usually determining this point, the only essential being that the transactions of the

[3] Hunt *v.* Rowley, 87 Ill. 491.

[4] McClintock *v.* Rogers, 11 Ill. 279; Watrous *v.* Morrison, 33 Fla. 261; Kincaid *v.* Dormey, 47 Mo. 337.

[5] Sawyer *v.* Cox, 63 Ill. 130; Bauer *v.* Gattmanhausen, 65 Ill. 499.

[6] Kruse *v.* Scripps, 11 Ill. 93.

day are shown under proper chronological heads. Where the volume of business daily passing through the recorder's office is very large, only a brief note, showing the nature of the instrument, parties, date, and a condensed description of the property, can be shown on the original entry, the date at the top of the page showing the date of filing for record, thus:

Nov. 29, 1882.

Doc. No.	Grantor.	Grantee.	Inst.	Date.	Description.

In Chicago, where from two to three hundred instruments frequently pass through the recorder's office in a single day, the above method is pursued, the examiner making his entries from the original instruments, the only practical system under circumstances similar to the foregoing. This information may also be obtained from the reception indexes of the recorder's office, should such books be kept, and while this might be sufficient in a majority of cases, yet oversights or omissions are liable to occur, particularly where the deeds are noted in alphabetical and not numerical order. The danger is apparent when it is remembered that, where a deed properly acknowledged and certified, is left for record with the recorder, it takes effect from that date, although not entered on the receiving book until afterward.[7]

It will sometimes happen that errors are made by the recording officer in transcribing. Where the examiner's entry is made from the original document these errors may be detected and corrected on the compilation of abstracts. In practice this is a circumstance of not infrequent occurrence.

Where the original instrument forms the basis of the entry a further index is necessary to furnish the book and page of

7 Poplin *v.* Mundell, 27 Kan. 138; and see Haworth *v.* Taylor, 108 Ill. 275.

the record for ready reference in making the abstract, which is easily accomplished where the now very common system of document numbers is employed. After the instrument has been formally filed for record the actual transcribing does not occur for several days or perhaps weeks, yet as the instrument takes effect and operates as constructive notice from the time it is filed, from obvious reasons the examiner must obtain his notes of same at that time and not wait for the uncertain contingency of actual transcription. The document number is placed on the instrument at the time of filing, and forms a portion of the original entry; it is posted as well on the tract index, and in making up the chain, as hereafter explained, furnishes a key by which the particular instrument is always identified.

§ 79. **Document Number Index.** As the numbers run in consecutive order, a book called the Document Number Index is provided, in which all the numbers of the series are first written or printed. At the close of business hours of each day, all the instruments which have been transcribed during the day are collected, and opposite the number of the deed in the Document Number Index, are written the book and page on which it has that day been recorded, thus furnishing a ready and easy reference to the books of the office, thus:

1—100.

Doc. No.	Book.	Page.	Doc. No.	Book.	Page.
100	614	520			

§ 80. **Long Form Entries.** Whenever practicable, the original entry may consist of a full abstract of every instrument. In the cities this is frequently impossible, but in sparsely settled counties, or in places where only a small number of conveyances are filed daily, it can easily be accomplished, and the

examiner will then have, in his own possession, a complete duplicate of the material parts of all the records of the county, an acquisition that circumstances may make of inestimable value. By this method the greater portion of the abstract can be compiled without consulting the records, thus effecting a great saving of time, labor and expense, and in many other ways it will be found equally advantageous. It is unnecessary to dilate on the subject of care and accuracy in the compilation of these entries, or the necessity of thorough revision. When made in short form from the original documents, errors may be detected on abstracting the deed from the records, but if the long form system be used, an error perpetrated in the entries will be repeated in the indexes, and again in the abstract, furnishing endless confusion and a remote possibility of a law suit for damages.

While this method possesses obvious advantages it is not without disadvantages. An abstract is presumed to represent the actual condition of the record and to have been compiled therefrom. The record may be erroneous, but in such case so also should the abstract. The examiner's entry may be a correct synopsis of the instrument, but if the abstract is made from such entry and not from the record it may not be a true recital of the instrument as it appears upon the record. For this reason, even when a long form of entry is used, the abstract should be compiled from the records rather than from the entries, and if divergencies appear they should be properly noted. In any event, even though the abstract may be prepared from the examiner's own long form entries it should nevertheless be compared with the record before it leaves his hands.

§ 81. **The Tract Index.** The Tract Index occupies much the same position in the abstract office, that the great ledger does in the counting room. It is the receptacle for all the notes of the entry books, where the great mass of each day's transactions is separated, classified and arranged, and exhibits at a glance on its broad pages the balance sheet of all the land titles of the county. It is the foundation stone upon which the entire superstructure of the business rests, and the source from whence

the examiner draws all his primary information in preparing the abstract. This index is arranged with sole reference to the land in the county, by sections or parts of sections in case of unsubdivided lands, and by lots, blocks or subdivisions in respect to such as have been resurveyed and platted. For convenience it should contain, as far as practicable, all the specific allusions to particular tracts found upon the records, whether consisting of deeds, agreements, releases, attachments, sales, *lis pendens,* or other instruments, in any way affecting title to such tracts, or mentioning same, or any part thereof. In addition all other instruments, capable of definite location, though containing no description, should, as in case of specific instruments, be posted under the particular classification to which they properly belong. For ordinary use six or eight quire demy [8] books will be found the most serviceable, the number of volumes being regulated by the size of the county, population, prospects, etc. The books should be ruled across with heavy and faint blue lines, and the page divided with red lines in the following proportions:

SEC. 16—1—23.

2002	Jno. Doe & wf	Rich'd Roe	N W ¼ N W ¼	M.	1-16-78 / 2-10-78	1—25 / A—515

The foregoing sample page would be posted from the original entries as follows: the left hand column is filled by the document number, the second column by the grantor's name, the third by the grantee's, while the wide space next following

[8] The demy page is recommended mainly on account of its width, but cap size is more convenient for handling. The demy sheet is 16x21, making a page 16x10½; the cap page is 14x8½. For the original entry a four quire cap is recommended. Should a double page be devoted to the tract index cap will also be found to be the more convenient form.

is devoted to a brief description of the property. The nature of the instrument, indicated by the initial letter or some abbreviation, occupies the next space, while in the two succeeding columns much information may be condensed into little space by writing on both the heavy and faint lines. Thus, in the first column the upper line is intended to represent the date of the instrument; as, first month, sixteenth day, 1878, the lower line in like manner representing the date of record. So, in the last column, the upper line will represent the book and page of the entry, which, if written *in extenso* will be the only reference needed on making the chain, the entry supplying all the desired information that could be afforded by the record; the lower line of this column represents the book and page of the record. Should the examiner so desire, another column may be added, in which are noted "remarks," notes of reference, satisfactions, re-records, etc., all of which will be found to greatly enhance the value of the volume.

In posting these books, economy of space should always be kept in view, otherwise they will soon become numerous and cumbersome, greatly retarding the examiner's labors. The faint lines should always be used in case of long descriptions, and the poster is allowed considerable latitude in the matter of abbreviation and condensation. So long as the identity of the parcel is preserved the description used in this book is of little moment; for it will be remembered this is but an index to the place where the full and original description may be found. For example: A description commences at the northeast corner of the northeast quarter of a stated section, town and range, and describes in a lengthy manner, by metes and bounds, an irregular shaped tract which contains eleven acres, the description ending at the place of beginning. It will save time and space, and be just as correct as an index, to post the parcel as "11 ac. in N. E. cor. N. E. ¼."

§ 82. **Irregular Index.** This index is designed as a receptacle for all matters, except judgments, that from their nature do not admit of specific posting in the tract indices. Of this nature are general powers of attorney, unless the examiner

sees fit to keep a separate book for same; releases and satisfaction pieces, which describe no property and are incapable of definite location; general confirmations, assignments, affidavits, etc. The index consists of two books, arranged alphabetically, by grantors and grantees, and is used, in compiling the chain, in exactly the same manner as the judgment indices. It is posted in the same manner as the tract index, except that in place of the description of the property is noted a brief statement of the subject-matter of the instrument, the other details being the same. In all compilations this index should be carefully searched for the names of all parties, grantor and grantee, who at any time during the period covered by the examination have held title to the land in question, or possessed any equities therein. In case of variance in the orthography of a name it is advisable to post it both in the category to which the spelling of the name would properly consign it, and in the section where the examiner has reason to believe it rightfully belongs. Thus should the name as found be "Lauson" and the examiner from other indicia have reason to believe the name is "Slauson," the two names, to insure accuracy, should be noted on the index, the latter being identified by any system of marks the examiner may adopt to show that it is a substitute.

§ 83. **Tax Index.** With the exception of sales for taxes, everything capable of such treatment should be posted in the tract index. Tax sales, however, can best be handled in a separate volume, and as a large portion are followed by redemption much dead matter will thus be kept off those books. This index is posted after every sale, and should be arranged to show: the description of the property; the name of the person against whom the tax is assessed; the nature of the tax for which the sale was made, as general, special, state, county, municipal, special assessment, and the like; the amount of the tax; the year for which it was levied; the date of sale; and if desired the name of the purchaser. On the right hand margin of the page a space should be left on which may be entered the fact of redemption. At the top of the page the section or subdi-

vision is written, as in the tract index. In compiling the chain of title this book is consulted in the same manner as the tract index, and a list of all the sales, forfeitures, etc., taken off, which is then sent to the office of the custodian of the tax records and verified by his books. All the redemptions are stricken from the chain, and existing liens shown as hereafter directed. A note of all the redemptions is then made in the index, thus:

SEC. 10 —12 — 14.

S W ¼ S W ¼	Thos. Higgins	Gen	1880	Apr 10 1881	10, 80	S. R. Smith	Red. June 1, 81

Should circumstances permit the examiner to procure a daily list of redemptions, this index would be much more servicable, and considerable labor would be saved in preparing the abstract. Such a course, however, is rarely practicable, and the method above indicated is that usually followed.

It has now become a common practice for examiners of title to show special assessments and impositions of like character. When this is done the better way is to keep a special index to all confirmed special assessments and where inheritance taxes are levied on the estates of decedents a further index covering these matters should also be provided. Confirmed special assessments may be noted on the general tract index and inheritance taxes might be posted in the irregular index, but the better plan, and that which is conducive to the best results in abstract making, is to keep special indices in both cases.

§ 84. **Judgment Index.** The Judgment Index consists simply of an alphabetically arranged index of names, taken from the court files exery day, and shows: the name of the judgment debtor; the plaintiff or judgment creditor; the court in which the judgment is docketed; the general number of the case; the time of rendition or docketing; the amount of the judgment and costs, and the fact of satisfaction in the same

manner as tax liens. In practice this book is used the same as the tax index. The following will be found a suitable form for the page:

201	Smith, John R.	Union Towing Co.	Circuit	Mar 10 1881	150 00	15 00	Sat. Mar. 15, 1882

If desired, a further column may be added, showing the nature of the suit. This book is used only for money judgments, or such as create a lien on land. Decrees in chancery, or actions and proceedings directly involving the title to land, are posted in the general tract indices.

§ 85. **Decrees and Sales in Chancery.** No separate index need be kept for proceedings in court of an equitable nature. For pending suits a note of the *lis pendens* or attachment as found in the registry of deeds is sufficient. For decrees, orders or sales made in pursuance thereof an original entry should be kept as in case of deeds, etc., showing as fully as may be the entire transaction, and posted as other instruments are in the general tract index. These proceedings have all the stability of conveyances between individuals, and form permanent muniments of title. Execution sales may be noted in like manner.

For greater convenience many examiners keep special indices of decedents' estates, as well as of the estates of minors and other persons under disability. Where this can be done the practice is recommended. In large and populous counties some such a course becomes almost a necessity.

§ 86. **Vowel Index.** In addition to the books described in the foregoing paragraphs, all of which are indispensable in a properly equipped abstract office, there are a number of supplemental volumes that may be used to advantage. Chief among these supplemental books may be mentioned an index to grantees arranged alphabetically, and, for the purpose of more ready reference, by vowel sounds. In this book are writ-

ten the names of all grantees, and after same the book and page of the record where the name appears and a reference to the book and page of the original entry of the examiner. The name is written but once, all subsequent transfers being posted opposite same by simple reference to book and page. A form for this book will readily suggest itself.

The primary object of this index is to furnish a ready means of ascertaining the present or past interests of any individual who at any time has held the legal title to lands in the county, and to facilitate search for real estate standing in the name of judgment debtors.

§ 87. **Laying Out the Books.** Considerable judgment must be exercised in laying out a set of abstract books, not so much for economy in material, though this may be an object, but for economy of time in their use, which is a very important consideration. The aim of the examiner should be to have his indices preserve such a correspondence in all their parts that posting shall cease in every division of the work at about the same time. To attain this end, where a section or subdivision is thickly populated and sales are frequent, considerable space, should be devoted to it, and, if necessary for greater convenience, the land may be indexed by half or quarter sections instead of sections. In less active localities, the index may be by sections and less space should be used. In a new county this question must be determined by geographical considerations, present location of towns, railroads, water ways, etc. In older places the experience of the past will usually furnish a safe guide in this respect for the future.

Alphabetical indexes are laid out on technical and arbitrary principles based upon experience in the distribution of initial letters in names. Thus it is found that certain letters occur much more frequently than others in the commencement of names, and space must be given accordingly. The table on the opposite page will be found a safe guide:

Thus it will be seen, in a book containing thirty pages one page will be sufficient for names beginning with the letter "A." Names beginning with the letter "B" are much more frequent,

SCALE FOR INDEXING BOOKS.

No. of Leaves.	30	40	60	80	100	120	140	160	180	200	220	240	260	280	300	320	340	360	300	400	420	440	460	480
A.....	1	1	1	2	3	3	3	4	5	6	6	6	6	7	8	8	9	10	10	11	11	12	12	12
B.....	2	3	4	6	7	10	12	13	15	17	18	20	21	23	25	26	28	30	32	34	35	37	38	40
C.....	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24
D.....	1	2	3	4	5	5	6	8	8	9	10	11	12	13	13	14	15	16	17	18	18	19	21	22
E.....	1	1	1	2	2	3	4	4	4	5	6	6	7	7	7	8	8	8	9	10	10	11	11	12
F.....	1	1	3	3	4	5	6	7	7	8	9	10	11	11	12	13	13	14	15	16	17	18	19	20
G.....	1	1	3	3	4	5	6	7	8	9	10	11	11	12	13	14	15	16	16	17	18	20	21	22
H.....	1	3	4	6	7	9	10	12	14	14	16	18	19	21	23	25	27	28	29	30	32	33	34	36
I.....	1	1	1	2	2	2	3	3	3	3	3	3	3	4	4	5	5	5	6	6	6	6	6	6
J.....	1	1	2	3	3	3	4	4	5	5	6	6	7	7	8	8	9	10	10	10	11	11	12	12
K.....	1	1	2	2	3	4	4	5	6	6	7	8	9	10	11	11	12	13	14	15	15	15	15	16
L.....	1	1	3	3	4	5	5	6	8	8	9	10	11	12	13	14	15	16	16	17	18	19	19	20
M.....	2	3	4	5	7	9	10	11	13	15	16	18	18	20	21	23	25	26	27	29	31	32	34	36
Mc.....	1	1	1	2	2	2	3	3	3	4	4	4	5	5	6	6	6	6	7	7	7	7	7	7
N.....	1	1	1	2	3	3	3	4	4	5	5	6	7	7	7	8	8	9	9	10	10	11	11	12
O.....	1	1	1	2	3	3	3	4	4	5	6	6	7	7	7	8	8	9	9	10	10	11	12	12
P.....	1	1	1	2	3	3	4	5	5	6	7	7	7	8	8	9	10	10	11	11	11	12	13	14
Q.....	1	1	1	1	1	1	1	1	1	1	1	1	2	2	2	2	2	2	2	2	3	3	3	3
R.....	1	2	3	4	5	6	7	8	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
S.....	2	3	5	7	8	10	13	14	16	17	19	22	23	25	27	29	31	33	35	36	38	40	42	44
T.....	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24
U.....	1	1	1	1	1	1	1	1	1	2	2	2	2	2	2	2	2	2	3	3	3	3	4	4
V.....	1	1	1	1	1	1	1	1	1	2	2	2	3	3	3	3	3	3	3	3	3	3	4	4
W.....	2	2	5	6	9	11	13	15	17	19	20	22	24	26	28	29	31	33	35	37	39	40	42	43
X.....	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	2	2	3	3	3	3
Y.....	1	1	1	1	1	2	2	2	2	2	2	2	3	3	3	3	3	3	3	3	4	4	4	4
Z.....	1	1	1	1	1	1	1	1	1	1	1	1	1	1	2	2	2	2	2	2	3	3	3	3

and hence two pages should be devoted to these names. And so the number of pages for each letter will be proportionately increased with the increasing size of the book, so that if it contains 480 pages, forty of them may properly be set aside for the letter "B."

§ 88. **Resume.** The foregoing brief sketch, it is hoped, will furnish sufficient hints to enable one with no previous experience to lay out and keep a set of abstract books in a methodical and intelligible manner. Neatness is a prime necessity in compiling the books. Chirography should be plain and distinct. Only the very best writing fluid should be used. Memoranda,

not of a permanent character, should be made with a hard lead pencil, and as little as possible should be made. When the memoranda has answered its purpose it should be erased. For their better preservation books should be encased in canvas covers and a fire-proof receptacle should be their abiding place at all times when not in actual use. Many things will suggest themselves to the examiner, arising from local causes, while his own ingenuity will enable him to improve on the forms here given. Having then started the books, the next thing in order is to prepare an abstract from them, and this will form the subject of the next chapter.

CHAPTER VII.

COMPILING THE ABSTRACT.

§ 89. Generally considered.
90. Extent of the search.
91. Making the chain.
92. Formal parts.
93. The caption.
94. Arrangement of the abstract.
95. Synopsis of instruments.
96. Fullness of narration.
97. Instruments shown for reference.
§ 98. Examiner's notes.
99. Irregular instruments.
100. Reference to original instruments and private memoranda.
101. Abbreviations.
102. Letter press copies.
103. Concluding certificate.

§ 89. **Generally Considered.** Examinations of title in the United States, which are usually prepared by professional examiners, do not, as a rule, disclose, except inferentially, any matter or thing affecting title save what appears of record, and searches are mainly restricted to the public records of the county. Ordinarily this is sufficient, and a careful search will reveal all that is necessary to a proper estimate of the title, and fully protect intending purchasers. In England, where the abstract is prepared from original documents, it is customary to give a far wider range to the examiner's efforts and to include not only the material parts of deeds, wills, etc., but of records and private acts of Parliament, and even of public acts passed for private purposes, which might in any wise implicate or affect the title; and to these are added such facts as fill up the interval of title, as descents, deaths, marriages, births, burials and other circumstances generally called matters *in pais*,[1] and when it is necessary to prove a pedigree, as where a descent occurs in the course of the abstract, in the absence of better evidence the examiner has recourse to wills of relatives, extracts from parish books, from family bibles, and even from tomb-

[1] 1 Prest. on Abstracts, 43.

stones.[2] Our system of registration, of probate proceedings, and of judicial inquiry and determination, and the legal effect thereof, renders the English examiner's methods useless to a large extent in the United States, yet it can not be denied that opportunities frequently occur for a judicious breach of the conventional observance of record evidence only, and for the introduction of what may properly be called matters *in pais*. A number of instances of this kind will be found noted on the succeeding pages of this book.

§ 90. **Extent of the Search.** An examination, upon its face, purports to show the course of title from a definite date to another definite date, and the fair and reasonable import of the undertaking is, that the examiner has made a full and true search relative to the title during that period and has noted on the abstract every transfer, or other matter, affecting the same, actually made and entered of record between those dates. He is under no duty, however, to inquire into the existence of any judgments entered, or conveyances recorded, prior to the date mentioned as the commencement of the search, neither is he required to ascertain or certify as to any lien arising under any such prior judgment, although the same may have first attached and become operative after that time by reason of the fact that the judgment debtor then first acquired title to the premises; nor is he bound to inquire or state whether the title vested in any grantee, during the period covered by the examination, was affected by any prior conveyance or any estoppel growing out of any covenants therein.[3]

It must be obvious, however, that an examination made in strict conformity to the foregoing will in many instances defeat the very object of the search, and hence it is customary to show subsisting tax and judgment liens, even though accruing prior to the date of the commencement of the examination, and, except in case of continuations, an abstract deficient in this respect should be rejected by counsel, as no safe opinion can be

2 Brown's Law Dict. 5.

3 Wakefield *v.* Chowen, 26 Minn. 379; Dodd *v.* Williams, 3 Mo. App. 278; and see, Ely *v.* Wilcox, 20 Wis. 523; State *v.* Bradish, 14 Mass. 296; Ford *v.* Unity Church, 120 Mo. 498.

predicated upon it. In *all* cases where a lien first attaches during the period covered by the examination, it should be shown, whatever may have been its inception, and any departure from this rule is to rob the abstract of its character of a trustworthy guide and reduce, if not vitiate, its value as an evidence of the true state of the title.

In many localities it is or has been customary to dispense with a formal abstract, and in its stead the examiner merely "certifies the title," as being "good," "bad" or "doubtful," in an individual named, basing his certificate upon his personal examination of the records. This is merely an opinion of title, and its worth depends wholly upon the learning, ability, and financial responsibility of the individual rendering it.

Again, while the examiner may present a synopsis of the deeds, etc., it is simply for the purpose of showing, like the English abstract, the present title of some specified person, the chain commencing at some given point as the root. In a case of this kind unusual care is required, lest a prior conveyance operating by way of estoppel, may not defeat the title shown. It is customary, in an examination similar to the one under consideration, to commence with a deed showing title in vendor or his grantor, and thence continuing down to the date of the certificate. There is not wanting authority to support an examination of this character, and it has been held that a deed recorded before the grantor has any record title may be safely disregarded in examination of title, under the system of registration and notice adopted in the different States of the Union; that such a deed would not be constructive notice to any innocent purchaser;[4] and further, that a purchaser finding an apparently valid title of record, is not expected to look behind it.[5] The rule, however, is unsafe and does not prevail generally,[6] and counsel before passing on an examina-

[4] Dodd *v.* Williams, 3 Mo. App. 278; and see, Ford *v* Unity Church, 120 Mo. 498; Calder *v.* Chapman, 52 Pa. St. 359; State *v.* Bradish, 14 Mass. 296; Ely *v.* Wilcox, 20 Wis. 523.

[5] State *v.* Bradish, 14 Mass. 296.

[6] See "Estoppel," "Notice" and "Registration."

tion purporting to show no more than above stated, should have satisfactory assurance that no prior deeds exist of record, or his opinion should indicate the possible defects of title resulting therefrom.

If the examiner is directed to commence his search at a given period, or with a specific event in the devolution of title, he will, of course, discharge his whole duty by a true showing of what has transpired since that time or event, but a purchaser will thereby assume a risk.

§ 91. **Making the Chain.** Before commencing the formal abstract a preliminary sketch should first be made from all the indices. This sketch, called the "chain," is simply a series of brief notes of all conveyances, incumbrances and liens affecting the property under consideration, as shown by the tract index, and, where the original entry is meager, the examiner uses these references in making full abstracts of the instruments from the records. It also shows what instruments are associated with the names of those whom the tract index invests with title, that appear upon the irregular index; the names of all persons who at any time have held title which are found upon the judgment index; and all tax sales or forfeitures of the land in question as shown by the tax index. These latter are then verified by comparison with the records, and all satisfactions or redemptions stricken from the sketch. The instruments, proceedings, etc., are then numbered and arranged in the order in which the abstract should be written, and furnish a reference guide for this portion of the work.

§ 92. **Formal Parts.** The abstract should be prepared in a neat and orderly manner, and so disposed as to facilitate the labor of counsel in passing on the title. A formal caption should apprise the reader at the outset of the subject of the examination, while the different searches should be arranged under classified heads, and for purposes of convenient reference the various conveyances and statements should be numbered consecutively from the beginning. The result of the search should be recapitulated at the conclusion by a certificate covering all the essential features of the examination. The formal

parts should be brief, yet explicit, and drawn with great care, particularly the examiner's certificate, for it is this which imparts to the abstract its value as evidence.

§ 93. **The Caption.** The object of the caption is to definitely describe the subject of the examination. It would seem to be the practice of Eastern abstract makers, following the English precedents, to insert here the name of the person for whom the search is made, and frequently, to describe the abstract itself as the exemplification of the title of some particular individual.[7] But this is usurping the province of the examining counsel, who alone should say where and in whom the title rests, and that only after a careful and diligent inquiry into all the questions raised by the abstract, both directly and inferentially. The work of the examiner is to present to counsel all that appears of record concerning a specified tract of land; no more. The counsel must say in whom, under the application of legal rules and principles, the title rests, or is vested. The caption, therefore, should consist of a full description of the parcel or parcels of land under examination, and the time from which the search is made. The following is the form of an ordinary caption:

EXAMINATION OF TITLE[8]

to

Lot Five (5) *of Block Four* (4) *of Bond's Subdivision of the North East quarter of Section Twenty-Three* (23) *Town Thirty-Seven* (37) *North, Range Thirteen* (13) *East of the Third Principal Meridian; except the South one hundred acres, and also one acre, in the North West corner of East one half* (½) *of said quarter section, deeded to the School Commissioners.*

Descriptions of platted lands are frequently confined to the record title of the plat, which fails to provide a full designa-

[7] See Curwen on Abstracts, 38; Willard on Conveyancing, 551.

[8] If desired the word "abstract" may be employed instead of "examination." The former is the English method, the latter more fully expresses the idea involved and is in common use in this country.

tion, and the description thus employed in the deeds is also used in the caption of the abstract. When such is the case it is a good plan to further indicate the location of the property with reference to the original division, thus:

Sub-Block Three (3) of Block (4) of Sheffield's Addition to Chicago, Cook County, Ills.

The premises in question are located upon the North half of the North East quarter of Section 39, Town 40 North, Range 14 East of the 3d Principal Meridian.

So also, it may happen that a subdivision is laid out on several parcels, in which case it may be deemed desirable to show the particular parcel in which the lots under examination are located. The caption would therefore vary a little from that last shown. As for example:

Lot (4) in Block (2) in Rockwell's Addition to Chicago, Cook County, Ills.

Said addition is laid out on the West Half of the North West quarter of Section 18, Town 39 North, Range 14 East of the 3d Principal Meridian, and the North East quarter of Section 13, Town 39 North, Range 13 East of the 3d Principal Meridian.

The Lot in question falls within the North East quarter of Section 13 aforesaid.

When the early stages of title, prior to the subdivision, are shown, the foregoing method often becomes a great help to counsel in examining the abstract.

Should the examination be a continuation of a former search, the words "Continuation of" may be placed at the beginning of the caption, preceding the word "Examination." If desired the word "Abstract" may be employed instead of "Examination." This is the English style and many examiners prefer it.

Where the examination commences at the source of title,

as where a devolution from the United States is shown, no announcement of the time from which the search dates is necessary, but when any intermediate point is selected, it is customary to indicate same. This is accomplished by a simple statement of the fact immediately following the description, and neatly separated from what precedes and follows by dashes, thus:

Commencing this examination Oct. 9, 1871.

The certificate, when properly drawn, will always show the respective dates covered by the examination, but many examiners prefer to indicate these facts in advance, and when such is the case, the time clause should read so as to show the termination as well as the commencement of the search. When the examination is partial, and does not come down to include present time, this method is strongly recommended. In such a case the time clause might read as follows:

Commencing this examination Oct. 9, 1871, and bringing the same down to include Sept. 7, 1874.

Where the examination includes several distinct parcels, and the search does not cover the same period of time as to all of the parcels, this fact should be indicated at the start; thus:

As to Lots 13 to 16 inclusive, in Block 5, we bring our examination down to include March 3, 1886.
As to the remainder of said premises we bring our examination down to include the date hereof.

In case of a continuation of a former search the time clause should read somewhat as follows:

Last examination made by us dated March 3, 1879.

or should the search have been made by a different examiner,

Last examination made by Handy, Simmons & Co., dated June 7, 1880.

It may be that the examination is designed to show only a particular title antedating the actual time of the search. In such case some initial statement disclosing the fact is necessary to avoid confusion, and this may be accomplished by some such statement as the following:

We bring our examination down to include the title to said premises acquired by Delbert A. Clithero by the deeds to him herein shown.

It sometimes happens that the client desires a search only from some particular time, and selects some particular instrument as the basis of his title. In this case, the instrument selected should form the initial number of the abstract, and the time clause should read substantially as follows:

We assume, by direction, that John Smith acquired title to the fee of the land described in the caption hereto, on the 10th day of April, 1873, by the instrument shown as number one of this examination.

Frequently the examiner will be called upon for partial, or special examinations, either of land or concerning individuals, in which case the caption should explicitly state all the points covered by the examination, and, if necessary for greater certainty, negative such as are not; as

Special Examination

for

Judgments and Pending Suits in the Circuit and Superior Courts of Cook County, Illinois, against George P. Will-

iams and John R. Smith. Judgments against John Smith disregarded.

Examinations for special conveyances, for real estate standing in the name of judgment debtors, for taxes, etc., should be treated in the same general manner.

Where the examination is confined to the elucidation of a single issue, it becomes more properly an abstract of the particular point under consideration, and is so denominated; as,

Abstract

of

A Tax Title to in-lot twenty-four, of the original plat of the village of Edgerton, Green county, Wisconsin, acquired under and by virtue of a sale made May 10, 1879, for the taxes of 1878.

§ 94. **Arrangement of the Abstract.** The different conveyances and stages of title are usually shown in chronological order so as to present; as far as possible, a connected chain, and are numbered *seriatim* from the beginning. Many examiners show the deeds and grants collectively, while the mortgages and liens are grouped together in the same manner under a classified head. This arrangement, though widely used, is inconvenient and frequently distracting to counsel. The liens and incumbrances when connecting title should be set forth in regular chronological order in conjunction with other instruments, and releases or discharges should immediately follow the incumbrance or lien which they purport to affect, irrespective of the time they bear date. The aim of the examiner should be to present, so far as may be, the course of title in unbroken sequence through whatever forms or instrumentalities it may pass. Judgments against the person, mechanic's liens, taxes and tax sales, may be shown after the course of title has been traced, in the shape of appendices and under appropriate heads. Decrees, judgments, orders affect-

ing the land, and tax deeds, of course appear in regular order in the body of the abstract. Official deeds, resulting from execution or judicial sales, should be preceded in the former case by the judgment, in the latter by the special proceedings and decrees upon which they are founded.

As a further aid in effecting a correct and systematic arrangement of the instruments shown in an examination, an illustration in the form of a chain is herewith given. This title, while it would present but few difficulties, is yet sufficiently intricate to explain the method.

EXAMINATION OF TITLE

to

The N. E. ¼ Sec. 10, T. 1 N., R. 23 E.

1.	*U. S. to A.*[9]	*Patent*	*All*	*Aug.*	*1, 1839.*
2.	*A. to B.*	*Deed*	*All*	*Dec.*	*15, 1839.*
3.	*B. to C.*	*Deed*	*All*	*June*	*10, 1845.*
4.	*C. to D.*	*Deed*	*All*	*May*	*3, 1850.*
5.	*D. to G.*	*Deed*	*Und. ½*	*June*	*1, 1850.*
6.	*G. to H.*	*Deed*	*Und. ½*	*April*	*11, 1855.*
7.	*D. to E.*	*Deed*	*Und. ½*	*July*	*2, 1852.*
8.	*E. to F.*	*Deed*	*Und. ½*	*Sept.*	*12, 1853.*
9.	*F. to H.*	*Deed*	*Und. ½*	*April*	*11, 1859.*
10.	*H. to M.*	*Deed*	*All*	*Oct.*	*8, 1859.*
11.	*State to I.*	*Tax Deed*	*All*	*March*	*1, 1850.*
12.	*I. to J.*	*Quit Claim*	*All*	*Jan.*	*2, 1851.*
13.	*J. to K.*	*Deed*	*All*	*May*	*15, 1851.*
14.	*K. to L.*	*Deed*	*All*	*Feb.*	*26. 1857.*
15.	*L. to M.*	*Deed*	*All*	*Oct.*	*8, 1859.*

[9] The above illustration is for arrangement only; of course, in compiling the abstract, a full synopsis of every instrument and proceeding must be given.

16. M. to N. Deed All Nov. 1, 1860.

Judgments.

Tax Sales.

Examiner's Certificate of Search.

The foregoing sketch, though brief, conveys, in some measure, an idea of the arrangement of a chain of title. From Nos. 1 to 4 the divestiture of the title from the government and its devolution through mesne conveyances is regular and without interruption. At No. 5 the ownership of the land changes from severalty to common, an undivided one half being vested by No. 6 in H. As H, in the devolution of title, subsequently becomes invested with the remaining one half, a stop should be made at this point and the title to such remaining one half traced until it again becomes merged in H. This is accomplished in No. 9. The reunited title should then be distinguished from what has preceded by a short dash, and the next conveyance, No. 10, should form another initial point, from which, if no other obstacle intervened, the chain would be continued. But during the devolution of the original title a tax title has been created by a grant from the State. This title is independent and adverse, and if there should be no subsequent merger would be properly shown after the original title had been fully traced. In the illustration this title is afterward acquired by M, therefore, as he now owns the original title, such tax title should at this point be traced to him. A broad dash should therefore separate the chain and the course of the tax title should be followed until M receives the investure, which is accomplished in No. 15. Here the broad dash is again employed to separate the tax title from the original, and the full and reunited course is continued in the deed from M to N. The judgments and tax sales, if any, follow as special appendices.

An abstract thus arranged greatly lessens the labors of coun-

sel in preparing an analysis,[10] and by reason of its coherency presents most, if not all, of its salient features on first perusal.

§ 95. **Synopsis of the Instruments.** In England, abstracts are prepared after a uniform system which has long been observed by the conveyancers of that country, and the impress of which is plainly discernible in many portions of the United States. It is very methodical and precise, and in view of the differences in the sources of information, as well as the information itself, and of the effect which many of the matters there required to be shown have upon title, is perhaps highly conducive to the end desired, yet after all it is more a matter of precedent and the observance of established forms than of real utility. Should the taste of the examiner so incline, or counsel so direct, the instruments may be displayed after the English model, which is, briefly, as follows:

The abstract is usually written on "brief" paper, which is divided by three real or imaginary longitudinal lines, thus leaving a page with four divisions which are technically known as "margins." The outer, or left hand margin, is left clear for the person investigating the title to insert any note or intended inquiry which may suggest itself during the perusal of the abstract, or it may sometimes be used by the abstract maker for the insertion of a note or statement necessary to a proper display of the title. The caption is written from the third margin. The description of the parties, as well as the testatum, is usually written from the outer margin. The parcels, that is the descriptions of the property, are invariably set out from the third inner margin. The habendum is most frequently written from the second inner margin, while the recitals are almost invariably written from the first inner margin.[11] This method undoubtedly possesses some advantages, the chief merits being, that it enables counsel at a glance to

10 As an instance, an analysis of the title shown by the above abstract is given in Chap. XXXII of this work.

11 Seaborne on Vendors, 4 *et seq.* As this matter receives frequent allusions in different parts of this work, an example illustrating the methods will be found in the appendix.

refer to any portion of an instrument without having his attention diverted to other parts, and the facility it affords for the comparison of instruments and the determination of their operation and effect when construed in relation to each other; but aside from this it is difficult to perceive any particular inducement for the adoption of the marginal system.

The form of synopsis recommended by the writer, and of which the succeeding illustrations afford numerous examples, is exceedingly simple and unartificial. It consists merely of an arrangement not unlike that used in preparing the pleadings in a law suit; that is, a caption reciting the parties to the transaction, or the nature of the transaction itself in practicable cases, followed by a plain narration of whatever matter may be deemed essential. The caption, for greater ease in perusing and comparing, is placed at the left hand side of the page and united with a bracket, or, if desired, may be written over and across the narration which follows. All the recitals are written across the entire page and not otherwise distinguished from each other than by being thrown into paragraphs. In case of notes a slight indentation is desirable to more fully distinguish them from other matter, but with this exception all writing had better be made from the ruled margin of the sheet, ordinary legal cap being used for the purpose. This method has long been pursued by the abstract makers of the West, where it is conceded the most perfect and finished abstracts are now produced, and has met the general approbation of the legal profession.

§ 96. **Fullness of Narration.** From what has been said, it will appear that a full and complete narration of every instrument, proceeding or act, shown in the abstract, is necessary to a complete and perfect examination. A thing of no seeming moment to the examiner, may, to the trained eye of counsel, be a circumstance of vital importance. While the abstract is not intended to be a copy of what is shown it should yet be sufficient to impart all the essential information that might be obtained from a perusal of the original documents. It is not necessary, save in exceptional cases, that it should be

a literal transcript of every point or matter deemed material or essential, for, on the contrary, the majority of these matters will be more clearly and pertinently presented by a brief and succinct statement that shall fully cover the particular point, divested of its redundancy and unnecessary verbiage. The object of the abstract is to economize time, and to enable the reader to survey the entire course of title, comparatively, at a glance. Hence, long and technical provisions should, whenever practicable, be digested so as to show their pith and substance, which, in many instances, may be done without in any manner impairing their significance. The faculty of condensation should be cultivated by all who would aspire to excellence in the preparation of abstracts, for nothing more distinguishes the accomplished and expert examiner, and the work is always duly recognized and appreciated by counsel.

These remarks, however, apply mainly to the general and not to the special incidents of instruments, for these latter, as a rule, can best be presented in the language of the originals, and to avoid error or omission should be so shown. Thus, a general recital is far better presented as a terse and succinct statement, but provisions peculiar to the instrument must be fully stated or literally copied, for it must ever be borne in mind, that where one is chargeable with the notice of the record of an instrument, he is equally affected with notice of all material matters contained in such instrument.[12]

§ 97. **Instruments Shown for Reference.** While the primary purpose of an abstract is to show only the course of title to a specified tract, yet, in order more fully to illustrate such title, or to enable counsel to obtain better views with respect thereto, it is not an infrequent practice to exhibit, for the purpose of reference, instruments which connect with the title collaterally. The practice is fully sanctioned by the usage of the best examiners and such collateral matters are often of high importance considered in connection with the title shown. Whenever it may be deemed desirable or expedient to show such instruments they should immediately follow the

12 Kerfoot v. Cronin, 105 Ill. 609.

deeds they affect or explain and should be preceded by the following note:

The following deed is shown for reference only.

It is well, also, when reference deeds are shown, to append a note in proper cases showing that the subsequent development of the title thereby conveyed is not contemplated, thus:

NOTE.—*Title of John Smith and his grantees not followed out.*

§ 98. **Examiner's Notes.** The examples in the preceding paragraph are notes of explanation. It is the custom of many examiners to freely intersperse through the examination their own comments and observations relative to matters therein stated. When properly inserted these notes are of much advantage in arriving at a proper estimate of the instruments shown, and in determining their character and the degree of importance to be attached to them. From his peculiar position, knowledge of the records, and control of indices and references, the examiner is frequently in possession of information, which, though not strictly essential to the abstract, and in a certain sense *aliunde,* is yet a valuable contribution and may obviate many perplexing questions that might otherwise arise on its perusal by counsel. This information should be appended in the shape of explanatory notes. They should be brief, concise, and confined strictly to a statement of facts. Queries, save in rare instances, opinions, and desultory suggestions, only serve to confuse and distract. When alluding to any particular instrument or proceeding, they should, when practicable, immediately follow the particular conveyance referred to, or should this be undesirable, may be placed at the end of the abstract, immediately before the certificate, by way of appendix. It is not a good plan to encumber the abstract with a profusion of notes, yet in no case where the matter stated is important, or necessary to a better understanding of what has preceded or may follow, should they be omitted, and

when doubtful as to the propriety of their insertion, it is better to err on the side of safety, even at the cost of being prolix.

§ 99. **Irregular Instruments.** In compiling the abstract the irregular index should be as carefully consulted as the index of lands, and not only should this index show every independent instrument of an irregular character, but also references to other instruments duly posted in the tract index, when by reason of anything therein contained or appended thereto, light may be shed upon examinations in which they do not properly appear. Thus, an affidavit of pedigree, domestic condition, etc., may be appended to a deed of specific lands which is duly posted in the tract index, but as this affidavit may have an equally important bearing upon the title to other lands, it must also be posted in the irregular index for easy reference.

§ 100. **Reference to Original Instruments and Private Memoranda.** An abstract is compiled, in the usual course, from the face of the record, and purports to show all essential facts thereby disclosed. If incorrect statements appear upon the record they must also appear upon the abstract. The examiner should not assume to correct the record. But, as will often be the case, if the examiner is satisfied that a misstatement has been made, or that the recording officer has failed to properly transcribe the contents of a document left with him for record, it is the duty of the examiner to apprise his client of such error, and that too upon the face of the abstract he has compiled. This will, in some instances, necessitate a reference to the original instrument and when the fact of an error lies within the examiner's knowledge this is a proper way of presenting it.

The usual and better way to show a matter of this kind is by a note appended to the abstract of the erroneous document in this manner:

NOTE.— *The original document, now in our hands, which is recorded as above in Book 512 of Records, page 197, shows the signature of said grantor as "Harriet Jones" and not "Hariet Janes."*

So, too, if the original entry books, made from the original documents as they were filed, shows a difference in names or description a reference thereto, in the same manner as the foregoing, is proper.

§ 101. **Abbreviations.** In preparing his notes and arranging his books, the examiner will find his labors greatly accelerated by the use of abbreviations. These may include not only the commonly accepted initials for the points of the compass, different classes of conveyances, governmental divisions of land, etc., but all such abbreviated forms or contractions as to himself may have a definite meaning. In the abstract, however, everything should be written out in full, for it can not be known into whose hands it may come, and arbitrary forms and abbreviations that to the examiner appear extremely lucid may cause much annoyance and inconvenience both to counsel and non-professional readers. On the other hand, the examiner should never attempt to supply the deficiencies of the conveyancer by writing out in the abstract his abbreviations in the deed, but whenever such occur the better way is to make a literal transcription of the abbreviated words or passages, and certify same with quotation marks thus: "Sec. 14, T. 39, Range 13 E." The question of interpretation will then rest where it rightfully belongs — with counsel who is to pass on the title. A deed is not invalid because of the description of the lands being in figures or well understood abbreviations,[13] but abstracts which are unintelligible without the aid of some proof to explain the meaning of abbreviations and initials used in them, when permitted to be used as evidence, are insufficient in themselves to establish title.[14].

§ 102. **Letter Press Copies.** No abstract or examination should be permitted to leave the maker's hands until a duplicate letter press copy, or its equivalent, has first been obtained. The examiner should always have in his own possession the verification of his work as a matter of self-protection, while in case the volume of business passing through the offices of regis-

13 Harrington *v.* Fish, 10 Mich. 415; Moseley *v.* Mastin, 37 Ala. 216.
14 Weeks *v.* Dowing, 30 Mich. 4.

tration is such as to preclude making full minutes in the first instance, the copies thus obtained will supply the deficiency, and be available for future examinations of the same property, without the labor of again referring to the records. This may be accomplished by noting on the tract index opposite the reference of the instrument in question the volume and page of the copy book on which the full abstract is preserved.

§ 103. **Concluding Certificate.** The result of the examiner's labors should be summed up in conclusion, by a brief recapitulatory and explanatory certificate, embodying the essential features of the search. Its extent is optional with the examiner, but it should, to give stability to the abstract, cover his searches in the offices of registration, the courts, and depositories of records relative to taxation, these three sources of information furnishing nearly all the exidence required in passing on the sufficiency of the title. It should be certain in its statements, leaving nothing to implication, and contain no more than is developed by actual investigation. If the examination is made from the records it should so state, enumerating the different classes examined, or describing the offices or depositories from which the information was obtained, but where it is made from indices, kept by the examiner, it is usual to certify from such indices,[15] which is a much safer plan than to certify from the records. It should be signed by the examiner and dated, such date being usually the date of the examination. The annexed form of certificate will cover the points investigated in an ordinary search:

15 As a further precaution the client is usually required to make a specific order, stating his desires, of which the following, taken from actual practice, is an example:

No.....

ORDER FOR EXAMINATION OF TITLE.

CHICAGO,.....188

HADDOCK, VALLETTE & RICKCORDS,

Make an examination, according to your Indexes to the Records in Cook County, Illinois, of deeds, judgments and tax sales, of the title to the following described land, in Cook County, Illinois:

.....(Here insert the description of the

We have examined our Indexes to records in Cook county, Illinois, and find:

No conveyances of the land described in the caption hereto, executed by any of the parties named herein as grantor or grantee, shown thereby to have been recorded in the Recorder's office of said Cook county, Illinois, since January 25, 1875, and prior to this date, and no proceedings affecting the title to said premises had in any of the courts of record of said county, except as shown on the ten (10) preceding sheets.[16]

No judgments rendered in any court of record in said Cook county, Illinois, against John M. Smith since October 25, 1872,[17] *and prior to March 2, 1880*[18] *nor against William Thompson since October 25, 1872, and prior to this date, which are a lien on said premises* [*or which we consider liens on said premises*].

NOTE.— *No examination made for judgments against John Smith, nor against John Smith with middle initial other than "M."*

No taxes, or tax sales, or forfeitures of said premises, remaining unredeemed or uncanceled of record (except as shown).

Haddock, Vallette & Rickcords,
Examiners.

Chicago, October 25, 1882.

property.) .....
.....
(Signed).....
No.....Street.

[16] Although the examiner may only certify that he *finds* no conveyances, yet this is equivalent to a statement that none exist. McCoraher *v.* Commonwealth, 5 Watts & S. (Pa.) 21.

[17] This date has reference only to the time from which a personal judgment is a lien on real estate and not to the commencement of the examination. In Illinois the lien only exists for seven years, hence, with reference to the date of the certificate, October 25, 1875, would have been a proper date from which to certify judgments, but in a majority of the States the period is ten years, which corresponds to the illustration above given.

[18] This would be the date when John M. Smith disposed of the title, and hence no examination

If the examination commences with the assumption of title in a given person, the certificate should, for the better protection of the examiner, specify such person by name and the statement of conveyances might read something like the following:

No conveyances of the land described in the caption hereto, executed by John M. Smith, shown thereby to have been recorded in the recorder's office of said Cook county, Illinois, since Jan. 25, 1875,[19] *and none by those who derived title through said Smith, named in the foregoing examination as grantor or grantee, etc.*

Where instruments have been shown for reference only, or where under the general caption deeds are exhibited of parcels which do not constitute any part of the lands in question, no necessity exists for following the title of such parcels or noting its subsequent devolution; as where a Railroad right of way intersects a division or tract of land. It is advisable, however, to call attention to this fact, either by a note following the abstract of such deeds or by a clause in the final certificate, and such mention, in either case, may read somewhat as follows:

No examination for conveyances by or judgments against the Illinois and Wisconsin Railroad Company or its grantees.

Where, in a continuation, no conveyances are shown, there having been no change of title since the last examination, the statement as to conveyances may simply recite this fact, or, if desired, and this is the better way, a special certificate may be made with respect to the record owner of the land, as shown by the last examination, and the holders of such incumbrances as may appear thereon; thus:

would be made concerning him after that date. William Thompson, though only holding title a little over two years, must yet be certified, as against judgments, for a period equal to the statutory limitation, which, in the example, is ten years.

[19] The date of the assumption of title and commencement of the search.

No conveyances of the land described in the caption hereto executed by John Brown[20] *or by James Smith,*[21] *mortgagee, shown thereby, etc.*

Where two or more parcels form the subject of the examination and the caption, in technical parlance, is a " double header," if the examination purports to be from different dates as to each parcel the fact must find appropriate mention in the certificate, as per example.

No conveyances of the land first described in the caption hereto, executed by any of the parties named herein as grantor or grantee, shown thereby to have been recorded, etc., since June 10, 1868, except as noted.

No conveyances of the land secondly described in the caption hereto, executed, etc., since March 1, 1870, except as noted.

In continuations, when no tax sales have occurred during the period covered by the search, say:

No tax sales had since Dec. 10, 1903.[22]

Of late years it has become customary to certify with respect to special assessments and when the land in question is located in a city this is an important matter. When certifying special assessments at any time, say:

No confirmed special assessments remaining unpaid, which we consider liens on said premises. (Except as shown.)

When certifying special assessments since the date of the last examination, say:

20 The record owner as shown by the last examination.

21 The encumbrancer as shown by the last examination.

22 The date of the last examination.

No special assessments confirmed since January 15, 1904, remaining unpaid, which we consider liens on said premises. (Except as shown.)

In the foregoing examples the abstracts are supposed to have been compiled from the records or the examiner's indices, and are what are termed "original examinations." Not infrequently, however, the examiner is called upon to prepare compilations from former examinations, being, in effect, digests of the title to particular tracts shown in such original examination in a general way with other lands. While the practice is not recommended there will yet be many cases in which it may be profitably followed, and, when this is done, the concluding certificate should specifically show the course pursued and verify the correctness of the compilation. Thus:

The foregoing Examination of Title to the land described in the caption hereto, is a compilation from the following several examinations, including the land in question, heretofore made by us, viz.:

To the West half of the South East quarter of Section Ten, Town Thirty-nine, North, Range Fifteen, East of the Third Principal Meridian, dated April 22, 1869.

To the same land dated March 1, 1890.

And we do certify that same is a true and correct compilation from said several examinations, including all conveyances of the land described in the caption hereto, made by the parties grantors or grantees named therein and shown thereby to have been recorded in the Recorder's office of Cook county, Illinois, prior to the dates of record of the deeds by them respectively, up to and including March 10, 1889.[28]

In like manner the examiner may be called upon to fill a gap in the history of the title. While the caption should show this fact, in the manner heretofore indicated, the certificate

[28] This is the date to be covered by the search and from which a continuation would be made.

should also be made with special reference to it and the recitals of conveyances, judgments, etc., should all be qualified by the statement,

And prior to June 10, 1870,

or words of similar import which clearly mark the time of the termination of the search. The certificate should, of course, bear date as of the actual time it was made.

CHAPTER VIII.

INCEPTION OF TITLE.

§ 104. Preliminary stages of title.
105. Inceptive measures under the U. S. land laws.
106. Disposal of the public domain.
107. Public land sales.
108. Private entry of lands.
109. Nature of title conferred by entry.
110. What lands subject to entry.
111. Pre-emption entries.
112. Nature of pre-emption rights.
113. Conveyances before entry.
114. Graduation entries.
115. Donation entries.
116. Homestead entries.
§ 117. Rights acquired under homestead acts.
118. Desert land entries.
119. Tree claims.
120. Location by military warrant.
121. Land scrip.
122. Swamp land grants.
123. School lands.
124. Internal improvement grants.
125. Land grants to railroads.
126. Public highways.
126a. Private land claims.
127. Who may acquire title.
128. Inceptive measures in the abstract.

§ 104. **Preliminary Stages of Title.** All of the lands in the National Territories, not appropriated by competent authority before they were acquired, are, in the first instance, the exclusive property of the United States, to be disposed of to such persons, at such times, in such modes, and by such titles, as the Government may deem most advantageous to the public. This right has been uniformly reserved by solemn compact upon the admission of new States, and has always been recognized and scrupulously respected by the States within which large portions of the public lands have been comprised, and within which much of these lands are still remaining.

The system adopted for the disposition of the public lands embraces the interests of all the States, and proposes the equal participation therein of all the people of all the States. The system is, therefore, peculiarly and exclusively the exercise of

a federal power, and the mode of its accomplishment, as well as the evidences or muniments of right which it bestows, are all the work of federal functionaries. Neither State nor Territory can, in any manner, interfere with the primary disposal of the lands.[1]

Under the land system of the United States, there are a number of preliminary or inceptive stages of title before its final divesture from the Government and consummation in the purchaser. They are created by the provisions of the various acts of Congress in furtherance of the development of the country, and their recital forms, or should form, the initial statements of every abstract, whenever the examination purports to show a connected chain of title from its source, the general Government. Where title, as in the East, is derived directly from the State as the original proprietor, these stages, of course, do not appear, nor are they present where title is deduced from anti-revolutionary governments. Titles derived from foreign powers prior to the acquisition of the soil by the United States are respected and protected, but should be confirmed, when inchoate, by special act or in conformity to general laws on that subject,[2] the title in such cases dating from the confirmation, though relating back to the time of the cession of the Territory to the Government, or to the original grant.[3]

§ 105. **Inceptive Measures Under the U. S. Land Laws.** The public lands are sold only by legal divisions, or parcels, made in conformity with the government system of surveys, and title is acquired by purchase at public sale; by ordinary "pri-

1 Irvine *v.* Marshall, 61 U. S. (20 How.) 558.

2 United States *v.* King, 3 How. 773; McMicken *v.* United States, 97 U. S. (7 Otto) 204.

3 The policy of the United States, in the adjustment of such titles has been one of unexampled liberality, reserving to claimants the lands to which they asserted titles derived from the lawful authorities of governments which held sovereignty over the territory prior to its acquisition, and confirmations have been extended to all claims founded on titles in form, orders of survey, and even to lands to which no written title had been recorded, where the claimants had made actual settlements before the change of sovereignty.

vate entry;" and by the various other methods provided in the special enactments of Congress known as the pre-emption acts, homestead acts, etc. These laws and regulations for the disposal of the public domain apply only to individuals who take direct from the United States.

Congress has also at different times by special legislation granted to the States, or certain of them, a portion of the public lands to aid in the construction of great internal improvements; to endow schools and encourage education; and for other specific purposes.

These various measures, for the most part, are inceptive and initiatory. Though creating vested interests, and granting equitable rights,[4] the legal title still remains in the original grantor,[5] to pass and become absolute in the grantee, only on the performance of prescribed conditions or in due course of law. A brief review of the preliminary steps to acquire title will form the subject of the succeeding paragraphs.

§ 106. **Disposal of the Public Lands.** The public lands of the United States are uniformly brought into market in pursuance of a system which originated in the year 1796[6] and was perfected about the year 1820. They are divided into two classes, designated respectively, the *minimum* at $1.25 per acre, and the *double minimum* at $2.50 per acre, and may be purchased in tracts of from 40 to 640 acres, or in larger bodies if the same can be found vacant. In cases of public sale or private entry the law requires the price to be paid in cash at the

[4] Stark *v.* Starrs, 6 Wall. (U. S.) 402.

[5] Carman *v.* Johnson, 20 Mo. 108; Hayward *v.* Ormsbee, 11 Wis. 3; Wilcox *v.* Jackson, 13 Pet. (U. S.) 498.

[6] The first treaty extinguishing the Indian title was not effected until 1795, but not a year had elapsed from the definitive treaty of peace in 1783 before the Congress of the Confederation took the initiative for establishing a system for the disposal of the then existing western lands, and on May 20, 1785, the requisite ordinance for that purpose was passed, by which the Board of Treasury was authorized to dispose of the surveyed lands in the western territory, commencing sales at New York or Philadelphia, with power to adjourn to any part of the United States.

time of purchase.[7] For a period of twenty years, beginning with the commencement of the last century, the lands were sold on credit, at not less than $2.00 per acre; but the credit system not working satisfactorily, in 1820 it was abandoned and the price reduced to $1.25 per acre. The $2.50 per acre lands are such as lie within the limits of railroad or internal improvement grants. Exceptions to these rules are made under the pre-emption and homestead laws, which will be noticed hereafter. The lands are first required to be surveyed, then advertised and exposed for sale at public acution, after which, whatever remains is subject to private entry, location, etc., at fixed prices.[8]

§ 107. **Public Land Sales.** The public sales are held in pursuance of a proclamation by the President,[9] or of a public notice given in accordance with directions from the General Land Office.[10] At this sale the lands are offered at a minimum

[7] See instructions, Sec'y Interior, Sept. 10, 1849; March 10, 1869.

[8] The first method of disposal was by offering at public sale for such price, above a fixed minimum, as the lands would bring, and after this to purchase by private entry, on a credit at a minimum in excess of the lowest price now admissible by law. In the progress of events the national legislature took cognizance of actual settlers, giving them precedence and preference in the purchase of the public lands, and, relieving them of the necessity of competing at public auction with ordinary purchasers, permitted them, on very liberal terms and at the lowest price, to secure titles to actual settlements. This policy continued retrospective until after the operation of the pre-emption law of 1830, and its supplements, and up to the passage of the permanent prospective pre-emption system by the act of Sept. 4, 1841. Congress has also dealt with lands which had been in the market ten years or longer by reducing these to actual settlers at low rates, but this benign policy having led to abuse and speculation, Congress rescinded the law, yet not without indicating a continued interest in the actual settler in passing the homestead act of May 20, 1862, by which any citizen can secure a farm comparatively without cost.

[9] In the early periods of the history of the country, Congress, in some cases, fixed by law the times at which public sales in particular land districts should be held, and in others directed the sales to commence at such times as the President should fix by proclamation. But by the act of April 24, 1820, regulating land sales generally, it became the duty of the President to proclaim and offer for sale all the public lands as they might be surveyed and prepared for market.

[10] Rev. Stat. U. S. § 2353 *et seq.*

price, and can not be sold for less, but may be sold for as much more as any one will give. On payment of the price for which the land is sold, the Receiver of the local land office issues his receipt as in other cases and the sale is noted on the tract books of the Register. The law limits the duration of the sale to two weeks, and in case of a shorter period private entries are not permitted until the expiration of that term. Comparatively, only a small portion of the public lands are disposed of by this method.

§ 108. **Private Entry of Lands.** The term "entry," as applied to appropriations of public land, is said to have been borrowed from the State of Virginia where it has been used in that sense from a very remote period. It has now a fixed and definite signification in the legal nomenclature of the country, and means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his application for same in the office of the designated land agents of the Government, and is confined to the right of purchase at private sale.[11]

The entry is made by presenting to the Register of the district land office a written application describing the tract desired, to which the Register attaches his certificate, setting forth the fact of such tract being at the time subject to private entry and specifying the price per acre. The application is then taken to the Receiver to whom payment is made, and who in return, gives duplicate receipts, one of which is retained by the applicant, to be surrendered on receiving his patent, and the other, together with the application, is delivered to the Register, who, after placing the application on file, issues his certificate of purchase of the land. The application, accompanied by the Register's corresponding certificate of purchase, is then forwarded to the General Land Office for official action.[12]

Patents do not issue in the usual course of business in the General Land Office until several years after the entry has

11 Chatard *v.* Pope, 12 Wheat. (U. S.) 586.

12 1 Lester's Land Laws, 311; Rev. Stat. U. S., § 2245 *et seq.*; and see Cir. Gen. Land Office, Mar. 1, 1884.

been made, though conveyances with warranty are freely made, and the property frequently passes through many hands on the strength of the inchoate title conferred by entry and payment. The recital of this entry forms the first statement of the abstract of all lands acquired in this manner, and should be followed, whenever practicable, with the Receiver's duplicate certificate of purchase and payment.

§ 109. **Nature of Title Conferred by Entry.** The practice of dating the legal title from the date of the entry is followed in many of the States,[13] yet nothing passes a perfect title to public lands, with one exception, but a patent.[14] The exception being where Congress, by special act, conveys land in words of present grant.[15] Congress has the sole power to make and authorize appropriations of the public lands[16] and to declare the effect and dignity of titles emanating from the United States,[17] and the whole legislation of the federal government in relation thereto declares the patent the superior and conclusive evidence of legal title; until it issues the fee remains in the government.[18] The entry can only come in aid of the legal title, and is no evidence of such standing alone, when opposed to a patent for the same land.[19]

But a party who has complied with all the terms and conditions which entitle him to a patent for a particular tract acquires a vested interest therein, and is to be regarded as the equitable owner thereof, the government simply retaining the formal legal title in trust for the purchaser until the patent issues.[20] The right to a patent once vested is equivalent, as respects the government, to a patent issued; and

13 O'Brien *v.* Perry, 1 Black. 132; Tidd *v.* Rines, 26 Minn. 201; Bullock *v.* Wilson, 5 Port. (Ala.) 338; Burdick *v.* Briggs, 11 Wis. 126.

14 3 Opinions Att'y Gen. 91; Carman *v.* Johnson, 20 Mo. 108.

15 3 Opinions Att'y Gen. 350; 9 do. 346; 11 do. 47; Grignon's Lessee *v.* Astor, 2 Howard, 319; Challefoux *v.* Ducharme, 4 Wis. 554.

16 United States *v.* Fitzgerald, 15 Pet. 407; Farrington *v.* Wilson, 29 Wis. 383.

17 Bagnell *v.* Broderick, 13 Pet. 436.

18 Peak *v.* Wendel, 5 Wheat. 293; Hooper *v.* Scheimer, 23 How. 235; Hayward *v.* Ormsbee, 11 Wis. 3; Bronson *v.* Kukuk, 3 Dill. 490.

19 Baird *v.* Wolf, 4 McLean, 549; Peak *v.* Wendel, 5 Wheat. 293.

20 Worth *v.* Branson, 98 U. S. (8

when the patent is issued it relates, so far as may be necessary to cut off intervening claimants, to the inception of the right of the patentee.[21] The interest thus acquired is a recognized property which courts will respect and protect,[22] and has been held to be a valid subject of sale or transfer.[23] In such case the assignment of the certificate of entry passes the equitable title to the land,[24] or, if intended as collateral security creates an equitable lien.[25] On filing the assignment of the certificate in the General Land Office, patent will issue to the assignee with the same effect as to the original purchaser,[26] or if issued to the original purchaser he will take only as trustee for the true owner.[27] Assignments are not frequently met with on the records. As a rule, the early proprietors disposed of their interests under the entry by deed of bargain and sale, and usually with covenants of seizin and warranty. The receiver's receipt was usually placed on record as the foundation of title, while the patent, in the mutations through which the property afterward passed, was often overlooked and frequently forgotten.[28]

The effect of location or entry in due form, is to segregate the land from the public domain and subject it to private ownership, with all the incidents and liabilities thereof. While such location is in force no other can lawfully be made;[29] the public faith has then become pledged to the locator and any subsequent grant of the same land would be void, unless the

Otto) 118; Waters *v.* Bush, 42 Iowa, 255.

21 Stark *v.* Starrs, 6 Wall. 402; Taylor *v.* Brown, 5 Cranch, 234; Morrill *v.* Chapman, 35 Cal. 88; Astrom *v.* Hammond, 3 McLean, 107.

22 Gains *v.* Hale, 26 Ark. 168; McLane *v.* Dovee, 35 Wis. 27.

23 Carrall *v.* Safford, 3 How. 460; Hutchings *v.* Low, 15 Wall. 88.

24 Sillyman *v.* King, 36 Iowa, 207; Meyers *v.* Croft, 13 Wall. 291; Burdick *v.* Wentworth, 42 Iowa, 440.

25 Wallace *v.* Wilson, 30 Mo. 335.

26 Instructions Sec'y Interior; 1 Lester's L. L. 351; Clark *v.* Hall, 19 Mich. 356.

27 Stark *v.* Mather, 1 Walker (Miss.), 181; Magruder *v.* Esmay, 35 Ohio St. 221; Cunningham *v.* Ashley, 14 How. 377.

28 Hundreds of thousands of uncalled for patents are yet remaining in the files of the General and local land offices. Gen. Land Office Report, 1875.

29 Simmons *v.* Wagner, 101 U. S. 251.

first location or entry is set aside.[30] It is within the power of the Commissioner of the General Land Office, however, to cancel entries of public lands at any time before patent issues, on proof that the entryman has failed to comply with the law.[31]

§ 110. **What Land Subject to Entry.** It is a fundamental principle, underlying the land system of the country, that private entries of the public lands are never permitted unless Congress by special act order otherwise, until after such lands have been exposed at public auction at the price for which they are afterward subject to entry.[32] Where lands have been surveyed but not exposed at public sale they may be obtained under the provisions of the pre-emption law, in which manner large portions of the valuable lands in the States admitted since 1841, have been taken up.[33] Lands known as "mineral," including deposits of the precious metals, coal, and salines, are not subject to ordinary private entry and are disposed of in accordance with special acts,[34] the general procedure, however, being the same. Nor can lands be entered which have been reserved for any purpose, or otherwise withdrawn from market.[35]

§ 111. **Pre-emption Entries.** As has been shown, in the earlier stages of our land system, no right or interest could be secured by the individual in any public land until it had been surveyed into legal divisions; nor after this had been done was it subject to sale until by a proclamation of the president, it was brought into market. This proclamation always fixed a time and place when the lands within a given district were offered for sale at public auction; and until all of them were sold, which could be sold in this manner, at prices above the minimum fixed by law, no one could make a private entry of a particular tract or establish a claim to it. The scenes of vio-

30 Worth *v.* Branson, 8 Otto, 118; Lytle *v.* Arkansas, 9 How. 314; U. S. *v.* Fitzgerald, 15 Pet. 401.

31 Jones *v.* Meyers, 2 Idaho, 793.

32 Eldred *v.* Sexton, 19 Wall. 189; do. 30 Wis. 189. See also 4 Opinions Att'y Gen. 167.

33 Meyers *v.* Croft, 13 Wall. 291.

34 Act, July 26th, 1866.

35 Hot Spring Cases, 92 U. S. (2 Otto) 698; Bellows *v.* Todd, 39 Iowa, 209.

lence, fraud and oppression, and the combinations which attended these sales, as well as the wrongs perpetrated under them, led to the law of pre-emption. It often occurred that emigration, in advance of the readiness of the public lands for these sales, had caused hundreds and thousands to settle on them; and when they came to be sold at public auction, their value, enhanced by the houses, fences and other improvements of the settler, placed them beyond his reach, and they fell into the hands of heartless speculators. To remedy this state of things the pre-emption system was established.[36]

A "pre-emption claim" confers upon the settler the exclusive right to purchase, at a minimum price, the public land of the United States upon which he has settled in conformity to the acts of Congress on that subject.[37] This policy of securing to individuals a preference right to purchase, had its origin at about the commencement of the last century, and at first was confined to lands which had been surveyed, but gradually this was changed until in 1862,[38] pre-emptions were allowed, under proper restrictions, on unsurveyed lands as well.

The laws on this subject are numerous, beginning as early as May 10, 1800, which allowed pre-emptions in the country northwest of the Ohio river, and were at first restricted to particular classes and localities, until the act of September 4, 1841,[39] and supplemental act of March 3, 1853,[40] which superseded all previous laws and now constitute the general pre-emption system.[41] Under this law the settler, possessing the prescribed qualifications, who enters upon public land, making improvements and bringing the same under cultivation,

36 Atherton *v.* Fowler, 6 Otto (U. S.), 513.

37 Dillingham *v.* Fisher, 5 Wis. 475.

38 12 Stat. at Large, 418.

39 5 Stat. at Large, 457.

40 10 Stat. at Large, 244.

41 Prior to the year 1841, the legislation of Congress had not encouraged settlements upon the public lands before they had been exposed to public sale. The enactments granting pre-emption rights, before this time, were mainly in the nature of relief laws, by which trespasses were waived, and a preference was given to those who were occupying public lands at the dates of the several laws.

and otherwise conforming to specified requirements, acquires a prior and exclusive right to purchase, and is protected in the enjoyment of his claim from intrusion or trespass by others.[42] To fix these rights, he is required, where the land at the time of settlement is subject to private entry, to file with the Register a declaratory statement, describing the land settled upon, and reciting his intention to claim the same under the provisions of the pre-emption act, and within twelve months thereafter to make proof of settlement and payment; failing in these particulars the land so settled or improved will be subject to the entry of any other person. By the act of May 30, 1862,[43] the pre-emption claimant of unsurveyed lands is required to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township embracing such pre-emption settlement.[44]

§ 112. **Nature of Pre-emption Rights.** The right of pre-emption attaches only to such public lands as are subject to the operation of the general land system of the country, and not to those which have been taken out of the class of public lands and appropriated to specific objects, or reserved for particular purposes.[45] No title, either legal or equitable, is conferred by the pre-emption laws. They give merely a naked right to purchase and acquire title within a specified time, on compliance with certain conditions.[46] The settler acquires, and can acquire, no vested interest in the land he occupies by virtue simply of settlement;[47] the land continues subject to the absolute disposing power of Congress until all the necessary legal steps to perfect an entry thereof have been taken.[48]

[42] Coleman *v.* Allen, 5 Mo. App. 127, and see, Cir. Gen. Land Office, March 1, 1884.

[43] 12 Stat. at Large, 418.

[44] Megerle *v.* Ashe, 47 Cal. 632.

[45] 3 Opinions Att'y Gen. 456.

[46] Woodward *v.* McReynolds, 2 Pin. (Wis.) 268; Brown *v.* Throckmorton, 11 Ill. 529; Hemphill *v.* Davies, 38 Cal. 577.

[47] Opinions Att'y Gen. 56; Burgess *v.* Gray, 16 How. 48.

[48] Frisbie *v.* Whitney, 9 Wall. 187; Busch *v.* Donohue, 31 Mich. 482; Yosemite Valley Case, 15 Wall. 77; R. R. Co. *v.* Tevis, 41 Cal. 489; Wittenbrock *v.* Wheadon, 128 Cal. 150.

Before this the settler has nothing but a contingent, personal privilege to become, without competition, the first purchaser of the property, a privilege which he may never exercise, or which he may waive or abandon. As previously stated, this right has been uniformly held to confer no present title to the land, being gratuitous, prospective and contingent; and it is indisputable that the general proprietor, the government, has a paramount right to reserve the land from sale, to recall the privilege previously conferred, or make an absolute grant of the land to other parties, with or without consideration.[49]

The interest acquired by a pre-emption right is not an estate within any definition known to the common law,[50] and at best can be regarded only as a right of occupancy with a privilege, enjoyed by no one else, of purchasing on prescribed conditions. It can not be sold, so as to vest the purchaser with any rights in the land, and such a sale would extinguish the pre-emptor's own right.[51] Neither can it be conveyed by devise.[52]

But should the pre-emptor die without establishing his claim within the period limited by law, his rights thus initiated are still preserved, and the title may be perfected by his personal representatives or his heirs, provided the entry is made during the period in which the pre-emptor would have been entitled to do so, had he lived, and patent will be issued accordingly.[53] In such event, however, while resort may be had to the laws of the State under which the descent was cast for the purpose

[49] 11 Opinions Att'y Gen. 490.

[50] Delaunay *v.* Burnett, 4 Gilm. (Ill.) 484.

[51] Moore *v.* Jordan, 14 La. Ann. 414; Quinn *v.* Kenyon, 38 Cal. 499; Morgan *v.* Curtenins, 4 McLean, 366; Brewster *v.* Madden, 15 Kan. 249; but see Delaunay *v.* Burnett, 4 Gilm. (Ill.) 454, Phelps *v.* Smith, 15 Ill. 572, where the interest is regarded as property which may pass by deed, the purchaser being regarded as the "legal representative" of the original claimant; also, Bowers *v.* Kuscher, 14 Iowa, 301.

[52] Rogers *v.* Clemmans, 26 Kan. 522.

[53] Rev. Stat. U. S. § 2269. It is impossible to state the number of entries made under the pre-emption laws, because the system of the General Land Office carries them into "cash entries" and they are therefore embraced in the annual cash receipts from sale of land under various laws, but it is estimated that there has been disposed of under the pre-emption system, since its inauguration, about 175,000,000 acres.

of determining who are the heirs, yet the heirs do not take the land by inheritance from their ancestor, but by direct conveyance from the United States, and the portion taken by each heir is determined, not by the law of inheritance but by the terms of the conveyance.[54]

§ 113. **Conveyances before Entry.** The benefits of the pre-emption acts, being intended only for the actual settler, are personal in their application, the 12th section of the act of 1841 [55] providing that "all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void;" and to prevent speculators from acquiring the land, the applicant, before being allowed to enter same, is required to swear that he has not contracted it away, nor settled to sell on speculation, and any grant or conveyance made by him before entry is declared void, with an exception in favor of *bona fide* purchasers for a valuable consideration. This restriction has been held, however, to extend only to the *right* to pre-emption; that is, the preference right to purchase at a minimum price, no matter what the value might be when the time limited for perfecting the pre-emption has expired,[56] leaving the pre-emptor free to sell or otherwise dispose of the land after the entry had been made.[57]

Since the passage of the act of 1841, in those parts of the United States where that act applies, the right to sell has been freely exercised after the claim has been proved up, the land paid for and the certificate of entry received; the pre-emptor then standing in the same relation to the government as other purchasers,[58] and though the patent may only issue to the purchaser, it will inure to the benefit of his grantee.[59] By proof and payment the equities of the claimant are matured and complete, and while the right of government to dispose of its own property is undisputed, as well to prescribe rules for the disposition of same, yet, subject to these well-known

54 Wittenbrock *v.* Wheadon, 128 Cal. 150.
55 5 Stat. at Large, 457.
56 Meyers *v.* Croft, 13 Wall. 291.
57 Robbins *v.* Bunn, 54 Ill. 48.
58 Cady *v.* Eighmey, 54 Iowa, 615.
59 Camp *v.* Smith, 2 Minn. 155.

principles, parties rightfully in possession of the soil may make valid contracts, even concerning the title, predicated upon the hypothesis that they may thereafter lawfully acquire such title, except in cases where Congress has imposed positive restrictions.[60] At the same time it must ever be borne in mind that the government has the power to cancel all entries of public lands at any time before patent issues,[61] and that the rule of *caveat emptor* applies with peculiar force to all purchasers of land from pre-emption entrymen.[62]

§ 114. **Graduation Entries.** In order to further facilitate settlement and encourage the sale of public lands to actual settlers and cultivators, Congress, by the act of August 4, 1854,[63] provided for a graduated scale of prices, for lands which had been in the market for ten years and upward, ranging from 12½ cents to $1,00 per acre. This act remained in force until June 2, 1862, when it was repealed.[64] In its essential features it closely resembled the pre-emption law, to which it was in fact an aid. The lands could also be purchased for cash at the graduated price. Like the pre-emption law, the rights conferred by this act were personal, and because of actual settlement and cultivation, made or contem-

60 Lamb *v.* Davenport, 18 Wall. 307. In California it has been held that a mortgage made before proof and payment, might be enforced after entry had been perfected: Clark *v.* Baker, 14 Cal. 612; Christy *v.* Dana, 34 Cal. 548. See also Reasoner *v.* Markley, 25 Kan. 635.

61 As where the pre-emptor has failed to comply with the requirements of law and has procured his final receipt or certificate on false evidence. See, Jones *v.* Meyers, 2 Idaho, 793.

62 Taylor *v.* Weston, 77 Cal. 534; Guidry *v.* Woods, 19 La. 334; Hestres *v.* Brennan, 50 Cal. 211.

63 10 Stat. at Large, 574.

64 Thousands of entries were made under the provisions of this act, the quantity of land sold, as shown by the reports of the General Land Office, aggregating nearly 26,000,000 acres. It is still possible that in some few cases patents have not been issued on the entries made, as there were many cases in which the required proof of settlement and cultivation was wanting, but under a confirmatory act passed March 3, 1857, the patents were delivered, on application therefor, without the proof being required in all such cases, where the entry was allowed prior to the passage of that act, and where it was not found to be fraudulently or evasively made. Subsequent to the passage of that act, and prior to June 2, 1862, when the graduation law was repealed,

plated. Assignments of the rights acquired under the acts were expressly prohibited and wholly disregarded, and the patents in every instance issued to the original purchaser.

The method of acquiring title under graduation acts was substantially the same as under the pre-emption laws, with only a slight difference in details. It is not customary, nor is it necessary, to incorporate in the abstract the inceptive details prior to entry. The matter is optional with the examiner, but the entry is the first material stage.

§ 115. **Donation Entries.** In a few localities initiations of title will be found under what are known as the "Donation Acts." These acts were a series of laws designed to induce settlements on the public lands in dangerous or distant parts of the nation. They were all local in character as well as temporary in their application, and all of them have long since expired by their own limitation. In their practical features they resembled the present homestead law, of which, indeed, they were the precursors. The first of these laws, passed in 1842,[65] was had in view of the Indian difficulties in Florida, and provided for the donation of one quarter section of land to any person, able to bear arms, who should make an actual settlement within a certain portion of the peninsula.[66] In 1850,[67] a still more liberal act was passed with special reference to the Territory of Oregon, and when in 1853 the Territorial government of Washington Territory was established, its terms were extended over that Territory. This act donated from a quarter to an entire section, a premium being placed on matrimony by a double allowance to a married man, and by permitting the wife to retain the ownership of half the

a large number of entries were allowed under that law, and in the course of business there came to be many patents for entries so allowed, the delivery of which was suspended for the reason that the requisite proof was not forthcoming. To this class of cases the confirmatory principles of the act of March 3, 1857, were made applicable by the act of Feb. 17, 1873, and the issuing of patents has since continued.

[65] 5 Stat. at Large, 502.

[66] This law, which was variously amended, resulted in the patenting of 1,317 claims.

[67] 9 Stat. at Large, 496.

land in her own right.[68] Residence on and cultivation of the land for four consecutive years was necessary to insure a patent from the government. The act expired Dec. 1, 1855. In 1854[69] a similar act was passed with special reference to the Territory of New Mexico, except that the grant was restricted in quantity to 160 acres, and available only by males then residing in the Territory or who should remove there prior to 1858.[70]

§ 116. **Homestead Entries.** Until 1862, Congress had passed no general law offering the public domain in a limited quantity to any person who would cultivate and make a permanent home thereon. Pre-emption laws, securing the right to enter land by purchase at a premium price fixed per acre had been enacted, and donation laws, applicable to particular States had been passed, but the liberal policy of offering homesteads had not been extended to all persons. The act of May 20th of that year[71] is the first homestead law of the government, "and it would be difficult perhaps," says Dillon, J., "to point to any enactment of the Federal Congress, more wise in conception, just in policy, and beneficial in results than this."[72] By this act a quantity of land, not exceeding 160 acres, is given to any person, being the head of a family and possessing the requisite qualifications, on condition of settlement, cultivation and continuous occupation as a home by the settler for a period of five years.[73] During this period

68 Upwards of 8,000 donation certificates were issued under this law covering about 3,000,000 acres.

69 10 Stat. at Large, 308.

70 Less than 200 certificates have been issued under this law.

71 12 Stat. at Large, 392.

72 Seymour *v.* Sanders, 3 Dill. 437.

73 At the close of the civil war, the President, by proclamation June 13, 1865, ordered the reopening of the United States district land offices in the States of Louisiana, Florida, Arkansas, Mississippi, and Alabama. Congress, June 21, 1866, directed that all public lands in those States should be reserved for settlement under the homestead act of May 20, 1862. The obtaining of these lands by the landless class of the South was considered essential to their future welfare and that of the Nation. Congress therefore, enacted that they should only be entered under the homestead law, and, changing the rule, fixed the maximum acreage to be entered by a

he is prevented from alienating any part of it, or from making any actual change of residence, or from abandoning the land for more than six months at a time. A full compliance with all the provisions of the act, entitles him to a patent at the expiration of five years.

The law requires the land "to be located in one body, in conformity to the legal subdivisions of the public lands, and after the same shall have been surveyed." The applicant is required to file with the Register of the district land office his application, designating the tract desired to be entered, together with his affidavit setting forth the facts which bring him within the requirements of the law,[74] whereupon the Receiver issues homestead duplicate receipts for each entry, one of which is delivered to the applicant, and the other returned to the General Land Office.[75] No certificate is issued at the time of entry, nor until the expiration of the five years, except in case of a sale for the benefit of infant heirs,[76] or where full payment is made before that time as provided by the act. In case of a sale for the benefit of infant heirs, a certificate issues in the name of the purchaser, upon evidence of sale made in obedience to a decree of a court of competent jurisdiction. In case of full payment the party is required to make proof of settlement and cultivation as required by the pre-emption laws, upon which, and the surrender of the homestead duplicate, a new and original entry may be made and a pre-emption receipt will issue as in ordinary cases.[77]

person at 80 acres. This law continued in force until June 22, 1876, when it was repealed and all of the lands in the five Southern States were ordered to be brought into market by proclamation for sale at public offering to be followed by private entry. Title to upwards of 12,000,000 acres was initiated by homestead entry under the law of 1866.

74 A fee of $10 must also be paid at this time, together with a commission of one-half of one per cent. upon the cash value of the land applied for, based on $1.25 per acre.

75 Cir. Gen. Land Office, Mar. 1, 1884.

76 § 2 of act.

77 Cir. Gen. Land Office, Oct. 30, 1862. From May 20, 1862, the date of the law, to June 30, 1889, according to a very modest estimate, the number of patents issued was 297,208, embracing an area of 74,302 square miles, or 47,553,280 acres. Rep. Gen. Land Office, 1889.

§ 117. **Rights Acquired Under Homestead Acts.** By the preliminary proceedings already noted, an inceptive right is vested in the settler, which by a faithful observance of the law in regard to settlement and cultivation for the continuous term of five years, and final proof and payment [78] is perfected and made the basis of a patent or complete title. The homestead settler's right attaches only from the date of entry, the pre-emptor's from the date of his actual personal settlement. The title in either case is consummated by a full compliance with the terms and conditions imposed by law.[79] By the 4th section of the act of 1862, land acquired in this manner is declared to be not liable for debts contracted prior to the issuing of the patent.

The sale of a homestead claim by the settler, before completion of title, vests no title or equities in the purchaser, and is not recognized by law,[80] and, in making final proof, the settler is by law required to swear that no part of the land has been alienated except for church, cemetery or school purposes, or the right of way of a railroad.[81]

In the event that a homestead claimant dies before patent issues, or before the right to demand a patent has accrued, the land does not become part of his estate. Upon his death all his rights under the homestead entry cease. His heirs thereupon become entitled to a patent,[82] not because they have succeeded to his equitable interest, however, but because the law gives them preference as new homesteaders, and allows them the benefit of the residence of their ancestor on the land.[83]

§ 118. **Desert Land Entries.** In the western-central

78 The payment here mentioned is a commission of ½ of one per cent. paid on the issuance of the certificate. The fees and commissions, however, vary somewhat. See Instructions Gen. Land Office, Oct. 30, 1862.

79 Commissioner's Instructions, Aug. 25, 1866.

80 An exception to this rule seems to have been made by the Act of June 15, 1880 (21 Stat. at Large, § 237). This act, however, is retrospective in its operation and applicable only to peculiar circumstances. See, Cir. Gen. Land Office Mar. 1, 1884.

81 Rev. Stat. U. S. § 2288.

82 Rev. Stat. U. S. § 2291.

83 Gjerstadengen *v.* Van Duzen, 7 N. Dak. 612.

part of the United States there is a vast arid region, estimated to contain more than seven hundred millions of acres, wherein agriculture can be conducted only by means of irrigation.[84] These tracts have received the name "desert lands," notwithstanding they possess remarkable fertility when properly irrigated, and, from the experience of actual settlers, can be made to produce larger crops than those which reward the labors of the husbandman in regions subject to periodic or occasional rainfall.[85]

In order to induce settlement on this class of lands lying west of the Missouri river, Congress, in 1877,[86] passed what is known as the "Desert Land Act," the object of which is to effect a reclamation of lands which will not, without artificial irrigation, produce any agricultural crop. This act is not a donation law, however, but simply a variation of the ordinary cash entry, its beneficial features being that the claimant has three years in which to introduce water and pay for the land. A duplicate certificate is issued at the time of entry, a small entry fee being paid, but final certificate of purchase is not given until proof of compliance with the terms of the act and full payment has been made for the land, which is usually three years afterward.

§ 119. **Tree Claims.** To promote the growth of timber on the treeless prairies of the West, Congress has further enacted a law, by which any person entitled to make a pre-emption or homestead entry may secure 160 acres of public land by planting, protecting and keeping in a healthy growing condition thereon, for eight years, ten acres of timber. Lands subject to entry under this act must be composed exclusively

[84] These lands lie in Nevada, New Mexico, Arizona, Colorado, Wyoming, Southern California, Montana, Eastern Oregon and Washington, and a portion of the Western part of the Dakotas. They are also found in small areas in other parts of the Western States.

[85] See, Report on the Lands of the Arid Region, by Powell, 1878; Preliminary Report of Public Land Commission, 1880.

[86] Act of March 3, 1877. This act applies only to California, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota.

of prairie lands, or other lands devoid of timber. At the expiration of eight years final proof is made and patent issues as in other cases. Residence or actual settlement is not necessary, nor will an entry of this character preclude a simultaneous homestead or pre-emption entry, hence "tree claims" have been made on a large portion of the western lands and will form the initial stage of title to much valuable property.

If the owner of a timber claim dies before he has complied with all the conditions necessary to obtain a patent, his heirs may complete the remaining conditions, and upon obtaining a patent they take the land in equal shares as direct grantees of the government and not by inheritance.[87]

§ 120. **Location by Military Warrants.** The practice of granting bounty land to officers and soldiers who have been engaged in the military service of the United States, as a public reward for devotion and patriotism, dates back to the period of the Revolution, and has formed the subject of a number of Congressional enactments since that time.[88] The warrants or certificates issued in pursuance of these acts may be located at any land office in the United States and must be made on lands subject to private entry, according to the legal subdivisions and in one body, the selection always to be in as compact a form as possible. The law expressly forbids the location of a warrant upon any lands to which there shall be a pre-emption right, or upon which there shall be an actual settlement or cultivation, or upon any lands which are reserved or withdrawn from market for any purpose whatever.[89] When located by the warrantee in person they are available upon any tracts of land which may be entered under the general pre-emption laws, whether such land has or has not been offered at public sale.[90] By act of Congress of March

87 Cooper *v.* Wilder, 111 Cal. 191.

88 No land bounties were given by Congress for military service in the civil war. The only privileges granted for such service, in connection with the public lands, were time allowances on homestead entries.

89 Act Feb. 11, 1847; Act. Sept. 28, 1850.

90 Instructions Gen. Land Office, April 1, 1848; do. Mar. 31, 1851.

22, 1852, certificates of location of military land warrants were made assignable, and the interest acquired by valid location was made to pass by deed or instrument of writing, in the form and subject to the regulations prescribed by the General Land Office, the assignee becoming fully vested with all the rights and property of the original owner or warrantee.[91]

The entry is made by application to the Register alone, who issues duplicate certificates of purchase, one of which is delivered to the purchaser and the other transmitted to the General Land Office as in other classes of entries. If the certificate has been assigned, and such assignment has been received before the issue of the patent, the same will be issued in the name of the assignee. Assignments and locations, as well as deeds of land so located prior to the issue of the patent, if made before March 22, 1852, have been held invalid.[92]

§ 121. **Land Scrip.** In 1784, the State of Virginia ceded to the United States the largest and most valuable body of land that ever belonged to the public domain of any State in the world. But previous to the cession the State had promised to give certain portions of it to the soldiers and sailors who had served during the Revolutionary War in its armies and navies. The government took the land charged with this obligation to satisfy the claims of Virginia's defenders, and assumed all unsatisfied outstanding military land warrants of the State, issued by proper authorities, giving in exchange therefor the land "scrip" of the United States.[93] This scrip is receivable in payment of any lands owned by the United States, subject to sale at private entry, but can not be applied by pre-emptors.

There has also been issued under acts of Congress,[94] and in pursuance of treaties with Indian tribes, a species of location

91 Waters *v.* Busch, 42 Iowa, 255; Bell *v.* Hearne, 19 How. 260. The grants for military and naval land bounties from the origin of these laws to June 30, 1883, amounted to 61,064,150 acres. Rep. Pub. Land Commission, 1883.

92 Nichols *v.* Nichols, 3 Pin. (Wis.) 174; Stephenson *v.* Wilson, 37 Wis. 482.

93 6 Opinions Atty. Gen. 243; 9 do. 156; Act Aug. 31, 1852.

94 10 Stat. at Large, 304.

certificates known as Indian or Half-breed scrip. It is issued to the Half-breed and can be located only in his name, and, unlike the Virginia scrip, can not be treated as money, but must be located acre for acre. This scrip is not assignable and transfers of same are held void. Though originally confined to reservations, the sphere of location has by statute been enlarged so as to comprise any other unoccupied lands subject to pre-emption or private sale. No receipt is issued to the locator, except in unavoidable cases, as where there is a small excess in the area of location over the scrip, which must be paid for and receipt issued as in bounty land warrant cases. But no certificate of purchase is issued, as in case of money purchases, the scrip and application, instead of certificates of purchase, being the instruments of title which are returned to the General Land Office in this class of business.[95] A certificate by the commissioner of the General Land Office showing the location of the scrip, and that such location was made by the party authorized to do so, is competent evidence to show title in the location. A copy of the scrip is not essential to prove title from the government whenever this becomes necessary.[96]

Private land scrip is issued on confirmation of the claims of individuals, and is intended as a compensation to the donee for the loss of valuable estates or interests in lands. It may be assigned, and when assigned may be located in the name of the assignee. It would appear that entries made with this scrip are not patentable, no provision being made therefor, but it seems that in this case a patent is not absolutely necessary for the full protection of claimants, inasmuch as a certificate of entry will be full evidence of a complete relinquishment by the United States of all its interests in the land located.[97]

95 Instructions Gen. Land Office, Feb. 22, 1864; do. May 13, 1865.

96 Wilcox *v.* Jackson, 109 Ill. 261.

97 Opinion and instructions Secy. of Int., Aug. 4, 1875. It is difficult to reconcile this procedure with the oft repeated decisions of courts, respecting the necessity of a patent to prove title out of the government, in actions of ejectment or other proceedings at law to try disputed titles.

The most important of this peculiar class of paper is that known as Agricultural College scrip. It is issued in pursuance of an act of Congress, passed July 2, 1862, to donate a portion of the public land to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts. The amount of land donated by this act was a quantity equal to 30,000 acres for each senator and representative in Congress by the apportionment under the census of 1860. The quantity of land to which each State was entitled was to be selected primarily from the public lands, within the limits of such State, that were subject to sale at private entry at the minimum price, and in case of a deficiency of such lands the Secretary of the Interior was instructed to issue land scrip to the amount in acres for such deficiency of its distributive share. This scrip was to be sold by the States and the proceeds applied to the uses prescribed by the act. The State is prohibited from locating the scrip within the limits of any other State, but its assignees may locate same upon any of the unappropriated lands of the United States subject to sale at private entry, or in payment for pre-emptions,[98] and in commuting homestead entries.[99] The manner of proceeding to acquire title with this class of certificates is the same as in cash and warrant cases.

§ 122. **Swamp Land Grants.** By act of March 2, 1849, Congress made a grant to the State of Louisiana of certain swamp and overflowed lands, and by act of Sept. 28, 1850,[1] made a similar concession to the State of Arkansas "and each of the other States of the Union in which such swamp and overflowed lands may be situated." The first act applied only to the State of Louisiana, and vested the fee in said lands upon the approval of the selections by the Secretary of the Interior. The general law of 1850 provides that the fee shall vest in the State upon the issuing of a patent. The method of selection being left optional with the States, Michigan and

[98] Instructions Gen. Land Office, July 22, 1870.

[99] Instructions Gen. Land Office, Feb'y 8, 1872. See also 15 Stat. at Large, 227.

[1] 9 Stat. at Large, 519.

Wisconsin adopted the field notes of survey as the basis of their acceptance, while the others agreed to ascertain the lands by examination in the field.[2] The grant comprised all lands which were wet and unfit for cultivation, and included also all lands which, though dry part of the year, were subject to inundation at the planting, growing or harvesting season, so as to destroy the crop. These lands, for the most part, have since, by drainage and cultivation, become valuable for agricultural purposes, and the title to many fine farms in the Western States is derived through the swamp land grants.[3]

Though the act provided for the issuing of a patent to vest the fee, it was itself a present grant, wanting nothing but a definition of boundaries to make it perfect, the patent being merely in confirmation of the equitable title already vested,[4] yet as the fee remained in the government until the issuance of the patent, the State would have no power to convey a legal title or dispose of the land prior to that event.[5] The complete abstract, therefore, should recite the original grant, showing the acceptance by the State, and any other necessary feature, and finally the patent from the government, as the foundation of title.

It will be observed that the provisions of this act extend to, and their benefits are conferred upon, only "each of the other States of the Union," and it has always been held by the General Land Office that the grant extended only to States in existence at the date of the act, and that as new States were admitted additional legislation was needed to confer the benefits of the swamp grant upon them.[6] In this construction Congress seems to have concurred, for in 1860 we find a special statute extending the swamp grant to the States of Oregon and Minnesota, which States had been admitted subsequent to

2 1 Lester's L. L., 542.

3 Since the passage of these acts and prior to June 30, 1889, there has been patented to fifteen States lands aggregating 57,099,972 acres. Rep. Gen. Land Office, 1889.

4 9 Opinions Atty. Gen. 253; Sterling *v.* Jackson, 69 Mich. 488.

5 Parsons *v.* Comm'rs S. & U. Lands, 9 Wis. 236.

6 See Rulings Commissioner Gen. Land Office, Jan. 19, 1874, and May 2, 1871.

the passage of the grant of 1850. This is undoubtedly correct, as all grants of the public domain are in the nature of benefits derived through the original granting acts, designating the character and extent of the grants and the manner in which they are to be made effective and secure to the grantee. Such benefits are usually bestowed not by general, but by special legislation.

§ 123. **School Lands.** It has always been a cherished policy of the government to set apart and appropriate a portion of every township for the advancement of education in the support of common schools. Formerly, one section only was devoted to this most laudable purpose, but in the States admitted during later years two sections have been reserved,[7] usually sections 16 and 36. The practice of setting apart section 16 is traceable to the ordinance of 1785, being the first enactment for the disposal by sale of lands in the Western territory, and became a fundamental principle by the ordinance of 1787, which settled terms of compact between the people and States of the Northwest Territory and the original States. One of the articles affirming that "religion, morality and knowledge being necessary for good government and happiness of mankind," declared that "schools and the means of education should forever be encouraged." This principle was

[7] To each organized Territory, after 1803, was and now is reserved the sixteenth section for school purposes, which reservation is carried into grant and confirmation by the terms of the act of admission of the Territory or State into the Union; the State then becoming a trustee for school purposes. These grants of land were made from the public domain, and to States only which were known as public-land States. Twelve States, from March 3, 1803, known as public-land States, received the allowance of the sixteenth section to August 14, 1848.

In the act for the organization of the Territory of Oregon, August 14, 1848, there was inserted an additional grant for school purposes of the thirty-sixth section in each township, with indemnity for all public-land States thereafter to be admitted, making the reservation for school purposes the sixteenth and thirty-sixth sections, or 1,280 acres in each township of six miles square reserved in public-land States and Territories, and confirmed by grant in terms in the act of admission of such State or Territory into the Union.

extended, first by congressional enactment,[8] and afterward in 1802, by compact between the United States and Georgia, to the Southwest Territory.

The constancy with which the government has ever adhered to this policy in the various compacts with the people of the newly formed States, and the care which Congress has manifested to prevent the accumulation of prior obligations which might interrupt it, fully display their estimation of its importance and value.[9] The reservation of these sections, in words of present grant, is made a part of the organic act on the admission of the State into the Union and passes to the State the title to the land without further legislation. As the government extends its surveys, so that the location of the section can be ascertained, the title in the State becomes perfect and complete.[10] Where sections 16 or 36 are in whole or in part included in private claims, held by titles legally confirmed or decided to be valid, the State may select their equivalent in other unreserved lands.

§ 124. **Internal Improvement Grants.** In addition to the grants hereinbefore described, Congress, from time to time, has made large grants of the public domain to the different States, to aid in the development of the country by the build-

8 1 Stat. at Large, 550.

9 See Cooper *v.* Roberts, 18 How. (U. S.) 173, for an elaborate review of this subject.

10 Cooper *v.* Roberts, 18 How. (U. S.) 173; Bucher *v.* Wetherby, 5 Otto (U. S.), 517. There has been granted and reserved for educational purposes, since the organization of the government and prior to June 30, 1883, a grand total of 78,889,839 acres. Of this amount 67,893,919 acres have been donated for the support and maintenance of the public or common schools, the balance has been variously given for agricultural and mechanical colleges, seminaries or universities.

In the legislation relating to the admission of the public-land States into the Union, from the admission of Ohio in 1802, grants of two townships of public lands, viz, 46,080 acres each, for university purposes are enumerated. Ohio, Florida, Wisconsin, and Minnesota are the exceptions, each having more than two townships in area. These reservations in each case require a special act. All school, university or agricultural college lands granted are sold by the legislatures of the several States or leased, and the proceeds of sale or lease applied to education.

ing of railroads, canals, and other internal improvements. These grants, though local in their nature, are all governed by the same general principles. The acts, as a rule, convey in words of present grant which vests a fee simple title in the States to which the lands are given,[11] and where, as in case of an unlocated railroad, no specific tracts are designated, they have been held to constitute a conditional grant *in præsenti* in the nature of a "float" which does not attach to any particular parcel of the public lands until the necessary determinative lines have been fixed upon the face of the earth,[12] but upon such definite location the title to each particular parcel will be as complete as if it had been granted by name, number or description,[13] relating back to the date of the grant.[14] The same general rules will also apply to special grants for State improvements.

All public grants are to be construed most strongly against the grantee, and this is specially true of legislative grants. In construing a congressional grant, it should always be borne in mind that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. This intent can not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties, and to the validity of which there must exist a present power of identification of the land conveyed. Where no such power exists, instruments with words of present grant, are operative, if at all, only as contracts to convey, but in the grants under consideration, as in all other cases of governmental conveyances, the rules of the common law must yield to the legislative will.[15]

§ 125. **Land Grants to Railroads.** From the period of

[11] U. S. *v.* Perchman, 7 Peters, 51; U. S. *v.* Brooks, 10 Howard, 442; Godfrey *v.* Bradley, 2 McLean, 412.

[12] 8 Opinions Atty. Gen. 244.

[13] 9 Opinions Atty. Gen. 41; R. R. Co. *v.* United States, 92 U. S. 733.

[14] Swann *v.* Lindsey, 70 Ala. 507.

[15] Schulenberg *v.* Harriman, 21 Wall. (U. S.) 60; R. R. Co. *v.* R. R. Co., 97 U. S. 491.

the inauguration of the system of land grants in aid of internal improvements by private corporations until the year 1862, it was the invariable practice to make the grant to the State, which, in this instance, acted as a trustee or transfer agent, conveying to the corporation the fee of the land after performance of conditions.[16] The charter of the Union Pacific R. R. effected a complete change in this respect. Here the grant was made direct to the corporation, all intermediaries being avoided, and the precedent thus set has been followed in a large number of grants made since that time.[17]

The act of Congress granting the lands is the inceptive measure of all titles initiated in this manner, and forms the first link in the chain. The acts are usually couched in words of present grant, as "that *there be* and *is hereby granted,*" and when so worded they constitute a conveyance that can only be defeated by failure to perform the conditions annexed to the grant. The general right to the land, subject to the exceptions contained in the act, vests at the date of the passage of the law, and, as in the case of other unlocated tracts, attaches to the specific lands at the time of filing the plat in the

[16] March 2, 1833, Congress authorized the State of Illinois to divert the canal grant of March 2, 1827, and to construct a railroad with the proceeds of said lands. This was the first Congressional enactment providing for a land grant in aid of a railroad, but was not utilized by the State.

The act of September 20, 1850, was the first railroad act of real importance, and initiated the system of grants of land for railroads by Congress which prevailed until after July 1, 1862. This grant gave the State of Illinois alternate sections of land (even-numbered) for six sections in width on either side of the road and branches, being a grant of specific sections. The road was to be a public highway, to be used by the Government free of toll or other charges, and the mails were to be carried at prices to be fixed by Congress. This act extended like terms and conditions to the States of Alabama and Mississippi in aid of the Mobile and Ohio road which was to connect with the Illinois Central and branches — all of which roads are now established.

[17] It is estimated that if the lands embraced in limits of grants to railroads were all available, and, that the corporations, State and National, built their roads, and complied with the laws, it would require 215,000,000 of acres of the public domain to satisfy the requirements of the various laws. Actual selections, forfeitures, etc.,

General Land Office. After this has been accomplished the title of the corporation becomes fully vested and complete.[18]

§ 126. **Public Highways.** By act of Congress, in the year 1866,[19] the right of way was granted for the construction of highways over public lands not reserved for public use, and in nearly all of the States containing public land a special enactment declares that all section lines, as far as practicable, shall be and remain public ways. The effect of these laws, taken together, is to locate and dedicate, by express public grant, a strip of land along each section line for highway purposes, and subsequent settlers and purchasers acquire title subject to the public use in this particular.[20] Where the land had passed into private ownership prior to the enactment of these laws their effect would be nothing more than an assertion of the right of eminent domain, and should the strip be actually taken the rule of compensation would undoubtedly apply.

§ 126a. **Private Land Claims.** Embraced in the accessions which at different times have been made to the National territory, are numerous individual foreign titles having their origin under the governments preceding the United States in sovereignty. To these the name "Private Land Claims" has been assigned. They are usually founded on written grants of some kind, yet they also exist even as nascent claims resting upon actual settlement before the change of government.[21]

have greatly reduced this amount. See Rep. Public Land Commission, 1883.

18 South Pac. R. R. Co. *v.* Dull, 22 Fed. Rep. 489.

19 Sec. 2477 Rev. Stat. U. S.

20 Wells *v.* Pennington county, 2 S. Dak. 1.

21 Turning to the national map it will be seen that these private claims or grants, marking the progress of early explorations and settlements on this continent, begin on the northern shores of the Michigan lower peninsula, come down to the old French settlement at and near Detroit, pass over to Green Bay and Prairie du Chien in Wisconsin, enter into Indiana at the old Vincennes post, down the eastern side of the Mississippi, and in Illinois reach Peoria, Prairie du Rocher, and the Kaskaskias, there resting on ancient British and French grants, and all within the limits of the United States according to the treaty of limits in 1783. Thence such ancient claims are found in descending the Mississippi under other forms of grant and granting officers, to the Gulf of Mexico, extending into the southern portions of Mississippi and

These titles have been scrupulously respected by the United States and every effort has been made to secure to individuals all their rights which originated under former governments. The principle has been rigorously maintained that though the sovereignty may change the rights of private property remain unaffected,[22] and in this respect no nation has shown a higher sense of justice or a more liberal spirit. Frequently these claims are confirmed by the United States and thereupon patents of confirmation issue,[23] but there are numerous holdings, particularly in States east of the Mississippi, which rest entirely on the old French and Spanish grants.

§ 127. **Who May Acquire Title.** The policy of the general government in relation to the sale of the public lands has ever been most liberal, yet a few restrictions have been imposed in certain cases which it may be well to notice. The general land system makes little or no discrimination, but to this has been superadded a specific new fact: the sale or disposal of certain lands, in certain limited quantities, at a re-

Alabama, and scattering all over both East and West Florida, crossing the Mississippi and following the shores of the Gulf, they are found, thickly scattered over Louisiana, existing in Arkansas, and in great numbers in Missouri.

In those localities south of the thirty-first degree, east of the Mississippi, to the Perdido, and those west of the Mississippi to the present State of Missouri, inclusive, the claims are founded on Spanish and French titles, under treaty of 1803 and ancient settlements; those east of the Perdido, in the Floridas, upon Spanish titles under the treaty of 1819, and under old settlements.

In New Mexico, Colorado, Arizona, and California, as we advance westward, there exist ancient Spanish titles, municipal and rural, claimed under the treaty of 1848 with Mexico, and what is known as the Gadsden purchase of December 30, 1853. These claims are for irregular tracts, illy defined, bounded by streams or marked by headlands, or natural objects in many cases since removed. They were made for agricultural, mining, stock-raising, or colonization, in all sizes from a village lot to a million-acre tract. The records kept by the granting authorities of Spain and Mexico have been a serious hindrance in some cases toward a satisfactory solution, being frequently of doubtful meaning. See, Report Public Land Commission, 1883.

[22] United States *v.* Percheman, 7 Pet. (U. S.) 51; Soulard *v.* United States, 4 Pet. (U. S.) 511.

[23] See § 132 "Confirmations," *post.*

duced price or on certain specific conditions, for personal use and for actual settlement and cultivation only, under a series of acts known as pre-emption, graduation, homestead acts, etc. The benefits of these acts are designed for actual settlers and exclude all persons not *sui juris*, such as married women, minors, and others who are legally incapable of contracting; meaning of course married women and minors not unemancipated, and constituting members of the family of the husband or father.[24] The general law, in so far as regards the United States, undoubtedly enables aliens to purchase the public lands for cash and at the ordinary price, subject only to such limitation as the particular States may enact.[25] The benefits of the special laws above referred to, however, apply only to persons who are citizens of the United States, or such as have filed their declarations to become citizens, as required by the naturalization laws.[26]

§ 128. **Inceptive Measures in the Abstract.** The foregoing brief and fragmentary review of the inceptive stages of title, but faintly expresses the vastness of our public land system and conveys no adequate idea of its many intricate details produced by an almost innumerable number of acts of local or temporary application, together with their attendant rulings, instructions and decisions by the Interior Department, and adjudicated cases.[27] A full and accurate knowledge of the United States land system is of the utmost importance to both examiner and counsel, and though it is not usual or necessary to incorporate any considerable portion of the inceptive measures in the abstract, yet when it is remembered that the validity of title to each and every tract carved from the public domain, depends upon the accuracy with which the first details of transfer from the government to its grantee were executed, the importance of exercising critical care at this stage of the abstract will be apparent.[28]

[24] 5 Stat. at Large, 458.

[25] 10 Stat. at Large, 649.

[26] 7 Opinions Att'y Gen 351.

[27] See Lester's or Zabriskie's Land Laws for a full exposition of these acts and decisions.

[28] A grant of public lands cannot be impeached collaterally unless it

A brief note of the entry should always form the initial statement of the abstract, or when originating in grant, a corresponding statement to that effect, the degree of fullness of narration being optional with the examiner. The various steps under the pre-emption laws prior to entry are unimportant, and shed no light on the title after the certificate has issued. But with homestead entries it is different. Here the certificate does not issue until five years after entry and during this period eventful changes may occur. In case the interest should be sold for the benefit of infant heirs, a certificate issues to the purchaser, and the abstract should show substantially all the proceedings from entry to issue of certificate. All the needed data can be procured by obtaining a transcript of the Register's tract book, something no well appointed abstract office can dispense with. The tract book, further, has all the dignity of other recorded evidence in matters affecting title.[29] In titles originating in grant or confirmation and not followed by patent, much more particularity is requisite than when the patent is relied on as the foundation of title, and a corresponding fullness of narration and detail is necessary.

is void upon its face. But it may be assailed in a direct proceeding.

[29] Russell *v.* Whitehead, 4 Scam. (Ill.) 7.

CHAPTER IX.

INITIAL STATEMENTS.

§ 129. The government entry.
130. The donative act.
131. Continued—Section sixteen.
132. Confirmations.
133. Town site entries.
134. The Receiver's receipt.
135. State lands.
136. The root of title.

§ 129. **The Government Entry.** Whenever the abstract goes back to the foundation of the title, it should always commence with a brief note of the original entry of the land at the United States Land Office of the district in which the same is located, giving the name of the person so entering it, together with the date, and any other particulars that may appear and are pertinent. Should the entry, from any cause, have been canceled and re-entry made, that fact should also be noticed, giving date of cancellation and re-entry. Where parties have negligently omitted to record the Receiver's receipt or the patent,[1] as is frequently the case, this forms the only item of information relative to the origin of the title, and will be of great service to counsel in his investigations, as well in determining the rights of the parties as in supplying missing links of evidence. The entry itself, if valid, gives a right to the Register's certificate of purchase, and creates an equitable interest in the land.[2] It is useful in showing the inception of title, and forms a symmetrical initial to the history which follows. No particular form is necessary so long as the facts are substantially stated, and the following example will suffice:

The northeast quarter of Section six, Town one, north, Range twenty-three, east of the 3d Principal Meridian, was entered by

[1] The recording laws of the States, as a general rule, do not require the recording of the Receipt, although provision therefor is always made.

[2] Levi *v.* Thompson, 4 How. (U. S.) 17.

Thomas J. Holmes, May 14, 1839, at the United States Land Office at Milwaukee, Wisconsin. Certificate, No. 341. (Certificate canceled, and re-entry made, June 10, 1839. Certificate, No. 800.)

This, of course, applies only when the land has been entered in the usual manner, and never includes sections 16 or 36, or such other lands as may have been selected by the State in lieu thereof, and which are commonly known as the "school sections." Nor would lands donated for specific purposes, as to assist in the construction of internal improvements, etc., be susceptible of this treatment. In such cases a recital of the original grant should constitute the initial statement of the abstract.

§ 130. **The Donative Act.** When the inception of title is through some grant of Congress, though the immediate grants are from the State, the preliminary measures by which the State acquired its right to convey should appear upon the abstract. A grant of public land by statute is the highest and strongest form of title known to our law,[3] and vests in the grantee all the title which the United States had at the time of the grant or may afterward acquire; subject, however, to the conditions and restrictions appended thereto, and this, although a patent may afterward issue.[4] The original grant, or so much thereof as may be necessary to show the conveyance, should therefore form the initial statement of an abstract of title to land so derived. Coupled with this should appear so much of the official action of the State authorities as will show an acceptance on their part and a compliance with such conditions as may be imposed by the granting act. These need not be set out at length; brief references are sufficient, provided all the essential steps are substantially noted. Public grants to States are usually of specified quantities but of unascertained

[3] 11 Opinions Atty. Gen. 47; Dousman *v.* Hooe, 3 Wis. 466.

[4] 9 Opinions Att'y Gen. 346; Thompson *v.* Prince, 67 Ill. 281; Hall *v.* Jarvis, 65 Ill. 302; Challefoux *v.* Ducharme, 4 Wis. 554; but see Foley *v.* Harrison, 15 How. 433.

location, which is determined by selection in accordance with the terms of the grant. A statement similar to the following should preface the abstract in such cases:

Section seven, Town thirty-nine north, Range fourteen east of the 3d Principal Meridian, with other lands, was selected by the Commissioner of the General Land Office, under the direction of the President, as a portion of those tracts granted by the United States to the State of Illinois by Act of Congress approved March 2, 1827, entitled "An Act to grant a quantity of land to the State of Illinois for the purpose of aiding in opening a Canal to connect the waters of the Illinois River with those of Lake Michigan."

Selection approved by the President May 21, 1830.

These statements are usually short, from the fact that the title at this stage is usually unquestioned, and in the older States has acquired all the elements of stability and permanence from long acquiescence and the effluxion of time. The examiner will finding no difficulty in adapting internal improvement or railroad grants from the hints above given, and further illustrations are not deemed necessary.

A selection by the State has the effect of an entry of the land, and withdraws the tract from further disposal, unless the selection shall be subsequently rejected, subject, of course, to the perfection of any pre-existing valid pre-emption claims;[5] and when a particular parcel of land is selected by a State, through its officers or other authorized agents, as a part of a gross acreage theretofore granted, and such selection and location are approved by the United States, the title becomes perfect and attaches to the land selected.[6]

§ 131. **The Same — Section Sixteen.** The immediate title to section sixteen, and in States west of the Missouri river to section thirty-six as well, is derived from the State, although

[5] See Instructions Commr. Gen. Land Office, Jan. 5, 1872.

[6] Megerle v. Ashe, 27 Cal. 322.

the original title comes from the Federal Government. These sections, in pursuance of the cherished policy of the government, are specifically appropriated to the use of common schools, which appropriation or reservation forms a part of the compact by which the State is admitted into the Union. When the lands are surveyed and marked out the possessory right of the State at once attaches, and, if there be no legal impediment, becomes a legal title.[7] Where such section has been sold or otherwise disposed of by the government, other lands, equivalent thereto and as contiguous as may be, are granted in their stead, such selection being known as "lieu lands"; the act of selection of a section in lieu of section sixteen, is that by which the tract becomes appropriated for school purposes.[8] A formal introduction, therefore, of land in sections sixteen or thirty-six, would read somewhat as follows:

Section sixteen, Town one north, Range thirty-one east of the second Principal Meridian, was granted by the United States to the State of Michigan for the use of schools, by act of Congress, June 23, 1836, providing for the admission of Michigan, as a State of the Union, and accepted by the State of Michigan by act of Legislature approved July 25, 1836.

Where section sixteen, as returned by the survey, is found to be occupied by pre-emption settlements made under the law permitting settlements on unsurveyed lands, or where the land has been otherwise disposed of, or prior rights have attached, and a selection of lieu lands is made, the preliminary note must show the facts of selection, confirmation, etc., necessary to bring it within the law vesting the title, thus:

The northeast quarter of Section seventeen, Town ten north, Range twenty-two east of the Fourth Principal Meridian, was selected by the Secretary of the Treasury[8a] *in lieu of land in*

7 Cooper *v.* Roberts, 18 How. (U. S.) 173.

8 Hedrick *v.* Hughes, 15 Wall. (U. S.) 123.

8a Under the present practice, selections from other public lands as indemnity for deficiencies in sections 16 and 36 and fractional town-

Section sixteen, by virtue of an act of Congress, approved June 15, 1844, and entitled "An Act to authorize the selection of certain school lands in the Territories of Florida, Iowa and Wisconsin," and was granted by the United States to the State of Wisconsin for the use of schools, by act of Congress approved August 6, 1846, entitled "An Act to enable the people of Wisconsin Territory to form a Constitution and State government, and for the admission of such State into the Union," and accepted by the State of Wisconsin by the Constitution framed February 1, 1848.[9]

§ 132. **Confirmations.** In the West and Southwest, the title to land rests, in many cases, upon confirmed claims of inchoate rights derived from the governments which owned the land prior to the conquest or cession, the method of confirmation differing considerably with the locality. The rights of parties claiming under titles from the Spanish or Mexican Governments are determined by special commissions appointed for the purpose, or by the United States courts, and such determinations are usually followed by patent.

Mexican grants were made by the governors of the Territories in conformity with laws on that subject, and a document signed by the governor served as the basis of title, while maps of the lands granted and circumstantial reports were preserved in the archives of the supreme government. A person

ships under acts of May 20, 1826, and February 26, 1859, are made by agents appointed by the respective States, which selections are filed in the local offices of the district in which the land is situated, and if found to be correct are certified to the General Land Office by the register of the local office where filed. If, upon examination by the Commissioner, the same are found to inure to the State, a list is made out and certified to the Secretary of the Interior for his approval. When approved, a certified copy of the same is transmitted to the governor of the State in which the selections are made, and a copy thereof transmitted to the local office from which the selections are received, to be placed on file, and the approvals to be noted on its records. By the approval of the Secretary, the fee is passed to the State. See sec. 2449 Rev. Stat., U. S.

9 Ordinarily no record evidence of the fact of selection is required beyond the entries in the books of the register of the local land office.

claiming under these grants is entitled to a patent from the United States whenever his claim has been confirmed by the commissioners, the District Court, or the Supreme Court, provided his proof of confirmation is accompanied by a survey certified by the surveyor general. But neither the decree of the court, nor the survey, nor the patent, is conclusive on anybody but the government and the patentee. The rights of third parties are expressly saved by act of Congress, and those who claim a title adverse to the patentee have still a chance to establish it in the proper courts of the State.[10] Whenever practicable, the decree of confirmation, or reference to it, together with a note of the survey and approval of the surveyor general, should form the initial statement of the abstract and precede the patent.

The territory lying north of the Ohio River and west of the Alleghanies and extending to the Mississippi, was claimed by Virginia previous to 1776 to be within its chartered limits, but was not reduced to its possession until the war of the Revolution. Previous to that time, however, numerous settlements had been made within that portion of the territory which at present comprises the States of Indiana and Illinois, consisting principally of French inhabitants from Canada, who held the lands they occupied under concessions from French and English authorities. The possession and titles of these people were respected by the State of Virginia, and on its cession of the territory to the United States it expressly stipulated for their confirmation, which was afterward effected by suitable legislation.

In the matter of pre-existing titles, the United States has never asserted anything more than a sovereign right over the subject. His property rights in and to the soil have never been interfered with, and a patent adds nothing to the force of a confirmation.[11] It is of value as record evidence of the pos-

10 See Instructions and Opinions, Atty. Gen. Sept. 29, 1859, Nov. 9, 1859; Moore *v.* Wilkinson, 13 Cal. 478.

11 Langdeau *v.* Hanes, 21 Wall. (U. S.) 521; Ryan *v.* Carter, 93 U. S. 78.

session and title of the ancestor, and of the recognition and confirmation of such title by the United States. It obviates controversies at law respecting the land, and becomes an instrument of quiet and security. Founded as it is upon a survey of the government, it removes all doubts as to the boundaries of the tract, which always arises when their establishment rests on uncertain evidence, yet it adds nothing to the interest vested by the confirmation.

In the legislation of Congress, a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a claim of previously existing title it is merely documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation by the United States. The instrument is not the less efficacious as evidence of previously existing right, because it also embodies words of release or transfer from the government.[12]

§ 133. **Town Site Entries.** It frequently happened that the advancing tide of immigration, not only pushed forward the adventurous pioneer and agriculturist beyond the line of the public surveys, but in many cases whole communities settled and formed a town or village. These settlements, sometimes on surveyed and sometimes on unsurveyed lands, have been provided for by several acts of Congress. The first act, approved July 1, 1864,[13] provided for the founding of cities or towns upon the public domain, and for entering the land upon which cities and towns had already been founded. This was supplemented by the act of March 3, 1865, which prescribed rules where the lots were of different dimensions, and not uniform. A further act approved March 2, 1867, author-

[12] Langdeau *v.* Hanes, 21 Wall. (U. S.) 521; Morrow *v.* Whitney, 5 Otto (U. S.), 551.

[13] A town site law with a very restricted application was passed in 1844, but was repealed by the act above referred to. Under the former system no title could be secured to town property until the locality had been embraced by the general system of public surveys.

ized the entry of public lands, settled upon and occupied as town sites in trust for the several use and benefit of the occupants thereof in prescribed quantities according to the number of inhabitants, respectively, in said towns. It will thus be seen that two methods exist of acquiring title to land in town sites at the inception of the town.

By the first method a privilege, both of purchase on sale and pre-emption at minimum figures, is granted, provided certain preliminary conditions are complied with. The requisites consist of filing with the recorder a plat or map of the town, describing its exterior boundaries according to the lines of the public surveys, when said surveys have been executed. The map must also exhibit the name of the city or town; the streets, squares, etc., together with the size and measurement of each municipal subdivision. The map must further be verified by the oath of the party acting for or on behalf of the town. When the town is within the limits of an organized land district, a similar copy must be filed with the Register and Receiver, and a copy must be forwarded to the General Land Office, within one month after filing with the recorder. Under the provisions of this act patents issue for all lots, the price of the lots being graded by size, location, etc.[14] The second method is under the act of 1867, which grants to the inhabitants of cities and towns on the public lands the privilege of entering the lands occupied as town sites at the minimum price of $1.25 per acre. The entry is made by the corporate authorities of such towns

[14] The first method limits the extent of the area of the city or town to 640 acres, to be laid off into lots, and which, after filing in the General Land Office the transcript, statement, and testimony required by law, are to be offered at public sale to the highest bidder, at a minimum of ten dollars for each lot. Lots not thus disposed of are made thereafter liable to private entry at said minimum, or at such reasonable price as the Secretary of the Interior may order from time to time, as the municipal property may increase or decrease, after at least three months' notice.

A privilege, however, is granted to any *actual settler* upon any *one* lot of pre-empting that, and any additional lot on which he may have "substantial improvements," at said minimum, at any time before the day fixed for the public sale.

and cities, or by the judges of the county courts acting as trustees for the occupants thereof, according to their respective interests. Either method may be resorted to, but the inhabitants are limited to one or the other of the modes prescribed.

The preliminary measures attending the inception of the title of town and city property when acquired under the acts above noted, should appear with reasonable degree of detail. If by the former method, the plat, or so much as may be necessary to show the property in question, should be given. The preliminary statement in this case would consist, in addition to the plat, of a resume of the steps taken, with dates, etc. In the latter case it would differ but slightly from an ordinary entry.[15]

§ 134. **The Receiver's Receipt.** The receipt issued by the Receiver of a district land office, though constituting no title, is evidence of an equitable interest, which, in many of the States, is accorded a dignity and effect equal to a complete investiture by patent. Upon the strength of this receipt large investments are frequently made and great improvements commenced, while the land often passes through many hands before a patent has been issued. In many cases the patent is never called for or formally delivered, the receipt being relied upon as sufficient evidence of title to warrant the largest expenditures and the most ample covenants of title.[16]

In a certain sense this is true; for though the patent is the superior and conclusive evidence of legal title,[17] yet the receipt so far precludes the government as to invalidate a second sale of the land, and the patent, when issued, by relation extends back to the time of the purchase so as to cut off intervening

[15] See acts above noted; 13 U. S. Stat. at Large, 343; 13 U. S. Stat. at Large, 529; Instructions Commissioner Aug. 20, 1864; Apr. 26, 1865; Sept. 21, 1868. Consult also Lester's or Zabriskie's Land Laws.

[16] A patent issued in the name of the purchaser inures to the benefit of the grantee under a deed executed before the patent issued: Magruder *v.* Esmay, 35 Ohio St. 221.

[17] Bagnell *v.* Broderick, 13 Pet. 436.

claimants.[18] In the courts of the United States, however, an equitable title, however strong, can not be set up at law to defeat the legal title by patent,[19] and an abstract which fails to disclose such instrument reveals a vital defect that should deter a purchaser from consummating the sale until it has been remedied. The receipt of the receiver, however, is *prima facie* evidence that the law has been complied with,[20] and under the rulings of State courts has been held to convey the entire beneficial interest in the land, leaving nothing in the government but a naked trust of the fee,[21] while it establishes in the person entitled to it a right to the possession as against one who shows no title.[22] On the other hand, the doctrine of *caveat emptor* applies with peculiar force to purchasers from an entryman and the government always has it within its power to cancel all entries of public land at any time before patent issues thereon.[23]

The instrument is very informal, and its main provisions may be shown as follows:

Receiver[24]	*Duplicate receipt, No. 5,084.*
to	*Dated May 1, 1839.*
	Recorded May 31, 1839.
William Robinson.	*Volume "A" of deeds, page 208.*

Acknowledges payment in full ($190.00) for the northeast quarter of Section ten, Town one north, Range twenty-three, east of 3d P. M., Milwaukee land district.

18 Stark *v.* Starrs, 6 Wall. 402; Magruder *v.* Esmay, 35 Ohio St. 221.

19 Baird *v.* Wolf, 4 McLean, 549; Hooper *v.* Scheimer, 23 How. 235; Bagnell *v.* Broderick, 13 Pet. 436.

20 Allison *v.* Hunter, 9 Mo. 402.

21 Waters *v.* Bush, 42 Iowa, 255; and see Worth *v.* Branson, 98 U. S. 118.

22 McDonald *v.* Edmonds, 44 Cal. 328.

23 Jones *v.* Meyers, 2 Idaho, 793; Hosmer *v.* Wallace, 47 Cal. 461; Randall *v.* Edert, 7 Minn. 450; Bellows *v.* Todd, 34 Iowa, 18.

24 If desired, say "United States, to," etc. The better practice, however, is as shown in the text, as the instrument does not purport to be anything more than an acknowledgment of the receipt of money by the person signing it.

The foregoing statement immediately follows the note of entry, and to preserve chronological sequence, precedes the patent when that instrument is shown. In receipts and patents, no special designation of the property with reference to political divisions is made, but same is described as of a certain land district. This has been held to be a sufficient designation, the name of the county not being essential, and the land district sufficiently indicating the State.[25]

§ 135. **State Lands.** Lands granted to the States for school and university purposes, as well as grants for internal improvements, are disposed of in much the same manner as the public lands of the general government. The special method of their disposal is regulated by express statute in each State, and while the system in all the States is based upon, and closely follows that pursued by the general government, minor differences of detail preclude more than a general notice. In some States the disposal of the land is placed in the hands of the Governor and Secretary of State, who issue and sign all patents emanating from the State; in others it has been placed in the hands of a special commission, to whom is given the power of disposal and control of the investment of the funds arising therefrom.

A certificate of sale of State lands is not sufficient to carry the fee, which, by analogy to the doctrine of sales of Federal lands, remains in the State until patent has issued. It entitles the purchaser, however, to the beneficial interest in the premises, and is sufficient evidence of title to vest in him the same rights of possession, enjoyment, descent, transmission and alienation of the lands therein described, and the same remedies for the protection of said rights, as against all persons except the State, that he would possess if he were the owner thereof in fee.[26]

The methods of sale are too widely divergent to inquire into.

[25] Mapes *v.* Scott, 94 Ill. 379.

[26] This matter is purely statutory. The reader, for greater certainty, will consult the statutes of his own State, both as to the legal effect of certificates of purchase, and the method of conducting sales.

Thus, in Wisconsin, sales of school lands are made by the commissioners of school and university lands;[27] in Illinois by the county superintendents.[28] Each State provides a method of its own with special officers to execute the power.

A certificate of sale of State lands, like the duplicate receipt of the receiver, is informal in substance, the main point being the execution by the proper statutory officer. Its provisions are usually prescribed by statute, and should consist of a description of the land sold, the sum paid, and where only a portion of the purchase money is paid the amount remaining due thereon, the time, place and terms of payment, and that if it shall be duly discharged, the purchaser or his assigns will be entitled to a patent for such land. As this matter, when followed by patent, is only introductory, the certificate may be shown briefly as follows:

State of Wisconsin	*Commissioner's certificate, No. 104.*
to	*Dated May 24, 1850.*
Abraham Smith	*Recorded June 1, 1850.*
Document, No. 300.	*Book, "A," page 45.*

Acknowledges receipt of $26.50 in (part) payment for Lot six, in Town one north, Range nineteen east of the Fourth Principal Meridian, in the northwest quarter of Section sixteen (and that said Abraham Smith will be entitled to a patent therefor on payment of $236.00).

§ 136. **The Root of Title.** The foregoing paragraphs have reference only to well ascertained beginnings of title, which may be traced with little difficulty from its source or fountain head. In all States west of the Alleghanies, with possibly the exception of Kentucky and Tennessee, this may be easily accomplished, and a purchaser may reasonably insist on the production of a chain of title from the government. Such, however, is not always done, and the examiner, from

[27] R. S. Wis., 1878, 106, chap. 15. [28] R. S. Ill., 1874, chap. 122.

information furnished by the vendor, prepares a preliminary statement, resting mainly on tradition, in which is recited the condition and course of the title at some remote period, which is followed by a regular examination from that time, usually twenty years or more prior to the date of the abstract. This is following the English precedents, and is not without authoritative usage in the United States. Where information is difficult of access, or impossible of procurement from official or authentic sources, as is often the case in the original States, such a practice might be followed as the only available method, leaving the keenness of counsel to detect flaws, and call for further evidence on desired points; but in the States formed from the territories where the rectangular system of surveying and registration of conveyances prevails, no good reason exists why a complete abstract showing the inception of title should not be produced. Where a preliminary sketch is given as forming the root of title, the examiner should carefully specify all his sources of information, and, if consisting of hearsay or tradition only, expressly disavow all responsibility for the truth of the matters therein recited. No other safe course is open, and the reader is apprised at the outset of the value to be placed upon the statement.

CHAPTER X.

CONGRESSIONAL AND LEGISLATIVE GRANTS.

§ 137. Legislative grants generally considered.
138. Nature and effect.
§ 139. Construction of legislative grants.
140. Formal requisites.

§ 137. **Legislative Grants Generally Considered.** Not a few titles have their foundation in Congressional or legislative grants, or are grounded upon legislative confirmations of previously existing inchoate or equitable rights. A recurrence to these is necessary, even though a patent may appear, as in many cases the patent is only confirmatory evidence of prior claims and is conclusive only between the sovereign and the patentee or these in privity with him.

A grant of land by statute is the highest and strongest form of title known to our law,[1] and does of itself, *proprio vigore,* pass to the grantee all the estate of the government except what is expressly excepted.[2] As a primary conveyance, however, it is not in general use, for, as a rule, the government parts with its title only by patent, but when an act of Congress purports to convey land in words of present grant it is equally as effective as a patent and vests a perfect and irrevocable title.[3]

§ 138. **Nature and Effect.** The United States or a State may make a grant of land by a law as effectually as by a patent issued in pursuance of a law. In the former case it is the direct act of the government through the Legislature; in the latter it is a ministerial act under the direction of the Legislature. A confirmation by law of a claim of title in public lands

1 11 Opinions Att'y Gen. 47.
2 9 Opinions Att'y Gen. 253.
3 Strother *v.* Lucas, 12 Pet. (U. S.) 454; Terrett *v.* Taylor, 9 Cranch (U. S.), 50; Chouteau *v.* Eckhart, 2 How. (U. S.) 372; Swann *v.* Lindsey, 70 Ala. 507; Dean *v.* Bittner, 77 Mo. 101.

is to all intents and purposes a grant of such lands,[4] and where one is in possession of land, a resolve of the Legislature, releasing them to him, passes a title without any further act, except performance of the conditions, if any.[5]

An act of Congress, containing provisions clearly indicating an intention to pass the fee unconditionally and absolutely, operates *ipso facto,* to vest the title in the grantee,[6] but if the grant be coupled with a condition it will not operate to vest the title until such condition has been complied with.[7]

So, too, an act of Congress granting land to one person, is higher evidence of title than a patent of the same land subsequently issued by the officers of government to another person, and can not be defeated by such subsequent patent; [8] thus, titles derived from the State, of lands selected under the "swamp grant," will take precedence over patents from the United States issued subsequent to the date of the granting act.[9]

Legislative grants and confirmations are usually followed by patent, the issuance of which is specially provided for in the granting act, yet the patent in most cases adds nothing to the force of the grant, but is merely confirmatory of what has preceded. If a claim be made to land with defined boundaries the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required and the confirmation will then immediately attach the title to the land segregated.[10]

[4] Challefoux *v.* Ducharme, 4 Wis. 554; Dean *v.* Bittner, 77 Mo. 101; Hall *v.* Jarvis, 65 Ill. 302; Langdeau *v.* Hanes, 21 Wall. 521; Strother *v.* Lucas, 12 Pet. 411; Field *v.* Seabury, 19 How. 323.

[5] Mayo *v.* Libby, 12 Mass. 339; Ryan *v.* Carter, 93 U. S. 78.

[6] Ballance *v.* Tesson, 12 Ill. 327; Grignons, Lessee, *v.* Astor, 2 How. 319.

[7] Thompson *v.* Prince, 67 Ill. 281.

[8] Dousman *v.* Hooe, 3 Wis. 466; Megerle *v.* Ashe, 27 Cal. 322.

[9] Ruigo *v.* Rotau, 29 Ark. 56; Keller *v.* Brickey, 78 Ill. 133; R. R. Co. *v.* Brown, 40 Iowa, 333; Daniel *v.* Purvis, 50 Miss. 261.

[10] Langdeau *v.* Hanes, 21 Wall. (U. S.) 521; Swann *v.* Lindsey, 70 Ala. 507; Dean *v.* Bittner, 77 Mo. 101.

Analogous to the rule which obtains in case of patents, where there are two confirmations or grants of the same land, the elder must prevail, and will give the better title.[11] The government, like an individual, has no power to withdraw or annul its grant; the first, if lawful, must stand, and the second can not operate as a consequence, for the reason that the grantor, when it was made, had no estate to convey.[12]

§ 139. **Construction of Legislative Grants.** A Legislative grant by the State is an executed contract,[13] and as such is within the clause of the Constitution of the United States which prohibits the States from passing any law impairing the obligation of contracts. It can not, therefore, be destroyed, and the estate divested by any subsequent legislative enactment. The rule applies with equal force to corporations as to individuals, and when the State enters into a contract with a municipal corporation, the subordinate relation of the corporation ceases, and that equity arises which exists between all contracting parties. The control of the Legislature over the corporation can be exercised only in subordination to the principle which secures the inviolability of contracts.[14]

Congressional grants are governed by the same rules, and a grant by Congress to a State can not be recalled at the will of Congress any more than a grant to an individual.[15] Generally, in a conveyance by the sovereign, of property which is usually the subject of private ownership, the extent of the thing granted is to be ascertained by the rules of construction applicable to private conveyances; yet in construing a Congressional grant, it must be remembered that the act by which the grant is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress; and that the rules of the common law must yield

11 Willot *v.* Sanford, 19 How. 79; 9 Opinions Att'y Gen. 253.

12 11 Opinions Att'y Gen. 47.

13 The Binghamton Bridge, 3 Wall. (U. S.) 51; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 625; Dingman *v.* People, 51 Ill. 267.

14 Grogan *v.* San Francisco, 18 Cal. 590.

15 Busch *v.* Donohue, 31 Mich. 480; Rice *v.* R. R. Co. 1 Bl. 358.

in this, as in all other cases, to the legislative will.[16] Another exception will be observed in that the ordinary rule construing the grant most strongly against the grantor is here reversed, and whatever is not given expressly, or very clearly implied from the words of the grant, is withheld.[17]

§ 140. **Formal Requisites.** No particular terms are necessary in a grant by Congress or the Legislature,[18] which will vary with the exigencies of each particular case. In preparing a synopsis of such grants the essenial features to be observed are: the title of the act; the date of passage or approval; the subject matter, including the granting words, in the language of the act; and the conditions or restrictions, if any, annexed to the grant. A practical example, taken from the files will better serve to illustrate the matter. Peter Poncin entered in due form a certain tract of land, which entry was afterward canceled by the commissioner of the General Land Office, but not until Poncin had made conveyances on the credit afforded by the entry. This cancellation was afterward set aside by special act of Congress and the claim of Poncin confirmed, with a further direction for a patent, which was subsequently issued. The land is now a portion of the city of St. Paul, Minn., and has become very valuable. As the inception of this title is somewhat complicated, a full detail of all the preliminary steps is important, and the abstract in this case should show: the original entry by Poncin; the subsequent cancellation; the confirmatory act of Congress; and finally the patent; the mesne conveyances by Poncin taking effect by relation. Examples of the entry have been given; the confirmatory act would appear much as follows:

16 R. R. Co. *v.* R. R. Co., 97 U. S. 491.

17 Mayor, etc., R. R., 26 Pa. St. 355; R. R. *v.* Litchfield, 23 How. (U. S.) 88.

18 Coburn *v.* Ellenwood, 4 N. H. 99.

United States[19]	*Act of Congress, entitled "An act authorizing a patent to be issued to Peter Poncin for certain lands therein described."*
to	*Approved July 27, 1854.*
	Recorded August 1, 1854.[20]
Peter Poncin.	*Book "C," page 560.*

Enacts, That the entry of Peter Poncin of the north half of the southeast quarter, and the south half of the northeast quarter of Section 36, in the Stillwater land district, Minnesota, canceled by the Commissioners of the General Land Office, be and same is hereby allowed and reinstated as of the date of said entry, so that the title to said lands may inure to the benefit of his grantees as far as he may have conveyed same; Provided, that the purchase money shall be again paid at said land office, and that thereupon a patent shall issue in the name of said Peter Poncin for said lands.

Further enacts, That the Superintendent of Public Schools of Minnesota be and he is authorized to select other land in lieu thereof.

This is one of the few species of conveyance that the examiner is justified in placing on the abstract when same does not appear of record in the county in which the land is situated; and where the records are silent, reference to other authentic sources of information must be inserted and attention drawn to the fact of non-registry. This is accomplished in the first instance by referring to the volume and page of the United States statutes, and in the latter by a foot-note, as follows:

NOTE.— *At the date of this examination the foregoing instrument is not of record in Ramsey county, Minnesota.*

19 If desired, this may read "Confirmation by the United States," as this example is, strictly speaking, a confirmation rather than a grant.

20 These acts rarely appear of record in the county, in which event refer to the book and page of the U. S. Statutes.

The foregoing example belongs to a class of private and local laws technically known as "relief" acts, of which vast numbers have been passed at different times since the public domain has been open for sale and settlement. As a patent usually follows all acts of this character the necessity of exhibiting them is not so great as in case of confirmations, for the latter not only serve as "acts of relief," but also operate as grants in favor of the confirmees. An abstract of a confirmation need not differ materially from the example last shown, the main object being to present all the operative parts of the law, but should the examiner desire a choice of phraseology in the arrangement of the formal parts a further illustration is herewith given.

"An Act to "confirm the title of "the heirs of James "Sympson, deceased, "to a certain tract of "land in the State of "Louisiana."

Act of Congress, entitled as in the margin.

Approved, Aug. 29, 1842, Vol. 6, page 869, U. S. Statutes at Large.

Enacts, that the heirs at law of James Sympson, deceased, late of Clarke County, Kentucky, be and they are hereby confirmed in their title to a certain tract of land situated at the mouth of the Atchafalaya, at its junction with the Mississippi River, containing 640 acres; and as surveyed and platted in the surveyor general's office at Donaldsonville, in the State of Louisiana, upon the survey made and returned by Charles Morgan, dated February 11, 1806, and executed for Andy Robinson.

Provided (it is stated) this confirmation shall only be construed as a relinquishment of the title of the United States to said land, and not to prejudice any superior or better title.

CHAPTER XI.

PATENTS.

§ 141. Definition.
149. Patents from the United States.
150. Validity.
151. Delivery.
152. General Land Office record.
153. Operation and effect.
§ 154. Continued.
155. Construction.
156. Formal requisites.
157. Patents from the State.
158. Continued.
159. Formal requisites of State patents.

§ 141. **Definition.** A patent has been defined as a grant of some privilege, property, or authority, made by the government or sovereign of a country to one or more individuals, and the term, as originally used in England, is said to have signified certain written instruments emanating from the king, and sealed with the great seal. These instruments conferred grants of lands, honors, or franchises, and were called letters patent from being delivered open, and, by way of contradistinction from instruments like the French *Lettres de cachet,* which went out sealed.[1] In the United States, the word is used to denote those instruments which secure to inventors, for a limited time, the exclusive use of their inventions, but when used in connection with real property, it means the title deed by which a government, either State or Federal, conveys its lands.

§ 149. **Patents from the United States.** A patent of the United States is the conveyance by which the Nation passes its title to the public domain and is the highest evidence of derivative title known to the law; it is conclusive as against the government, and all persons claiming under junior patents or titles,[2] until set aside or annulled by some competent tribu-

1 2 Bou. Law Dict. 298.

2 Hooper *v.* Young, 140 Cal. 274.

nal.[3] When delivered to and accepted by the grantee, it passes the full legal title to the land,[4] and carries with it the presumption that all the prerequisites of law have been complied with.[5] But the patent must show upon its face a regular issue, and a full compliance with the formalities of law, for a patent forms no exception to the rule, that the legal title to lands can not be conveyed except in the form provided by law.[6] The principal requisites in this respect have reference mainly to execution and authentication. To conform strictly to the letter of the law, the patent must be signed in the name of the President, either by himself or his duly appointed secretary, sealed with the seal of the General Land Office, and countersigned by the Recorder. Until all of these have been done, the United States has not executed a patent for a grant of lands. Each and every one of the integral parts of the execution is essential to the perfection of the patent. They are of equal importance under the law, and one can not be dispensed with more than another. Neither is directory, but all are mandatory, and neither the signing nor the sealing, nor the countersigning, can be omitted any more than the signing or the sealing, or the acknowledgment by a grantor, or the attestation by witnesses, when by statute such forms are prescribed for the due execution of deeds by private parties for the conveyance of lands.[7] Where, however, the patent is regular upon its face, then a presumption arises that it is valid and that it passes title, and it is, of itself, *prima facie* evidence that all the steps prescribed by law for its proper issuance have been taken before it was executed.[8]

§ 150. **Validity.** The primary rules which control the

[3] United States *v.* Stone, 2 Wall. 525; Strong *v.* Lehmer, 10 Ohio St. 93; Stoddard *v.* Chambers, 2 How. 284.

[4] Moore *v.* Robbins, 6 Otto, 530; Leroy *v.* Jamison, 3 Sawyer, 369.

[5] Sweat *v.* Corcoran, 37 Miss. 513; Hill *v.* Miller, 36 Mo. 182; Collins *v.* Bartlett, 44 Cal. 371; Winter *v.* Crommelin, 18 How. 87; Stringer *v.* Young, 3 Pet. 320.

[6] McGarrahan *v.* New Idria Mining Co., 96 U. S. (6 Otto) 316.

[7] McGarrahan *v.* Mining Co., 96 U. S. 316.

[8] Heinlen *v.* Heilbron, 97 Cal. 105.

validity of patents are not unlike those which obtain in conveyances between individuals. The government must possess title to that which it assumes to convey; the instrument of conveyance must be in legal form, and it must have been issued by competent authority. Notwithstanding a patent may be executed in due form its validity may yet be impeached, and at all times it is subject to inquiry as to whether the officers who issued it had authority to make a conveyance, or whether the land which they purported to convey was within their control. If not, then the patent is absolutely void and may be attacked in any collateral proceeding.[9]

This follows from the fact that the true office of a patent, whether of a State or the United States, is to pass title to lands in practically the same manner as the deed of an individual. It conveys to the patentee all the interest of the government, whatever it may be, and, as a rule, is conclusive between them. But it does not establish the fact that the government possessed title,[10] and hence is open to attack collaterally, the same as any other muniment which purports to convey possessory rights.[11] Thus, it may be impeached, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the land; that is, that the law did not provide for its sale; or that it had been reserved from sale or dedicated to special purposes; or had been previously transferred to others. In such event the patent would be inoperative to pass title, and objection to it could be taken on these grounds at any time and in any form of action.[12]

§ 151. **Delivery.** Unlike conveyances between individuals, a formal delivery of a patent is not essential to its validity, nor will non-delivery thereof defeat the grant.[13] The

9 Cummings *v.* Powell, 116 Mo. 473; Edwards *v.* Ralley, 96 Cal. 408; Doolan *v.* Carr, 125 U. S. 625.

10 Musser *v.* McRea, 38 Minn. 409.

11 Winter *v.* Jones, 10 Ga. 190.

12 Steel *v.* St. Louis Smelting Co., 106 U. S. 447.

13 It is the practice of the General Land Office to transmit patents, as rapidly as completed, to the various local offices for delivery on surrender of the duplicate receipt or certificates. Frequently, however, they remain uncalled for, and on the discontinuance of a

importance attached to the delivery of deeds in modern conveyancing arises largely from the fact that a deed has taken the place of the ancient livery of seizin, when, in order to give effect to the enfeoffment of the new tenant, the act of delivering possession in a public and notorious manner was the essential evidence of the investure of the title to the land. This became gradually diminished in importance until the manual delivery of a piece of the turf, and many other symbolical acts, became sufficient. When all this passed away and the creation and transfer of estates in land by a written instrument, called the act or deed of the party, became the usual mode, the instrument was at first delivered on the land in lieu of livery of seizin,[14] until finally any delivery of the deed, or any act which the party intended to stand for such delivery, became effectual to pass the title.[15]

No livery of seizin, however, was necessary of the king's grants, which were made matters of record, for when the seal was affixed to the instrument and enrollment of it was made, no higher evidence could be had, nor was any other evidence necessary of this act or deed of the king. Hence, Mr. Cruise in his digest says: "The king's letters patent need no delivery; nor his patents under the great seal of the Duchy of Lancaster; for they are sufficiently authenticated and completed by the annexing of the respective seals to them." In like manner when a patent for public lands has been made out and signed by the President, the seal of the United States affixed, and the instrument countersigned by the Recorder of the Land Office and duly recorded in the record book kept for that purpose, it becomes a solemn public act of the government of the United States and needs no further delivery or other authentication to make it perfect and valid.[16] When this has

local office all undelivered patents remaining in its files are returned to the General Land Office where they are assorted, filed and preserved. See Rep. General Land Office, 1875.

14 Shep. Touch. 64; Coke on Litt. 266 b.

15 Church *v.* Gilman, 15 Wend. 656; Warren *v.* Levitt, 11 Foster (N. H.), 340; Hatch *v.* Hatch, 9 Mass. 306.

16 Gilmore *v.* Sapp, 100 Ill. 297.

been done the title to the land conveyed passes by matter of record to the grantee, and delivery, as in case of the deeds of private individuals, is not necessary to give effect to the granting clause of the instrument.[17]

Theoretically, in order that the patent may take effect as a conveyance, it is essential that there be an acceptance on the part of the grantee, but the acts required to be done by him in the preparation of his claim are equivalent to a positive demand for the patent, and where the patentee does not expressly dissent, his assent and acceptance are always presumed from the beneficial nature of the grant.[18] Some confusion has arisen as to the time when a patent takes effect, that is, when it becomes operative as a conveyance and binding upon both parties, from not distinguishing between acts which bind the government and acts which bind the patentee. No one can be compelled by the government, any more than by an individual, to become a purchaser, or event to take a gift. Nor can the burdens or advantages of property be thrust upon him without his assent, and the patent of government, like the deed of a private person, must, in order to take effect as a conveyance and transfer title, be accepted by the grantee; yet, as we have seen, the possession of property is so universally considered a benefit, that, in the absence of express dissent, an acceptance is presumed whenever the conveyance is placed in condition for acceptance, and this occurs when the last formalities required by law of the officers of the government are complied with. By the execution, sealing and recording, open and public declaration is made that, so far as the government is concerned, the title to the premises has been transferred to the grantee. The record stands in place of the offer for delivery in the case of a private deed; and the instrument is thenceforth held for the grantee, who takes by matter of record.[19]

§ 152. **General Land Office Record.** Patents do not

17 United States *v.* Schurz, 102 U. S. 378; LeRoy *v.* Jamison, 3 Saw. 369; Houghton *v.* Hardenberg, 53 Cal. 181.

18 Pierre Mutelle case, 3 Op. Att'y Gen. 654; LeRoy *v.* Jamison, 3 Saw. (C. Ct.) 369.

19 LeRoy *v.* Jamison, 3 Saw. (C.

come within the provisions of the recording laws of the State, where the terms of the statute do not specifically include them,[20] though it is usual to record them in the county where the land is situate, and such registration, as a rule, is expressly permitted by statute. The act for the establishment of a General Land Office provides that all patents issuing therefrom "shall be recorded in said office in books to be kept for the purpose," and the indorsement of such record will always be found upon the patent. This indorsement should always be copied by the recording officer when presented for local registration, and a minute of same made by the examiner when preparing the abstract. Direct and easy reference is thus made to the highest source of information in case of the mutilation, loss or destruction of the original, though, of course, recourse may be had to it in other ways. This original record is not in itself a grant of title, but it is an evidence of equal dignity with the patent, because, like the patent, it shows that a grant has been made.

The record called for by act of Congress is made by copying the patent to be issued into the book kept for that purpose, and such record, as a matter of evidence, stands in the same position and has the same effect as the instrument of which it purports to be a copy.[21] The public records of the departments of the government are not, like those kept pursuant to ordinary registration laws, intended for notice, but for preservation of the evidence of the transactions of the department. Where the county records fail to show a patent, and no other divesture of governmental title appears, recourse should be had to the General Land Office, and the claimant's title will be determined, in the absence of other circumstances, by what is there shown.

The failure to record the patent does not defeat the grant,

Ct.) 369; Green v. Liter, 8 Cranch (U. S.), 247; Gilmore v. Sapp, 100 Ill. 297.

[20] Moran v. Palmer, 13 Mich. 367; Curtis v. Hunting, 6 Iowa, 536.

[21] McGarrahan v. New Idria Mining Co., 6 Otto, 316; Sands v. Davis, 40 Mich. 14.

but merely takes from the party one of the means of making his proof. If the patent itself can still be produced, and it is duly executed with all the formalities required by law, the patentee and his grantees may still maintain their rights under it. A perfect record of a perfect patent proves the grant, but a perfect record of an imperfect patent or an imperfect record of a perfect patent has no such effect. In such latter case, if a perfect patent has in fact issued, it must be proved in some other way than by the record. The record of the patent, analogous to the doctrine of registration under State laws, is treated as presumptive evidence of its delivery to and acceptance by the grantee.[22]

§ 153. **Operation and Effect.** A patent is a complete appropriation of the land it describes,[23] and passes to the patentee all the interest of the United States, whatever it may be, in everything connected with the soil, or forming any portion of its bed, or fixed to its surface; in short, in everything embraced within the term "land."[24] It is conclusive evidence of the right of the patentee to the land described therein, not only as between himself and the government, but as between himself and a third person, who has not a superior title from a source of paramount proprietorship.[25]

When issued to a confirmee of a foreign grant, a patent operates like the deed of any other grantor, and passes only such

22 McGarrahan *v.* New Idria Mining Co., 6 Otto, 316; LeRoy *v.* Jamison, 3 Sawyer, 369.

23 Stringer's Lessee *v.* Young, 3 Pet. 320.

24 Fremont *v.* Flower, 17 Cal. 199. According to the common law of England, mines of gold and silver were the exclusive property of the crown, and did not pass in a grant of the king under a general designation of lands or mines. It has sometimes been asserted that this prerogative right passed to or was inherent in the States, but this is an error. The *jura relgalia* which pertained to the king at common law, comprehended not only those rights which relate to the political character and authority of the sovereign, but also those which are incidental to his regal dignity, and may be severed at pleasure from the crown and vested in the subject. It is only to the rights of the first class that the States by virtue of their sovereignty are entitled, and mines of the precious metals belong to the second class. Moore *v.* Snow, 17 Cal. 199.

25 Waterman *v.* Smith, 13 Cal. 373.

interest as the government possessed, the deed taking effect by relation from the initiation of the series of proceedings for confirmation and of which it forms the last act.[26] But as the record of the government of the existence and validity of the grant, it establishes the title of the patentee from the date of the grant, such title depending, up to the issuance of the patent, upon the character of the grant and the proceedings of the former government in reference to it.[27] As such record, with respect to the title of the patentee existing at the date of the cession of the foreign territory, it is conclusive evidence of title in the patentee at the time the jurisdiction of the subject passed from the foreign government to the United States.[28] It is the evidence which the government furnishes the claimant of its action respecting his title. By it the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid, and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty; and that the grant was located, or might have been located, by the former government, and is correctly located by the new government, so as to embrace the premises as they are surveyed and described.[29] A patent issued on a confirmed foreign grant, is, therefore, in the nature of a conveyance by way of quit-claim. It is conclusive only as between the parties thereto, and is evidence that as against the United States, the validity of the grant has been established.[30]

§ 154. **Continued.** The Government of the United States has a perfect title to the public land and an absolute and unqualified right of disposal. Neither State nor territorial legislation can in any manner modify or affect the right which the government has to a primary disposal; nor can such legislation deprive the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in

[26] Yount *v.* Howell, 14 Cal. 465; Leese *v.* Clark, 18 Cal. 535.

[27] Teschemacher *v.* Thompson, 18 Cal. 11.

[28] Leese *v.* Clark, 20 Cal. 387.

[29] Leese *v.* Clark, 20 Cal. 387.

[30] Adam *v.* Norris, 103 U. S. 591.

the transfer of the title after the initiation of proceedings for its acquisition.[31] Whether the title to a portion of the public lands has passed from the United States depends exclusively upon the laws of the United States; when it has passed, it then becomes subject to State laws.[32] These statements acquire additional importance from the fact that in a majority of the Western States the entry has, for many years, been recognized as the basis of a legal title, and in actions of ejectment has frequently been received as such; but in the federal courts the patent is held to be the foundation of title at law, and neither party can bring his entry before the court.[33]

A purchaser from one holding under a patent is not bound to look behind the patent to learn if it was properly issued to the one entitled to it,[34] for the instrument is in itself presumptive evidence that all prior proceedings are legal,[35] but every purchaser is presumed to have notice of any defect of title apparent upon its face,[36] and is chargeable with notice of whatever the patent recites.[37]

A patent issued to a fictitious person is a nullity,[38] as is also a patent issued to a person deceased,[39] but the heirs of a deceased person will take a valid title to the land so conveyed to a deceased ancestor[40] under special acts of Congress.[41]

§ 155. **Construction.** It is a rule of construction generally applicable to public grants, that such grants are to be con-

31 Union Mill, etc., Co. *v.* Ferriss, 2 Sawyer, 176; Gibson *v.* Chouteau, 13 Wall. 92.

32 Wilcox *v.* Jackson, 13 Pet. 498.

33 McArthur *v.* Browder, 4 Wheat. 488; Fenn *v.* Holmes, 21 How. 481.

34 Schnee *v.* Schnee, 23 Wis. 377.

35 Barry *v.* Gamble, 8 Mo. 88; Winter *v.* Crommelin, 18 How. 87; Stringer *v.* Young, 3 Pet. 320.

36 Bell *v.* Duncan, 11 Ohio, 192.

37 United States *v.* Land Grant Co., 21 Fed. Rep. 19.

38 Thomas *v.* Wyatt, 25 Mo. 24.

39 Galt *v.* Galloway, 4 Pet. (U. S.) 345; McDonald *v.* Smalley, 6 Pet. (U. S.) 261.

40 Galloway *v.* Finley, 12 Pet. (U. S.) 264.

41 In 1836 Congress passed an act to give effect to patents issued in the name of deceased persons which provides, that the title to the land designated in such patents shall inure to and become vested in the heirs, devisees or assignees of such deceased persons as if the patent had been issued to the deceased person during life.

strued most favorably to the public and most strongly against the grantee; that nothing passes by such grants except what is expressed in unequivocal language, and that whatever is not unequivocally granted is deemed to be withheld, nothing passing by implication. In late cases, however, it has been held, that this rule does not apply, at least to its full extent, to grants made upon adequate valuable considerations, but refers rather to gratuitous grants made by the sovereign upon the solicitation of the grantees.[42]

But little room for construction will ordinarily be found in patents, and when rules of construction are invoked it is usually to determine matters relating to description. In such cases it has been held that the entire description of the lands given in the patent must be taken together, and the identity of the land ascertained by a reasonable construction of the language used. If, however, there be a repugnant call, which, by other calls of the patent, clearly appears to have been made through mistake, the patent will still be valid and the ambiguity or doubt which may arise may be explained in the same manner and under the same rules that obtain between private grantors and grantees.[43]

§ 156. **Formal Requisites.** As has been seen, less formality is required in grants from the sovereign than in deeds between individuals, the main essentials having reference to the facts of execution. The instrument usually consists of an acknowledgment of payment for the land granted, and a conveyance thereof by a description conforming to the terms of the government survey. This, with the execution, is all that is found in the average patent, particularly when issued to a purchaser in the regular course of disposition according to pre-

[42] Langdon *v.* New York, 93 N. Y. 129; Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344. The reason generally given for the rule is, that in a grant proceeding from the application of the subject, the grantee ought to know what he asks, and if that does not appear, nothing shall pass from the sovereign by reason of the uncertainty.

[43] Boardman *v.* Reed, 6 Pet. (U. S.) 328; McIver *v.* Walker, 9 Cranch (U. S.), 173.

scribed legal formulas. The abstract of such an instrument is as simple as the original, and would cover all the essential points if made as follows:

United States	*Patent.*
	Certificate, No. 520.
to	*Dated Feb. 1, 1860.*
	Recorded Feb. 25, 1888.
Francis W. Walker.	*Book 15, page 90.*

Grants, The Northeast quarter of Section ten, Town two North, Range twenty-three, East of 3d P. M., Milwaukee Land District.

General Land Office, record 100,520.

Where the patent is issued in pursuance of a confirmation or act of Congress, the matter of inducement will usually be found immediately preceding the granting clause, and in such case a brief recital should be made in the abstract setting out the substance or purport of the matter of inducement.

It will often happen that a patent has been duly issued and delivered to the patentee, but through neglect has not been placed on record in the registry of deeds of the county where the land is situate. To remedy the defect of title thus produced, where the original document can not be found, it is customary to procure an exemplification of the General Land Office record and this, when recorded, practically takes the place of the original patent. In abstracting such instruments the commissioner's certificate should always be shown, and this may be done, substantially, as follows:

Appended is;

A certificate, dated Dec. 2, 1887, by Jno. M. Brown, Commissioner of the General Land Office, Washington, D. C., under the seal of said office, that the "annexed" copy of Patent to Francis W. Walker, founded on Milwaukee, Wis., cash entry No. 520, is a true and literal exemplification from the records of "this office."

§ 157. **Patents from the State.** The lands belonging to the State are distinguishable into two general classes: 1st. Those which it owns by virtue of grants from the United States. 2d. Those which it owns by reason of its sovereignty. The original thirteen States and Texas entered the Union as landed proprietors. In the remaining States, with but a few exceptions, as Vermont, whose territory was claimed by New York and New Hampshire, etc.,[44] the original title to the soil was in the general government. The States entering the Union as sovereign proprietors, claim original and ultimate title in all their lands, while the class of lands, in States formed from the territories, belonging to the State by reason of its sovereignty, includes only the shores of the sea, and of its bays and inlets. Such lands, called "marsh" or "tide" lands, are such as are covered and uncovered by the ebb and flow of the tide, but are susceptible of reclamation so as to

[44] Kentucky was part of Virginia, Tennessee of North Carolina, and Maine was claimed by Massachusetts. The territory "northwest of the river Ohio" was originally claimed by Virginia, and was conveyed to the United States by the deed of cession of March 1, 1784, as a common fund for the use and benefit of all the States, "upon condition that the territory so ceded shall be laid out and formed into States, containing a suitable extent of territory, not less than 100, nor more than 150 miles square, or as near thereto as circumstances will admit; and that the States so formed shall be republican States and admitted members of the Federal Union, having the same rights of sovereignty, freedom and independence as the other States." The State of Georgia, by deed of cession, dated April 24, 1802, substantially the same as the Virginia cession, conveyed the territory forming the present State of Alabama. The remaining territory was acquired by purchase and conquest. The cessions of Georgia and Virginia were accepted by the United States, and the municipal eminent domain held as a trust for the new States to be formed in conformity to the deeds of cession, the details to be regulated by the act of Congress known as the ordinance of 1787. Upon the admission of the new States nothing remained to the United States, according to the terms of the agreement, but the public lands, and upon their disposal the power of the general government over these lands, as property, also ceased, leaving the State in undisputed sovereignty, including the ownership and dominion of her navigable waters and the soil under them. See Pollard *v.* Hagan, 3 How. (U. S.) 212; Freedman *v.* Goodwin, 1 McAlister, 142; Ward *v.* Mulford, 32 Cal. 365; Farrish *v.*

be made valuable for agricultural or other purposes.[45] This doctrine of title by sovereignty also prevails in some of the inland States, and is applied to the submerged lands covered by navigable lakes and streams upon the borders and within the boundaries of the State.[46]

The State can make no disposition of the lands it holds by virtue of its sovereignty prejudicial to the rights of the public to use them for navigation and fishery, but it may dispose of them for the purpose of promoting the interests of navigation, or of reclaiming them from the sea, where it can be done without prejudice to the public right of navigation.[47]

The title to lands under tide waters within the realm of England was by the common law deemed to be vested in the king as a public trust to subserve and protect the public right to use them as common highways for commerce, trade and intercourse. The king, by virtue of his proprietary interest, could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use, which he could neither destroy nor abridge. The laws of most nations have sedulously guarded the public use of the navigable waters within their limits against infringement, subjecting it only to such regulation by the State, in the interest of the public, as is deemed consistent with the preservation of the public right.[48] The title to lands under tide waters in this country, which before the Revolution was vested in the king, became, upon separation of the colonies, vested in the States within which the lands are situated. The people of the State, in their right of sovereignty, succeeded to the royal title, and through the Legislature may exercise the same powers, which, previously to the Revolution, could have been

Coon, 40 Cal. 33; Barney *v.* Keokuk, 94 U. S. 336; Shively *v.* Parker, 9 Or. 504.

45 People *v.* Morrill, 26 Cal. 336; Ward *v.* Mulford, 32 Cal. 365; Simpson *v.* Neil, 80 Pa. St. 183; Coburn *v.* Ames, 52 Cal. 385; Hinman *v.* Warren, 6 Oreg. 408; Pollard *v.* Hagan, 3 How. (U. S.) 212.

46 Musser *v.* Hershey, 42 Iowa, 356; Barney *v.* Keokuk, 94 U. S. 324; Benson *v.* Morrow, 61 Mo. 345.

47 Ward *v.* Mulford, 32 Cal. 365.

48 Andrews, J., in People *v.* Ferry Co., 68 N. Y. 71.

exercised by the king alone, or by him in conjunction with parliament, subject only to those restrictions which have been imposed by the Constitution of the State and of the United States.[49] A modified form of this doctrine has been adopted by States adjacent to the great lakes.

§ 158. **State Patents — Continued.** It will be seen, therefore, that in the Colonial States, as well as in the State of Texas, the original and paramount source of title is the State. In all the States formed from national territory, except as the sovereign prerogative above mentioned has been asserted, the patent from the State is only a mesne conveyance of an older and pre-existent title, depending for its validity upon the preliminary steps by which the State acquired ownership to the soil. In tide water States, notably Alabama, California and Oregon, where the doctrine of original title by virtue of sovereignty has been strongly asserted, a State patent or grant may, in some cases, form the foundation of an unassailable title; but in the interior as well as in States bordering on the great lakes, where no perceptible tide is found, the State while exercising dominion over its water ways, has usually conceded the ownership in the soil covered thereby to the adjacent riparian proprietor, who would hold, whatever might be the mesne conveyances, from the United States in virtue of the original divesture by patent, grant, or otherwise. The rule, in this respect, is not uniform, however, and in some of the States bordering on the great lakes, as in Illinois, while title to the bed of streams is conceded to the owners of the banks, the land under the waters of the lakes is held by the State and the title of the riparian proprietor stops at the shore.[50]

§ 159. **Formal Requisites of State Patents.** The formalities to be observed in patents emanating from the State have reference to the statutory requisites relative to issuance and execution, and while the instruments closely follow the forms adopted by the national government, minor differences of detail will yet be found, varying with the locality. Or-

[49] Lansing *v.* Smith, 4 Wend. 9.

[50] See, People *v.* Lincoln Park Comr., 162 Ill. 138.

dinarily a State patent, in analogy to those issued by the general government, is under the hand of the chief magistrate, and authenticated by the great seal. Such a course is, however, by no means uniform, the statute often prescribing other and different formalities. Thus, in Wisconsin, the commissioners of school and university lands are alone authorized to convey such lands, and that power can not be transferred to others; hence a patent issued by the Governor and Secretary of State, although in conformity to the general statute regulating patents, would be void and inoperative to pass the title to that particular class of lands.[51] Thus it will be seen that in State, as in national patents, the execution, according to prescribed regulations, is after all the main point of inspection in abstracting these documents.

[51] McCabee *v.* Mazzuchelli, 13 Wis. 478.

CHAPTER XII.

SURVEYS, PLATS AND SUBDIVISIONS.

§ 160. General remarks.
161. Division of the public domain.
163. Subdivision of sections.
164. Rectangular surveying.
165. Meander lines.
166. Plats and subdivisions.
167. Formal requisites.
168. Effect of registration.
169. Vacation and cancellation.
170. Dedication by plat.
171. Re-surveys.

§ 160. **General Remarks.** A fair knowledge of the principles of surveying is indispensable to good work on the part of either examiner or counsel. In tracing devious paths and intricate windings of the title through the media of uncertain, ambiguous or faulty descriptions, as well as where, by minute subdivisions, and irregular shaped parcels, the proper location of the land becomes a matter of careful measurement or calculation, this knowledge will be found of the utmost importance. A knowledge of the governmental divisions of the county is also necessary to intelligent inquiry, and the same is generally true of subsequent subdivision either by public authority, as case of town plats, or subdivisions by individuals. Where the examination is complicated by questions arising from description, counsel should first familiarize himself with the relative position of the land, and, when the examiner has furnished no plats, can greatly facilitate his labors by the use of sketch maps prepared by himself.

§ 161. **Divisions of the Public Domain.** The public lands of the United States are ordinarily surveyed into rectangular tracts bounded by lines conforming to the cardinal points, according to the true meridian.[1] The largest of these

[1] This system, which is essentially American in all its details, was reported from a committee of Congress May 7th, 1784. Thomas Jefferson was the chairman of this committee, and to him the credit

divisions, called a *township,* is a body six miles square, having reference to an established principal base line on a true parallel of latitude, and to a longitude styled a principal meridian, and contains, as near as may be, 23,040 acres. The townships are subdivided into thirty-six tracts, each one mile square, called *sections,* and containing, as near as may be, 640 acres. The division is accomplished by running through the township, each way, parallel lines at the end of every mile. Any number or series of contiguous townships situate north or south of each other constitute a *range.*

As it is impossible to strictly follow the letter of the law in regard to the public surveys, owing to the convergency of the meridians, an inequality develops, increasing as the latitude grows higher. The excess or deficiency is added to or deducted from the western or northern ranges of sections or half sections in each township according as the error may be in running the line from east to west or from north to south. To obviate, in some measure, the errors that otherwise would result from the convergency of meridians, standard parallels, or, as they are usually termed, "correction lines," are established at stated intervals,[2] while what are known as "guide meridians" are also surveyed at regular distances.[3]

The townships bear numbers in respect to the base line, either north or south of it, and the ranges bear numbers in

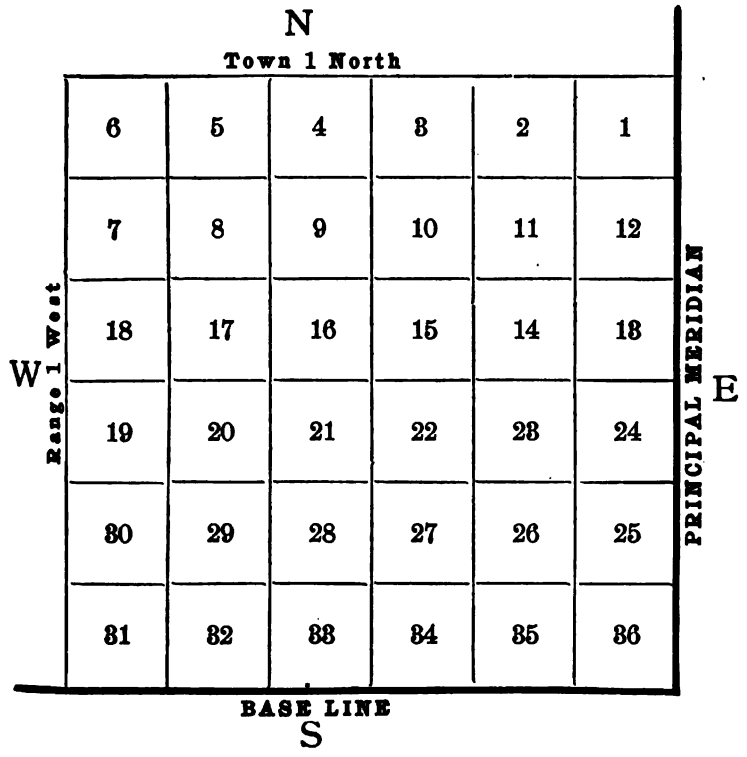
of its invention is usually accorded, but beyond the committee's report, its origin is not positively known. It is thought the square form of States, provided in Virginia's deed of cession of her western territory, may have influenced Mr. Jefferson in favor of a square form of surveys, although in the colony of Georgia a square form of surveying had been in vogue in eleven townships for fifty years prior thereto.

2 Correction lines are run east and west from the principal meridian and constitute special bases for township lines lying north thereof. Such lines are run and marked at every four townships, or twenty-four miles north of the base, and at every five townships, or thirty miles, south of same.

3 Guide meridians are surveyed at distances of every eight ranges of townships, or forty-eight miles, east and west of the principal meridian; the guides north of the principal base starting either from it or from standard parallels.

respect to the meridian line according to their relative position to it either east or west.

The sections are the smallest tracts, the out boundaries of which the law requires to be actually surveyed. Their minor subdivisions are defined by law and are designated by imaginary lines dividing the sections into four quarters of 160 acres each, and these in turn into quarter-quarter sections, of 40 acres each. The thirty-six sections into which a township is subdivided are numbered consecutively commencing with section one at the northeast angle and proceeding west to section six; thence proceeding east the sections number to twelve and so on alternately until the number thirty-six in the southeast angle.[4] The accompanying diagram will serve



[4] See Zabriskie's or Lester's U. S. Land Laws for full details of these important topics. The lines and corners of land established by the

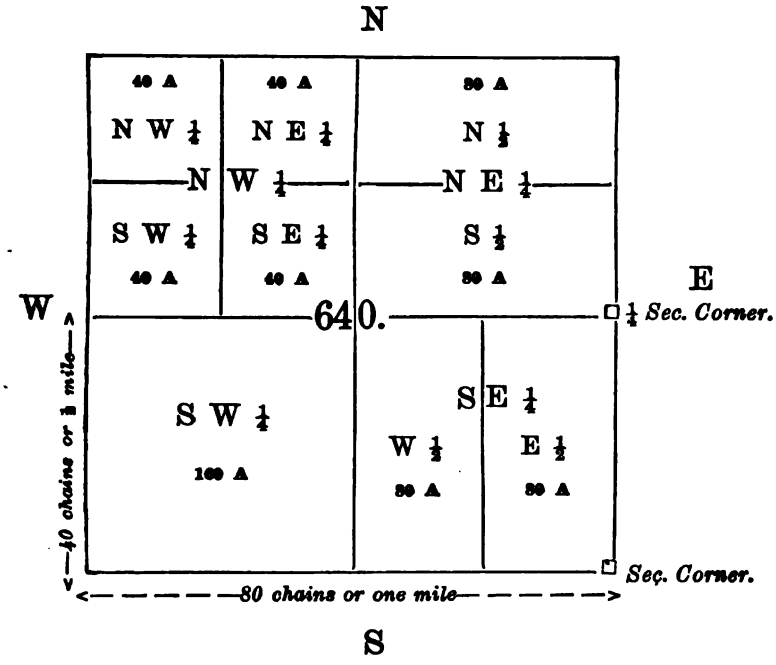
to illustrate the method of running the exterior lines of townships and sections.

The official township plats, of which mention has already been made, will furnish all the information necessary to a thorough understanding of each particular township, and show, in addition to a general topographical delineation of the surveyed territory, the exact area of each section, excesses, deficiencies, meanders of navigable streams, islands and lakes and all other details necessary for surveying or subdivision; as, witness monuments, section and quarter section corners, etc.

§ 163. **Subdivision of Sections.** Although the section is the smallest division of public land, the lines of which are actually run by the government surveyors, smaller divisions are contemplated by law and provision is always made for their ready ascertainment, which is done by running true lines from one established point to another. These legal subdivisions vary from a quarter section, containing 160 acres, to a "quarter-quarter" section, containing but 40 acres. The shape and area of the sectional subdivisions will be better understood, perhaps, by reference to the following diagram.

The illustration contemplates only an ordinary survey, where no obstacles intervene to interrupt the symmetry of the map, or interfere with the running of the lines, nor does it provide for deficiencies or excesses, which will usually occur in sections 1, 2, 3, 4, 5, 6, 7, 18, 19, 30 and 31, the greatest discrepancy being found in section 6. The section lines are surveyed from south to north on true meridians, and from east to west, in order to throw the excesses or deficiencies

government surveys when it was first surveyed, platted and recorded must control, when they can be ascertained and identified; but when such lines and corners are in doubt, and a matter of much uncertainty and dispute, the parties may settle them and thus end the dispute; and when they have agreed upon the position of such boundary, and have acted upon it as the true line, they are estopped from asserting another and a different line: Yates *v.* Shaw, 24 Ill. 367; Thomas *v.* Sayles, 63 Ill. 363. But parties holding simply an agreement that might ripen into an equity can not make agreements as to surveys which will be binding on a subsequent holder of the legal title: Sawyer *v.* Cox, 63 Ill. 130.



in measurement on the north and west sides of the township, and, as the sphericity of the earth must necessarily interfere with the correctness of measurements calculated for a level area, it will be found that the sections and half-sections on the northern and western lines of a township will always vary from the prescribed legal standard. The legal presumption is, however, that the section contains 640 acres.

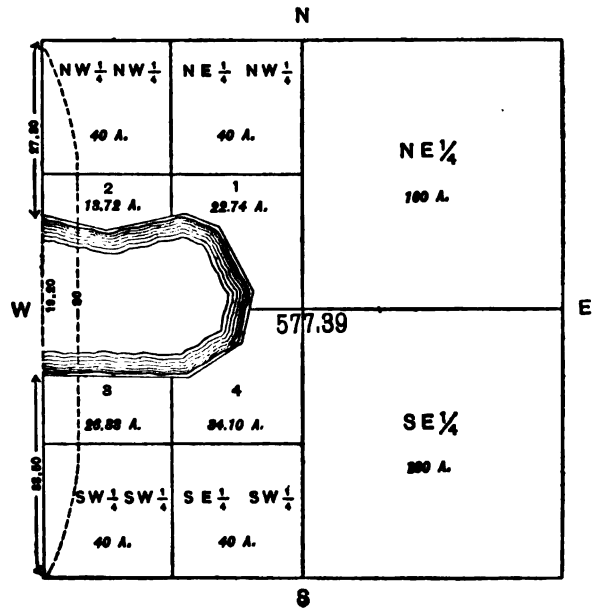
The section and quarter section corners are established as indicated in the diagram; the half quarter sections are not marked in the field, but are regarded by the law as points intermediate between the half mile, or quarter section corners.[5]

The smallest parcel indicated on the foregoing map is a quarter-quarter section, with an area of 40 acres, this being the limit of subdivision recognized by the government. If required, however, this tract may be divided in the same man-

[5] Act of April 24, 182

ner as a section and the various parts described by the same general terms.

Where navigable lakes, streams, etc., intercept the surveys, they produce fragmentary divisions known as "fractional" sections, quarters, etc., the divisions of a fractional section being also known as "lots." Meander corner posts are established at all those points where township or section lines intersect the banks of such rivers, bayous, lakes, or islands as are by law directed to be meandered, and the courses and distances on meandered navigable streams govern the calculations wherefrom are ascertained the true areas of the tracts binding on such streams. In the sale of such fractional tracts or lots, which always conform, as near as may be, to the size and shape of the regular subdivisions, the specific lot is sold by the acreage as returned by the government surveyors, and reference is always made to the field notes and plats for certainty of description, boundary, etc. The annexed diagram will serve to illustrate the subject more fully:



While meander lines follow, in a general way, the sinuosities of the bank of the stream or lake, yet the lines themselves are always straight. This is necessary for the purpose of accurate measurement. Their only office, however, is to facilitate measurement; they do not constitute boundaries of the tract. The water is always the boundary.[6]

Interspersed throughout the rectangular surveys of the public domain, are surveys of numerous bodies of land of anomalous and irregular forms covered by titles known as "Private Land Claims," which the government of the United States, under treaty obligations, or from other considerations, has confirmed. These titles derive their origin from rights acquired under the sovereignty which once held dominion over the territory now constituting part of the Union, and from donations under the laws of the United States. The surveys of such titles are in strict accordance in measurement, form, and extent with the land system of the government from which the titles are derived.

In compiling the abstract it is advisable to prefix thereto a sketch of the government survey as shown by the official township plats, and particularly should this be done when the subject of the examination consists of a fractional section or lot. Such sketch will be of great service to counsel and serve to illustrate and define the boundaries of the land far better than any verbal description can. Where land binds upon a navigable meandered stream or lake, accretions and relictions will occur, materially changing the shore line, and here the sketch will prove very serviceable in fixing the original boundaries, as well as in determining present rights.

§ 164. **Rectangular Surveying.** The rectangular system of surveying above described has now been in operation in the United States for more than one hundred years.[7] Its advantages over other methods consist in its economy, simplicity

[6] This is particularly true in those States where the bed of streams and lakes belongs to the State.

[7] It was formally adopted May 20, 1785.

in the process of transfer, brevity of description in deeding the land by patents, and in the convenience of reference of the most minute legal subdivision to the corners and lines of sections,[8] the convenient mode of subdividing sections with a view to economy and to facilitate sales of small tracts being an essentially marked feature. The principal base, principal meridian, standard parallels and guide meridians constitute the framework of the rectangular system of public surveys, and there are at present permanently established twenty-three principal bases and thirty principal meridians,[9] controlling the public surveys in the land States and territories.

As a general rule, the public surveys are governed by one principal base and principal meridian, but in a few districts and on the Pacific slope, a number of different initial points are necessitated by abrupt mountains throughout the district. The lines of public surveys over level ground are measured with a four-pole chain of sixty-six feet in length,[10] eighty chains constituting a mile; but where the features of the country are broken and hilly, a two-pole chain is used. The lines and corners thus run are marked and perpetuated by blazing trees, stones, mounds or other monuments, the witness monuments, bearings and distances being ascertained and described in the field notes.

The boundaries and contents of the several sections and quarter sections are ascertained in conformity to the following rules: "The boundary lines actually run, and marked in surveys returned, shall be established as the proper boundary lines of the sections or subdivisions for which they were intended; and the length of such lines, as returned, shall be held and considered as the true length thereof; and the bound-

8 See Zabriskie's Land Laws, 508; Instructions Commr. Gen. Land Office, May 3, 1881; Government Manual of Surveying, 1883.

9 These are divided into six numerical meridians and twenty-four independent meridians named after the locality which they control.

10 Commonly known as a "Gunter's chain." It is composed of one hundred links. Twenty-five of these links make one rod, but, in practice, rods are now seldom used, distances being taken in chains and links. See appendix for tables of measures.

ary lines which shall not have been actually run and marked as aforesaid, shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the said boundary line shall be ascertained by running from the established corners due north and south or east and west lines (as the case may be) to the water-course or other external boundary of such fractional township." [11]

§ 165. **Meander Lines.** Meander lines are run, in surveying fractional portions of the public lands bordering on navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the bank of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser.[12] Fractional divisions, made so by the interference of water, are designated and sold by the numbers attached to the lots, and reference is always had to the notes of survey. The water indicated in these notes is always the boundary, and where there exists a difference between the meandered line as run and the existing line of the water-course, the latter and not the former is to be considered the true boundary.[13] Yet, though a meandered line is generally considered as following the windings of a stream, it seems the question whether it does so or not may always be determined by evidence *aliunde*, and the mere fact that it is run and designated upon the plats as a meandered line is not conclusive against the government; thus, it has been held, that an entry of government land, bounded by a meandered line, does not include land lying at the time between such meandered line and the bank of the river.[14] So, too, while the meander line is not, in strict sense, a boundary,

[11] 1 Stat. at Large, 446; 2 Stat. at Large, 73; 2 do. 313.

[12] R. R. Co. *v.* Schurmeir, 7 Wall. (U. S.) 272; Lamprey *v.* State, 52 Minn. 181.

[13] Boorman *v.* Sunnucks, 42 Wis. 233; Houck *v.* Yates, 82 Ill. 179; Lamprey *v.* State, 52 Minn. 181.

[14] Lammers *v.* Nissen, 4 Neb. 245. But see Wright *v.* Day, 33 Wis. 260, and authorities last cited.

yet if there is no body of water corresponding to the meander line, to which the ownership of adjoining lands extends, then the line limits the extent of the land conveyed.[15]

Where fractional pieces of land are patented, bounded in part by a stream or bayou, the original plat may be resorted to, and the lines as originally run will control. This is the rule adopted in determining controversies between contiguous proprietors of fractional lands, the patentees, and those claiming under them, being restricted to the boundaries as shown by the plats and field notes. In all cases, where land is made fractional by a navigable water-course, the patentee purchases by the plat, and a patent for a fractional part of a quarter section on one side of a water-course, where the area sold is noted on the plat of the fractional tract called for by the patent, will not extend his entry and purchase across the stream, so as to embrace that part of the quarter on the other side.[16]

§ 166. **Plats and Subdivisions.** Agricultural lands seldom receive any other subdividing than that afforded by the government survey, but in cities, towns and villages, the necessities of society require a most minute subdivision into what are popularly termed blocks and lots.[17] Original subdivisions again become the subject of resubdivisions, and these in turn are not infrequently divided to meet the exigencies of social or business relations. The formal act of resurveying is technically termed a *subdivision;* the result of the survey, when projected upon paper, a *plat.*

15 As where a meandered lake had dried up. Carr *v.* Moore, 119 Iowa, 152.

16 McCormick *v.* Huse, 78 Ill. 363.

17 The term "lot" seems to be peculiar to American land parceling. Its origin is unknown. It does not appear to have any affinity with the term as used in other connections, as "a lot of goods," etc. It is said that the word, in connection with land, originated in the colonies and grew out of the custom of dividing grants into parcels and then numbering each parcel. The numbers would then be placed in a hat, or some other receptacle and drawn out by those among whom the land was to be divided. Each man would then take the parcel corresponding to the number he had drawn, and as his land had come to him, literally, by lot, it soon became customary to speak of the land as a lot, and the usage has ever continued.

These subdivisions and plats play an important part, both in conveyancing and in the examination of titles, and upon them no small portion of the validity of land titles rests. In every community of any appreciable size, lands are conveyed and described with special reference to these plats and subdivisions, the government survey being referred to only incidentally and for the purpose of greater certainty in locating the particular tract which forms the subject of the plat. They form equally as important features in preparing an abstract as the title deeds there shown, and require the same degree of care from the examiner in their exposition. Where a deed of conveyance gives no other description of the land than the lot or block of a survey or subdivision, the authentic plat of such survey is as much a part of the deed as if set out in it,[18] and a reference to a plat is as effective by way of estoppel as express words of grant or covenant.[19] A reference to a plat by lot and block has usually a more controlling influence than a special description, and when a designation by lot is followed by a description by metes and bounds embracing an area less than the lot, it has been held to import an intent of the grantor to convey the whole lot, the law presuming the addition to be merely an effort to give a more particular description.[20]

§ 167. **Formal Requisites.** The formalities attending the platting and subdividing of land are the subject of express statutory regulation in all the States, and, unlike deeds, there are no common or uniform methods, each State providing its own system of platting and authentication. Ordinarily the plat must show the shape and exterior boundaries of the land it is intended to represent, and of each subdivision thereof; the length and courses of all boundary lines; the monuments erected in the field; and the name of the tract so divided, as well as the streets, alleys, etc., shown thereon, together with the width of such streets, alleys, etc. Appended to the plat there must usually be a description of the land surveyed, officially certified by the surveyor and a certificate of acknowledgment

[18] Dolde *v.* Vodicka, 49 Mo. 100; Powers *v.* Jackson, 50 Cal. 429.

[19] Baxter *v.* Arnold, 114 Mass. 577; Cox *v.* James, 45 N. Y. 557.

[20] Rutherford *v.* Tracy, 48 Mo. 325.

by the owner or owners of the land. In addition, municipal regulations sometimes require an approval by the civic authorities. The foregoing, or similar requirements, are usually made indispensable requisites to registration, and their faithful observance is necessary to give validity to the subdivision. As a rule, no field notes are required, the dimensions shown upon the plat being sufficient for all practical purposes.

Plats are usually recorded in the registry of deeds in special books, though this is not a uniform practice, and where no specific regulation exists they will also be found in other places. Thus, arbitrary divisions made by the assessor for the purposes of taxation will frequently be found in the office of the auditor or clerk of the county; plats made by the order of a court of chancery in partition, and other cases, will be found among the records and archives of the court, though these observations rather apply to what has been than to present practices. At the present time all plats, particularly in the newer States, are required to be filed with the recorder of deeds. The following will serve as a precedent for abstracting a plat and subdivision, the minor details of which must be varied to suit the demands of local legislation.

Subdivision by William Smith } *Plat, entitled* [here set out the title as found on the plat, and proceed as hereinafter shown].

Or, if desired, commence it thus:

Smith Subdivision[21] *of The northeast quarter of the northwest quarter of Section 10, Town 13 North, Range 21, east of the 3d P. M.* } *Plat entitled as in the margin. Recorded June 2, 1891. Book 2 of Plats, page 25. Surveyor's certificate, by Jason Lothrop, dated June 1, 1881, certifies that he has surveyed the northeast quarter, etc.,* [set out description by surveyor] *into lots and blocks, as shown upon the annexed map, and that said map is a correct representation of all the exterior*

[21] This is taken from the title of the plat, and should consist of a literal transcription.

boundaries of the land surveyed, and of the divisions thereon made, and further certifies that said survey and map was made by the order and direction of William Smith, and that he has fully complied with all the provisions of law in surveying, subdividing and mapping same.

[Should notes of survey be filed in addition to the map, they may be shown or not in the discretion of the examiner, or as his client may direct.]

Acknowledged by William Smith, as owner, June 2, 1881.

Said map is as follows (or), *by direction, we omit the map.*

Usually, if the map is small, it is customary to insert it. If very large, then only such portion need be set out as is necessary to show the relative location, shape, boundaries and distances of the particular lot or lots under examination.

In this event, the concluding paragraph should read:

So much of said map as relates to the property in question is as follows:

It is recommended that whenever practicable the plat or some portion of it be shown. It is usually of considerable assistance to counsel, and if the examination involves niceties in measurements, or conflicting claims of contiguous proprietors, it is indispensable. If the law requires attesting witnesses any defect of this nature should be noted, as also any imperfect or defective execution. Plats and subdivisions made by executors, administrators and guardians, as well as in partitions between heirs and tenants in common are frequently made under the direction and sanction of a court of equity, and in this event a general synopsis of the proceedings in court, as well as the acts of the owners or parties interested, should be shown.

§ 168. **Effect of Registration.** When duly executed, acknowledged and recorded, as provided by law, a certified copy of a plat and subdivision may be used in evidence to the same extent and with like effect as in case of deeds, and by statute

such registration and acknowledgment is usually made to operate as a conveyance in fee simple of those portions of the platted lands as are marked or noted on such plat as donated or granted to the public, or any society, corporation or body politic, and as a general warranty against the donor, his heirs and representatives, to such donee or grantee for their use, or for the use and purposes therein named or intended, but for no other use. The parts intended for streets, alleys, ways, commons, or other public uses, are held in the corporate name of the municipality in trust for the uses and purposes set forth or intended.[22] Selling by a plat which has not been recorded is a misdemeanor in many of the States.

§ 169. **Vacation and Cancellation.** The making of plats and subdivisions being regulated, in the main, by statute, no uniform rules can be given as to the method of vacation or cancellation, and recourse must be had to local law, as in the case of platting and recording. Ordinarily a plat may be vacated by the owner of the property, at any time before he has disposed of any part thereof, by a written instrument declaring such intention, executed, acknowledged or proved, and recorded in like manner as deeds of land. Such a declaration, duly recorded, usually operates to destroy the force and effect of the recording of the plat so vacated, and divests all public rights in the streets, alleys, public grounds, etc., laid out or described in such plat.[23] The record of the plat so vacated should also refer to the vacation.

The foregoing describes the common and most simple manner of vacation. In some States, however, more formality is required, frequently rendering necessary the intervention of a court, as well to authorize the initiation of proceedings as to approve of such as may be taken.[24] Where an application is required to be made to a court, notice is also required to all whom it may concern. In the former case of vacation a syn-

22 See R. S. Ill. 1845, p. 115; do. 1874, p. 771; R. S. Wis. 1878, p. 645; see *infra*, "Dedication by Plat," page 179.

23 R. S. Ill. 1874, Chap. 109, § 6.

24 R. S. Wis. 1878, Chap. 101, § 2265.

opsis of the instrument filed is all that is necessary in the abstract; in the latter, a resume of the steps taken as well as the judgment or order of the court is necessary. The effect is practically the same in either case both as to the owners and the public. When made by a declaratory statement, the abstract would be substantially as follows:

Vacation[25]
of
The plat of Riverdale, being Fred. Schmidt's subdivision of part of the south 2,300 chains of the southeast quarter of section 33, town 37 north, range 14, east.

Declaration of vacation.
Dated Jan. 31, 1883.
Recorded Jan. 31, 1883.
Book 852, page 210.

Recites, that Frederick Schmidt, who is the sole owner of all the lands and lots covered by blocks 5, 6, 7, 8, 9, 10 (etc.), *of Frederick Schmidt's subdivision of part of the south 2,300 chains of the southeast quarter of section 33, town 37 north, range 14 east of the 3d P. M. in the County of Cook, and State of Illinois, recorded June 21, 1874, in book 7 of plats, page 83, under the provisions of the statute, sets aside the subdivisions referred to and vacates the same for the purpose of restoring the property to its original condition, meaning and intending to declare vacated, and does declare vacated the whole of said plat.*

Acknowledged Jan. 31, 1883.

Whenever practicable, a vacation should immediately follow the abstract of the subdivision and plat thereby affected. This can always be done where no conveyances have been made. Where portions of the property have been sold and the owners join in the execution of the vacation, the deeds to them will intervene in chronological order. As a rule, there can be no vacation of a portion of a plat containing a dedication of land to

[25] Instead of this caption the examiner may say, "Vacation by Frederick Schmidt," and then set out the title of the plat vacated in the right-hand margin.

a public use unless all of the owners of all lots sold with reference thereto join in the proceeding.[26]

§ 170. **Dedication by Plat.** Where a dedication to public use is sought to be established from the acquiescence of the owner in the use of the property by the public, or from acts or declarations of an equivocal character, which are consistent with a dedication to the public use, or to the mere permissive use by the public for a temporary though indefinite period of time, the intention of the owner in permitting such use is unquestionably of controlling influence and importance in determining whether property has been dedicated by the owner to public use or not.[27] But where the dedication is clearly manifested by unequivocal acts or declarations, upon which the public or those interested in such dedications have acted, the fact that the owner may have entertained a different intention from that manifested by his acts or declarations is of no consequence.[28] Therefore, if the owner of land subdivides and plats the same, or lays out and establishes a town or any addition thereto, and makes and exhibits a map or plan of such town or addition, with streets, alleys, public squares, etc., and sells the lots with reference to such map or plan, the purchasers acquire, as appurtenant to their lots, all such rights, privileges, easements and servitudes represented by such map or plan to belong to them, or to their owners, and the sale and conveyance of lots according to such map implies a grant or covenant, for the benefit of the owners of the lots, that the streets and other public places represented by the map shall never be appropriated by the owner to a use inconsistent with that represented by the map on the faith of which the lots are sold.[29]

If the owner of land indicates by the map, or other un-

[26] Village of Lee *v.* Harris, 206 Ill. 428.

[27] Dillon Mun. Corp. § 498; Irwin *v.* Dixon, 9 How. 30; Manderschild *v.* Dubuque, 29 Iowa, 73; Godfrey *v.* City of Alton, 12 Ill. 29; Rees *v.* Chicago, 38 Ill. 322.

[28] Lamar County *v.* Clements, 49 Tex. 347.

[29] Lamar County *v.* Clements, 49 Tex. 347; Huber *v.* Gazley, 18 Ohio, 18; Logansport *v.* Dunn, 8 Ind. 378; Beaty *v.* Kurtz, 2 Pet. 566.

equivocal acts or declarations, that a particular lot or square is to be reserved or applied to a particular or specific use, of a *quasi* public character, and such as to induce purchasers of contiguous or neighboring lots to give a higher price than they otherwise would, the use to which such lot was to be appropriated would no doubt be a reservation, and not, strictly speaking, a dedication to public use. But, nevertheless, the difference, so far as the owners of lots purchased on the faith of such reservation are concerned, is merely nominal, for the owner of the property who thus sells it is estopped from appropriating the land so reserved to a purpose inconsistent with that for which it was reserved, or he will be held by such sale to have created a servitude in the property reserved in favor of the dominant estate, which he has conveyed, which will prevent his applying the reserved property to any other purpose than that for which it was reserved.[30]

As a general proposition the fee does not pass by a dedication but remains in the original proprietor burdened with the public use; but in a statutory dedication, by making and recording a plat, the fee passes as an incident and is held by the municipality for the use and benefit of the public.[31] An important distinction will therefore be made between a *common-law* and a *statutory* dedication.

As a necessary sequence, where the title of one who makes a dedication fails, the dedication also fails; but if the owner of the title recognizes the dedication, as where there has been a plat made by the one whose title has failed and the true owner deeds lands according to the plat, he will be estopped from denying the dedication.[32]

§ 171. **Re-surveys.** Occasionally re-surveys are made, when, by reason of time or circumstance, the original survey fails to furnish the desired information. The only object of a re-survey is to determine the lines of the original, and hence

[30] Harrison *v.* Boring, 44 Tex. 255; Com. *v.* Rush, 14 Penn. St. 186.

[31] Manly *v.* Gibson, 13 Ill. 308; R. R. Co. *v.* Joliet, 79 Ill. 25. This is statutory. Consult local statutes.

[32] Gridley *v.* Hopkins, 84 Ill. 528.

it will never be permitted to change or alter the lines of the old survey whenever such lines can be ascertained from monuments or other authentic data. In every instance the monuments set by the original survey and named or referred to in the plat, are the highest and best evidence from which to determine lines. If these are lacking the stakes set by the surveyor may be resorted to, and, in the event that these can not be found, buildings or permanent erections shown to have been constructed according to them may themselves be considered monuments and proper evidence for locating the true lines.

The disturbance of ancient lines and boundaries is discouraged by the courts as tending to create confusion and the unrest of titles, and this is particularly the case where, as often happens, municipal officers attempt arbitrary re-surveys for the purpose of correcting or changing the lines or boundaries of a town.[88]

88 See, Racine v. Emerson, 85 Wis. 80.

CHAPTER XIII.

FORMAL PARTS OF DEEDS.

§ 172. Operative parts of a deed.
173. Names of the parties.
174. Grantors.
175. Grantees.
176. Nature of the instrument.
177. Date of instrument.
178. Registration.
179. Consideration.
180. Effect of consideration.
181. Words of grant.
182. Words of inheritance and limitation.
183. Description of property.
184. Description—Sufficiency.
185. Description—Identification.
§ 186. Description—Construction.
187. Special recitals.
188. The habendum.
189. Exceptions and reservations.
190. Conditions and limitations.
191. Covenants.
192. Execution.
193. The signature.
194. The seal.
195. Attestation.
196. Acknowledgment.
197. Delivery.
198. Ancient deeds.
199. Stamps.

§ 172. **Operative Parts of a Deed.** In making an abstract or synopsis of a deed of conveyance, the essential features which require notice on the part of the examiner are as follows:

The names of the parties, grantor and grantee respectively, with full *descriptio personæ,* including the character in which they act.

The nature of the instrument.

The dates respectively, of execution and registration, together with the volume and page of the registry.

The consideration, or other matter of inducement.

The operative words of grant, inheritance and limitation.

The description of the land or property conveyed.

The habendum, whenever it assumes to limit or qualify the grant.

Reservations and exceptions from the grant.

Covenants and conditions.

Restrictive clauses, and directions respecting the uses to which the land shall be applied.

Special recitals.

Execution and attestation.

The acknowledgment and certificate of conformity.

A number of the foregoing parts must appear in every abstract, while a few need only be shown when they become material; the question of materiality to be decided by the examiner from the circumstances developed in each particular case. A brief review of the foregoing heads will be made in the succeeding paragraphs and the subjects will also receive further consideration in other parts of the work treating of specific conveyances.

§ 173. **Names of the Parties.** As there can be no valid deed without grantors to give [1] and grantees capable of taking,[2] the parties to the conveyance form the first natural inquiry. In the abstract they should be shown with the same certainty of identity as in the original instruments, together with any imperfect designation, error or omission appearing on the face of the deed or deduced inferentially from a comparison with other instruments in the chain. Errors or omissions, however slight or trivial, should always be mentioned in such a manner as to bring them to the attention of any person who may peruse the abstract, and, when necessary, such mention may be supplemented by the examiner's private note, or by references to other instruments shown in the same examination. The names of the parties should form the caption to the synopsis, and are usually written in the style of a legal caption or entitlement in court pleadings, on the left hand margin of the sheet and united by a bracket.

§ 174. **Grantors.** The names of the grantors appear several times in a deed. They are usually inserted among the first recitals of the premises, accompanied with a description of the person and other particulars as to residence, marriage, capacity, etc. Frequently they again appear in the covenant

1 Whitaker *v.* Miller, 83 Ill. 381. Garnett *v.* Garnett, 7 T. B. Mon. (Ky.) 545; Douthitt *v.* Stinson, 63 Mo. 268.

clause and finally in the execution. In abstracting a deed the names, wherever written, should be carefully compared with each other and variances in the granting or covenanting clauses as well as in the execution and acknowledgment, properly noted. The domestic relations of either or any of the grantors, if stated, should always be given with the same particularity as the original.

At common law the deed of a married woman is absolutely void,[3] but by liberal and progressive legislative enactments, this rigorous and seemingly unjust rule has been practically abrogated. The examiner will therefore note the changes of the law in this respect, as applied in his own State, and carefully observe that all the requirements of the statute, at the date of the deed, have been substantially complied with, as a married woman can only be divested of her property or interest in land in the mode which the Legislature has prescribed.[4]

Though it is the universal practice of conveyancers to insert after the names, the residence and not infrequently the occupation of the parties, there appears no good reason why these matters should be transferred to the abstract. The question of alienage is set at rest in most of the States by special legislation, while the chain of conveyances is usually sufficient to prove identity without referring to residence or occupation. Some examiners give the residence of parties only when they reside without the State, as an aid in determining their identity in the search for judgments, or to enable counsel to further prosecute inquiries raised by the abstract and not answered therein. The matter is optional with the examiner and may be omitted or not in his discretion. Special descriptions, particularly when explanatory of the capacity in which the parties act,[5] should be given verbatim. This direction acquires addi-

[3] Fowler *v.* Shearer, 7 Mass. 14; Lane *v.* Soulard, 15 Ill. 124.

[4] Mason *v.* Brock, 12 Ill. 273; Garret *v.* Moss, 22 Ill. 363; Heaton *v.* Fryberger, 38 Iowa, 185.

[5] As heirs at law of a deceased person; devisee of a certain testator; widow of a former grantor, etc.

tional force when such descriptions indicate representative or official character.

§ 175. **Grantees.** Most of the foregoing remarks on grantors apply with equal force to grantees, and the same care should be observed in reciting and describing them. The names of the grantees are found in the operative part of the premises, and occasionally are repeated in the habendum, though the references which follow are usually to "said second parties." Imperfect designation, errors and omissions should be treated, so far as may be, in the same general manner as in case of grantors, though these circumstances are not so apparent when applied to grantees, and usually must be deduced inferentially or by comparison.

It is essential to the validity of a conveyance that it be to a grantee capable of taking and of proper identification; hence, a deed to one who had died prior to its execution [6] or to a person not in being,[7] or to a corporation which has no legal existence,[8] would be a nullity, and pass no title to any one.[9] The same result would follow from a deed to the heirs of a living person named therein without giving the names of the heirs.[10] So, too, a conveyance to Jno. Smith & Co. would, at law,[11] have the effect to vest the title in Jno. Smith alone,[12]

6 Hunter *v.* Watson, 12 Cal. 363.

7 Morris *v.* Candle, 178 Ill. 9; Heath *v.* Heath, 114 N. C. 547; Davis *v.* Hollingsworth, 113 Ga. 210. But this, of course, refers only to a deed conveying a present estate.

8 Douthitt *v.* Stinson, 63 Mo. 268.

9 Douthitt *v.* Stinson, 63 Mo. 268; Hornbeck *v.* Westbrook, 9 Johns. (N. Y.) 73; but although no grantee be named, if the grant be made for a specific use, a trust will often be created which a court of equity will protect, and, if necessary, appoint a trustee and compel a conveyance to him of the legal title. Bailey *v.* Kilburn, 10 Met. (Mass.) 176.

10 Hall *v.* Leonard, 1 Pick. (Mass.) 27; Winslow *v.* Winslow, 52 Ind. 8. In a similar case in Tennessee, however, it was held that the word "heirs" should not be taken in its technical signification, but to mean "children," and that the deed took effect as a present grant. See Grimes *v.* Orrand, 2 Heisk. (Tenn.) 298.

11 The several members of a firm can not be regarded, in the view of a court of law, as holding real estate as tenants in common, unless it be conveyed to them, as such, by name.

12 Arthur *v.* Webster, 22 Mo. 378; Winter *v.* Stock, 29 Cal. 407; Gossett *v.* Kent, 19 Ark. 607; Barnett *v.* Lachman, 12 Nev. 361.

a firm name not being a sufficient naming of the grantee; yet it seems that this may be regarded as a latent ambiguity which may be explained by parol,[13] while in equity, he would be treated as holding the legal title in trust for the partnership. A conveyance to John Smith & Son would be effective, however, as "son" is a sufficient word of purchase, and, similarly, a deed to Smith & Jones of a designated place, would be legally sufficient to pass title to John Smith and Thomas Jones, it being shown that they were engaged in business as partners at the place named.[14]

An absolute conveyance from husband to wife, while void, at law, will generally be upheld in equity, and will vest the title in the wife as against the heirs of the husband.[15]

A deed to a party by a wrong baptismal or Christian name will yet vest title in the intended grantee,[16] extrinsic evidence being admissible to explain mistakes or prove identity,[17] and if upon a view of the whole instrument the grantee is pointed out, the grant will not fail, even though the name of baptism be not given at all.[18]

When two persons bear the same name any designatory quality mentioned in the deed should be shown, as "Jr.,"[19] "2d," etc., and for the purpose of more certain identification it is often well to add the residence of the parties if given. If father and son bear the same name, unless explained, the grant will be taken as one to the father.[20]

[13] Murry *v.* Blackledge, 71 N. C. 492.

[14] Menage *v.* Burke, 43 Minn. 211; and see, Kelley *v.* Bourne, 15 Oreg. 476.

[15] Putnam *v.* Bicknell, 18 Wis. 333; Dale *v.* Lincoln, 62 Ill. 22; Sherman *v.* Hogland, 54 Ind. 578.

[16] Staak *v.* Sigelkow, 12 Wis. 234; but see Crawford *v.* Spencer, 8 Cush. (Mass.) 418.

[17] Peabody *v.* Brown, 10 Gray (Mass.), 45.

[18] Newton *v.* McKay, 29 Mich. 1; and see Scanlan *v.* Wright, 13 Pick. (Mass.) 523.

[19] The word "Jr." forms no part of the name of the person to whose name it is usually affixed, but is merely descriptive of the person intended, and is usually adopted to designate the son where father and son both have the same Christian name as well as family name. Padgett *v.* Lawrence, 10 Paige (N. Y.), 170.

[20] Stevens *v.* West, 6 Jones (N. C.), 49; Padgett *v.* Lawrence, 10 Paige (N. Y.), 170

No person can take a present estate under a deed unless named therein as a party, and the habendum can never introduce one who is a stranger to the premises to take as grantee,[21] though he may take by way of remainder, but where the grantee's name has been omitted in the premises, if the habendum be to him by name, his heirs, etc., he takes as a party, and the defect is cured.[22] Far less strictness is required as to capacity, etc., in grantees than is observed in case of grantors, and few of the disabilities which encompass the latter are applicable to the former. Coverture, infancy, lunacy, etc., form no bar to the grant, but as a rule, to be valid, it must be to a corporation, or to some certain person named, who can take by force of the grant, and hold in his own right, or as trustee.[23]

§ 176. **Nature of the Instrument.** After the recital of the parties, the next inquiry of importance is the nature of the conveyance, which can be ascertained only from a general survey of the entire instrument. The name of the document should be written on the right hand margin of the sheet in the manner hereafter shown, and should be sufficiently full to indicate its true purport. The name of the particular kind of deed has, of course, no legal efficacy or value, but serves as a fitting introduction to the synopsis, and apprises the reader at the outset of its import and character. Where the deed is made with general warranty it is described in the abstract as a "Warranty Deed." This will be a sufficient reference to the covenant. So, too, if the instrument is a quit claim, and is so described, no necessity will exist for setting out the operative words of conveyance or other recitals. If the instrument departs from conventional forms it may be described simply as a "Deed," and so much of the special matter should be given as will enable counsel to determine its specific character and operative effect.

§ 177. **Date of Instrument.** The date of the execution

21 Blair *v.* Osborne, 84 N. C. 417; Hornbeck *v.* Westbrook, 9 Johns. 73.

22 Lawe *v.* Hyde, 39 Wis. 346.

23 Jackson *v.* Cary, 8 Johns. 385; Newton *v.* McKay, 29 Mich. 1.

of the deed should follow next in order, and may consist simply of a line embodying the fact, as,

Dated July 10, 1882,

or, if without date, a statement to that effect. The date is no part of the substance of a deed,[24] nor is it essential to its validity,[25] the conveyance taking effect only from its delivery,[26] but the date may become important in determining questions of priority,[27] or in ascertaining whether all the statutory requirements at the time of the execution of the deed have been complied with. The date of a deed, in the absence of other proof, is presumed to be the true date of its execution,[28] as well as delivery,[29] and is the time from which title in the grantee should, in most cases, be computed.[30]

As deeds are now drawn, the date usually forms the initial recital of the premises, though it may frequently be found in the testimonium clause, and in case of discrepancy the latter should, it seems, be taken as the true date.[31] Though the expressed date of a deed is immaterial to its operation and effect,[32] and may under ordinary circumstances be contradicted or explained, yet when taken in connection with conditions or stipulations annexed to the grant, it may become important in fixing the time for the performance of any act by grantor or grantee, and in such case can not be varied by parol.[33] Should the instrument be without date, the date of acknowledgment

[24] Jackson *v.* Schoonmaker, 2 Johns. 230; Meach *v.* Fowler, 14 Ark. 29; Costigan *v.* Gould, 5 Denio, 290.

[25] Jackson *v.* Bard, 4 Johns. 230; Blake *v.* Fish, 44 Ill. 302; Thompson *v.* Thompson, 9 Ind. 323.

[26] Thatcher *v.* St. Andrew's Church, 37 Mich. 264; Whitaker *v.* Miller, 83 Ill. 381.

[27] See title "delivery."

[28] Darst *v.* Bates, 51 Ill. 439; Smith *v.* Porter, 10 Gray, 66.

[29] Hardin *v.* Crate, 78 Ill. 553.

[30] Breckenridge *v.* Todd, 61 Am. Dec. 83.

[31] Morrison *v.* Caldwell, 5 T. B. Mon. (Ky.) 436. In formally drawn deeds where the date is stated in the premises the testimonium recital is usually "the day and year first above written" without specific mention.

[32] Harrison *v.* Trustees of Phillips' Academy, 12 Mass. 456.

[33] Joseph *v.* Biglow, 4 Cush. (Mass.) 82.

may be presumed to be also that of execution and delivery.[34]

§ 178. **Registration.** For convenience, the particulars of registration should follow the date, though many examiners prefer to insert them at the conclusion of the synopsis as a proper logical sequence. On the perusal of the abstract, however, these facts are best read together, and, to facilitate the labors of counsel, should be placed as first indicated. The only material facts concerning registration are, the date of record and the volume and page on which the instrument is recorded, which should be stated briefly and concisely. In case of re-record, the date, volume and page of the former record may be given after the synopsis as a supplemental foot-note. As the general subject of registration has already been quite fully noticed, but little need be further said at this place.

The date of record is important in passing on questions of priority, particularly when the instrument is itself without date, and it acquires an additional importance in those States where, by statute, it must be recorded within a specified time to secure preference over other conveyances or against creditors.

Whenever practicable, it is recommended that all information be taken direct from the records, but occasionally it will happen that through the tardiness of the enrolling officers, deeds, and other instruments are not actually transcribed until long after they have been filed for record. In this event the examiner, in order to fully cover the period of his search, must have recourse to the original documents, but it is further recommended that after the synopsis of all such documents, the examiner append the following:

NOTE.— *The particulars of the foregoing conveyance taken from the original instrument.*

§ 179. **Consideration.** The consideration named in the deed next follows, and when consisting of the ordinary acknowl-

[34] Gorman v. Stanton, 5 Mo. App. 585.

edgment of the receipt of money, may be expressed in a simple statement of the amount mentioned; as

Consideration, $1,000.00.

The consideration recital, under the current of modern decisions, has lost its former importance and not infrequently fails to denote the true motive of the conveyance. When only a nominal sum is inserted, coupled with other considerations not of a pecuniary nature, as "love and affection," marriage, performance of specific acts, etc., the recital should be given in full, in the identical language of the instrument, and verified by quotation marks. When the expressed consideration amounts to a condition precedent or subsequent, this may become of primary importance, while it should always be stated with sufficient clearness to enable counsel to determine whether same is sufficient to sustain the conveyance. Should the instrument be without consideration, this fact should also be noted in the line,

No consideration expressed.

§ 180. **Effect of Consideration.** No consideration was required in conveyances under the common law, the homage and fealty incident thereto being deemed sufficient, but became necessary under the statute of uses.[35] As a general proposition, any valuable consideration, acknowledged or proved, is sufficient to sustain a conveyance of lands,[36] and the acknowledgment in the deed of payment thereof is so far conclusive of the fact as to give effect to the conveyance.[37] A deed executed by the party in whom title is vested, and expressing a valuable consideration, never needs, as against him or those

[35] At the present time the only practical operation of the expression of a consideration or the introduction of a clause reciting a consideration, is to prevent a resulting trust to the grantor and estop him from denying the making and effect of the deed for the uses therein declared. Meeker *v.* Meeker, 16 Conn. 383; Goodspeed *v.* Fuller, 46 Me. 141; Graves *v.* Graves, 29 N. H. 129.

[36] Jackson *v.* Leek, 19 Wend. 339.

[37] Ochiltree *v.* McClurg, 7 W. Va. 232.

claiming under him, or as against a stranger, to be supported by showing what other reason, in addition to the will of the party, led to its execution.[38] Nor is it essential to the validity of a conveyance that the consideration should be expressed,[39] and a deed, if properly drawn, will pass the title, whatever it may be, without reference to the consideration paid.[40] Where parties contract by deed, a consideration will usually be implied from the seal,[41] which as a rule imports consideration,[42] and it has been held that an instrument in form a conveyance and duly signed, whether under seal or not, imports a consideration,[43] while a voluntary conveyance, without any consideration, either good or valuable, is valid and binding between the parties and their privies.[44]

As against the grantor, and those in privity with him, the acknowledgment in the deed of payment of the purchase price is his receipt or admission, which on proof of the deed will be considered as proved.[45] Such acknowledgment, however, is not conclusive, being merely by way of recital, and though it affords *prima facie* evidence of the fact, yet, like any other receipt, it may be inquired into,[46] and, for the purpose of recovering the consideration the grantor may still show that it was never, in fact, paid,[47] but not to invalidate or defeat the operation of the deed.[48]

38 Rockwell *v.* Brown, 54 N. Y. 210; Merrill *v.* Burbank, 23 Me. 538.

39 Jackson *v.* Dillon, 2 Overt (Tenn.), 261; Wood *v.* Beach, 7 Vt. 522; Boynton *v.* Rees, 8 Pick. (Mass.) 329.

40 Fetrow *v.* Merriweather, 53 Ill. 278; Laberee *v.* Carleton, 53 Me. 211.

41 Ross *v.* Sadgbeer, 21 Wend. 166; Evans *v.* Edwards, 26 Ill. 279; Croker *v.* Gilbert, 9 Cush. (Mass.) 131.

42 Hunt *v.* Johnson, 19 N. Y. 279; Croft *v.* Bunster, 9 Wis. 503; Bush *v.* Stevens, 24 Wend. (N. Y.) 256.

43 Ruth *v.* King, 9 Kan. 17. This in the absence of statutory requirements to the contrary.

44 Fouby *v.* Fouby, 34 Ind. 433; Wallace *v.* Harris, 32 Mich. 380; Laberee *v.* Carleton, 53 Me. 211.

45 Bayliss *v.* Williams, 6 Coldw. (Tenn.) 440.

46 Huebsch *v.* Scheel, 81 Ill. 281; Parker *v.* Foy, 43 Miss. 260; Webb *v.* Peele, 7 Pick. (Mass.) 247.

47 Barter *v.* Greenleaf, 65 Me. 405; Paige *v.* Sherman, 6 Gray (Mass.), 511; Grout *v.* Townsend, 2 Hill (N. Y.) 554.

48 Bassett *v.* Bassett, 55 Me. 127; Newell *v* Newell, 14 Can. 206; Richardson *v.* Clow, 8 Ill. App. 91.

As against the creditors of the grantor such recital is but hearsay, and no evidence of the fact of payment,[49] but no one except a creditor can avail himself of the objection that the deed was given without consideration.[50]

§ 181. **Words of Grant.** The operative words of grant are found in the premises and usually immediately follow the consideration recitals, in which order they should also appear in the abstract whenever it may be desirable to set them forth fully. It is a familiar rule with conveyancers, that to vest a title to land the deed must contain apt words of grant, release or conveyance,[51] and, so faithfully has this been followed, it is not uncommon to meet with deeds containing as many as seven or even ten operative words of grant. The effect of these words is a question of construction to be governed and decided by the law of the State in which the land is situate,[52] and no general rule can be formulated for the guidance of the practictioner the laws of the different States being widely divergent. The words of grant of most frequent occurrence are "grant,[53] bargain and sell." In many of the States, when not limited by express words, they are construed as covenants,[54] while in other States such a conveyance, without more, would be a mere quit-claim and inoperative to convey an after-acquired title,[55] or warrant that conveyed.[56] Where the deed is without covenants, or contains only special or limited covenants, the words of grant should be set forth immediately preceding the description. When the usual covenants of seizin, warranty, etc., appear in the deed they are immaterial, and may be omitted.

[49] Redfield Mfg. Co. *v.* Dysart, 62 Pa. St. 62; Rose *v.* Taunton, 119 Mass. 99; Houston *v.* Blackman, 66 Ala. 559.

[50] Hatch *v.* Bates, 54 Me. 136.

[51] Johnson *v.* Bantock, 38 Ill. 111; Catlin *v.* Ware, 9 Mass. 218; Hammelman *v.* Mounto, 87 Ind. 178; Brown *v.* Manter, 21 N. H. 528.

[52] McGoon *v.* Scales, 9 Wall. 23; Clark *v.* Graham, 6 Wheat. 577.

[53] The word "convey" is equivalent to "grant." Lambert *v.* Smith, 9 Or. 185.

[54] Brodie *v.* Watkins, 31 Ark. 319; Hawk *v.* McCullough, 21 Ill. 220. This construction is usually made under peculiar statutory provisions.

[55] Butcher *v.* Rogers, 60 Mo. 138; Nicholson *v.* Caress, 45 Ind. 479.

[56] Taggart *v.* Risley, 4 Oreg. 235. The word "give" was formerly held, in the absence of express

Technical words of grant possess little of their former efficacy, though it is still true that to constitute a conveyance there must be sufficient words showing an intention to grant an estate,[57] yet every part of the instrument may be resorted to for the purpose of ascertaining its true meaning and the intention of the parties,[58] and, generally, any writing that sufficiently identifies the parties, describes the land, acknowledges a sale of vendor's rights for a valuable consideration, and is signed, sealed and delivered, is a good deed of bargain and sale,[59] and, if complete in other respects, has been held to constitute a valid conveyance even though all words of grant are omitted.[60]

§ 182. **Words of Inheritance and Limitation.** Closely allied to the foregoing are the words of inheritance and limitation, once of the very essence of the deed,[61] but now, by reason of sweeping statutory changes, comparatively without value or legal effect. Though invariably inserted by the conveyancer, words of inheritance are no longer necessary to create or convey a fee, and, as a rule, every grant of lands will pass all the estate or interest of the grantor, unless a different interest shall appear by express terms or necessary implication,[62] the question of the estate transferred being determined rather by the end sought to be attained by the grantor, than by the language employed.[63] The usual and ordinary words for conveying an estate in fee simple are "heirs," or "heirs and assigns forever."

The rule in Shelly's case, with its refinements and subtilties

covenants, to constitute a warranty during the life of the grantor. Dow *v.* Lewis, 4 Gray (Mass.), 468.

57 McKinney *v.* Settles, 31 Mo. 541; Brewton *v.* Watson, 67 Ala. 121; Brown *v.* Manter, 21 N. H. 528.

58 Saunders *v.* Hanes, 44 N. Y. 353; Callins *v.* Lavalle, 44 Vt. 230; American Emigrant Co. *v.* Clark, 62 Iowa, 182.

59 Chiles *v.* Conley's Heirs, 2 Dana (Ky.), 21.

60 Bridge *v.* Wellington, 1 Mass. 219. This case has been severely criticised in subsequent decisions and frequently rejected.

61 Jackson *v.* Meyers, 3 John. 388.

62 Merritt *v.* Disney, 48 Md. 344; Beecher *v.* Hicks, 7 Lea (Tenn.) 207; Eiseley *v.* Spooner, 23 Neb. 470.

63 Hawkins *v.* Champion, 36 Md. 83; Kirk *v.* Burkholtz, 3 Tenn. Ch. 425; Lehndorf *v.* Cope, 122 Ill. 317. This is now a general statutory rule. In a few States, however, the common-law rule still obtains and words of inheritance are necessary to pass a fee.

is not recognized in some States, and has but a partial effect in others, although its influence is still manifest in nearly every State. As a wide difference of interpretation is displayed in the decided cases, it is difficult to prescribe a definition of the rule that shall be sufficiently certain. Generally, if an estate of freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of his body, he takes a fee tail; if to his heirs generally, a fee simple. The words "heirs" or "heirs of the body" in such case, are words of limitation and not of purchase.[64] The rule in Shelly's case is, however, at most a technical rule of construction, and must, as a general proposition, give way to the clear intent of the donor when that intention can be ascertained from the instrument in which the words supposed to be of limitation are used.[65]

Whenever the words of inheritance depart from the usual form for granting a fee, and seek to create a vested or contingent remainder in some person other than the grantee named, the only safe method for the examiner is to set forth the granting clause verbatim, and as a further precaution the habendum may also be shown. To create an estate tail or remainder, there must be the use of technical words designating a class of heirs to take in succession, or language disclosing a clear intent to that effect.[66] The word "children," though frequently used, is usually a word of purchase, requiring strong language to change it into a word of limitation. In the preparation of abstracts these questions are too frequently lost sight of by the examiner, who fails to give to them and other seemingly minor details, the attention their importance deserves.

[64] Butler *v.* Huestis, 68 Ill. 594; consult Foster *v.* Shreve, 6 Bush (Ky.), 519; Bradford *v.* Howell, 42 Ala. 422; Forrest *v.* Jackson, 56 N. H. 357; Smith *v.* Block, 29 Ohio St. 488; King *v.* Rea, 56 Ind. 1. Entails, when permitted, are limited to the first degree only, that is, the first grantee takes an estate for life while the remainder passes in fee to the second taker. See, Butler *v.* Huestis, 68 Ill. 594.

[65] Belslay *v.* Engel, 107 Ill. 182.

[66] Middleton *v.* Smith, 1 Coldw. (Tenn.) 144.

§ 183. **Description of Property.** After the parties to the conveyance, the description of the thing or subject-matter conveyed is the great essential,[67] but for convenience, and following the orderly parts of the deed, it should appear immediately after the words of conveyance. In abstracting a deed it is customary to condense the introductory sentences of the description, which allude generally to the situs of the land in a given county and State, but from this point, or after the words "to wit," the entire description, as found in the deed, should be set forth verbatim. It is the custom also, of many examiners, to refer for descriptions to the caption of the abstract, or to other instruments in the chain containing the same or substantially the same description; a practice as slovenly as it is dangerous and one strongly to be reprehended. Both in preparing the abstract and in passing upon the title, the description should in every case be compared with the caption, and any deviation therefrom, either in form or substance, carefully noted.

§ 184. **Description — Sufficiency.** Every deed of conveyance, in order to transfer title, must, either in terms or by reference or other designation, give such description of the subject-matter intended to be conveyed as will be sufficient to identify the same with reasonable certainty.[68] If the description is too indefinite to convey anything, or too vague to permit of location, then the deed lacks one of the essential elements of a conveyance.[69] It is not essential, however, that the deed should on its face ascertain the limits or quantity of the particular tract conveyed. It will be sufficient if it refers to certain known objects or things, and provides definite means by which the land may be readily ascertained and known;[70] where words of general description only are used, oral evidence may be resorted to for the purpose of ascertaining the particular

67 Whitaker *v.* Miller, 83 Ill. 381.

68 Berry *v.* Derwart, 55 Md. 66; Long *v.* Wagoner, 47 Mo. 178; Barker *v.* Ry. Co., 125 N. C. 596.

69 Barker *v.* Ry. Co., 125 N. C. 596.

70 Coats *v.* Taft, 12 Wis. 388; Dwight *v.* Packard, 49 Mich. 614.

subject-matter to which they apply.[71] Any description by which the identity of the property intended to be conveyed is established, will be sufficient,[72] and a description not sufficiently certain in itself may be made so by reference to other deeds in which it is sufficient.[73]

§ 185. **Description — Identification.** Defects of description are sometimes cured by the acts of the parties after the conveyance has been made. As, where the land intended to be conveyed is not identified in the deed the parties may afterward survey or stake out a tract, and, if the grantee takes possession of such tract, this, it is said, ascertains the grant and gives effect to the deed.[74] But such a proceeding, as a rule, can only be shown by matter *in pais*, and hence does not affect the conclusions of the examiner deduced from an inspection of the record. Unless the parties have recorded the survey or minutes of location the examiner is under no duty to note the fact, even though he may be cognizant of it, and the opinion of counsel should conform to the facts of record only. If parties desire to fix and perpetuate their rights in a specific parcel of land recourse should be had to the courts or to the public records.

§ 186. **Description — Construction.** It is a rule of construction as to the description of the land found in the premises of a deed, that the least certain and material parts must give way to the more certain and material. Quantity is never allowed to control courses and distances,[75] and courses and distances must yield to fixed monuments and natural objects also referred to therein.[76] But where the monuments, if once ex-

[71] Coleman *v.* Improvement Co., 94 N. Y. 229.

[72] Smith *v.* Crawford, 81 Ill. 296; Allen *v.* Bates, 6 Pick. 460.

[73] Russell *v.* Brown, 41 Ill. 184; Credle *v.* Hays, 88 N. C. 321.

[74] Thus, where a deed was made for "one-half acre of land near the wharf," describing the wharf, it was held that such deed was not void for uncertainty if the parties, after the conveyance, marked out a parcel of land of which the grantee took possession with the consent of the grantor. Simpson *v.* Blaisdell, 85 Me. 199; and see, Herrick *v.* Morrill, 37 Minn. 250.

[75] Bishop *v.* Morgan, 82 Ill. 352; Saunders *v.* Schmaelzle, 49 Cal. 59.

[76] Dupont *v.* Davis, 30 Wis. 170; Sanders *v.* Eldridge, 46 Iowa, 34; Cunningham *v.* Curtis, 57 N. H. 157.

isting, are gone, and the place where they originally stood can not be ascertained, the courses and distances, when explicit, must govern;[77] and where the boundaries are doubtful, quantity often becomes a controlling consideration.[78] Nor will the rule that monuments, natural or artificial, rather than courses and distances, control in the construction of a conveyance, be enforced when the instrument would thereby be defeated, and when the rejection of a call for a monument would reconcile other parts of the description and leave enough to identify the land.[79] Where a deed calls for a natural object and the line gives out before reaching it, the line must be extended to the natural object, and the distance disregarded;[80] but where no monuments are referred to and none are intended to be afterward designated, the distance stated in the grant must govern the location.[81] An erroneous description of land by numbers will not control other descriptive particulars which indicate the land with certainty.[82]

Where lines are run to fix the boundaries of a tract, with special reference to the points of the compass, they will generally be construed according to their technical significance. Thus, a line running "northerly" will be construed to mean due north, and so of the other cardinal points. These terms may be controlled or qualified by other words of description used in connection, but in case there is nothing to suggest a different construction they must be given their technical meaning.[83]

Where, as is often the case, the conveyancer, from an over anxiety to identify the property, makes two descriptions, the one, as it were, superadded to the other, the one description being complete and sufficient in itself, the other incorrect, the incorrect description, or feature, or circumstance, may be re-

77 Drew *v.* Smith, 46 N. Y. 204; Clark *v.* Wethy, 19 Wend. 320.

78 Winans *v.* Cheny, 55 Cal. 567.

79 White *v.* Luning, 93 U. S. (3 Otto) 515.

80 Strickland *v.* Draughan, 88 N. C. 315.

81 Negbauer *v.* Smith, 44 N. J. L. 672.

82 Bradshaw *v.* Bradbury, 64 Mo. 334; Montgomery *v.* Johnson, 31 Ark. 62.

83 Fratt *v.* Woodward, 32 Cal. 220.

jected as surplusage, and the complete and correct description allowed to stand alone.[84]

It must be remembered, however, that notwithstanding the utmost liberality is allowed in the construction of descriptions, so as, if possible, to effectuate the intention of the parties, nothing passes by a deed except what is described in it, whatever the intention of the parties may have been, and extrinsic evidence is inadmissible to make the deed operate upon land not embraced in the descriptive words.[85]

§ 187. **Special Recitals.** Immediately following the description are usually found the special recitals, reservations, exceptions, conditions, etc., though in forms specially prepared they may also be found in that part of the deed technically known as the reddendum and to insure certainty all of the instrument from the habendum to the testimonium clause should be carefully read by the examiner when compiling the abstract. All special matter, including recitals, references, exceptions, reservations, conditions, limitations, etc., should be set forth fully in an orderly manner and, whenever practicable, in the identical language of the deed and verified by quotation marks. When not so treated, or where slight condensation may be advantageously employed, the matter should be preceded by a parenthetical statement, to indicate that what follows is a transcription and not an observation by the examiner, thus:

"*Said grantor* (*it is stated*) *agrees to*," *etc.*

Recitals in deeds bind the parties thereto, and those claiming under them,[86] and a grantee is chargeable with notice of facts recited in a deed which constitutes a necessary part of his chain of title,[87] but such recitals are not evidence against one

[84] Kruse *v.* Wilson, 79 Ill. 233; Myer *v.* Ladd, 26 Ill. 415; Wade *v.* Deray, 50 Cal. 376; Credle *v.* Hays, 88 N. C. 321; Bray *v.* Adams, 114 Mo. 486.

[85] Coleman *v.* Improvement Co., 94 N. Y. 229.

[86] Fisk *v.* Flores, 43 Tex. 340; Lamar *v.* Turner, 48 Ga. 329.

[87] Pringle *v.* Dunn, 37 Wis. 449; Acer *v.* Wescott, 46 N. Y. 348; Bryne *v.* Morehouse, 22 Ill. 603; R. R. Co. *v.* Kennedy, 70 Ill. 350.

who holds under a title emanating from an independent source.[88]

§ 188. **The Habendum.** It is rarely that the attention of either examiner or counsel is called to the habendum of a deed, which, unless declaring a trust, or defining the limitation of an estate, may be passed without notice in the abstract. Though formerly, like many other technical features, of great importance, it has now degenerated into a mere form,[89] and in the statutory conveyances in use in many of the States is entirely omitted. In general the habendum refers to the premises and declares what estate the grantee shall hold. It may sometimes enlarge or diminish the grant, when showing a clear intention so to do,[90] but can not perform the office of divesting the estate already vested by the premises, and is void if repugnant thereto.[91] Where the deed purports to create a vested or contingent remainder, or conveys property in trust, the habendum often becomes important, and where no estate is mentioned in the granting clause it becomes efficient to declare the intention and rebut any implication which would otherwise arise from the omission.

§ 189. **Exceptions and Reservations.** Everything that restrains, qualifies, reserves or subtracts from the grant or thing granted, should be shown on the abstract with minuteness of detail, and to that end it is desirable that everything in the nature of an exception or reservation be copied verbatim. Both a reservation and an exception must be a part, or arise out of that which is granted in the deed. The difference is that an exception is something taken back or out of the estate then existing and clearly granted, while a reservation is something issuing out of what is granted.[92] Thus, an exception is always a part of the thing granted, and of a thing in being.[93]

88 Lamar *v.* Turner, 48 Ga. 329; Kerfoot *v.* Cronin, 105 Ill. 609.

89 4 Kent Com. 468; 4 Blk. Com. 298.

90 Corbin *v.* Healy, 20 Pick. 514.

91 Riggin *v.* Love, 72 Ill. 553; Halifax *v.* Stark, 34 Vt. 243; Robinson *v.* Payne, 58 Miss. 690.

92 Adams *v.* Morse, 51 Me. 497; Kister *v.* Reeser, 98 Pa. St. 1.

93 Winthrop *v.* Fairbanks, 41 Me. 307.

A reservation is of a thing not in being, but is newly created out of the land or property demised.[94]

The usual operative words to create an exception are, "saving and excepting," etc., but the terms indicative of either method are often used indiscriminately and frequently in conjunction, as "excepting and reserving," etc., and the difference between the two is so obscure in many cases that it has not been observed.[95] Although there is a technical distinction between the terms, yet where "reserving" is used with evident intent to create an exception, effect should be given in that sense.[96] A reservation in a deed will never operate to give title to a stranger, though it may, when intended by the parties as an exception, afford notice to the grantee of adverse claims in or to the thing excepted or reserved.[97] A restriction may take effect as a reservation, if it does not necessarily deprive the grantee of the essential benefits of the grant.[98]

The same certainty of description is required in an exception out of a grant as in the grant itself, as where a deed excepts out of the conveyance one acre of land, and there is nothing in the exception to locate it upon any particular part of the tract, the exception is void for uncertainty, and the grantee takes the entire tract.[99] Reservations and exceptions, when expressed in a doubtful manner, are to be construed most strongly against the grantor,[1] yet if the intention of the parties can be fairly ascertained from the instrument, such intention will govern in its construction.[2]

§ 190. **Conditions and Restrictions.** Analogous to the exceptions and reservations of a deed are the conditions qualifying the grant and the limitations or restrictions of its use, both of which demand the closest attention on the part of ex-

[94] Gay *v.* Walker, 36 Me. 54. See, Warvelle, Real Property, 256.

[95] Winthrop *v.* Fairbanks, 41 Me. 307.

[96] Sloan *v.* Lawrence Furnace Co., 29 Ohio St. 568.

[97] West Point Iron Co. *v.* Reymert, 45 N. Y. 703.

[98] Gay *v.* Walker, 36 Me. 54.

[99] Mooney *v.* Cooledge, 30 Ark. 640.

[1] Wyman *v.* Farrar, 35 Me. 64; Duryea *v.* New York, 62 N. Y. 592.

[2] Wiley *v.* Sirdorus, 41 Iowa, 224.

aminer and counsel. As in the case of reservations, the conditional or restrictive clauses should be copied word for word, the abstract showing them to be literal quotations. Conditions frequently partake of the nature of the consideration for the conveyance, and declare its true motive, and, when such is the case, it becomes doubly important that they be correctly shown.

Conditions are divided into *precedent* and *subsequent*, the former being something which must be punctually performed before the estate can vest, and deeds containing them expressly declare that the grant is *upon* such condition. A condition subsequent indicates something to be performed after the estate vests, the continuance of such estate depending upon its performance. The character of conditions, precedent or subsequent, depends upon the intention of the parties, as shown by a proper construction of the whole instrument, not upon the precise or technical words used.[3] A deed upon condition subsequent conveys the fee with all its qualities of transmission. The condition has no effect to limit the title, until it becomes operative to defeat it.[4]

The law does not favor forfeitures,[5] and conditions in avoidance of an estate are strictly construed; no language will be construed into such a condition contrary to the manifest intent of the parties, nor when any other reasonable construction can be given to it.[6] Conditions of this kind will not bind the heirs or assigns unless they are expressly mentioned,[7] nor will a conditional grant revert on breach, there being no clause providing for forfeiture or re-entry,[8] and until defeated by an actual entry made for the purpose of claiming a forfeiture, by some one having the right so to do, the estate continues in the grantees.[9] Conditional grants, though sometimes running to individuals, are more frequently found in dedicatory conveyances,

3 Rogan *v.* Walker, 1 Wis. 527; Sheppard *v.* Thomas, 26 Ark. 617.

4 Shattuck *v.* Hastings, 99 Mass. 23.

5 Voris *v.* Renshaw, 49 Ill. 425; Hoyt *v.* Kimball, 49 N. H. 322.

6 Wier *v.* Simmons, 55 Wis. 637.

7 Page *v.* Palmer, 48 N. H. 385. This is the general rule, but local statutes may qualify or vary it.

8 Packard *v.* Ames, 82 Mass. 327.

9 Osgood *v.* Abbott, 58 Me. 73; Guild *v.* Richards, 82 Mass. 309.

or in deeds to religious, charitable or educational institutions.

Restrictions on the use of property conveyed are of more frequent occurrence, but, unless they are also conditions subsequent, do not work a forfeiture in their violation. They consist usually of building regulations, sanitary measures and matters involving the good morals of community, as prohibition of the sale of intoxicating liquors on the premises, etc. They are designed ordinarily to prevent such use of the premises by the grantee and those claiming under him, as might tend to diminish the value of the residue of the land belonging to the grantor or impair its eligibility for particular purposes, and that such a design is a legitimate one, and may be carried out consistently with the rules of law by reasonable and proper restrictions, can not be doubted. Every owner of property has the right to so deal with it, as to restrain its use by his grantee within such limits as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the land which he retains.[10] Such restrictions are recognized and upheld by the courts, and violations thereof will be restrained by injunction.[11]

A condition, whether precedent or subsequent, is not bind-

[10] The only restriction on this right is that it shall be exercised reasonably, with due regard to public policy, and without creating any unlawful restraint of trade. Nor does there seem to be any doubt that in whatever language such a restraint is couched, whether in the technical form of a condition or covenant, or of a reservation or exception, or merely by words which give to the acceptance of the deed by the grantee the force and effect of a parol agreement; it is binding as between the immediate parties thereto, and may be enforced by or against their respective assigns. Whitney *v.* Ry. Co., 11 Gray (Mass.), 359; Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35; Watrous *v.* Allen, 57 Mich. 362; and see Warvelle on Vendors, § 438 *et seq.*

[11] Dorr *v.* Harrahan, 101 Mass. 531; Cowell *v.* Col. Springs Co. 100 U. S. 55; Clark *v.* Martin, 49 Pa. St. 289. Where restrictions upon building are inserted in a deed as a part of a scheme for a plan of improvement, such restrictions, as a rule, though spoken of as conditions, are not to be deemed technical conditions whose breach involves forfeiture. Ayling *v.* Kramer, 133 Mass. 12.

ing after the party imposing it has rendered its performance impossible or unnecessary.[12]

§ 191. **Covenants.** The covenants of a deed add nothing to its efficiency as a means of conveyance, and a quitclaim deed will as effectually pass the title and covenants running with the land as a deed of bargain and sale, if no words restrict its meaning.[13] The covenant clause usually immediately precedes the testimonium, and when consisting only of the conventional assurance of seizin, right to convey, freedom from incumbrance, quiet enjoyment and warranty, may be passed with simple notice, or if the deed is in other respects regular, and is described in the abstract as a "Warranty Deed," there seems no good reason why any further mention should be made, particularly if the client knows such to be the examiner's custom. There is no uniform rule regarding their insertion, and usually they are omitted. Special, or unusual covenants, or such as seek to limit the grantor's liability, should be noticed at such length as their importance seems to demand, and if necessary for a proper understanding, should be literally transcribed.

Covenants are either express or implied. Implied covenants must be consistent with, and not contrary to, the express covenants,[14] and where a deed contains both, the latter qualifies and restrains the former.[15] Covenants are also classified as *personal* and *real,* or those which run with the land, though some confusion exists as to the division between them.[16] No special words are needed to raise a covenant,[17] and whatever shows the intent of the parties to bind themselves to the performance of a stipulation may be deemed a covenant without regard to the form of expression.[18]

The ancient common law warranty has been superseded by

12 Jones *v.* R. R. Co., 14 W. Va. 514.

13 Morgan *v.* Clayton, 61 Ill. 35; Rowe *v.* Becker, 30 Ind. 154; Pingree *v.* Watkins, 15 Vt. 479; White *v.* Whitney, 3 Met. 81; Hunt *v.* Amidon, 4 Hill, 345.

14 Gates *v.* Caldwell, 7 Mass. 68.

15 Kent *v.* Welch, 7 Johns. 258; Sumner *v.* Williams, 8 Mass. 201.

16 2 Bou. Law Dict. 327.

17 Newcomb *v.* Presbrey, 8 Met. 406.

18 Taylor *v.* Preston, 79 Pa. St. 436.

personal covenants, and never had any practical existence in this country.[19] The weight of American authority holds that the covenants of seizin, good right to convey and freedom from incumbrances, are *in presenti;* that they do not run with the land, and if broken at all, are broken at the instant of their creation.[20] The claim for damages thereby becomes personal in its nature to the grantee, and is not transferred by a conveyance to a subsequent grantee.[21] Several of the States, following the English rule, permit an action by a remote grantee in his own name where the substantial breach of the covenant occurs after the assignment, and the whole actual damages are sustained by the assignee.[22] Where privity of estate exists between the parties, and the covenant is one about or affecting the land granted, and tends directly and necessarily to enhance its value, or render it more beneficial to those by whom it is owned, the covenant is said to be incident to the land, and may be enforced by and is binding upon, those in whom the title subsequently vests.[23] It is a general principle that covenants which run with the land pass only with the legal title thereto.[24] The covenant of warranty extends only to the right, title and interest in the lands bargained and sold by the vendor. The covenants can not enlarge the premises.[25]

Where a covenant is implied from statutory words, the very words of the statute must be used to raise it.[26] In a conveyance in form a "Warranty Deed," but omitting any of the customary covenants, it is well to note the omission, and in such cases, where by statute covenants are implied from specific words of grant, the operative words of conveyance as found in the deed should be inserted.

19 Jones *v.* Franklyn, 30 Ark. 631.

20 Tone *v.* Wilson, 81 Ill. 529; Fuller *v.* Jillett, 9 Biss. (C. Ct.) 296.

21 Salmon *v.* Vallejo, 41 Cal. 481; Dale *v.* Shively, 8 Kan. 276; Pillsbury *v.* Mitchell, 5 Wis. 17; Moiston *v.* Hobbs, 2 Mass. 433; Greenby *v.* Kellog, 2 Johns. 2.

22 Richard *v.* Bent, 59 Ill. 38; Schofield *v.* Homestead Co., 32 Iowa, 317; Cole *v.* Kimball, 52 Vt. 639.

23 Wooliscroft *v.* Norton, 15 Wis. 198; Wheeler *v.* Schad, 7 Nev. 204.

24 Wright *v.* Sperry, 21 Wis. 331.

25 Lamb *v.* Wakefield, 1 Sawyer, 251.

26 Vipond *v.* Hurlbut, 22 Ill. 226.

§ 192. **Execution.** The execution of a deed technically comprises the signing, sealing and delivery[27] and in some States the attestation of witnesses as well, but the attention of examiner and counsel need only be directed to the two former, and, where required by law, the attestation. The laws of the various States on the subject of execution, though preserving a general harmony, are by no means uniform nor have they always been the same during the governmental existence. The examiner should be fully posted on all the changes of the law in respect to the execution of deeds in his own State, and carefully observe and note in the abstract any defects or errors, in signatures, seals or attestation, and any non-compliance with statutory requirements. Extra vigilance will be required in the cases of deeds by married women, conveyances by delegated authority and by corporations.

§ 193. **The Signature.** Sealing, not signing, was the *sine qua non* to the validity of the common law deed, and a signature was not considered necessary.[28] Sealing is now of little moment, save as a technical requirement, while in several States it is entirely dispensed with, and the deed derives its efficacy from the signature. An unsigned deed, though duly attested, acknowledged and delivered, is a nullity.[29]

27 Thorp *v.* Keokuk Coal Co., 48 N. Y. 253.

28 Coke, Lit. L. 1, C. 5, § 40. This was doubtless occasioned by reason of the very general inability of the mass of the people to read or write; see 1 Reeves' Hist. Eng. Law, 184, note. Under the Saxon rule it would seem that signing was in general use provided the parties were able to write, and whether they could write or not it was customary to affix the sign of the cross; but on the Norman conquest waxen seals, usually with some specific device, were introduced and took the place of the Saxon method of writing the name and making the sign of the cross. By the statute of 29 Charles II, for the prevention of frauds and perjuries, all transfers of land were required to be put in writing and signed by the parties making same, and this statute is the foundation of the American laws upon the subject. In Blackstone's time signing does not appear to have been essential to validity, although he says (1 Com. 305): "It is said to be requisite that the party, whose deed it is, should seal, and now in most cases, I apprehend, should sign it also."

29 Goodman *v.* Randell, 44 Conn. 325; Miller *v.* Ruble, 107 Pa. St. 395; Hilton *v.* Asher, 103 Ky. 730.

The law presumes that in executing instruments, parties use their real names, and does not presume them to have different names. So, where the record of a deed purporting to have been signed by *Harmon* S. was acknowledged by *Hiram* S., it was held inadmissible to prove a conveyance by Hiram,[30] as only the signer can acknowledge as grantor. It is doubtful, however, whether this can be received as the accepted doctrine, the volume of authority inclining to the contrary, and generally if the grantor's true name is recited in the body of the deed and he also acknowledges it by his true name, the fact that he signs it by a wrong name does not invalidate the conveyance.[31] All variances of this nature, being of the essence of the conveyance, require full notice. A deed signed with a mark, if otherwise regular, may be treated as properly executed, and such is also the custom of examiners where the signature is in a foreign language. Where an instrument is found with a signature affixed to it, the presumption is, that the party signing it knew its contents, and there is no distinction in this respect between those who can and those who can not write.[31a]

§ 194. **The Seal.** In most of the States the formality of a seal is required in the execution of deeds for the conveyance of land, while in some its use has been dispensed with by statute. The common law seal has been defined as an impression upon wax or wafer or some other tenacious substance capable of being impressed,[32] but as the record would fail to show the method

It would seem as though the statement of the text was not only in consonance with law but with reason as well, yet late decisions in some localities would indicate that a deed is not necessarily void because the grantor's name is not subscribed to it, provided it is written in his own handwriting, and so placed in the body of the deed as to control the grant. The question then becomes one of intent, and, it has been held, may be considered by a jury in connection with other circumstances. See Saunders *v.* Hackney, 10 Lea (Tenn.), 194. See also the topic "Defective Execution," in the succeeding chapter.

30 Boothroyd *v.* Engle, 23 Mich. 19.

31 Middleton *v.* Findla, 25 Cal. 76; Tustin *v.* Faught, 23 Cal. 237; Zahnn *v.* Haller, 71 Ind. 136; Houx *v.* Batteen, 68 Mo. 84.

31a Doran *v.* Mullen, 78 Ill. 342.

32 Warren *v.* Lynch, 5 Johns. (N. Y.) 239. And a later decision held that the seal of a corporation or of a private individual impressed directly upon paper without the use

of sealing, the examiner would still be at a loss to know if the deed had been properly sealed, were this rule still in effect. In a majority of the States where seals are still required, a scrawl has, by statute, the force of a seal, whenever it appears from the body of the instrument, the scrawl itself, or the place where affixed, that such scrawl was intended for a seal.[33] Where a scrawl is allowed for a seal, the word "seal" at the end of the maker's signature, and referred to in the testimonium clause, creates a sealed instrument; the word "seal" is equivalent to a scrawl.[34] And, generally, an instrument will be treated as sealed, when the intent to affix a seal is clear.[35] It has been held that where the record was made at a time, and under a law, permitting the registration of only sealed instruments, and the instrument was in form a warranty deed, the conclusion attestation and certificate of acknowledgment, all speaking of it as under seal, it will be presumed that the original was sealed. And whether or not it was the legal duty of the recorder to indicate upon the record whether the instrument was sealed, his omission to do so will not overcome the presumption.[36] Usually, if the instrument is otherwise in form, it will at least be sufficient to convey an equitable title, and therefore, if recorded, will affect those interested with constructive notice of its contents as fully as if sealed.[37]

If one of several grantors named in an instrument which purports to be sealed by all of them, neglects to affix his seal thereto, in the absence of other evidence he will be deemed to

of wax or other tenacious substance is a nullity, although holding the contrary as to seals of courts and public officers. See Farmers' Bank *v.* Haight, 3 Hill (N. Y.), 493.

33 Hudson *v.* Poindexter, 42 Miss. 304; Deininger *v.* McConnel, 41 Ill. 229. This is a general statutory rule.

34 Groner *v.* Smith, 49 Mo. 318; Lewis *v.* Overby, 28 Gratt. (Va.) 627.

35 Burton *v.* LeRoy, 5 Sawyer, 510; McCarley *v.* Supervisors, 58 Miss. 749; Flowery Mining Co. *v.* Bonanza Co., 16 Nev. 302.

36 Starkweather *v.* Martin, 28 Mich. 471; LeFranc *v.* Richmond, 5 Sawyer (C. Ct.), 601.

37 Grandin *v.* Hermandez, 29 Hun (N. Y.), 399. Local statutes prescribing requisites for registration may vary this rule.

have adopted the seal of some one of the other signers, and will be equally bound with them.[38]

In compiling the abstract it is unnecessary to refer to the execution, or any part thereof, if in all respects regular and in conformity to law; only defects or omissions require notice, and these are best shown by a literal transcription.

§ 195. **Attestation.** Subscribing witnesses to a conveyance of land are not necessary at common law,[39] nor by statute in many of the States; others require an attestation by one subscribing witness only, while in a majority it is necessary that the deed be executed in the presence of two witnesses, who shall subscribe their names to same as such. As the matter of attestation is purely statutory the effect of omission in this particular is to be decided solely by the application of local law.

The usual and ordinary words of attestation are "signed, sealed and delivered in our presence," but the late statutory forms of conveyance have somewhat abbreviated this ancient form of expression, and the words "in our presence," immediately following the testimonium clause, and followed by the signatures of witnesses, is a good and sufficient attestation. When required at all, attestation is usually a prerequisite to registration, and any informality in this respect deprives the instrument of its legal effect as constructive notice.[40] When properly attested no mention of the fact seems necessary in the abstract, while omissions or defects may be indicated by some simple statement; as

No subscribing witnesses shown of record.

§ 196. **Acknowledgment.** The statutes of all the States provide for a proof of execution of conveyances of land, by an acknowledgment of the deed before some officer, evidenced by his certificate of authentication. Such acknowledgment, prop-

[38] Yale *v.* Flanders, 4 Wis. 96; Norvell *v.* Walker, 9 W. Va. 447; Mackay *v.* Bloodgood, 9 Johns. (N. Y.) 285; Davis *v.* Burton, 4 Ill. 41.

[39] Woods Conv. 239; 2 Black. Com. 307; Dole *v.* Thurlow, 12 Met. (Mass.) 157.

[40] Parret *v.* Shaubhut, 5 Minn. 323; Ross *v.* Worthington, 11 Minn. 441.

erly certified, authorizes the production of the instrument in evidence without other or further proof of its execution, and, in some States, is a prerequisite to registration.

The certificate of authentication is no part of the conveyance, and is not the act of either party to it,[41] but only evidence in regard to its execution and acknowledgment, and, like all other evidence, should be reasonably considered and construed.[42] Being statutory creations greater strictness is necessary in their construction, yet it is a well settled rule, that a substantial compliance with statutes prescribing the form and requisites of an official certificate of acknowledgment, or proof of deeds, is sufficient. It is the policy of the law to uphold such certificates whenever substance is found, and not to suffer conveyances, or proof of them, to be defeated by technical or unsubstantial objections, and in construing them resort may be had to the deed or instrument, to which they are appended; [43] yet nothing will be presumed in favor of an official certificate, which must state all the facts necessary to a valid official act.[44]

Of course, the certificate should be signed by the person making it. It is also customary for the officer to add a description of his office, as, "John Smith, Notary Public." But, while this is a usual and proper custom, it does not seem to be necessary where the body of the certificate describes him as a notary public and acting officially. In such case the omission of the name of his office after his signature will not have the effect of rendering the acknowledgment invalid.[45]

The official acts of a notary should be authenticated by his seal,[46] particularly when a non-resident of the jurisdiction

41 An acknowledgment taken by a grantee named in the deed is void, though the deed itself will still be valid and binding as between the parties and its execution may be established by common law evidence. Hogans *v.* Carruth, 18 Fla. 587.

42 Harrington *v.* Fish, 10 Mich. 415; Gray *v.* Ulrich, 8 Kan. 112.

43 Wells *v.* Atkinson, 24 Minn. 161; Tubbs *v.* Gatewood, 26 Ark. 128; Barnet *v.* Proskauer, 62 Ala. 486; Calumet Co. *v.* Russell, 68 Ill. 426.

44 Wetmore *v.* Laird, 5 Biss. 160.

45 Lake Erie, etc., R. R. Co. *v.* Whitham, 155 Ill. 514.

46 The requisites of a notarial seal are determined by the law of the locality from which the officer derives his authority; or, if that be

where the land is situate, and usually, in such cases, his certificate must also be accompanied by a certificate of magistracy and conformity made by some officer of competent authority.

The seal is *prima facie* evidence that the person using it is a notary, duly commissioned,[47] etc., and its absence should be briefly noted; thus:

No notarial (or official) seal shown of record.

As a rule, a notarial certificate from another State without a seal or certificate of conformity will be invalid;[48] and, generally, where the statute requires a notary to attach his seal to certificates of his official acts, a certificate unauthenticated by the impression of such seal is void.[49]

The law does not usually, in terms, impose upon the recorder the duty of transcribing the official seal of the officer taking the acknowledgment, and many recorders simply represent it by a scroll and the words "seal" or "notarial seal;"[50] but whatever the form that may be employed to indicate the fact of sealing it should be observed by the examiner. It has been held, in several instances, that where there is a statement in the

silent on the subject, then by the rules of the common law. It is defined as an impression on the paper directly, or on wax or wafer attached thereto, made by the official as and for his seal. In the absence of express legislation it need not contain his name, for it is the seal, and not its composition or character of which courts take judicial notice. The presumption is that a seal is the official seal of the person it purports to be, and who subscribed the jurat. In Re Phillips, 14 Nat. Bankr. Reg. (No. 5) 219.

47 Brown *v.* Phil. Bk., 6 Serg. & R. 484; Stephens *v.* Williams, 46 Iowa, 540.

48 Booth *v.* Cook, 20 Ill. 129; Texas Land Co. *v.* Williams, 51 Tex. 51. See also the local statutory provisions on this subject.

49 Welton *v.* Atkinson, 53 Neb. 674; Hewitt *v.* Morgan, 88 Iowa, 468; De Graw *v.* King, 28 Minn. 118. But compare, Sonfield *v.* Thompson, 42 Ark. 46.

50 In Smith *v.* Dal, 13 Cal. 510, it was held that it is not necessary that the seal should be copied upon the record and that it is enough if it appears from the record that the deed copied was under seal. In Bucklen *v.* Hasterlik, 155 Ill. 423, it was held that the letters "L. S." following the name of a notary in a certificate of acknowledgment, as shown in an abstract of title, sufficiently indicate that an official seal was attached to such certificate.

body of the certificate, that the officer who made it, affixed his seal of office, a presumption is raised that such was the fact, and that it is not necessary that the record copy should contain a *fac simile* of the seal, nor any indications thereof by scroll.[51]

But although a deed is defectively acknowledged, or even not acknowledged at all, it is good as between the parties and subsequent purchasers with actual notice, and passes title equally with one duly certified. The certificate does not affect the force of the instrument.[52] Acknowledgment, however, is frequently a requisite for registration, and a deed must be legally recordable to make the record thereof constructive notice.[53]

The certificate should state the fact of acknowledgment, and should fix the identity of the party making same, these being the great essentials of every official authentication.[54] A certificate defective in either respect does not show a substantial compliance with the requirements of law, which provide that the grantor shall be known or his identity satisfactorily proved to the certifying officer.[55] When regular, the certificate is noticed at the conclusion of the synopsis by a brief mention of the fact and date, as,

Acknowledged June 1, 1882.

Slight defects or omissions may be shown in a descriptive way, as:

Acknowledged June 1, 1882, by William Smith only. (or) *In certificate of acknowledgment, said grantor's name is written "William Smythe."*

51 Geary *v.* City of Kansas, 61 Mo. 378; Griffin *v.* Sheffield, 38 Miss. 359.

52 Stevens *v.* Hampton, 46 Mo. 404; Gray *v.* Ulrich, 8 Kan. 112; Dole *v.* Thurlow, 12 Met. 157; Hoy *v.* Allen, 27 Iowa, 208.

53 Pringle *v.* Dunn, 37 Wis. 449; Bass *v.* Estill, 50 Miss. 300; Willard *v.* Cramer, 36 Iowa, 22.

54 Bryan *v.* Ramirez, 8 Cal. 461; Pendleton *v.* Button, 3 Conn. 406; Short *v.* Conlee, 28 Ill. 219.

55 Stuller *v.* Link, 2 Thomp. & C. (N. Y.) 86; Callaway *v.* Fash, 50 Mo. 420; Smith *v.* Garden, 28 Wis. 685.

Defects of form, insufficient statement, or non-compliance with the statute, will frequently require an entire or partial transcription of the certificate. The acknowledgments of married women, corporations, and persons acting by delegated power, or in an official capacity, should be closely scrutinized, while in several of the States the deed is ineffectual to convey the homestead estate unless the statutory right is specially waived in the acknowledgment. Where the certificate omits any of the jurisdictional facts such omissions should be properly noted, as:

Certificate of acknowledgment by James Thompson, Notary Public, Cook County, Ill., does not state that grantors were known to him, or that they waived their homestead rights.

As between the immediate parties, the certificate may be impeached for fraud, collusion, or imposition, but not otherwise,[56] As to purchasers for a valuable consideration without notice, it is conclusive as to all matters which it is the duty of the acknowledging officer to certify if he has jurisdiction,[57] and where an officer is authorized to take acknowledgments, it will be presumed that they were taken within his jurisdiction.[58]

The subject will be further considered, with practical examples, in treating of specific conveyances.

§ 197. **Delivery.** No principle is better established by the entire current of modern authority than that the delivery of a deed is essential to a transfer of the title.[59] It is the final act consummating and confirming the conveyance, and without which all other formalities are ineffectual.[60] A deed, though

[56] Fitzgerald *v.* Fitzgerald, 100 Ill. 385.

[57] Williams *v.* Baker, 71 Pa. St. 476; Wharton on Evid. § 1052; Borland *v.* Walrath, 33 Iowa, 130; Howland *v.* Blake, 97 U. S. (7 Otto) 624.

[58] People *v.* Snyder, 41 N. Y. 397; Teutonia, etc., Co. *v.* Turrell, 19 Ind. App. 469; Cox. *v.* Stern, 170 Ill. 442.

[59] Mitchell *v.* Bartlett, 51 N. Y. 447; Stiles *v.* Brown, 16 Vt. 563; Fisher *v.* Beckwith, 30 Wis. 55; Oliver *v.* Stone, 24 Ga. 63.

[60] Young *v.* Gailbeau, 3 Wall. 636; Whitaker *v.* Miller, 83 Ill. 381; Thatcher *v.* St. Andrew's Church, 37 Mich. 264.

duly executed and otherwise perfect, while remaining under the control of the grantor passes no title.[61]

To constitute a sufficient delivery, the deed must not only be delivered by the grantor, but must be accepted by the grantee,[62] though ordinarily a delivery of a deed implies an acceptance.[63] What constitutes a valid delivery or acceptance has been the subject of a great diversity of opinion and a vast number of reported decisions, and is still, to some extent an open and unsettled question to be determined by the particular facts of each case under the application of local law. These questions, however important in other respects, present but few features to the examiner, who looks only at the instruments as they appear upon the records, and passes on their sufficiency and legal effect from what is there shown. The attestation clause usually recites that the conveyance was "signed, sealed and delivered," etc., but this has been held, not sufficient, in itself, to establish a delivery.[64]

The recording of a deed not only affords *prima facie* evidence of its delivery,[65] but, when the instrument is properly executed and acknowledged, raises a legal presumption of that fact,[66] and, where it is to the grantee's advantage, of its ac-

61 Egery *v.* Woodard, 56 Me. 45; Fisher *v.* Hall, 41 N. Y. 416; Byars *v.* Spencer, 101 Ill. 429. Though it seems that a deed once delivered is not invalidated by the fact that it remains in the possession of the grantor. Wallace *v.* Berdell, 97 N. Y. 13.

62 Comer *v.* Baldwin, 16 Minn. 172; Commonwealth *v.* Jackson, 10 Bush (Ky.), 424; Welch *v.* Sacket, 12 Wis. 243; Oxnard *v.* Blake, 45 Me. 602.

63 Davenport *v.* Whistler, 46 Iowa, 287; Bundy *v.* Ophir Iron Co., 38 Ohio St. 300; Bivard *v.* Walker, 39 Ill. 413. This is the general rule, and rests upon the ground that a party is presumed to accept that which is beneficial to him, yet the presumption that a party will accept a deed because it is beneficial to him will never be carried so far as to consider him as having accepted it. Bell *v.* Farmers' Bank, 11 Bush (Ky.), 34.

64 Ruslin *v.* Shield, 11 Ga. 636; but see, Howe *v.* Howe, 99 Mass. 88.

65 Himes *v.* Keighblinger, 14 Ill. 469; Burkholder *v.* Cased, 47 Ind. 418; Kille *v.* Eye, 79 Pa. St. 15; Jackson *v.* Perkins, 2 Wend. 308; Lawrence *v.* Farley, 24 Hun (N. Y.), 293; Connard *v.* Colgan, 55 Iowa, 538; Moore *v.* Giles, 49 Conn. 570.

66 Kille *v.* Eye, 79 Pa. St. 15; Alexander *v.* Alexander, 71 Ala. 295; but see, Boyd *v.* Slayback, 63 Cal. 493.

ceptance as well.[67] Where the grantor in a deed not actually delivered causes the same to be recorded, this has been held a sufficient delivery to enable the grantee to hold the land as against the grantor and those claiming under him.[68] Generally a delivery will be presumed, in the absence of direct evidence of the fact, from the concurrent acts of the parties recognizing a transfer of title.[69]

As a general rule a deed will be presumed to have been delivered on the day it bears date,[70] though this presumption is not conclusive.[71] It has been held that where the date of acknowledgment is subsequent to the date of the deed, there is no presumption of delivery prior to the acknowledgment.[72] The volume of authority, however, does not sustain this doctrine, and the date of execution, in the absence of other proof to the contrary, may still be taken as the true date of delivery,[73] and not the date of acknowledgment, which, as a matter of convenience, may well have been made afterward.[74] So where a grantee dies between the dates of the deed and its acknowledg-

67 Metcalfe *v.* Brandon, 60 Miss. 685; Masterson *v.* Cheek, 23 Ill. 73. While the recording of a deed for land may afford *prima facie* evidence of its delivery and acceptance, this must be understood as applying to a deed simply conveying the land, and not as applying to a deed which imposes an obligation upon the grantee to assume and pay a pre-existing incumbrance on the property. Thompson *v.* Dearborn, 107 Ill. 87.

68 Kerr *v.* Birnie, 25 Ark. 225; Dale *v.* Lincoln, 62 Ill. 22; Palmer *v.* Palmer, 62 Iowa, 470.

69 Gould *v.* Day, 4 Otto (U. S.), 405. Thus where a deed had been executed and recorded without the knowledge of the grantee, who subsequently executed a conveyance to a third party, this recognition by both parties of the transfer of the title was held to be sufficient evidence that at the time a delivery of the deed had been made. Ibid.

70 Deninger *v.* McConnell, 41 Ill. 228; Treadwell *v.* Reynolds, 47 Cal. 171; Harman *v.* Oberdorfer. 33 Grat. (Va.) 497; Raines *v.* Walker, 77 Va. 92.

71 Whitman *v.* Henneberry, 73 Ill. 109.

72 Fontaine *v.* Savings Institution, 57 Mo. 553; Brolasky *v.* Furey, 12 Phil. (Pa.) 428. Washburn also announces the same principle. See 3 Wash. Real Prop. (4th Ed.) 286.

73 Hardin *v.* Crate, 78 Ill. 553; Ellsworth *v.* Cent. R. R., 34 N. J. L. 93; Billings *v.* Stark, 15 Fla. 297.

74 People *v.* Snyder, 41 N. Y. 402; Hardin *v.* Osborne, 60 Ill. 93, and see Fisher *v.* Butcher, 19 Ohio, 406.

ment, it will be presumed that the deed had been delivered in his lifetime.[75] As a conveyance derives its effect and operation only from delivery of the deed, the question of time will not infrequently form an important element in the methods employed by counsel in framing his opinion of the title, as well as in determining the respective rights and relations of parties who hold under the deeds, or who show conflicting or adverse claims. The abstract will usually shed but little light on itself, and under ordinary circumstances it will be safe to proceed on the assumption that the date of execution is also the time at which the title to the property conveyed passed to the grantee.[76] In case of a forged instrument, there is no presumption of delivery either at its date, or at any other time.[77]

§ 198. **Ancient Deeds.** Deeds more than thirty years old are called "ancient deeds," and are exempt from the usual tests applied to conveyances, being admitted in evidence without proof of execution,[78] and where a deed would be evidence as an ancient deed without proof of its execution, the power under which it purports to have been executed will be presumed.[79] This rule is not uniform, however, and it has been held that a conveyance, though over thirty years old, can not be admitted as an ancient deed when purporting to be executed by one acting as administrator in the absence of proof of his authority to make the deed. And when such authority is conferred by an order or decree of a court, the jurisdiction of the latter to grant the order or decree must be shown on the face of the proceedings.[80]

Some discretion may be employed by the examiner in regard to conveyances of long standing, and under which the rights of the parties have become fixed by continued possession and enjoyment. It will not be necessary, in many cases, to notice de-

75 Eaton *v.* Trowbridge, 38 Mich. 454.

76 Breckenridge *v.* Toss, 3 T. B. Mon. (Ky.) 150. The same doctrine is recognized and sanctioned by the English decisions under their statutes of enrollments. See also Shep. Touch. 72.

77 Remington Pap. Co. *v.* O'Dougherty, 81 N. Y. 474.

78 Whitman *v.* Heneberry, 73 Ill. 109; Gardner *v.* Granniss, 57 Ga. 539.

79 Johnson *v.* Shaw, 41 Tex. 428.

80 Fell *v.* Young, 63 Ill. 106.

fects that should invariably appear in the case of later deeds, particularly when rendered of no effect by curative legislative enactments.

Most of the States have enacted statutes which, in effect, cure defects and irregularities in acknowledgments of deeds made a specified time prior to such enactments. In the absence of any inhibiting constitutional limitation, and except as against vested rights, it would seem the legislature has power to cure, by retroactive legislation, defective acknowledgments of deeds, in all cases where the purpose of the acknowledgment is the admission of the instrument acknowledged to record or its use as evidence. Where the statute cures irregularities in acknowledgment, the record of such deed, made prior to the enactment, is also cured and rendered valid, and such record, or a copy thereof, is properly admissible in evidence.[81]

§ 199. **Stamps.** By act of Congress,[82] July 1, 1862, and acts amendatory thereto,[83] an *ad valorem* stamp duty was imposed on deeds of conveyance and other contracts relating to real property. The act provided that the stamps should be affixed to the instrument and properly cancelled,[84] and in default thereof the instrument to be invalid. The act became in force on and after Oct. 1, 1862, and continued for a period of ten years.[85] By the act of June 13, 1898, a stamp duty was again imposed, which, in various forms, continued until July 1, 1902. On all instruments executed during these periods, the examiner will observe whether the record purports to show a stamp. If so, it should be briefly indicated in some manner, as;

U. S. Int. Rev. Stamps for $1.50 affixed.

or, if none;

No Int. Rev. Stamp shown of record.

81 Summer *v.* Mitchell, 29 Fla. 179.

82 12 U. S. Stat. 475.

83 13 U. S. Stat. 299.

84 13 U. S. Stat. 293.

85 The duty was repealed by the act of June 6, 1872, in force, Oct. 1, 1872. See, 17 Stat. at Large, 256.

The presence or absence of the stamp, however, matters little so far as the validity of the conveyance is concerned, for it is not in the constitutional power of Congress to prescribe for the States a rule for the transfer of property within them,[86] nor to provide rules of evidence for the State courts,[87] and conveyances are not rendered void by the omission of the prescribed stamps,[88] nor for neglect to cancel them if affixed.[89] The act, so far as it prescribes a rule of evidence, is operative only in the Federal courts, and has no application to the courts of the States.[90]

The right of the Federal Government to collect a revenue by the imposition of stamp duties is undisputed, and penalties may be prescribed for the non-payment of such tax. But the authorities are united in declaring that an unstamped instrument if otherwise conforming to law, is not, for that reason, invalid.[91]

86 Moore *v.* Moore, 47 N. Y. 467; Carpenter *v.* Snelling, 97 Mass. 452.

87 Barbour *v.* Gates, 43 N. Y. 40; Craig *v.* Dimock, 47 Ill. 308; Green *v.* Holway, 101 Mass. 243; Griffin *v.* Ranney, 35 Conn. 293.

88 Janvrin *v.* Fogg, 49 N. H. 340; Rhienstrom *v.* Cone, 26 Wis. 163; Brown *v.* Thompson, 59 Me. 372; Morris *v.* McMorris, 44 Miss. 441; Latham *v.* Smith, 45 Ill. 29.

89 Agricultural Assoc. *v.* Neill, 31 Iowa, 95; D'Armond *v.* Dubose, 22 La. Ann. 131.

90 Wilson *v*, McKenna, 52 Ill. 43; People *v.* Gates, 43 N. Y. 40; Sammons *v.* Halloway, 21 Mich. 162; Woodward *v.* Roberts, 58 N. H. 503; Small *v.* Slocumb, 112 Ga. 279; Kennedy *v.* Roundtree, 59 S. C. 324; Cos *v.* Estes, 106 Tenn. 472.

91 Sammons *v.* Halloway, 21 Mich 162; Bunker *v.* Green, 48 Ill. 243; Duffy *v.* Hobson, 40 Cal. 240. An apparently contrary decision was reached in Chartiers, etc., Co. *v.* McNamara, 72 Pa. St. 278, but this case seems to stand alone.

CHAPTER XIV.

ERRORS, OMISSIONS AND DEFECTS.

§ 200. Error generally.
201. Defect of parties—Grantor.
202. Defect of parties—Grantee.
203. Disparity of dates.
204. Technical phrases.
205. Misdescription — Uncertainty.
§ 206. Misdescription—Omission.
207. Misdescription—Quantity.
208. Defective covenants.
209. Defective acknowledgment.
210. Continued.
211. Repugnancy.

§ 200. **Error Generally.** Conveyancers, like other mortals, have no immunity from error. Not only do the best skilled often forget, but ignorance and carelessness, assuming the office and functions of the conveyancer, augment their mistakes a thousand fold. Superadded to these, are the errors, blunders and omissions arising during the transcribing from the original documents to the record, all of which necessitates constant watchfulness on the part of both examiner and counsel.

The errors most common are found in disparity of dates; the acknowledgment frequently antedating the execution, and occasionally the date of registration having priority of both. Discrepancies in names; a particular name appearing in the premises, another in the execution and ofttimes yet another in the acknowledgment. Manifest misdescriptions of the property intended to be conveyed when compared with preceding conveyances; sometimes glaring and obtrusive and again retiring and only discernible by close and concentrated attention. Omissions are more frequent and palpable. They are usually the result of negligence on the part of either the conveyancer or recorder, or perhaps both, and call for a corresponding degree of care on the part of the examiner. Where printed *forms* are used in conveyancing, blanks are frequently improperly filled, or quite as often left untouched. This will fre-

quently be found to be the case in the matter of dates, personal pronouns, references to the parties, venue and the like. Misdescriptions of the property often occur where the conveyancer copies the description from some older deed in which figures, initials, words, a course or distance, or even a whole line will be omitted and pass unnoticed until detected by the examiner. These errors, appearing on the face of the record, it is the duty of the examiner to detect and carefully note in such a manner that the attention of counsel will be drawn to them on the perusal of the abstract.

§ 201. **Defect of Parties — Grantor.** A discrepancy will frequently be noticed between the names of the grantors in the body of the deed, usually written by the conveyancer, and those in the execution, written by the parties personally. Where the variation is slight the difference may be shown by writing the name in the caption or entitlement as it appears in the signature, and adding a statement at the conclusion of the synopsis substantially as follows:

In body of deed (and certificate of acknowledgment) said grantor's name is written "George A. Smith."

The error being indicated in both names by an underscore.

Discrepancies similar to the one just noticed are frequent, but fortunately comparatively harmless. The law knows but one Christian name, and the omission or insertion of a middle name is immaterial,[1] and usually if there is a variance between the names of the grantors as they appear in the body of the deed and in the signatures, the identity of the persons will be presumed, until rebutted, where the deed has been properly acknowledged.[2] In case of a radical difference in the orthography or sound, the names in the premises should form the caption and the execution of the deed should be set forth fully.

1 James *v.* Stiles, 14 Pet. 322; Dunn *v.* Gaines, 1 McLean, 321; Erskine *v.* Davis, 25 Ill. 251; Scofield *v.* Jennings, 68 Ind. 232; Franklin *v.* Talmadge, 5 Johns. (N. Y.) 84.

2 Lyon *v.* Kain, 36 Ill. 362.

An apparent defect of parties will sometimes appear through an error of the copyist in transcribing the original instrument to the pages of the record. Thus a deed is found from *Harry* Thompson. The title of record, as shown by the previous conveyance, is vested in *Harvey* Thompson. Now if the original entries of the examiner disclose that the deed in question is from Harvey Thompson it may fairly be concluded that the name as recorded is an error of transcription. But the examiner must show the deed as he finds it. This he does, calling attention to the discrepancy by underscoring the erroneous part of the name and then, for the information of counsel, he should append a note something as follows:

NOTE.— *Our books of original entry, compiled from original instruments before the same are spread of record, show the name of the grantor in the foregoing deed to be Harvey Thompson.*

It sometimes happens that, through inadvertence or mistake, the name of the grantor has been entirely omitted in the body of the deed, and while it has been held, in some instances, that one who signs, seals and delivers a deed is bound by such acts as grantor, although not named as such therein,[3] the current of later decisions would indicate that a deed of this kind is ineffectual to convey any interest or pass title.[4] The theory upon which the first mentioned class of cases proceed seems to be, that the signing of a deed manifests the intention of the signer to be bound by it, and, hence, that courts should construe such a deed so as to give effect to the intention of the parties. But the preponderance of authority holds that the intention of parties must be derived from the language of the deed itself, and, therefore, when there is nothing in the body of the deed to show an intention on the part of the signer thereof to convey,

[3] Elliott *v.* Sleeper, 2 N. H. 525; Thompson *v.* Lovrein, 82 Pa. St. 432; Armstrong *v.* Stovall, 26 Miss. 275.

[4] Harrison *v.* Simmons, 55 Ala. 510; Laughlin *v.* Fream, 14 W. Va. 322; Peabody *v.* Hewitt, 52 Me. 33; Bank *v.* Rice, 4 How. 225; Stone *v.* Sledge, 87 Tex. 49.

his mere signature cannot be held to manifest such purpose.

Where only a portion of the grantors named in a deed sign and acknowledge same, the authorities are somewhat divided as to its effect. Some hold that where a deed shows that it was intended to be jointly executed by all the parties, an execution and delivery by a portion only is incomplete and does not bind them;[5] a majority of cases, however, favor the contrary doctrine and seem to sustain the principle, that the parties executing will be bound thereby, and the deed be sufficient to pass their interests.[6]

If the true owner of land conveys by any name, the conveyance, as between him and his grantee, will transfer title, and in all cases evidence *aliunde* is admissible to identify the actual grantor.[7]

§ 202. **Defect of Parties — Grantee.** Defects, of the kind which forms the caption to this section, arises mainly from imperfect designation, misnomer and omission, and from their nature are not always susceptible of easy detection. In case of misnomer they will frequently appear only inferentially by comparison with other instruments, but when detected attention should be drawn to them. Where a deed to William *Harmon* is followed by a conveyance from William *J. Hermann,* there is an apparent break in the chain and the examiner should call attention thereto by an underscore, or, better still, by a row of short marks under each name, thus: *Hermann.* When an understanding to that effect exists between examiner and counsel, this method of notation will also serve to signify that this is the identical manner in which words so treated appear upon the records, and is not due to any negligence of transcription on the part of the examiner.

Defects similar to that just considered are latent defects and

[5] Arthur *v.* Anderson, 9 S. C. 234.

[6] Story Part., § 119; Parsons Part., § 369.

[7] As where a deed purports to be from *John* O. Black, and is signed "J. O. Black," parol evidence is admissible to show that *James* O. Black was the identical person who in fact executed the deed. Wakefield *v.* Brown, 38 Minn. 361.

susceptible of parol explanation, and where no new deeds are made, affidavits showing the identity of the parties should be required by counsel. In construing deeds of this character, *i. e.*, where a party takes under a misnomer, but conveys by his proper name, courts are ever inclined to grant the widest leniency, for, in the great influx of foreign speaking population which the United States is constantly receiving, mistakes must occur in adapting to the English forms of pronunciation, foreign names and the spelling of same; hence it has been held that a deed to "Mitchell Allen," followed by a deed from "Michael Allaine," is not a fatal variance, and the parties will be presumed to be the same.[8] Very frequently the negligence of the recorder will produce disparities of this kind, as where the records show a deed to "Electa Wilds" and a subsequent deed of the same property from "Electa Wilder," "Wilds" being, however, the true name. In every case similar to this the attorney examining the abstract should, by proper inquiries, ascertain the facts, and when the defect is wholly due to errors in transcribing, a re-record of the instrument should be had. As a rule, defects in the record or paper title may be cured or removed by parol evidence.[9]

Grantees capable of identification, though not fully named, will nevertheless take title; thus, a deed to John Smith and the "other heirs at law" of one deceased, would convey an estate to all the heirs of such deceased person as fully as if each were specifically named;[10] yet where one of such "heirs" has attempted to assert title, the abstract should show by competent evidence his right so to do. A conveyance to a person specified,

[8] Chiniquy *v.* Catholic Bishop, 41 Ill. 148. It has been held that where a person accepts a deed of conveyance in which his name is not correctly stated or spelled, he is deemed to have adopted the erroneous name for the purpose of acquiring and holding title to the land. Blinn *v.* Chessman, 49 Minn. 140. And, generally, if a person is in existence a conveyance to him by a wrong name passes title. Wilson *v.* White, 84 Cal. 239.

[9] Hellreigil *v.* Manning, 97 N. Y. 56; Shriver *v.* Shriver, 86 N. Y. 575.

[10] Cook *v.* Sinnamon, 47 Ill. 214; Low *v.* Graff, 80 Ill. 360.

however, and the heirs of a *living* person would be void as to all except the person specifically named.[11]

A deed to a dead person is, of course a nullity,[12] though it seems that a conveyance to one at the time dead, "or his heirs," is good if the heirs can be identified.[13] It seems almost unnecessary to remark that a deed without a grantee is absolutely void.[14]

But, as previously shown, it is not essential to validity that the grantee shall be specifically named. It is enough that sufficient appears to distinguish him from the rest of mankind, and if, by proper construction, this can be done the grant will not fail. Thus, where a deed recited that the grantor in consideration of a sum of money paid by John Smith "does hereby convey unto the said —— all right, title and interest in and to" property then described, the deed was held a valid conveyance to John Smith. This presents a familiar case of omission by an unskilled draughtsman. The recital that the money was paid by John Smith raises a strong but not conclusive presumption that he was intended for the grantee, but the imperfect granting clause recites that the grant is to "the said ——," clearly indicating some person theretofore named. The only persons to whom reference could be made are the grantor and John Smith, hence the court in construing the deed held that the grantee was sufficiently identified.[15]

§ 203. **Disparity of Dates.** A frequent defect in deeds is a disparity of dates, that is, the acknowledgment antedating the execution, etc. This is a minor defect, however, that does not go to the foundation of the deed, for the date may be disregarded in a proper case and the deed will yet stand.

In point of form the date is not essential, and is valuable chiefly as an evidence of time in passing on the rights of parties, or fixing the status of the conveyance in respect to other deeds

11 Hall *v.* Leonard, 1 Pick. 27; Winslow *v.* Winslow, 52 Ind. 8; but see Grimes *v.* Orrand, 2 Heisk. (Tenn.) 298.

12 Hunter *v.* Watson, 12 Cal. 363.

13 Neal *v.* Nelson, 117 N. C. 393.

14 Whitaker *v.* Miller, 83 Ill. 381.

15 Henning *v.* Paschke, 9 N. Dak. 489.

or transfers of title. For the purpose of operative conveyance the time of delivery is the true date, and this may always be shown by parol. Attention is called to defects or disparities of dates by a broad dash or underscore, as

Dated June — 1883, or *Dated June 13, 1883.*

In the latter case, both dates, or as many as appear irreconcilable, must be treated in this manner, and the disparity will thus be brought prominently before the notice of the person perusing the abstract.

§ 204. **Technical Phrases.** Whenever it is apparent that a grantor has used a technical word to express an idea different from its technical signification, a court will construe it according to the manifest intention of the grantor,[16] but in ascertaining such intent, where the words employed are not technical, they must be taken in their usual acceptation.[17]

In conveyancing a large number of phrases have obtained currency, which, practically, neither add to nor detract from the force of that which precedes or follows, but are retained and used in much the same manner as numerous other incidents of modern deeds, rather for their supposititious efficacy than for any real utility. Of this class is the language "more or less," which is extensively used in deeds and contracts for the sale of land. This term must be understood to apply only to small excesses or deficiencies attributable to the variation of the instruments of surveyors, etc.[18] In like manner the words "known as," in a description in a deed, is a mere formula and has no restrictive effect.[19] "And all the buildings thereon," etc., have no legal signification.[20] So, also, many phrases in the body of the deed are without force;

16 C. P. R. R. Co. *v.* Beal, 47 Cal. 151.

17 Bradshaw *v.* Bradshaw, 64 Mo. 334.

18 Benson *v.* Humphreys, 75 Va. 196. It has been held, however, that a qualification of the quantity of a lot of land sold as "more or less" will cover any deficiency not so gross as to justify the suspicion of wilful deception or mistake amounting to fraud: Wylly *v.* Gazan, 69 Ga. 506.

19 Kneeland *v.* Van Valkenburgh, 46 Wis. 434.

20 Crosby *v.* Parker, 4 Mass. 110.

as, the words "to his and their proper use and behoof," etc., following the words of limitation. These words have no particular meaning or effect in determining either the extent of the interest conveyed, or the nature and quality of the estate intended to be vested. In deeds of bargain and sale, at the present time, they serve no office whatever.[21]

Words and phrases similar to the foregoing, detract nothing from the deed by their omission and do not call for notice, but where technical words of limitation, purchase, inheritance, etc., are omitted in deeds purporting to convey only limited or special interests or estates, it will sometimes become advisable to show such omission, together with such parts of the habendum, or other operative portions of the deed, as will supply the missing words or indicate the undefined intent of the grantor. The intent, when apparent, and not repugnant to any rule of law, will always control technical terms; for the intent and not the words, is the essence of every agreement.[22]

§ 205. **Misdescription — Uncertainty.** Ambiguous and uncertain descriptions, particularly when composed of calls for courses and distances, are among the most common defects found in modern deeds. They arise frequently from the carelessness and inattention of the conveyancer, but more often, perhaps, from a false economy in the survey, the draughtsman computing his distances and framing his courses by reference to some former map or survey, and not by actually running the lines in the field. This very convenient, but equally pernicious system, prevails to an alarming extent in modern conveyancing, and when attempted by incompetent hands, is often followed by uncertainty if not fatal error. In all cases of description by metes and bounds, the description in the deed under examination should be compared with both former and subsequent ones as given in other conveyances, and with the true description of the tract that forms the subject of the examination. This task should be performed both by the examiner and by counsel, and is a precaution never to be omitted.

21 Jackson *v.* Cary, 16 Johns. 302; Brown *v.* Renshaw, 57 Md. 67.
22 Callins *v.* Lavelle, 44 Vt. 230.

An imperfect or uncertain description does not, of itself, vitiate the conveyance, provided it affords definite means by which the identity of the premises may be established; as by reference to certain known objects or things,[23] or to perfect descriptions in other deeds.[24] In the absence of references, or other identifying circumstances, if the land be so inaccurately described as to render its identity wholly uncertain, the grant is void.[25] The same rule applies with equal force to exceptions and reservations from the grant, for although the grant may prevail, the exception may be void for uncertainty.[26] What is here meant, however, is legal invalidity, for notwithstanding that at law a deed may be void on its face for want of a definite description of the land intended to be conveyed, yet, in equity, it may be reformed upon proper allegations and proof of extrinsic facts.[27]

Imperfect descriptions creating uncertainty by reason of vagueness are common, particularly in case of tax deeds; as, "200 acs. in Sec. 2," etc.; no particular portion of the section being designated. A deed is not necessarily void for uncertainty where land is described by a general name or designation, which by extrinsic evidence can be fully identified,[28] and, as a rule, a deed will only be held void for uncertainty, where, after resort to oral proof, it still remains a matter of conjecture what was intended by the instrument.[29] It will be understood, however, that this alludes only to latent ambiguity.[30]

§ 206. **Misdescription — Omission.** One of the principal elements of uncertainty in descriptions is produced by omissions of essential particulars, though the effect of such omissions is not the same in all the States. The name of the county and State in which the land is situate usually precedes, and some-

[23] Coats *v.* Taft, 12 Wis. 388; Smith *v.* Crawford, 81 Ill. 296.

[24] Russell *v.* Brown, 41 Ill. 184.

[25] Calcord *v.* Alexander, 67 Ill. 581; Campbell *v.* Johnson, 44 Mo. 247; Dickins *v.* Barnes, 79 N. C. 490; Rollin *v.* Pickett, 2 Hill (N. Y.), 552.

[26] Thayer *v.* Torry, 37 N. J. L. 339.

[27] Greene *v.* Dickson, 119 Ala. 346.

[28] Tucker *v.* Field, 51 Miss. 191.

[29] Smith *v.* Crawford, 81 Ill. 296.

[30] Bowers *v.* Andrews, 52 Miss. 596.

times follows the description. Its insertion tends to greater certainty, yet the entire omission of this particular is of minor consequence, provided the section, town and range is correctly stated, as there can be but one locality answering that description,[31] but a description giving simply the subdivision of the section, and omitting the section, town and range, would be so defective that it would convey nothing,[32] even though the county and State were given.[33] A very common omission is found in the matter of the meridian, as where lands are described as "Section 10, Town 39, North Range 14 East." The insertion of the county and State will serve, in large measure, to correct the uncertainty thus created but should the county and State be also omitted the description is fatally defective unless aided by extrinsic evidence.

But, as previously stated, a material omission will not usually invalidate an instrument, where other adequate elements of identification exist.[34]

§ 207. **Misdescription — Quantity.** A recital in a conveyance of land that the tract contains a certain number of acres, unless there is an express covenant as to quantity, will always be regarded as a part of the description merely, and if inconsistent with the calls of the deed, will be rejected as surplusage.[35] Such a recital aids, but does not control, the description of the grant.

§ 208. **Defective Covenants.** Defective covenants form a fruitful source of litigation, as well as of vexation and annoyance, and the examiner should devote especial care in abstracting this portion of the deed, to the end that through his negligence the intending purchaser may not also buy a lawsuit.

31 Howe *v.* Williams, 50 Mo. 252; Beal *v.* Blair, 33 Iowa, 318; Slater *v.* Breese, 36 Mich. 77; Sickmon *v.* Wood, 69 Ill. 329; compare Lloyd *v.* Bunce, 41 Iowa, 660.

32 Tollenson *v.* Gunderson, 1 Wis. 113; Fuller *v.* Fellows, 30 Ark. 657; but compare Butler *v.* Davis, 5 Neb. 521.

33 Such a deed, though inoperative as a conveyance, would raise an equity in the land sought to be conveyed in favor of the grantee. Lloyd *v.* Bunce, 41 Iowa, 660.

34 Slater *v.* Breese, 36 Mich. 77.

35 Fuller *v.* Carr, 33 N. J. L. 157; Campbell *v.* Johnson, 44 Mo. 247; Ufford *v.* Wilkins, 33 Iowa, 110.

The majority of these errors arise through the stupidity or carelessness of incompetent draughtsmen in the use of printed forms, and unless closely scrutinized they will sometimes escape the eye of even an expert examiner. A familiar example — one occurring more frequently, perhaps, than any other — is in the commencement of the collective covenant clause, which reads: "And the said parties of the first part for —." Here follows, in the printed blank, a space intended to be filled by the conveyancer, with a personal pronoun descriptive of the granting party or parties. The conveyancer neglects to fill this space; and the clause continues, "their heirs," etc., "do covenant," etc. Here there is certainly no direct covenant on the part of the granting parties, and in a similar case in Illinois, it was held that the legal effect of a covenant of this character is not that the grantors will defend the title, but that the same shall be defended by their heirs, etc.; that it does not give a right of action against grantors on the loss of the title, but provides a remedy against their legal and personal representatives; that it exempts the grantors from personal liability, but binds their descendants in respect of the estate that may be cast upon them; that it is not like a covenant that a person who is not a party to the deed shall warrant and defend the title, for in such case, upon the eviction of the grantee, and the failure of such third person to comply with the terms of the covenant, an action might be maintained against the grantor, on the familiar principle that what a party undertakes shall be performed by another, he must himself perform on the default of that other. Here, the covenant is that the act shall be performed by parties who can have no legal existence during the lives of the grantors, and until their decease there is no person living who can be called upon to avouch the title.[36]

A covenant by the grantors —"for them — heirs," etc.— has been construed, "themselves, their heirs," etc., and held to be

[36] Rufner *v.* McConnel, 14 Ill. 168; Traynor *v.* Palmer, 86 Ill. 477. The error above indicated is common, and can be found in books of "practical forms." See "New Wisconsin Form Book," p. 92, form No. 2.

the covenant of grantors.[37] If the grantors covenant for themselves, the neglect to insert the words "their heirs," etc., after the allusion to the grantors, is only a minor defect, and, while it calls for notice, is attended with no evil consequences. The legal effect of the covenant would be the same if all reference to the heirs, executors and administrators were omitted,[38] and this applies as well to grantees as to grantors.

§ 209. **Defective Acknowledgment.** The office of the acknowledgment is to authenticate the deed, but to be effective for this purpose, it must conform to, or substantially follow, the directions of the statute, both as to the certifying officer and the form and substance of the certificate. The certificate, however, is no part of the deed, but only evidence of its execution, and, like all other evidence, should be reasonably considered and construed.[39] A substantial compliance with the statute prescribing its form and requisites is all that is required,[40] and minor defects, not going to the essence of the acknowledgment, may be disregarded.

Clerical errors are common, and arise mainly in the use of printed forms, where blanks are improperly filled or passed over without filling. Courts are always inclined to construe such defects liberally,[41] and only purchasers for value can take advantage of a defective acknowledgment.[42] Where a certificate stated that "Personally appeared before me P. H. and E. H., his wife, who —— personally known to me," etc., omitting "are" after "who," it was held that such omission did not impair the deed, as "who" might be disregarded as superfluous, and the certificate would then be correct.[43] So where the word "appeared" was omitted after the phrase "before me person-

37 Baker *v.* Hunt, 40 Ill. 264.

38 Hall *v.* Bumstead, 20 Pick. 2; Bell *v.* Boston, 101 Mass. 506.

39 Harrington *v.* Fish, 10 Mich. 415.

40 Calumet, etc., Co. *v.* Russell, 68 Ill. 426; Carpenter *v.* Dexter, 8 Wall. 513; Summer *v.* Mitchell, 29 Fla. 179.

41 Scharfenburg *v.* Bishop, 35 Ia. 60; Fisher *v.* Butcher, 19 Ohio, 406; McCardia *v.* Billings, 10 N. Dak. 373.

42 Mastin *v.* Halley, 61 Mo. 196.

43 Hartshorn *v.* Dawson, 79 Ill. 108.

ally," the omission was held to be a clerical error, and not fatal to the validity of the acknowledgment;[44] again, a certificate that A "to me well known," etc., was held to be substantially in the form prescribed by statute, viz.: that A "known to me to be the person whose name is subscribed to the foregoing instrument, acknowledged," etc.,[45] and, generally, when the defect can be reconciled, or does not defeat the acknowledgment by indefiniteness or uncertainty, it will not invalidate.[46]

Another common defect, and one that raises a very embarrassing question, is presented in the case of a misplaced or improper pronoun. In most printed forms the recital of acknowledgment reads, "and acknowledged that — he — signed, sealed, delivered" etc., the purpose of this "labor saving" device being, to allow the blanks before and after the word "he" to be filled by letters that shall make the words "she" or "they" according as the exigencies of the case may require. The careless or ignorant draughtsman frequently neglects to avail himself of the device and the deed goes forth with an ambiguous recital of one of the essential facts of acknowledgment. The mistake often occurs in the case of a joint acknowledgment by husband and wife and the effect of the certificate, in such event, is that the parties appeared before the officer and acknowledged that "he," the husband, executed the instrument. Now it is undoubtedly true, under the general trend of the decisions, that obvious errors or omissions, clearly appearing upon the face of the certificate to be clerical in their nature, will not invalidate the acknowledgment, and that, before a certificate will be held fatally deficient, there must be an absence of some essential fact of a substantial character. But, is not an omission like the one now under consideration a matter of substance? In a recent case where the question was presented it was held that it would render the whole sentence useless and meaningless, so far as the wife was concerned, to place upon it the construction that she appeared before the notary and

[44] Scharfenburg *v.* Bishop, 35 Iowa, 60.

[45] Watkins *v.* Hall, 57 Tex. 1.

[46] Ogden *v.* Walters, 12 Kan. 282.

acknowledged that her husband executed the deed, yet that such construction must be had unless it was held that the word "he" was not changed to "they" through a clerical oversight. To hold the former, it was contended, would be a strained and technical construction of the language used, and so the certificate was sustained.[47]

A material omission, unaided by other circumstances, will vitiate the acknowledgment, as where purporting to be made by —— Smith, without other designation of the person;[48] but it has been held that where the certificate omits the name of grantor, if it yet shows that the party who appeared before the officer was the grantor, and that he, and no one else appeared and acknowledged,[49] or if he is referred to by name in the wife's acknowledgment,[50] this will be sufficient. In all cases the error or omission should be clearly indicated by the examiner, and in such a manner that counsel can pass upon it with relation to the context. Hence so much of the certificate should be presented in all cases which seem to require it, as will effectuate this end.

A defect of frequent occurrence will be found in disparity of dates, as where the date of the deed is subsequent to the date of acknowledgment; yet this error, while it calls for notice, is of minor importance and does not constitute a valid objection to the title.[51] Such antedating is usually the result of clerical mistake and is so construed in the absence of any matters calculated to raise a contrary presumption, and as the officer in taking an acknowledgment is required to certify both the day and the year he will be presumed to have performed his duty and will not be supposed, without proof, to have taken the acknowledgment before the deed was in fact executed.[52]

§ 210. Defective Acknowledgment — Continued. A

47 McCardia v. Billings, 10 N. Dak. 373; see also, Montgomery v. Hornberger, 16 Tex. Civ. App. 28.

48 Hiss v. McCabe, 45 Md. 77.

49 Wilcoxon v. Osborn, 77 Mo. 621.

50 Magness v. Arnold, 31 Ark. 103.

51 Dressel v. Jordan, 104 Mass. 407.

52 Cover v. Manaway, 115 Pa. St. 338.

certificate in which the person taking the acknowledgment gives himself no official designation or title is fatally defective, for an acknowledgment or proof amounts to nothing unless it be taken by an authorized officer, and whether the person be authorized or not, is a fact which should appear in the certificate of the officer himself.[53] But when it appears from the certificate that it was taken by an authorized officer, it is not necessary, nor is it customary, for him to state in so many words, that he was authorized to take such proofs.[54] If the title of an officer taking an acknowledgment is written out fully in the body of the certificate it has been held that the omission of such title from the signature is immaterial;[55] if the title of the officer is affixed to the signature, this, it seems, is sufficient without mention elsewhere,[56] and in some cases it has been held that the use of initials generally understood to stand for the title of an office will answer the same purpose as the full title.[57]

A question sometimes arises with respect to capacity when the actual acknowledgment is taken by a deputy, and not by the officer in person. It is generally held, however, in the case of court officers, that where the acknowledgment purports to be taken by the clerk and is certified in his name, with a seal of court attached, it will be sufficient, and that the certificate is none the less the act of the clerk because made by his deputy.[58] It is further held, that the seal of a court affixed to a certificate carries with it a presumption that it was properly attached.[59]

The want of a seal is usually no defect where the land conveyed is within the certifying officer's jurisdiction, yet it is a general rule, that whenever a certifying officer is required to have a seal he must authenticate his certificate under his official

[53] Lessee of Johnston *v.* Haines, 2 Ohio, 55; Cassell *v.* Cook, 11 Ohio, 610.

[54] Livingstone *v.* McDonald, 9 Ohio, 168.

[55] Colby *v.* McOmber, 71 Iowa, 469; Brown *v.* Farran, 3 Ohio, 140; Lake Erie, etc., R. R. Co. *v.* Whethans, 155; Ill. 514.

[56] Russ *v.* Wingate, 30 Miss. 440.

[57] See, Rowley *v.* Berrian, 12 Ill. 198; Russ *v.* Wingate, 30 Miss. 440; Final *v.* Backus, 18 Mich. 218; Owen *v.* Baker, 101 Mo. 407.

[58] Hope *v.* Sawyer, 14 Ill. 254; Small *v.* Field, 102 Mo. 104; Herndon *v.* Reed, 82 Tex. 647.

[59] Small *v.* Field, 102 Mo. 104.

seal,[60] as well as his signature, and its presence is usually made by statute an indispensable requisite when the officer resides beyond the State. The form of the notary's seal is a matter of minor importance. The recorder is not required to make a *fac simile* of the impression of the seal upon his books, and generally could not if he were; ordinarily he is permitted to show it by a scrawl, the record then disclosing the fact of sealing and that the seal used purported to be a seal of office. This is about all that is required and persons dealing upon the faith of the record will be protected by it.[61]

A certificate defective in venue is insufficient for failing to show the locality in which the act is done, though this may be cured by the certificate of conformity,[62] or even by the seal,[63] when the county only has been omitted, and the officer has authority to exercise his office in any part of the State; but this omission has been held in Iowa to be fatally defective, and the seal inefficient to cure the defect.[64] In a properly drawn certificate, the date as well as the place of acknowledgment should appear, yet it would seem that the want of a date to a certificate otherwise good, will not vitiate it.[65] An acknowledgment taken by the grantee is of no effect, though the deed would still be binding between the parties and their heirs.[66]

The main defects of substance are a failure to state the fact of acknowledgment, or to fix the identity of the parties.[67] These are the two essentials and neither can be dispensed with. The certificate must state the fact of acknowledgment. It is this which forever afterward binds the party, even though he may not acknowledge the instrument freely in point of fact; yet if he acknowledges properly, he is afterward estopped to deny his act as against subsequent innocent purchasers. The

60 Mason *v.* Brock, 12 Ill. 273.

61 Sonfield *v.* Thompson, 42 Ark. 46; Hammond *v.* Gordon, 93 Mo. 223; Jones *v.* Martin, 16 Cal. 166; Griffin *v.* Sheffield, 38 Miss. 359.

62 Hardin *v.* Osborne, 60 Ill. 93.

63 Chiniquy *v.* Bishop of Chicago, 41 Ill. 148.

64 Willard *v.* Cramer, 36 Iowa, 22.

65 Irving *v.* Brownell, 11 Ill. 402.

66 Hogans *v.* Carruth, 18 Fla. 587.

67 Bryan *v.* Ramirez, 8 Cal. 461; Pendleton *v.* Button, 3 Conn. 406; Short *v.* Conlee, 28 Ill. 219.

officer is bound to know and certify the identity of the person making the acknowledgment. Such person must be known to him as the person who executed the instrument and must be so certified. A certificate deficient in this respect is fatally defective.[68]

The examiner will further observe, where the acknowledgment appears to have been taken in a foreign jurisdiction, that the officer's certificate conforms to local regulations, and if not, that it is accompanied by a certificate of conformity to the law of such foreign jurisdiction, made by some competent officer. In the case of some officers, particularly those not having a seal, a certificate of magistracy must also accompany the certificate of acknowledgment. Should no such certificate appear, after noting the defects or divergence, the examiner will add:

No certificate of magistracy or conformity shown of record.

When accompanied by such certificate, its purport should appear, thus:

Certificate of magistracy and conformity by Jno. Smith, Clerk of the Circuit Court, Cook County, Ill., [69] *appended.*

Sometimes the fact will appear that the officer taking the acknowledgment was authorized to take proof of deeds but there will be nothing to show that his certificate conforms to the law of his venue, in which case say:

Certificate of magistracy, but not of conformity, by Jno. Smith, Clerk, etc.

In case of foreign notaries, and other officers, a certificate of magistracy is usually required by statute, but where the

[68] Callaway *v.* Fash, 50 Mo. 420; Smith *v.* Garden, 28 Wis. 685.

[69] Here, if desired, set out any portion of the certificate; as that the officer's signature is genuine, etc. The unqualified and positive affirmation that the magistrate's signature to the acknowledgment is genuine, necessarily implies, on the part of the clerk, both a knowledge of the handwriting and his belief of its genuineness: Wells *v.* Atkinson, 24 Minn. 161.

notary's certificate is in conformity to local law, the certificate of magistracy and conformity need not be noticed in the abstract, its main office being to cure defects of form. A commissioner appointed by the Governor of a State to take acknowledgments of deeds in another State, is an officer of the State from which he derives his appointment. The courts of that State are bound to take judicial notice of his acts, and these require no other authentication than his seal of office.[70] His certificate, however, should be in conformity with the laws of the State from which he derives his authority.[71]

A properly drawn notarial certificate will always disclose the officer's jurisdiction, and where a defect of this kind occurs, as where the officer fails to state that he is a Notary Public "in and for the county and State aforesaid," it should be shown by a brief note, thus:

Certificate of acknowledgment by "Henry Brown, Notary Public," whose venue is, "State of Illinois, County of Cook." Jurisdiction of officer not otherwise shown.

§ 211. **Repugnancy.** Where there is a disagreement or inconsistency between two or more clauses of a deed, it is a general rule that the earlier clause will prevail if the inconsistency be not so great as to avoid the instrument for uncertainty.[72] This rule is always applied where an estate expressly granted is followed by a reservation, exception, or condition which destroys the grant.[73] In the matter of description, where there is a clear repugnance, effect will always be given to that which is most definite and certain, and which will carry out the evident intention of the parties.[74]

70 Smith *v.* Van Guilder, 26 Ark. 527.

71 Brannon *v.* Brannon, 2 Disney (Ohio), 224.

72 Tubbs *v.* Gatewood, 26 Ark. 128; Green Bay, etc., Co. *v.* Hewitt, 55 Wis. 96.

73 Cutler *v.* Tufts, 3 Pick. 277; Pynchon *v.* Sterns, 11 Met. 304; Rines *v.* Mansfield, 96 Mo. 394.

74 Wade *v.* Deray, 50 Cal. 376; Kruse *v.* Wilson, 79 Ill. 233; Bassett *v.* Budlong, 77 Mich. 338.

CHAPTER XV.

CONVEYANCES BY INDIVIDUALS.

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§ 212. **Deeds in General.** In the United States, the ancient technical principles relating to common law conveyances seem to be in a great measure inapplicable. The tendency of modern legislation, as well as the current of later decisions, has been to simplify the forms of conveyance and to reduce the number of the methods. The deeds commonly in use, and by which the great bulk of real estate transactions between individuals is effected, are, the deed of bargain and sale, popularly known as "Warranty Deed" and the deed of release and quitclaim, known as "Quitclaim Deed." To these may be added a third, a deed adapted from the old deed of nonclaim, combining qualities peculiar to both of the other classes, and called "Special Warranty Deed,"[1] wherein the grantor

[1] The above enumeration, though the conveyances assume different forms, is in reality but one kind of deed, to wit, a bargain and sale.

covenants only against his own acts and those who claim under under him, and not against adverse or paramount titles. They are all effectual to convey the fee, or whatever interest the grantor may possess, and will always do so unless a contrary intention is expressly manifest or clearly deducible by implication.

§ 213. **Deeds Poll and Indentures.** The operative instruments for the conveyance of land were formerly classed as "deeds poll" and "indentures," the former being where an obligation was incurred, or an estate conveyed, by only one of the parties to the transaction, the other being a mere recipient; the latter, on the other hand, contained mutual transfers or covenants, the one in exchange for the other. A deed poll was a single instrument, signed by one party, and delivered to the other; an indenture consisted of two or more parts, of the same tenor, executed in duplicate by both parties, and interchangeably delivered by one to the other. The name "indenture," is said to have originated from the practice of writing both parts of the agreement upon one parchment, and then cutting them asunder in acute angles,[2] the parts at the place of separation resembling teeth. Such a deed was said to be "indented." The phrase "this indenture" still forms the initial to deeds of bargain and sale, though such conveyances are in effect deeds poll, and affords another instance where common-law forms of expression have been retained after their original meaning and technical significance have been lost.[3]

§ 214. **Construction and Effect of Deeds.** The general construction of deeds is favorable to their validity, and al-

2 2 Hill Abridgment, 280; 2 Wash. Real Prop. 587; 2 Sharswood's Black Com. 294.

3 Adaptations of both forms are still in use. The deed poll always commences with a declaration to all persons, calling upon them to notice the act of the grantor. The phrase reads, "Know all men by these presents," etc., and the grant is usually in the first person. The Indenture, on the other hand, is always in the third person, and commences "This Indenture witnesseth" that the grantor has conveyed, etc. In powers of attorney and similar documents the deed poll form is always preserved. In leases, dual agreements, and instruments of a bilateral character the indenture is still generally employed.

though courts can not give effect to an instrument so as to do violence to the rules of language or of law, they will yet so construe it as to bring it as near to the actual meaning of the parties, as the words they have seen fit to employ, and the rules of law will admit.[4] The intention of the parties, when it can be ascertained, will always control, if by law it may, and as between them the deed is always construed most strongly against the grantor.[5] When the words of a deed are so uncertain that the intention of the parties can not be discovered, the deed is void.[6] In the exposition of deeds, the construction must be upon the whole instrument, and with a view to give every part of it meaning and effect, and the intent when apparent, and not repugnant to any rule of law, will control technical terms.[7] Where a deed purports to convey all the interest and title of the grantor, effect will be given to it accordingly, although he actually held a greater interest than he, at the time of conveyance, supposed he owned, for a party is bound to know enough about his title, as not, by his want of knowledge, to mislead a purchaser.[8]

§ 215. **Validity.** In all works treating on conveyancing, or the alienation of real property, the subject of validity of conveyances of land, as affected by extraneous evidence, rightly occupies a prominent position, yet in a work of this character it can receive little more than passing notice. The principal facts which tend to invalidate deeds, aside from defects of form or substance, which appear from inspection, are: incapacity of the parties; inadequacy of consideration; fraud in the inception; and undue influences or duress in the procurement; all of which must, from their several natures, be shown by

[4] Callins *v.* Lavalle, 44 Vt. 230; Churchill *v.* Reamer, 8 Bush (Ky.), 256; Peckham *v.* Haddock, 36 Ill. 38; Hadden *v.* Shoutz, 15 Ill. 581; Jackson *v.* Meyers, 3 Johns. 395.

[5] City of Alton *v.* Transportation Co., 12 Ill. 38; Jackson *v.* Hudson, 3 Johns. 375.

[6] Rollin *v.* Pickett, 2 Hill. 522; Jackson *v.* Rosvelt, 13 Johns, 97; Peoria *v.* Darst, 101 Ill. 671.

[7] Callins *v.* Lavalle, 44 Vt. 230; Saunders *v.* Hanes, 44 N. Y. 353.

[8] Thomas *v.* Chicago, 55 Ill. 403.

evidence *aliunde*, the deed upon its face being regular and the formalities of law having been fully complied with.[9]

There is an important distinction between void and voidable deeds, although the terms are often used indiscriminately. A deed absolutely void passes no title, while a deed which is voidable merely may be the foundation of an unassailable title in the hands of a subsequent purchaser without notice.[10] The term "void" is seldom, unless in a very clear case, to be regarded as implying a complete nullity; but it is, in a legal sense, subject to large qualifications in view of all the circumstances calling for its application and the rights and interests to be affected in a given case.[11] Statutes not infrequently declare acts void, which the tenor of their provisions necessarily makes voidable only. Deeds are seldom absolutely void, though they may be relatively so, and incapable of legal effect as between the parties, but in regard to the consequences to third persons the distinction is highly important.[12] Matters *in pais* are seldom known to the examining counsel, who is justified in pronouncing that a marketable title which appears so of record, and which in fact is such, until assailed or set aside by competent authority. As respects subsequent purchasers without notice, the right or title conferred by a conveyance is to be determined by the instrument of transfer as recorded, and not by facts *in pais* or other instruments not recorded.[13]

Latent ambiguities and defects do not usually avoid a conveyance, and a deed intended to correct an error in a former deed by the same grantor, will cure such defect, and take effect

9 A purchaser of land from a prior *bona fide* holder who acquired the legal title, as shown by the records, for a valuable consideration, without notice of any outstanding equity, will be protected against such equity, even though he himself had notice thereof: Peck *v.* Arehart, 95 Ill. 113.

10 Crocker *v.* Ballangee, 6 Wis. 645.

11 Brown *v.* Brown, 50 N. H. 538; Kearney *v.* Vaughn, 50 Mo. 284.

12 Bromly *v.* Goodrich, 40 Wis. 131; Seylar *v.* Carson, 69 Pa. St. 81; Van Schaac *v.* Robbins, 36 Iowa, 201; Kearney *v.* Vaughn, 50 Mo. 284.

13 Miller *v.* Ware, 31 Iowa, 524; Peck *v.* Arehart, 95 Ill. 113.

by relation as of the time when the erroneous deed was given, the same as if it had been reformed in equity.[14]

§ 216. **Warranty Deeds.** The most familiar form of conveyance known to our law is the deed of bargain and sale technically called a warranty deed. The legal import of a deed of this character is that of absolute conveyance of the interest intended and that there is no resulting trust in the grantor, who is estopped from ever after denying its execution for the uses and purposes mentioned in it,[15] while its name is derived from the personal covenants which follow the habendum.

The operative words of conveyance in this class of deeds, are "grant, bargain and sell," which in many States are allowed to operate as covenants of seizin, freedom from incumbrances, and quiet enjoyment,[16] unless their statutory effect is rendered nugatory or limited by express words contained in such deed.[17] It is still a common practice for the conveyancer to insert in warranty deeds, as well as in other classes of conveyances, all the operative terms used in transferring land; as, "grant, bargain, sell, remise, release, alien, convey and confirm," though their presence, save where they imply covenants, is no longer necessary. This was formerly done, that the instrument might take effect in one way if not in another, and in such case the party receiving the deed had his election which way to take it. Thus according to the words used, he might claim either by grant, feoffment, gift, lease, confirmation or surrender. The majority of the foregoing words of grant are now superfluous, except that in a few States the words "grant, bargain and sell" must, under the statute, be construed as express or implied covenants, for seizin, against incumbrances, etc.,[18] yet the rule that the law of the State where the land lies governs the interpretation of the deed, does not warrant the

[14] Hutchinson *v.* R. R. Co., 41 Wis. 541.

[15] Kimball *v.* Walker, 30 Ill. 482.

[16] Prettyman *v.* Wilkey, 19 Ill. 235; Hawk *v.* McCullough, 21 Ill. 220.

[17] Finley *v.* Steele, 23 Ill. 56.

[18] Brodie *v.* Watkins, 31 Ark. 319; Finley *v.* Steele, 23 Ill. 56.

implication of personal covenants not authorized by the law of the State where the deed was made. The question, whether the words shall import covenants, must be decided by the law of the latter State.[19]

It must be understood that some words evidencing an intention to transfer an estate must appear, but the conveyancer has a choice of a number, and the word "convey," which is most in use, fully expresses the intent, and is effectual for all purposes.[20]

§ 217. **Abstract of Warranty Deed.** In preparing an abridgment of an ordinary deed of bargain and sale, when drawn in the usual manner and unincumbered by any unusual conditions or stipulations, only the salient features are necessary, it being understood that the deed is in form, and that all the essential requisites have been complied with. Were this otherwise the abstract would become unnecessarily bulky and cumbersome, and defects when shown would be less readily detected. This is the universal custom of abstract makers, and the method seems to have met the approbation of the legal profession. An ordinary deed of conveyance is sufficiently presented as follows:

John Smith, and *Mary B., his wife,* *to* *Thomas L. Jones.*	*Warranty Deed.* *Dated June 1, 1882.* *Recorded June 28, 1882.* *Volume 28, page 10.* *Consideration $1,000.00.*

Conveys land in Racine county, Wis., described as lot fourteen, of block twenty-eight, of Roswell's Addition to the village of Emmetsburgh, being a part of the northwest quarter of section thirty-six, town two north, range fourteen, east of the third principal meridian.

Acknowledged June 1, 1882.[21]

19 Bethel *v.* Bethel, 54 Ind. 428.

20 An extremely simple form of a deed in fee is given in 4 Kent Com. 461; and see Hutchins *v.* Carleton, 19 N. H. 487; Bridge *v.* Wellington, 1 Mass. 219.

21 In the abstract of ancient conveyances it may be necessary to

The foregoing example pre-supposes good work on the part of conveyancer and examiner, and that the instrument as shown of record is regular in form and properly executed and acknowledged. It further carries the presumption that no recitals appear, other than those common to all deeds of bargain and sale, and that all covenants necessary for the proper assurance of the estate conveyed are inserted. Should the examiner desire, however, to note the covenants, he may add:

Full covenants of seizin and warranty.

Defects of form or substance, occurring in any part of the deed, must be suitably noticed as suggested in the preceding chapter. In ancient deeds, where the premises are inperfect by reason of omission of words of inheritance, the habendum may be shown thus:

Habendum to heirs and assigns.

§ 218. **Notes.** The matter of examiner's notes has already been discussed. These should be appended, whenever practicable, immediately after the deed to which they allude; as, in the foregoing example, if the abstract is of the original instrument and not of the record thereof, a mention of the fact immediately follows same, thus:

NOTE.— *The particulars of the foregoing deed taken from the original instrument.*

§ 219. **Quitclaim Deeds.** A quitclaim deed is as effectual for transferring the title to real estate as a deed of bargain and sale,[22] and passes to the grantee all the present interest

show a trifle more than is here noted. The words of inheritance in the premises and habendum may be material in determining the nature of the estate conveyed, but as the necessity of the word "heirs" or other words of inheritance has been dispensed with in a majority of the States for upward of fifty years, their insertion or omission in ancient grants will have but little effect on the titles of to-day, which, though defective originally, have been perfected by the effluxion of time.,

22 Morgan *v.* Clayton, 61 Ill. 35; Rowe *v.* Pecker, 30 Ind. 154; Pingree *v.* Watkins, 15 Vt. 479.

or estate of the grantor,[23] together with the covenants running with the land, unless there are special words limiting and restricting the conveyance.[24]

But while a quitclaim deed is as effectual to pass title as a deed of bargain and sale, still, like all other contracts, it must be expounded and enforced according to the intention of the parties as gathered from the instrument, and if the words used indicate a clear intention to pass only such land or interests as the grantor then owns, lands embraced in a prior valid deed have been held to be reserved from its operation, even though such prior deed remains unrecorded.[25] It is a rule, however, of general application, that a quitclaim deed, when recorded, takes precedence of a prior unrecorded warranty deed from the same grantor, the purchaser under the quitclaim having no notice of the prior deed, and there being no words therein suggestive of an earlier conveyance.[26]

A quitclaim deed, though effectual as a present conveyance, when unaccompanied by warranty will not operate to carry a subsequently acquired title,[27] nor can one who takes under such a deed be regarded, in all respects, as a *bona fide* purchaser without notice of outstanding titles and equities.[28] The authorities are not agreed, however, with respect to the character to be accorded to a purchaser by quitclaim. As a general proposition he obtains just such title as the vendor had, and the land in his hands remains subject to all the equities attaching to it in the hands of the vendor, even though they may

[23] Nicholson *v.* Caress, 45 Ind. 479; Carter *v.* Wise, 39 Tex. 273; Carpentier *v.* Williamson, 25 Cal. 158.

[24] Brady *v.* Spruck, 27 Ill. 478; Marden *v.* Chase, 32 Me. 329.

[25] Hamilton *v.* Doolittle, 37 Ill. 473.

[26] Brown *v.* Coal Oil Co., 97 Ill. 214; Graff *v.* Middleton, 43 Cal. 341; Marshall *v.* Roberts, 18 Minn. 405; Merrill *v.* Hutchinson, 45 Kan. 59; and see, Hope *v.* Blair, 105 Mo. 85.

[27] Comstock *v.* Smith, 13 Pick. 116; Jackson *v.* Winslow, 9 Cow. 13; Harriman *v.* Gray, 49 Me. 538; Kinsman *v.* Loomis, 11 Ohio, 475; Miller *v.* Ewing, 6 Cush. 34.

[28] Stoffel *v.* Schroeder, 62 Mo. 147; Carter *v.* Wise, 39 Tex. 273; Springer *v.* Brattle, 46 Iowa, 688; Oliver *v.* Piatt, 3 How. (U. S.) 363.

be unknown to such purchaser.[29] But it would seem this harsh doctrine is not applicable in all cases. It prevails in settling conflicting titles, and is intended to protect equities as against those charged with notice of their existence, but is never invoked to protect a fraudulent grantor who, by false representations, induces a confiding purchaser to believe that he acquires an indefeasible title under a quitclaim deed.[30] In the absence of fraud, however, a party accepting a quitclaim deed takes the risk of the title,[31] for where a person purchases of another who is willing to give only a quitclaim, he may properly enough be regarded as bound to inquire and ascertain at his peril what outstanding equities exist, if any. His grantor virtually declares to him that he will not warrant the title even as against himself, and it may be presumed that the purchase price is fixed accordingly.[32]

It is generally conceded, even in those States which hold the strongest against quitclaims, that the mere form of a deed will not conclude the parties thereto nor prevent a vendee thereunder from claiming the protection given to a purchaser in good faith. At most, a deed in this form is simply a warning; it imposes the duty of inquiry, and it charges the purchaser with notice of such outstanding equities or interests as he might have discovered by the exercise of reasonable diligence. But where the vendee has paid a fair consideration, has duly examined the public records, and finds what appears to be a clear right of ownership in the vendor, the preponderating rule seems to be, that he will not be affected by secret equities, liens, interests or incumbrances of which he had no notice and concerning which no inquiry was suggested.[33]

The grantee of one holding under a quitclaim, when such grantee holds by a warranty deed, is presumed to be a bona fide purchaser for value. He is not affected by the mere fact

[29] Mann *v.* Best, 62 Mo. 491; May *v.* LeClaire, 11 Wall. (U. S.) 217.

[30] Ballou *v.* Lucas, 59 Iowa, 22.

[31] Botsford *v.* Wilson, 75 Ill. 132; Thorp *v.* Coal Co., 48 N. Y. 253.

[32] Winkler *v.* Miller, 54 Iowa, 476.

[33] Merrill *v.* Hutchinson, 45 Kan. 59.

that he derives title through a quitclaim deed, and will take the land free from outstanding equities of which he had no notice. It is the policy of the law that real estate titles should become matters of certainty as far as possible, and as quitclaim deeds occur in the lives of many titles, a different rule than the one above set forth would tend to unsettle titles, hinder and delay improvements and impair the selling value of all property so affected.

§ 220. **Abstract of Quitclaim Deeds.** As in the case of simple warranty deeds, only the main features of quitclaim deeds need be shown in preparing a synopsis of same. The operative granting words of deeds of this nature are "remise, release, convey and quitclaim;" but any other words indicating conveyance will do as well and have the same effect. In the abstract it is not customary to recite these words, but the description is prefaced by the simple word "convey," the examiner indicating the nature and legal import of the instrument by its name. Should the deed contain the statutory words which raise covenants, they then become material, for the instrument in effect becomes a warranty deed, though in form a quitclaim.[34] To raise a statutory covenant the very words of the statute must be used,[35] and if only a part of them appear, as "grant, sell and convey," the deed will remain a quitclaim.[36]

It is the custom of conveyancers to insert after the words of grant, a recital of the estate or interest conveyed; as all "right, title, interest," etc., but this is the legal, as well as the statutory effect of the deed, and the omission or insertion of such words is immaterial to the deed, and consequently of no importance to the abstract, except when they clearly indicate a prior conveyance, or afford constructive or actual notice of existing equities. Where the deed contains covenants of any kind, particularly of warranty, these words become material,

34 DeWolf *v.* Hayden, 34 Ill. 525.
35 Vipond *v.* Hurlbut, 22 Ill. 226.
36 Whitehall *v.* Gottwal, 3 Penn. 323; Frink *v.* Darst, 14 Ill. 304; Young *v.* Clippinger, 14 Kan. 148.

however, and in some States they are of controlling efficacy,[37] as per the succeeding paragraph.

§ 221. **Effect of Covenants in Quitclaim Deeds.** Inasmuch as the particular granting words employed in deeds are now of comparatively little moment, if one conveys land with a general covenant of warranty against all lawful claims and demands, he can not be allowed to set up against his grantee, or those claiming under him, any title subsequently acquired, either by purchase or otherwise, and such new title will inure by the way of estoppel to the use and benefit of the grantee, his heirs and assigns.[38] But where the deed does not on its face purport to convey an indefeasible estate, but only "the right, title and interest" of the grantor, though containing covenants of ownership, warranty, etc., it will, it seems, only convey such interest in the land as the grantor has at the date of the deed,[39] and the covenants are to be regarded as having reference to and as being qualified and limited by the grant.[40] In a like case, where the grantor agrees to warrant the title conveyed only as against all claims derived from himself, he is understood to refer to existing claims and incumbrances, and not to any title he may afterward derive from a stranger.[41]

As quitclaim deeds are usually drawn, after the words of grant are a number of words limiting or defining the estate conveyed; as "all right, title, interest, claim, demand," etc., which, in what are usually termed "straight" deeds, may be disregarded; but when followed by covenants, it is advisable that every part of the instrument which tends to show the nature and extent of the granted estate be set out, including all the operative parts of the premises and the habendum.

[37] See Holbrook *v.* Debo, 99 Ill. 382.

[38] Comstock *v.* Smith, 13 Pick. 119.

[39] Brown *v.* Jackson, 3 Wheat. (U. S.) 449; Bowen *v.* Thrall, 28 Vt. 382; Blanchard *v.* Brooks, 12 Pick. (Mass.) 47.

[40] Bell *v.* Twilight, 6 Foster (N. H.), 411; Rawle Cov. for Tit. 420.

[41] Bogy *v.* Shoab, 13 Mo. 378; Gee *v.* Moore, 14 Cal. 474; Allen *v.* Holton, 20 Pick. 458; Holbrook *v.* Debo, 99 Ill. 372.

A distinction has been made by some courts between such deeds as quitclaim or release the land itself and such as merely release whatever interest the grantor may have in the land,[42] and though the distinction does not always seem to rest in sound reason, yet where such doctrine obtains, no other safe course is open to the examiner than that above indicated, and it is immaterial whether the deed be one of the quitclaim or non-claim.[43]

§ 222. **Special Warranties.** There is in common use in the United States, though it would seem to be rarely employed in England, a deed of conveyance, with a limited warranty, variously known as a "special warranty" or deed of "non-claim." In its original form the non-claim was inserted immediately after the habendum, without the usual words of covenant being prefixed, and purported to be a denial of any further rights in the grantor in relation to the property conveyed, and from which he was "utterly debarred and forever excluded" by virtue of the instrument.[44] The covenant might be general, but was usually limited to the grantor and those claiming under him. As now framed it is a limited personal covenant, not as against paramount title, but only so far as concerns the acts of the grantor. It is a covenant of warranty to the extent of its import, and differs from a general warranty only, in that one is a warranty against any and all paramount titles, while the other is against the grantor himself, and all persons claiming by, through or under him.[45] "As a general rule," says Rawle,[46] "no distinction has in any way been taken between such a covenant, and the ordinary covenant of warranty. Both are, in general, held to have the same operation by way of estoppel; both equally possess the capacity of running with the land, and confer the same rights

42 See Holbrook *v.* Debo, 99 Ill. 372; Blanchard *v.* Brooks, 12 Pick. 46.

43 Gibbs *v.* Thayer, 6 Cush. 32.

44 See Rawle on Cov. for Title, p. 223, 3d Ed.

45 Holbrook *v.* Debo, 99 Ill. 372; Porter *v.* Sullivan, 7 Gray, 441; Lathrop *v.* Snell, 11 Cush. 453.

46 Rawle on Cov. for Title, p. 223, 3d Ed.

as to a recovery in damages."[47] Such a deed, however, can not be extended to include a general covenant of warranty, and, as it contains no general covenants to secure the title, an aggrieved party can have no remedy under it on the ground of a mere failure of title, provided there has been no fraud in the transaction.[48] The deed is shown in the abstract the same as a warranty deed, except that it is called a "special warranty." The operative words of grant, if material, *i. e.*, if implying covenants, should be set out and the express covenants may be noticed as follows:

Grantor covenants against his own acts, and those claiming by, through or under him only.

The legal effect of the deed as a conveyance is, of course, equal to a deed of bargain and sale in any other form. Its defects as a conveyance must be noted, as in other cases, and the remarks and suggestions heretofore made relative to deeds gnerally will apply to these and all other classes, but, to avoid prolixity, will not be further alluded to when speaking of each particular kind.

§ 223. **Statutory Forms.** While the constant tendency of courts and conveyancers has been to modify and reduce the common law forms of expression in conveyances of land, the radical hand of the legislator has further been felt of late years in the changes wrought in the form, contents and effect of deeds and kindred instruments. Statutory forms are now prescribed, as brief and curt as those they are intended to supplant were often long and verbose. The wisdom of these forms has often been doubted, while their poverty of language has not endeared them to the conveyancer, and as the statute has left their use optional they have not as yet, in some localities, come into very general use.

[47] The following cases sustain the text: Kimball *v.* Blaisdell, 5 N. H. 533; Gibbs *v.* Thayer, 6 Cush. 33; Claunch *v.* Allen, 12 Ala. 163; Bennett *v.* Waller, 23 Ill. 97; Holbrook *v.* Debo, 99 Ill. 372.

[48] Buckner *v.* Street, 15 Fed. Rep. 365.

The operative words of statutory deeds purporting to convey the fee, are "convey and warrant," which words have also the effect of express covenants of seizin, good right to convey, freedom from incumbrances, peaceable possession and warranty of title. Deeds made in conformity to statute have all the force and effect of covenants that are usually contained in the common law deeds. All the covenants mentioned in the statute are to be regarded and treated as though they were incorporated in the deed, of which they constitute a part as effectually as if they were written therein.[49] The operative words of conveyances of naked interests are, "Convey and quitclaim." The operative words, in either case, should always be given in the abstract, which, in other respects, will not differ from the ordinary forms of abridgments already shown.

§ 224. **Common Law Conveyances.** In addition to the deed of bargain and sale, which in its three-fold form of "warranty," "quitclaim" and "non-claim" has been made a statutory conveyance in many of the States, there are a number of technical forms of conveyance derived from the land and conveyancing system of Great Britain and which are popularly known as "common law deeds." They consist primarily of the deeds of Release, Confirmation, Surrender and Assignment.[50] These deeds, as originally employed, were all highly technical, long, and verbose. They displayed to fine advantage those extremely complex but finely rounded sentences that so delighted the heart of the conveyancer of the eighteenth century and furnished so much food for disquisi-

49 Carver *v.* Louthain, 38 Ind. 530; Kent *v.* Cantrall, 44 Ind. 452; Lehndorf *v.* Cope, 122 Ill. 317.

50 The elementary writers classify common law deeds as follows: Five original conveyances, to wit: Feoffment, Gift, Rent, Lease, Exchange and Partition; five derivative conveyances, to wit: Release, confirmation, Surrender, Assignment and Defeasance; and five conveyances derived from the statute of uses, to wit: Covenant to stand seized to uses; bargain and sale; lease and release; deed to lead or declare the uses of other more direct conveyances; and deeds of revocation of uses: Willard, Conveyancing, 419; 3 Wash. Real Prop., Chap. 5.

tion and disputation in construing estates under the complicated English land tenures. In the United States they have lost somewhat of their redundancy, though there are not wanting to-day many forms needlessly long and uselessly prolix, while the difference in our land system, and estates thereunder, has robbed them of much of their original significance. There now exist but few estates that can not be adequately conveyed by deed of bargain and sale, and in a majority of instances a "quitclaim" deed will accomplish all that was formerly sought through the media of the deeds above enumerated.

§ 225. **Release.** The term "release," in its popular and limited signification, is now used to denote the instrument whereby the interest conveyed by a mortgage is reconveyed to the owner of the fee, and it is also used generally to designate the conveyance of a right of any kind to a person in possession. In England, it obtains in a four-fold form, and is one of the most important of the common law forms of conveyance.[51] In the United States, the technical principles relating to deeds of this character are wholly, or in a great measure, inapplicable, while the conveyance which corresponds to a release at common law, is the popular quitclaim deed, the operative words being the same in both deeds. If a release is used it is generally regarded as a substantive mode of conveyance.[52]

Where a deed remising and releasing lands contains a covenant of warranty of title, either general, or simply as against the claims of all persons claiming under the grantor only, and particularly if the habendum be to the grantee, his heirs, etc., it will not be a simple release, but a conveyance of the

51 Under the English system of conveyancing, releases are extensively employed as methods of conveyance of estates in fee. But in order to give effect to a deed of release, it is first necessary to execute a lease (or bargain and sale for a year) which by force of the statute of uses puts the lessee or bargainee in possession, and being thus in possession, although by a mere fiction, the release operating by way of enlargement of the estate, is effectual to transfer the entire title.

52 Hall's Lessee *v.* Ashby, 9 Ohio, 96.

fee, and a title subsequently acquired by the grantor will inure the grantee, unless it is derived from a sale under an incumbrance assumed by the grantee.[53]

§ 226. **Confirmation.** The subject of confirmation has been several times alluded to in the course of this work, but mainly in treating of confirmations by the government of previously existing but inchoate rights to what would otherwise be public land. Deeds of confirmation are also in use among individuals, and is that species of conveyance whereby an existing right or voidable estate is made sure and unavoidable, or where a particular interest is increased. The appropriate technical words of confirmation are "ratify, approve and confirm," but "grant and convey" or similar terms will have the same effect.

Deeds of confirmation are not in general use, as a "quit-claim" is effective for almost every purpose which might be accomplished by the former. Frequently, however, recitals in deeds show that they were given in ratification or confirmation of previous acts or to correct errors, irregularities or infirmities in former deeds, in which event they take effect by relation as of the date of the former act or deed, and the confirmatory words become material to interpret and explain the undisclosed intention or correct the irregularity of the former deed. In such case the abstract should briefly set out the confirmatory particulars, as:

This deed is given, it is stated, to correct an error in a former deed from the same parties, dated June 10, 1900, wherein the land conveyed was erroneously described as being located in Section Ten.

§ 227. **Surrender.** A surrender is defined as the yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, the lesser estate being merged in the greater by mutual agreement,[54] and the term is applied both to the act and the instrument by which it is accomplished. It is directly opposite in its nature to release, which

[53] People ex rel. Weber v. Herbel, 96 Ill. 384.

[54] 2 Bou. Law Dict. 573; Coke Litt. 337b.

technically operates by the greater estate descending upon the lesser. The operative words of a conveyance of this nature, are "surrender and yield up," but any form of words that indicates the intention of the parties will serve the same purpose, while a surrender is always implied when an estate incompatible with the existing estate is accepted.

Though books on conveyancing still continue to give ample forms for deeds of surrender, the quitclaim deed in common use has taken its place for most purposes, but it would seem that this is still the proper instrument for the relinquishment of leasehold interests, dower, etc. In deeds of surrender the special matter of inducement usually precedes the operative part of the deed; as in case of leasehold, a recital of the lease, etc., and an abridgment of this matter should appear in the abstract. This, and the surrender clause, constitute the essential distinctive features. An example is given of a surrender of a life estate:

William E. Chaning
to
Thomas L. Channing,
only son and heir apparent of said William E. Channing.

Surrender,
Dated, etc.,
* * * *
Recites that [here set out briefly the matter of inducement, which would be, in this case, the instrument conveying the life estate to the father and the remainder to the son]. *Now this Indenture witnesseth (it is stated) that said first party in consideration of $1.00 grants, surrenders and yields up to second party all those certain lands and tenements* [describing same] *and the estate for life, or life interest of said first party, in and to said premises mentioned to be hereby granted and surrendered, to the intent that same may merge and become absolutely extinguished, so that said second party may be in the actual possession of said premises.*

[Note covenants if any.]

Acknowledgment.

A better idea of the abridgments of deeds, and other instruments presented in this work, would be obtained if it were practicable to insert the original instruments in connection therewith. As it is, the reader is requested to compare same with the forms presented in any form book and to note where language can be eliminated without impairing the force of the instrument, and where condensation and abbreviation can be advantageously employed. A deed, of the character just considered is, when drawn after the regulation pattern, very long and technical. Condensation in such cases is an imperative necessity, while the spirit of the original must be preserved.

§ 228. **Assignment.** An assignment is a mode of conveyance applicable to any estate in lands whatever; but the term is usually employed to express the transfer of an equitable estate or a leasehold interest, and as such will receive attention in another part of the work. The operative words of conveyance are "assign, transfer and set over," but any other words evincing an intention to make an entire transfer will be sufficient.[55]

An assignment by endorsement on a deed is entirely nugatory. Such a proceeding might, perhaps, vest in the assignee a right to the paper itself, but would not affect the title to the land. At best, it might, in equity, be considered as an executory contract, on proof of the facts connected with it, and as such entitle the assignee to a decree for specific performance, but it would not operate as a conveyance of the legal title.[56]

§ 229. **Conveyances in Futuro.** At common law an attempt to create or convey a freehold or estate of inheritance *in futuro* was a nullity, the nearest approach being a covenant to stand seized to uses, and this was only permissible when the consideration was blood or marriage,[57] nor was it until comparatively recent years that such conveyances have been recog-

55 2 Hill Abridg. 318; 4 Cruise Dig. 81.

56 Lessee of Bently *v.* Deforest, 2 Ohio, 221; Linker *v.* Long, 64 N. C. 296. But see, Harlowe *v.* Hudgins, 84 Tex. 107, where a contrary rule is announced.

57 2 Black. Com. 338; Jackson *v.*

nized in the United States, unless the estate had first been filtered through the medium of a trustee. This resulted from the principle of the old feudal law, that there must always be a known owner of every freehold estate, and that the title thereto should never be in abeyance. It followed, therefore, that a freehold to commence in the future could not be conveyed, for the reason that it would be in abeyance from the time of the conveyance until the future estate of the grantee should vest. Under the statute, however, a freehold estate in most, if not all of the States, may be created to commence in the future. The effect of such legislation has been to abrogate the common law, and the rule now seems to be well established that if a deed conveys a vested right to either a present or future enjoyment of the premises it is valid.[58]

Conveyances of this kind will usually be found to take the form of a common deed of bargain and sale, with a proviso restraining the grantee from using or occupying the granted premises during the life of the grantor,[59] or defining the time at which the deed shall become effective, though in this respect they are variant, occasionally partaking of the nature of a contingent remainder. If otherwise sufficient a deed of land to take effect at a future time will vest the fee in the grantee according to its terms.[60]

In the abstract there should be shown: the words of grant, and if material the words of limitation, as tending to indicate more fully the nature of the granted estate; the proviso limiting or restricting the use of the estate or explaining its scope; the habendum, with only slight abridgment, this being one of

McKenny, 3 Wend. 233; Brewster *v.* Hardy, 22 Pick. (Mass.) 380; Spaulding *v.* Gregg, 4 Ga. 81.

[58] Mattocks *v.* Brown, 103 Pa. St. 16; Morley *v.* Daniel, 90 Ga. 650; Shackelton *v.* Sebree, 86 Ill. 616; Wilson *v.* Carrico, 140 Ind. 533.

[59] See Chandler *v.* Chandler, 55 Cal. 267; Abbott *v.* Holway, Adm'r, 72 Me. 298; Shackleton *v.* Sebree, 86 Ill. 616; Kent *v.* Atlantic, De Laine Co., 8 R. I. 305; Bohon *v.* Bohon, 78 Ky. 408.

[60] Furgusen *v.* Mason, 60 Wis. 377; McDaniel *v.* Johns, 45 Miss. 632; Mitchell *v.* Mitchell, 108 N. C. 542; Owen *v.* Williams, 114 Ind. 179; White *v.* Hopkins, 80 Ga. 154.

the few cases in which it becomes material and important; and the covenants, or such of them as may appear material. A deed of this character, taken from the files, will serve more fully to illustrate the matter. A grantor seeks to convey the fee, to vest only in the event of his death before that of the grantee, as extreme a case as can be well imagined. Omitting the preliminary parts, which would be in the form already shown, except that the consideration and conveying clauses are set forth more fully, the abstract after the description would read:

Provided (it is stated) "that this deed is not to take effect and operate as a conveyance until my decease, and in case I shall survive my said wife, this deed is not to be operative as a conveyance, it being the sole purpose and object of this deed to make a provision for the support of my said wife if she shall survive me, and if she shall survive me, then and in that event only, this deed shall be operative to convey to my said wife said premises in fee simple. Neither I, the grantor, nor Clarissa B. Abbott, shall convey the above premises while we both live, without our mutual consent. If I, the grantor, shall abandon or desert my said wife, then she shall have the sole use and income and control of said premises during her life."

To have and to hold, etc., "to the said Clarissa B., if she shall survive me, her heirs and assigns, to their use and behoof forever."

Said grantor covenants "that I have good right to sell and convey the same to the said Clarissa B., if she shall survive me, to hold as aforesaid at my decease," and that he, his heirs, etc., will warrant and defend the same "to said Clarissa B. if she shall survive me."

The foregoing deed was construed and declared a valid conveyance *in futuro*, sufficient to vest the fee in the grantee on the happening of the contingency mentioned.[61] It is doubt-

61 See, Abbott *v.* Holway, admr., 72 Me. 298, a very instructive case; see, also, Brown *v.* Atwater, 25 Minn. 520.

ful, however, whether such an instrument would be given effect as a deed in a number of States.[62]

Under the statutes now in force in a majority of the States, the owner of land may convey in the manner prescribed, any part or portion of his estate therein as he and his grantee may agree, subject only to those restrictions which the law imposes as required by public policy, but relieved from the technical doctrines which arose out of ancient feudal tenures, and all the restrictive effect which they had upon alienations. "The mere technicalities of ancient law," says Barrows, J., "are dispensed with upon compliance with statute requirements. The acknowledgment and recording are accepted in place of livery of seizin, and it is competent to fix such time in the future as the parties may agree upon as the time when the estate of the grantee shall commence. No more necessity for limiting one estate upon another, or for having an estate, of some sort, pass immediately to the grantee in opposition to the expressed intention of the parties. The feoffment is to be regarded as taking place, and the livery of seizin as occurring, at the time fixed in the instrument, and the acknowledgment and recording are to be considered as giving the necessary publicity which was sought in the ancient ceremony."[63]

§ 230. **Conveyances of Special Interests and Qualified Estates.** The terms "warranty" and "quitclaim" are used in preparing the synopsis of deeds, only when the instruments to which they are applied purport to be absolute conveyances of the entire interest of the grantor. In the former instance, when containing covenants which run with the land; in the latter, when conveying but a naked interest, uncoupled with covenants or conditions. In both of these cases the legal import may safely be determined by the examiner, who may indicate same by the name he applies to the conveyance; in all other cases he should simply use the generic word "deed,"

62 Consult, Turner *v.* Scott, 51 Pa. St. 126; Rowlings *v.* McRoberts, 95 Ky. 346; Leaver *v.* Gauss, 62 Iowa, 314.

63 Abbott v. Holway, Adm'r, 72 Me. 298; Kent *v.* Atlantic, DeLaine Co., 8 R. I. 305.

and setting out the material and operative parts of the instrument should leave the question of their legal import and effect to counsel.

This class of conveyances comprises deeds of equitable interests, contingent and vested remainders, reversions, all conveyances not *in presenti,* and may include estates for life or years, as well as incorporeal hereditaments,[64] easements and the like. Greater particularity is required in their treatment than in the other classes of conveyances heretofore mentioned, as their validity and effect do not depend so much on general principles, as in case of warranties and quitclaims, as upon the application of special provisions of law to particular facts. The operative words of conveyance, and frequently those of purchase or limitation, become material in determining the nature and extent of the estate granted, while the habendum, or some portion thereof, must also be resorted to to explain or further define the grant made in the premises. The conditions annexed to the grant, or restraints upon the use or enjoyment of the land must further be observed, and where covenants are inserted in a deed of this kind it is well to allude to them.

It is a generally recognized principle, that where the granting clause does not define the nature of the estate conveyed, and is not followed by language assuming to supply what is thus omitted, the estate conveyed is a fee, or whatever interest the grantor possessed at the time, and this is the general statutory doctrine; but where the habendum describes what estate passes it becomes efficient to declare the intention, and will rebut any implication which would otherwise arise from the omissions of the premises. The habendum, in such case,

64 A grantee may take a fee in any kind of hereditament, either corporeal or incorporeal; but there is this distinction between the two species; that a man is seized in his *demesne* as of a fee of a corporeal hereditament, while of an incorporeal hereditament he can only be said to be seized as of fee, and not in his *demesne,* which means property in the thing itself: Wiggins Ferry Co. *v.* O. & M. Railway Co., 94 Ill. 83. This, however, is one of the abstractions of the mediæval lawyers and the distinction may not be recognized in many States.

does not contravene the rule that nothing can be limited thereby, nor does it contradict the language of the granting clause, but simply supplies what is there omitted, and removes all necessity for resorting to implication to ascertain the intention of the parties.[65] Neither can the covenants enlarge the grant, whatever be their tenor,[66] yet they, like the habendum, may serve to more fully explain the intention of the parties, as will be seen from some of the examples given in this chapter, and courts are ever more inclined to look to the whole instrument for a proper construction, than to isolated and detached portions as formerly.[67]

§ 231. **Continued — Illustrations of Special Cases.** It is impossible to give more than a reference to the large class of conveyances that come within the scope of this section, but it is believed that the examiner will readily recognize such when met with in actual practice.

A common occurrence in deeds and wills will be found in the efforts to secure to married women and their children the use and ownership of land freed from the dominion and control of the husband and father, and such conveyances give rise to many subtle questions in their construction. A conveyance of land directly to a woman and her children, without other words, she then having children, would vest the title in her and her children equally,[68] and it seems no title will vest at law in children thereafter born,[69] although the instrument may declare the grantor's intent that the after-born children shall take.[70] But such children would take as beneficiaries under a trust by deed,[71] or will,[72] and perhaps the living grantees

65 Riggin *v.* Love, 72 Ill. 553.

66 Lamb *v.* Wakefield, 1 Sawyer (C. Ct.) 251.

67 Saunders *v.* Hanes, 44 N. Y. 353; Callins *v.* Lavelle, 44 Vt. 230.

68 Hickman *v.* Quinn, 6 Yerg. (Tenn.) 96; Loyless *v.* Blackshear, 43 Ga. 327; Barber *v.* Harris, 15 Wend. (N. Y.) 615.

69 Faloon *v.* Simshauser, 130 Ill. 649.

70 Lillard *v.* Ruckers, 9 Yerg. (Tenn.) 64; Newsom *v.* Thompson, 2 Ired. (N. C.) 277; but see, Barber *v.* Harris, 15 Wend. (N. Y.) 615.

71 Gray *v.* Hayes, 7 Humph. (Tenn.) 588.

72 Turner *v.* Ivie, 5 Heisk. (Tenn.) 222.

under such a deed expressly providing for after-born children would hold the legal title interest for themselves and such children.[73]

A very slight indication of an intention that the children shall not take jointly with the mother will suffice to give the estate to the mother for life, with remainder to the children, as well in the case of a deed [74] as of a will [75] and even though the woman should have no children then living, or if she were unmarried, there would yet be such a contingent remainder in favor of any children she might have, that she would have no power by a conveyance before issue to defeat this contingent remainder in favor of such issue.[76] There are cases which hold that a conveyance to a woman and her children will vest in the woman no more than an estate for life with remainder in fee to the children as a class, so that those in being at the date of the deed as well as those subsequently born would be entitled to take in the distribution on the termination of the life estate.[77] It is also a well established rule that a conveyance to a woman and the heirs of her body will pass only a life estate to the woman herself, her children, whether born before or after execution, taking a vested estate in the remainder.[78] In like manner, a deed to a woman and her issue by a specified husband, will give to her only a life estate with the remainder to her children begotten by such specified husband.[79] If the conveyance be expressly to the mother for life, and after her death to her children, the children born during the life estate would take, the remainder vesting as they came into being, and opening to let in those born afterward.[80]

73 Holmes *v.* Jarret Moon, 7 Heisk. (Tenn.) 506; Jackson *v.* Sisson, 2 Johns. Cas. 321; Schumpert *v.* Dillard, 55 Miss. 438.

74 Moore *v.* Simmons, 2 Head (Tenn.), 506.

75 Bunch *v.* Hardy, 3 Lea (Tenn.), 543.

76 Frazer *v.* Sup. of Peoria, 74 Ill. 282.

77 Coursey *v.* Davis, 46 Pa. St. 25; Hague *v.* Hague, 161 Pa. St. 643.

78 Fletcher *v.* Tyler, 92 Ky. 145.

79 Bodine *v.* Arthur, 91 Ky. 53.

80 Beecher *v.* Hicks, 7 Lea (Tenn.) 207; Blair *v.* Vanblarcum, 71 Ill. 290.

In all of these cases, aside from the fine points of construction to decide the ownership of the fee, collateral questions arising from the doctrine of dower and curtesy present themselves according as the statutory law of the State may be; the collateral questions being dependent on the construction of the main question of the nature and quality of the estate conveyed. The intention of the grantor being gathered from the whole instrument, it is recommended that all technical words of conveyance, limitation and definition, whether in premises, habendum or covenants, be set out fully and without reserve, and repugnancies or variations noted as heretofore shown. In the instances above cited, and generally when the instrument purports to convey more than one estate, or where the estate conveyed is defeasible from any cause, the premises and habendum must be construed together and should be properly presented for that purpose; as, in a case where land is conveyed to A, to hold until his son B shall become of age, and then to B in fee; or if B shall die before that event, then to A in fee. In such a case the premises and habendum and all operative words become material and must be shown, thus:

Grants, bargains, sells and conveys to A, and his son B, the following described land, etc.

*To have and to hold * * * unto said A, for and during the minority of his son B, and until said B shall arrive at the age of twenty-one years; and unto said B, his heirs, etc., * * * in case he shall arrive at the full age of twenty-one years; but in case the said B shall decease before he arrives at the age of twenty-one years, then unto said A, his heirs, etc.*

(Note covenants if material.)

As a general rule, contingent interests are assignable, devisable and descendible the same as the vested interests.[81]

§ 232. **Restrictive and Conditional Conveyances.** The subject of conditions and restrictive clauses in deeds and

[81] Kenyon *v.* See, 94 N. Y. 563.

other forms of conveyance has already been alluded to, and need not be extensively discussed here. As a rule, any condition which is repugnant to the estate granted will be invalid, but it has been held that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may effect its value or the nature of the estate conveyed. Repugnant conditions are those which tend to the utter subversion of an estate; such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons, or for a limited period, or which provide for its subjection to particular uses, are not subversive of the estate. They do not destroy or limit its alienable or inheritable character, and the reports are full of cases where conditions imposing restrictions upon uses to which property conveyed in fee may be subjected, have been upheld. In this way slaughter houses, soap factories, saloons, distilleries, livery stables, tanneries, and machine shops have in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families.[82] That such a purpose is a legitimate one, and may be carried out consistently with the rules of law, by reasonable and proper covenants, conditions, or restrictions, can not be doubted.

In abstracting deeds of this character, the attention of the examiner should be particularly directed to the words of grant, the habendum, the conditions annexed to the grant, and the covenants. Conditions restricting the use of the premises conveyed are usually conditions subsequent, and often provide for a reversion of the title upon their breach, and upon which the grantor may recover in ejectment.[83] The form for creat-

82 Cowell *v.* Colorado Springs Co., 100 U. S. 55; Plumb *v.* Tubbs, 41 N. Y. 442; Collins *v.* Marcy, 25 Conn. 242; Sperry *v.* Pound, 5 Ohio, 189; Gray *v.* Blanchard, 8 Pick. 284; Clark *v.* Martin, 94 Pa. St. 289.

83 Plumb *v.* Tubbs, 41 N. Y. 442; Wakefield *v.* Van Tassell, 202 Ill. 41; Martin *v.* Ry. Co., 37 W. Va. 349.

ing a condition in a grant or deed, as laid down by the elementary writers, is "provided always, and this deed is upon the express condition," [84] and these expressions have always been held sufficient to create an estate upon condition, unless there is something in the deed to negative this idea. Inasmuch as estates upon condition working forfeiture are odious,[85] courts have generally laid hold of any plausible feature to sustain them. Such conditions are not favored, and must be construed strictly,[86] and will under no circumstances, be enforced further than may be absolutely required, and so strong is this principle engrafted in the law that courts of equity will seldom lend their aid to divest an estate for breach of a condition.[87]

The fact that an estate is subject to condition does not in any way affect its capacity for alienation, or of being devised, or descending in the same manner as an indefeasible estate, but the purchaser, devisee, or heir, takes it subject to whatever conditions may be annexed to it.[88] The estate so granted is sometimes called a base or qualified fee, being such as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. It is a fee, because it may possibly endure forever; and it is base or qualified, because its duration depends upon collateral circumstances which qualify and debase the purity of the donation.[89] But these terms are now rarely employed, the ideas they represent being better expressed by what is called a conditional limitation. Indeed, the ideas involved, as well as the terms in which they are expressed, are survivals of the middle

[84] Kent's Com. 122; 2 Wash. Real Prop. 3.

[85] Warner *v.* Bennett, 31 Conn. 478; Palmer *v.* Ford, 70 Ill. 369; Craig *v.* Wells, 11 N. Y. 315.

[86] Gadberry *v.* Sheppard, 27 Miss. 203; Bradstreet *v.* Clark, 21 Pick. 389; Hoyt *v.* Kimball, 49 N. H. 327; 4 Kent Com. 130; Woodworth *v.* Paine, 74 N. Y. 196.

[87] Warner *v.* Bennett, 31 Conn. 478; Ins. Co. *v.* Walsh, 54 Ill. 164; Palmer *v.* Ford, 70 Ill. 369; Wing *v.* Railey, 14 Mich. 83; Smith *v.* Jewett, 40 N. H. 530.

[88] Taylor *v.* Sutton, 15 Ga. 103; Wilson *v.* Wilson, 38 Me. 18; Underhill *v.* R. R. Co., 20 Barb. 455.

[89] Wiggins Ferry Co. *v.* O. & M. Ry. Co., 94 Ill. 83.

period of the common law, and in modern legal theories have practically become obsolete.

§ 233. **Prohibited Conveyances — Adverse Seizin.** "From an early date," says Washburn, "the policy of the law has not admitted of the conveyance, by any one, of a title to land which is in the adverse seizin and possession of another. This is considered, not as passing a title, but as the transfer of a right of action in violation of the early laws against champerty and maintenance, and therefore, not to be sustained by the courts." [90] This doctrine was long maintained in this country and still prevails to a limited extent in some of the older States,[91] but in the West it has been swept away by express statutory enactments, and no conveyance is void because at the time of its execution or delivery, the land in question is in the possession of another who holds by a title adverse to that of the grantor.[92] Where such doctrine still prevails, an entry on the land and delivery there, will evade the letter of the law and make good the deed.[93] The abstract will show both titles, provided they are each deducible of record, and questions of this kind must be decided by the application of local law to the admitted or known circumstances. At most, the principle will apply only as to the person holding the adverse title at the time of the execution and delivery of the deed, or those claiming by, through or under him, and as to all others the deed would be valid and effectual.[94]

90 3 Wash. Real Prop. 329 (4th Ed.).

91 Sohier *v.* Coffin, 101 Mass. 179; Jones *v.* Monroe, 32 Ga. 188.

92 Hall *v.* Ashby, 9 Ohio, 96; Shortall *v.* Hinkley, 31 Ill. 219; Crane *v.* Reeder, 21 Mich. 82; Stewart *v.* McSweeney, 14 Wis. 471. Under these statutes any one claiming title to land although out of possession, and notwithstanding there may be an actual adverse possession, may sell and convey the same as though in actual possession, and his deed will give the grantee the same right of recovery in ejectment as if the grantor had been in the actual possession when he conveyed: Chicago *v.* Vulcan Iron Works, 93 Ill. 222.

93 Farwell *v.* Rogers, 99 Mass. 36; Warner *v.* Bull, 13 Met. 4.

94 Edwards *v.* Rays, 18 Vt. 473; Wade *v.* Lindsey, 6 Met. 407; Betsey *v.* Torrance, 34 Miss. 138; Farnum *v.* Peterson, 111 Mass. 151. The English statutes upon which this doctrine was founded, grew out of peculiar exigencies entirely foreign to our condition and habits.

§ 234. **Continued — Fraudulent Conveyances.** What are known as "fraudulent conveyances," or such as are made with intent to hinder and delay creditors, though formal in all respects, and valid and effectual between the parties, are prohibited by law and void to a certain extent.[95] Depending largely upon intent, the record will furnish few clues to the real character of such a deed, which will usually pass unquestioned when found upon the abstract. Want of consideration may be sufficient to raise an inquiry, yet, as has been seen, this of itself does not denote bad faith, nor is a consideration essential to the vesting of the title, and where the controlling motive in making the deed was to defeat creditors, a full consideration is usually expressed. The invalidity of a deed is usually the result of a decision of a court, and whatever internal evidence it may possess will rarely decide its character.

The question of fraudulent intent, as a rule, is confined to the immediate parties and does not extend to the second grantee, who, if acting in good faith and without notice, will take the property, and the full title, purged of its former taint.[96] Such a purchaser is a favorite in the eyes of a court of equity.[97]

§ 235. **Conveyances Subject to Incumbrance.** Where land is conveyed subject to a mortgage, a promise to pay the debt thus secured can not be inferred from the mere acceptance of the deed.[98] even though made a part of the consideration.[99] In the absence of other evidence, such a deed shows

They were passed at the close of revolutions, when the property of the kingdom having to a great extent changed hands, it became the interest of those who succeeded to power to place every possible obstacle in the way of the former proprietors recovering possession.

[95] Dyer *v.* Homer, 22 Pick. 258; Dunlap *v.* Dunlap, 10 Ohio 162; Harvey *v.* Varney, 98 Mass. 118; Horner *v.* Zimmerman, 45 Ill. 14; Stevens *v.* Harrow, 26 Iowa, 458.

[96] Jackson *v.* Henry, 10 Johns. 185; Wright *v.* Howell, 35 Iowa, 292; 1 Story Eq. Jur. § 434; George *v.* Kimball, 24 Pick. 238; 4 Kent Com. (11th Ed.) 464.

[97] 1 Story Eq. Jur. § 434.

[98] Ins. Co. *v.* Stewart, 86 Pa. St. 89.

[99] Fiske *v.* Tolman, 124 Mass. 254. Compare Twitchell *v.* Mears, 8 Biss. (C. Ct.) 211.

that the grantee merely purchased the equity of redemption.[1] But if a grantee takes a deed, containing a stipulation that the land is subject to a mortgage, which the grantee assumes or agrees to pay, a duty of payment is imposed on him by the acceptance, and the law implies a promise to perform it.[2] This, of course, only applies where there has been an actual acceptance by the grantee, for the simple facts of execution, acknowledgment, and recording of a deed of incumbered property, with a clause therein that the grantee shall pay the mortgage indebtedness, is not sufficient, in itself, to create a personal liability on the part of such grantee unless he has assented to such clause, yet as we have seen, by his acceptance of the deed his assent to all it contains may be inferred.[3]

The examiner should observe great care, therefore, in the abstracting of clauses relating to subsisting claims or incumbrances, for the purchaser is charged with notice of all recitals of this character, and is bound thereby even though such incumbrance fails to appear of record.[4] Though the conveyance of property subject to mortgage, unless expressly so provided, imposes no personal liability on the grantee, it yet raises a presumption that the purchaser buys the property to the extent stated, and takes his chances of realizing out of it enough, over and above the mortgage, to indemnify him for his advance of purchase money. The fair inference is that the purchaser does not pay the vendor the full value of the property, but that the amount of the mortgage debt is reserved in his hands as so much purchase money for the purpose of discharging the lien. In such case the land conveyed is as effectually charged with the amount of the mortgage as if the purchaser had expressly assumed its payment.[5]

As between the vendor and the purchaser of the equity of redemption, the general rule is that the land is the primary

1 Strong *v.* Converse, 8 Allen, 557.

2 Pike *v.* Brown, 7 Cush. 133; Furnas *v.* Durgin, 119 Mass. 500; Schumucker *v.* Sibert, 18 Kan. 104; Miller *v.* Thompson, 34 Mich. 10.

3 Thompson *v.* Dearborn, 107 Ill. 87.

4 White *v.* Foster, 102 Mass. 375; Vaughan *v.* Greer, 38 Tex. 530.

5 Gale *v.* Wilson, 30 Gratt. (Va.) 166.

fund for the liquidation of the incumbrance,[6] but where the payment of an outstanding incumbrance, created by the grantor, expressly constitutes part of the purchase money, it has been held in some cases that the law will imply an undertaking by the purchaser to pay it, upon which the mortgagee may recover.[7] Where this doctrine obtains the consideration recital becomes important and should be fully shown in the abstract.

§ 236. **Dedication by Deed.** Intent, as has been stated, is the vital principle of dedication. In a case where acts and declarations are relied on to show such intent, to be effectual they must be unmistakable in their purpose and decisive in their character; and in every case must be unequivocally and satisfactorily proved.[8] Where the deed relied on is to the public direct, that is, to the State or any of its municipal agencies, no question as to the intent can usually arise; but when the dedicatory matter forms a recital or agreement in a deed between individuals, the rule above stated becomes efficient to determine its import. In ascertaining the intent of the parties in the latter case, it is a fundamental rule of construction, that the language employed is to be read in the light afforded by the subject-matter and the surrounding circumstances,[9] while every part of the deed is admissible to declare the meaning of certain passages, and such construction should be put upon particular words as will best answer and effectuate the apparent general intention.[10]

The recitals indicative of dedication are best shown by a literal transcription, whenever the circumstances will admit of such treatment, or a judicious condensation of the agreement, covenants and declaration of uses, may be presented when such

[6] Daniel *v.* Leitch, 13 Gratt. (Va.) 206; Jumel *v.* Jumel, 7 Paige, 595; Wedge *v.* Moore, 6 Cush. 8; Eaton *v.* Simmonds, 14 Pick. 98.

[7] Twitchell *v.* Mears, 8 Biss. (C. Ct.) 211; and see Garsney *v.* Rogers, 47 N. Y. 233.

[8] Harris' case, 20 Gratt. (Va.) 833; Holdane *v.* Cold Spring, 21 N. Y. 474; Harding *v.* Hale, 61 Ill. 192.

[9] Nash *v.* Towne, 5 Wall. 689.

[10] Talbott *v.* R. R. Co., 31 Gratt. (Va.) 685.

a course may not be desirable; but, in any event, sufficient of the language employed should be given as will enable counsel to determine whether there has been a dedication to public uses, or simply an adjustment of the conflicting claims of the parties, resulting in a common right of way to be annexed as an easement to the property for the convenience of the owners, and not for the accommodation of the public.

§ 237. **Resulting Trusts.** It is a general rule of equity, that if the purchase money of land is paid by one person, but the deed, through any accident, mistake, fraud, or other circumstances contrary to the real intention of the parties, is taken in the name of another, the trust of the legal estate results to him who advanced the money,[11] and this circumstance formerly raised many questions in examinations of title. However, of late years, the operation of this rule has been greatly restricted by statute, and many of the questions which formerly perplexed examiner and counsel are now laid at rest. The statute has not abolished trusts arising or resulting by implication of law, but in a majority of instances has declared the legal title to be vested in the alienee named in the deed, subject to the claims of creditors of the person paying the consideration, in whose favor a trust for the amount of their claims results, but even such trust can not be established to defeat or prejudice the title of a purchaser for a valuable consideration and without notice of such trust.[12]

Wherever the foregoing law obtains, and it is now very general, but little difficulty will be experienced from this class of undisclosed trusts, and until their efficiency has been declared by a court of competent jurisdiction they can form no

11 Case *v.* Codding, 38 Cal. 191; Frederick *v.* Haas, 5 Nev. 389; Fleming *v.* McHale, 47 Ill. 282; Dryden *v.* Hanway, 31 Md. 254; Mallory *v.* Mallory, 5 Bush (Ky.), 464; Johnson *v.* Quarles, 46 Mo. 423; Nixon's Appeal, 63 Pa. St. 279; Campbell *v.* Campbell, 21 Mich. 438; Harvey *v.* Ledbetter, 48 Miss. 95.

12 See R. S. Wis., Chap. 96; Gen. Stat. Minn., Chap. 43; Comp. Laws Mich. § 2637; R. S. N. Y. § 51; consult Martin *v.* Martin, 5 Bush (Ky.), 47; Durfee *v.* Pavitt, 14 Minn. 424; Fisher *v.* Forbes, 22 Mich. 454; Foote *v.* Bryant, 47 N. Y. 544.

appreciable factor in making up the estimate of title. A neglect to state the consideration of the conveyance or acknowledge its payment was formerly considered evidence of a resulting trust in favor of the grantor or some other person paying same, but this, as has been seen, no longer prevails, and a failure to recite the consideration will not materially affect the conveyance though it may, in some localities, be evidence of a vendor's lien.

§ 238. **Re-records and Duplicates.** Re-records and duplicates of instruments already shown in present or former examinations, if they disclose no variations, may be passed with the briefest notice. Such instruments only serve to incumber the chain, and should be kept out of sight as far as possible.

The following is considered a sufficient notice:

Harry M. Packham, bachelor,
to
The Illinois Central Railroad Company, its successors and assigns.

Deed.
Dated, etc.[13]
* * * * *
* * * * *
A re-record of deed recorded Aug. 16, 1852, as Doc. 36,168, in Book 101, page 580, as appears by the Recorder's certificate appended to the record.

In case of duplicates, say:

Apparently a duplicate of lease recorded Sept. 5, 1882, as Doc. 100,580, in Book 910, page 550 (and shown as No. 15 of this examination).

A re-record, of course, carries its own internal evidence, while duplicates can only be classed as such by inference, yet

[13] Here follows the various matters relating to registration, consideration, the grant, etc., as shown in previous examples. For brevity they are omitted in the form above given and the same course will be pursued for the remainder of the work.

where there appears an exact correspondence of parties, dates, subject-matter, as well as identity of language, it is almost impossible that the examiner shall err in classing it as a duplicate. When the originals appear in the same examination, re-records and duplicates should, whenever practicable, immediately follow such originals, in which event say:

Apparently a duplicate of the foregoing instrument.

When such original instruments do not form a portion of the examination, the re-records should not be inserted in the chain of title, but are best shown among the appendices, under the head of "Re-records," or "We also find."

§ 239. **Corrected Records.** Not infrequently instruments are incorrectly transcribed by the recording officer and the error of transcription only becomes manifest after an abstract of the record has been made. In such cases a correction of the record is usually had and a mention of such corrected record becomes necessary in the abstract. It is, of course, permissible for the examiner to correct the abstract to conform to the corrected record, but this means an erasure or mutilation of some kind, and if such correction is made after the abstract has left the examiner's hands a precedent of most doubtful character is established. In such event, perhaps, it is better to add a marginal note showing the correction than to tamper with what has already been shown. If this shall be thought desirable something like the following may be inserted after the erroneous item or placed opposite to it in the margin of the abstract.

NOTE.— *Since the date of this examination the record of the foregoing deed has been corrected by the Recorder so that the description of the land thereby conveyed now appears on such record as follows:* [Here set out the corrected description or other matter.]

(Signed) Handy & Company,
Chicago, June 1, 1903. *Examiners.*

CHAPTER XVI.

SPECIAL CLASSES OF INDIVIDUAL CONVEYANCES.

§ 240. Marriage settlements.
241. Conveyances to husband and wife.
242. Conveyances between husband and wife.
243. Conveyances by married women.
244. Effect of wife's conveyance.
245. Acknowledgment of deeds by married women.
246. Release of dower.
247. Joint tenancies and tenancies in common.
248. Partition deeds.
249. Partnership conveyances.
250. Corporate conveyances.
251. Statute of mortmain.
252. Power of acquisition—User.
253. Municipal corporations.
254. Conveyances to corporations.
§ 255. Conveyances by corporations.
256. Continued — Execution — Acknowledgment.
257. Acts of officers in excess of charter powers.
258. Record of seal.
259. Conveyances by incorporated religious societies.
260. Heirs at law.
261. Post obit conveyances.
262. Conveyances by delegated authority.
263. Powers of attorney.
264. Revocations.
265. Conveyances in trust.
266. Revocation of trust.
267. Declarations of trust.
268. Removal and substitution of trustees.
269. Resignation — Refusal to act — Successor.

§ 240. **Marriage Settlements.** It was at one time doubted whether any interest in either real or personal property could be settled to the exclusive use of a married woman without the intervention of trustees; but for many years direct conveyances and settlements have been protected in equity alike against the marital rights of the husband, as against his creditors. Nor is it at all material whether the settlement be made by a stranger or by the husband himsef, for it is now universally held that a settlement by a husband, on his wife, made by direct conveyance to her, will be enforced in the same manner, and under the same circumstances, that it would be

if made by a stranger, or to a trustee for her exclusive use.[1]

A marriage settlement usually conferred upon the wife only the use of the property during her life, or for a definite period, with a remainder in fee to her issue or other persons designated; but marriage settlements proper have fallen into general disuse, while the general abolition of uses and trusts, and removal of former disabilities, have placed conveyances for this purpose upon the same plane and subject to the same rules as other conveyances between individuals.

Conveyances, of whatever nature, intended as a settlement, should be shown quite fully, particularly the granting clause and habendum, together with any special matter by way of restriction, for the power of disposition may be restricted or enlarged by the terms of the settlement; and in construing these terms, the intention of the grantor, as apparent upon a fair construction of the instrument, must govern.[2] If the instrument contains any express or implied restrictions upon the power of disposition, either as to the mode of conveyance, or purpose for which it may be conveyed, she can convey it in no other manner and for no other purpose, while if it contains no limitation or restrictions, express or implied, she may convey it in the same manner as her general estate.[3]

§ 241. **Conveyances to Husband and Wife.** Under the common law, a grant to a man and his wife does not constitute them either joint tenants or tenants in common, they being in legal contemplation but one person, and hence unable to take by moieties. Both would therefore be seized of the entirety; neither could dispose of any part of the estate without the assent of the other, and upon the death of either, the whole of the estate would remain in the survivor. This rule

1 Jones *v.* Clifton, 101 U. S. 225; Sims *v.* Rickets, 35 Ind. 192; Putnam *v.* Bicknell, 18 Wis. 351; Burdens *v.* Amperse, 14 Mich. 91; Wallingford *v.* Allen, 10 Pet. 594.

2 Young *v.* Young, 7 Coldw. (Tenn.) 461; McChesney *v.* Brown's Heirs, 25 Gratt. (Va.) 393.

3 Young *v.* Young, 7 Coldw. (Tenn.) 461; McClintic *v.* Ocheltree, 4 W. Va. 249; Kimm *v.* Weippert, 46 Mo. 532.

has not been materially changed by statute and is accepted in a majority of the States.[4]

In such an estate there can be no partition, as neither spouse has any separate interest.[5] Between them there is but one owner, and that is neither the one nor the other, but both together. The common law permitted the husband, for his own benefit, during their joint lives, to use, possess and control the land and take all the profits thereof, and even to mortgage and convey an estate to continue during such joint lives, though he could make no disposition of the land that would prejudice the right of the wife in case she survived him; but later authorities hold that, from the peculiar nature of this estate, and from the legal relation of the parties, there must be unity of estate, unity of possession, unity of control, and unity in conveying and incumbering it; and it necessarily and logically results that it can not be seized and sold upon execution for the separate debts of either.[6]

In several of the States where the rule formerly prevailed, it has been held that the legal unity of husband and wife

[4] Arnold *v.* Arnold, 30 Ind. 305; Hemingway *v.* Scales, 42 Miss. 1; Washburn *v.* Burns, 34 N. J. L. 18; McCurdy *v.* Canning, 64 Pa. St. 39; Fisher *v.* Provin, 25 Mich. 347; Garner *v.* Jones, 52 Mo. 68; Robinson *v.* Eagle, 29 Ark. 202; Marburg *v.* Cole, 49 Md. 402; Hulett *v.* Inlow, 57 Ind. 412; Bertles *v.* Nunan, 92 N. Y. 152; Meyers *v.* Reed, 17 Fed. Rep. 40.

[5] In some of the Western States there is a peculiar system of property rights growing out of the marital relation, which, while it originated in the civil law has been borrowed directly from the Spanish or Mexican law. This is known as the doctrine of *community*. The underlying principle of the community system is that whatever is acquired by the joint efforts of husband and wife shall be their common property; that the matrimonial relation in respect to the property acquired during its existence is in fact a community, of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to he property after dissolution in ase of one surviving the other. It extends to real as well as personal property, and includes everything, acquired by either husband or wife luring the marriage, except that which is acquired by gift, devise or descent.

[6] Chandler *v.* Cheney, 37 Ind. 391; McDuff *v.* Beauchamp, 50 Miss. 531; Hulett *v.* Inlow, 57 Ind. 412.

has been broken by the "married women's" acts, and that they take only as tenants in common.[7] But estates which had vested prior to the acts in question are not affected, changed or modified by them. They remove no disabilities and confer no new rights in relation to such estates, which can only be conveyed or incumbered by the joint act of both parties, while the survivor takes an absolute title to the whole in case of death, as heretofore.[8]

The legislation of the States, concerning the property rights of married women, has been very uniform, but the judicial construction of similar statutes has been variant and contradictory. In some instances, as has been observed, courts have decided that statutes making joint grantees tenants in common, and giving to married women the same rights in property as though they were sole, have effectually destroyed the common law unity of husband and wife, and made them substantially separate persons for all purposes; but in a majority of the States the declared effect of these statutes has been confined to their express terms and they have been held to have no relation to or effect upon real estates conveyed to husband and wife jointly, and that, notwithstanding those statutes, they still take as tenants by the entirety.[9]

The granting clause and habendum may serve in many instances to determine the nature of the estate granted, and it is advisable, in all cases where the deed purports to convey to husband and wife, to set out sufficient of both clauses to fully disclose the nature of the grant. As a general rule, no special language is required to create an estate of entirety and where the deed does not specify the manner in which they are to hold the land a tenancy by entirety will be presumed.[10] This conforms to the rule of the common law which provides

7 Hoffman *v.* Stigers, 28 Iowa, 302; Clark *v.* Clark, 56 N. H. 105; Cooper *v.* Cooper, 76 Ill. 57; Walthall *v.* Goree, 36 Ala. 728.

8 Harrer *v.* Wallner, 80 Ill. 197.

9 Bertles *v.* Nunan, 92 N. Y. 152; Bates *v.* Seeley, 46 Pa. St. 248; Robinson *v.* Eagle, 29 Ark. 203; McDuff *v.* Beauchamp, 50 Miss. 531.

10 Stelz *v.* Shreck, 128 N. Y. 263; Phelps *v.* Simons, 159 Mass. 415; Morrison *v.* Seybold, 92 Ind. 298; Bramberry's Appeal, 156 Pa. St. 628.

that in a conveyance to both spouses they will take as joint tenants or tenants in common only by express words, or words strongly implying such intention.[11] Where the words of the grant clearly show that the intent was to create a tenancy in common effect will be given to it and they will so hold.[12]

§ 242. **Conveyances Between Husband and Wife.** It is now well settled that a conveyance by a husband to his wife, without the intervention of a third person or trustee, where suitable and meritorious, and not in fraud of creditors, will be upheld in equity,[13] while in those States where the legal identity of husband and wife is no longer recognized, such conveyance may be good at law.[14] Where the ancient doctrine still obtains, a deed from husband to wife, without the intervention of a trustee, is void at law; nor can a court of equity regard it as effectual to transfer the legal title. But where such deed is founded upon a good and sufficient consideration,[15] equity will enforce it according to the intention of the parties, where the same can be done without prejudice to the rights of others.[16]

A voluntary conveyance, that is, a conveyance without consideration, is a fraud upon the creditors of the husband, even in the absence of fraudulent intent, and this is especially true when the conveyance leaves the husband insolvent.[17] As a rule, conveyances of this class call for close scrutiny, and fre-

11 Baker *v.* Stewart, 40 Kan. 442.

12 Miner *v.* Brown, 133 N. Y. 308; Thornburg *v.* Wiggins, 135 Ind. 178.

13 Hunt *v.* Johnson, 44 N. Y. 27; Simmons *v.* Thomas, 43 Miss. 31; Sherman *v.* Hogland, 54 Ind. 578; Montz *v.* Hoffman, 35 Ill. 553; Hockett *v.* Bailey, 86 Ill. 76.

14 Booker *v.* Worrill, 55 Ga. 332; Dickson *v.* Randal, 19 Kan. 212; Barclay *v.* Plant, 50 Ala. 509; Kaufman *v.* Whitney, 50 Miss. 103.

15 Not necessarily money: Wells *v.* Wells, 35 Miss. 664; Wilder *v.* Brooks, 10 Minn. 50; Sims *v.* Ricketts, 35 Ind. 181. When the conveyance is made as a provision for her, this will be sufficient, for the duty of maintenance which a husband owes to a wife is a good consideration for a voluntary conveyance vesting title in her: Gill *v.* Wood, Adm'r, 81 Ill. 64; Kellogg *v.* Hale, 108 Ill. 164.

16 Huber *v.* Huber, 10 Ohio, 371; Brookbank *v.* Kernard, 41 Ind. 339; Cardell *v.* Ryder, 35 Vt. 47.

17 Watson v. Riskamire, 45 Iowa, 231.

quently for inquiries *in pais*. Local statutes will go far to settle many questions, yet there are numerous cases, even under favorable statutes, where a knowledge of the circumstances and situation of the parties must result in the rejection of the title so offered, whether the conveyance be to the wife direct, or through an intermediary, for it is a fundamental principle that the rights of creditors can not be infringed or defeated in this manner.[18]

§ 243. **Conveyances by Married Women.** No class of conveyances call for greater vigilance or closer scrutiny than those executed by married women. Though at present a progressive and liberal spirit is manifest in the enactments of the various State legislatures, tending to remove entirely all restraints and impediments from the free acquisition and alienation of real property by married women, yet such enactments are of very recent origin, and furnish no rule for the construction of conveyances made prior to the time at which they became effective. At common law, a married woman could make no disposition of her lands except by some matter of record, as a fine and recovery;[19] hence it follows that a conveyance of her separate property by a woman during her coverture would be void, unless specially authorized by statute.[20] Such statutes now exist, however, and confer upon married women a number of rights, which, being in derogation of common law principles, are strictly construed by the courts. In all cases a rigid and literal compliance with the statute is essential to vest title. The removal of the common law disabilities was not accomplished at any one time, but extends over a series of years, and an additional burden is thrown on examiner and counsel by this fact. Different formalities were requisite at different periods, and thorough knowledge of the changes in the law in this respect are indispensable to a correct and satisfactory examination.

By the common law, upon the marriage of a man with a

18 Aultman *v.* Obermeyer, 6 Neb. 260.
19 1 Blk. Com. 293; 2 Kent Com. 150.
20 Hoyt *v.* Swar, 53 Ill. 134.

woman seized of an estate of inheritance, he became seized of the freehold *jure uxoris* during their joint lives, and if he had issue by her born alive, then for his own life absolutely; in which latter case, if he survived the wife, he was styled tenant by the curtesy.[21] Subsequently, by statute, the husband was given this right of tenancy by the curtesy, whether they had issue born or not. In most of the States tenancy by the curtesy is now abolished. A few remnants are still observable, however, and local law must be resorted to for the purpose of defining the husband's marital rights.

The first enactments looking toward the power of alienation by the wife provided that conveyances might be made by forms of deeds ordinarily employed, but attended by many formalities, particularly in the matter of acknowledgment and authentication, it being a vital principle always that the husband join in the conveyance. Under these enactments the acknowledgment of the wife seems to have been the operative act to pass title and not the delivery of the deed. Subsequently the rigors of the early rules became relaxed, and, while the husband was still required to join in the execution, the acknowledgment ceased to be the effective means to work the transfer of title, and the certificate thereof was placed on the same footing as that required for an unmarried woman. The greater part of the old formalities, in a majority of the States, are no longer requisite, the gradual and uniform tendency of modern legislation being to facilitate the power of alienation by women of their separate estates, though it is still indispensable, in many jurisdictions, that the husband join with the wife in the execution of the deed.[22]

Legislation, in some of the more advanced States, has had the effect to destroy the common law unity of person in husband and wife, so far as that unity is represented by the husband, and in its stead a rule has been introduced, analogous to that of the civil law, by which the wife is regarded as a

[21] 1 Blk. Com. 126; 2 Kent Com. 108.

[22] Styles *v.* Probst, 69 Ill. 382; Hollman *v.* De Nyse, 51 Ala. 95; Hand *v.* Winn, 52 Miss. 784; Armstrong *v.* Ross, 20 N. J. Eq. 109.

distinct person so far as her separate property, contracts, etc., are concerned, while her conveyances may be made in the same manner, and with like effect, as if she were unmarried.[23] Under these laws no joinder is necessary, other than for the purpose of waiving homestead or other marital rights, and for all practical purposes of transfer of her separate property the husband and wife stand before the law as strangers.[24]

The tenancy by the curtesy is also becoming obsolete or attaches only on the death of the wife, and then but to such lands as she died seized of, and of which she had made no final disposition by will. Where, however, the laws of a State give to the husband the same right of dower in the real estate of the wife that she has in his real estate, the effect of a non-joinder of the husband in a deed of the wife's lands has the effect to preserve such dower interest, and hence the joinder becomes necessary to a properly executed deed.[25]

§ 244. **Effect of Wife's Conveyance.** When a married woman joins with her husband, or otherwise properly executes a conveyance of lands, held by her in her own right, which purports to convey the entire estate therein, she is estopped from afterward setting up any title to such lands, whether it existed at the time of making such conveyance, or was subsequently acquired by her.[26] So, too, the deed or other contract of a married woman respecting her separate property may be reformed for mistake the same as if she were sole. Where the deed is made upon a good consideration, defects may be remedied, and the deed specifically enforced in equity.[27]

§ 245. **Continued — Acknowledgment.** The formalities attending the acknowledgment of married women's conveyances now differ in no material respect from other deeds, though formerly they involved no little circumlocution and ceremony. It was, and, in some few States, is yet, custom-

23 Price *v.* Osborn, 32 Wis. 34; Westlake *v.* Westlake, 34 Ohio St. 621; Tomlinson *v.* Matthews, 98 Ill. 178.

24 Tomlinson v. Matthews, 98 Ill. 178.

25 Huston *v.* Seeley, 27 Iowa, 183.

26 King *v.* Rea, 56 Ind. 1.

27 Knox *v.* Brady, 74 Ill. 476; Shivers *v.* Simmons, 54 Miss. 520.

ary to make a personal examination of the wife, apart from the husband, in which the contents and nature of the instrument must be made known to her, and upon such examination she is required to make a "free and voluntary" acknowledgment without "fear of compulsion," and to further state that she does not wish to retract; that she resigns her dower, waives her homestead rights, etc., and, where such is the law, courts have usually exacted a strict and literal compliance, and material departures or omissions have been held to vitiate the conveyance as a means of passing the wife's interest in the property.[28] The law long regarded the wife as under the control of the husband, and subject to his coercion. Hence, it was not expected that in his presence, and within his hearing, she would be likely to act contrary to his wishes, and therefore it required her to signify her wish or intention apart from him before the officer taking the acknowledgment. The result of this separate examination is sometimes embodied in a separate certificate, but the usual method is to state the facts in a separate clause attached to or following the general statement of acknowledgment. In all cases the statement of essential facts must be clear and explicit.

It will be seen from the foregoing that the date of execution may be an important factor in determining the validity of a married woman's deed; that during certain periods it will be valid only when the husband has joined in the execution and the certificate of acknowledgment shows a special method of authentication; that during certain other periods while the husband must still be joined yet the acknowledgment may be made as in other cases of transfer; and that in still other periods a married woman's deed is not distinguished from that of her husband, requiring no joinder and no special method of acknowledgment. These various periods will be determined by local statutory law, and both examiner and counsel must be conversant therewith.

[28] Pribble *v.* Hall, 13 Bush (Ky.), 61; Looney *v.* Adamson, 48 Tex. 619; Wright *v.* Dufield, 58 Tenn. 218; Petition of Bateman, 11 R. I. 585; Little *v.* Dodge, 32 Ark. 453; Silliman *v.* Cummins, 13 Ohio, 116.

§ 246. **Release of Dower.** The right to dower is a legal right which can not be barred, unless it has been relinquished in the manner prescribed by law,[29] and this may be accomplished either by a joinder of the wife in a conveyance by the husband, or by a separate deed of relinquishment.[30]

The release which a woman makes by joining with her husband operates against her only by estoppel and not by grant,[31] and, in the absence of any express legislative requirement to the contrary, the release will be valid and effectual without mention of her name, or of the dower, in the body of the deed. It being only an inchoate right, and not a present estate, no words of grant are necessary.[32] Nor is it necessary that there should be a consideration moving to her, and though she might insist on a consideration inuring solely to herself as a condition of such release, yet, failing to exact this, her release will be good if supported by an adequate consideration moving to the husband alone.[33] Where a wife joins with her husband in a conveyance of his lands, which is properly executed by her, is effectual and operative against him, and is not superseded or set aside as against him or his grantee, her inchoate right of dower is thereby forever extinguished for all

29 Davis *v.* McDonald, 42 Ga. 205. "A divorce from the bonds of matrimony," observes Mr. Washburn, "always defeats the right of dower, unless it be saved by the statute authorizing such divorce; for at common law, in order to entitle a widow to dower, she must have been the wife of the husband at the time his decease": 1 Wash. Real. Prop., *196, and see also Bish. Mar. & Div., § 661; 2 Black. Com. 130; 4 Kent Com. 54; Whitsell *v.* Mills, 6 Ind. 229; McCraney *v.* McCraney, 5 Iowa, 232. A reasonable provision out of the husband's estate is usually given in lieu of dower. See "Chancery Proceedings," *infra*. In some States, however, where the action is brought by the wife, for the misconduct of the husband, her right of dower continues notwithstanding the divorce. This is the rule in Illinois and several other States.

30 Sykes *v.* Sykes, 49 Miss. 190; Shepard *v.* Howard, 2 N. H. 507; Thatcher *v.* Howland, 2 Met. 41.

31 Mallony *v.* Horan, 12 Abb. (N. Y.) Pr. N. S. 289; do. 49 N. Y. 111.

32 Johnson *v.* Montgomery, 51 Ill. 185; Frost *v.* Deering, 21 Me. 156; Sterns *v.* Swift, 8 Pick. 532, but compare McFarland *v.* Febiger, 7 Ohio, 194.

33 Bailey *v.* Litten, 52 Ala. 282.

purposes.[34] The conveyance, however, must be of the freehold or fee,[35] and such as would destroy the seizin of the husband, while the right is of such a nature, when inchoate, that it can not be itself transferred by any of the instruments of conveyance in common use,[36] and can be released only to the owner of the fee, or to some one in privity with the title by his covenants of warranty.[37]

The release is often accomplished by a separate instrument of relinquishment, but as this deed acts only by way of estoppel, no particular form of words is necessary, and any apt words indicating the intent will suffice.[38] The abstract of such an instrument would consist mainly of its recitals, thus:

Clio S. Greene
to
James W. Penfold.

Release of Dower.[39]
Dated Nov. 6, 1851.
Recorded Nov. 7, 1851.
Vol. "B," page 379.

"For a valuable consideration," releases all right and claim of dower in and to a certain piece of land in the South-West fractional quarter of Section 19, Town 2 North, Range 22, East —, described in a conveyance by "my husband," Patrick P. Greene, to said James W. Penfold, and recorded in Vol. "B," page 124.

Acknowledged Nov. 6, 1851.

Whenever practicable, let the deed of relinquishment immediately follow the husband's deed, irrespective of intervening conveyances, or if to a grantee of the husband's grantee, then immediately after his deed, the object being to keep the dower interest closely associated with the fee. This method of arrangement will be highly appreciated by counsel.

[34] Elmdorf *v.* Lockwood, 57 N. Y. 322.

[35] Sykes *v.* Sykes, 49 Miss. 190.

[36] Marvin *v.* Smith, 46 N. Y. 571.

[37] La Framboise *v.* Crow, 56 Ill. 197; Reed *v.* Ash, 30 Ark. 775.

[38] Gillilan *v.* Swift, 21 N. Y. Sup. Ct. 574.

[39] Deeds of this character are more properly "Surrenders" than "Releases," but this is the name they have acquired.

§ 247. **Joint Tenancies and Tenancies in Common.** Where several persons purchase land, and advance the money in equal proportions, and take a conveyance to them and their heirs, this, at common law, is a joint tenancy; that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other.

The doctrine of survivorship, however, is not in accordance with the genius of our institutions,[40] and this incident of estates has been generally abolished in the United States, except in a few instances, while the extent of its operation has everywhere been very much restricted. Conveyances to two or more persons are now usually held to create a tenancy in common, unless the language used clearly and manifestly shows an intention to create a joint tenancy, in which event the intention may be given effect. But even where this is allowed a joint tenant, by deed, may alienate his undivided interest and his grantee will hold as a tenant in common with the others.

Tenants in common are considered as solely and severally seized; they have several and distinct freeholds, and there is no privity of estate between them.[41] They may convey and dispose of their undivided interests to a stranger and the same may be taken and sold on execution,[42] the purchaser simply taking the same position in relation to the co-tenants as was occupied by the grantor or judgment debtor;[43] but one tenant in common, owning an undivided interest, can not convey to a stranger a certain portion of the tract in common, and put the purchaser in possession of the portion conveyed,[44] unless the other tenants confirm the conveyance.[45]

§ 248. **Partition Deeds.** Where property is owned by a number of persons in common, they may, by properly executed deeds, convey to each other in severalty specific por-

40 Burnett *v.* Pratt, 22 Pick. 557.
41 Burr *v.* Mueller, 65 Ill. 258.
42 Butler *v.* Roys, 25 Mich. 53.
43 Fischer *v.* Eslaman, 68 Ill. 78.
44 Mattox *v.* Hightshue, 39 Ind. 95; Shepardson *v.* Rowland, 28 Wis. 108; Hartford, etc., Ore Co. *v.* Miller, 41 Conn. 112. Compare Barnhart *v.* Campbell, 50 Mo. 597.
45 Hartford, etc., Ore Co. *v.* Miller, 41 Conn. 112.

tions of what was formerly held jointly, and where the course of title clearly shows the origin of their property rights and the proper measure of their title, the deeds so executed are evidences of title of the highest order. This will be the case where land is held by partners, and all purchasers by deed or will in which they are specifically designated, but not always when the claim is by descent. In the latter event a proper proof of heirship is essential, and unless this appears the title is not marketable.

A partition deed is mutual, unless otherwise specified, the interchange of interests forming the consideration. In abstracting same, all the material recitals should be fully stated, and the method of division minutely described. The ordinary covenants will not, as a rule, be found, but a mutual covenant of non-claim and warranty against their own acts, and those claiming under them, is usually inserted in their place. The deed shoud be signed and acknowledged by both parties to the transaction and is presumably interchangeably delivered. A deed possessing these and other requisites might be shown in the abstract as follows:

Andrew Barlow [46] *to and with Charles Dalton.*	*Partition Deed. Dated, etc.* * * * * *

Recites, that said parties are now seized in fee simple, as tenants in common of the following described real estate [describing same], *and have agreed to make a full, just, and equal partition and division between them, of and in the aforesaid tract, of and according to their respective shares and interest therein, in manner following* [describing same].

And said Andrew Barlow gives, grants, allots, assigns, sets over, releases and confirms to said Charles Dalton the said first described piece or allotment of land, to have and to hold * * * * * * *in severalty, as his full share therein.*

[46] When the course of title is through Andrew Barlow, simply reverse the names. The next conveyance in this abstract is supposed to be from Charles Dalton.

And Charles Dalton gives, grants, etc. [describing his allotment].

And said Andrew Barlow covenants that said Charles Dalton shall freely, etc., hold and enjoy said first described piece or allotment of land without molestation, interruption, or denial of him, said Andrew Barlow, or any person claiming by, through, or under him. (And said Charles Dalton covenants the same in regard to said second described piece or allotment of land.)

Signed and acknowledged by both parties August 1, 1881.

§ 249. **Partnership Conveyances.** Lands held by several persons as partners, purchased by them with partnership funds and for partnership purposes, are regarded in a somewhat different light from lands held by an individual, or even by tenants in common in their ordinary relation, and for certain purposes may be treated as personal property. Even though the title be taken in the individual name of one or both partners, the land will, in equity, be treated as personalty so far as is necessary to pay the debts of the partnership or adjust the rights of the partners. No other or different formalities are necessary in its acquisition than those observed in the case of ordinary deeds of conveyance. Yet, though the conveyance to them is in form such as to make them tenants in common, still, in the absence of an express agreement, or of circumstances showing an intent that the estate conveyed shall be held for their separate use, it will be considered and treated in equity as vesting in them in their partnership capacity, and clothed with an implied trust that they hold it until the purposes for which it was purchased shall be accomplished, and that it shall be applied, if necessary, to the payment of the partnership debts.

Upon the dissolution of the partnership by the death of one of the partners, the survivor has an equitable lien upon such real estate for his indemnity against the debts of the firm, and for securing the balance that may be due to him from the deceased partner on settlement of the partnership accounts be-

tween them, and the widow and heirs of such deceased partner have no beneficial interest in such real estate until the surviving partner is so indemnified.[47] The legal title, it is true, is cast upon the heirs as in any other case of tenancy in common, but only becomes certain after all the debts of the firm are paid.[48] As the widow and heirs can claim only in the right of the husband and father, such derivative right in equity will extend no further in behalf of the wife and children than that of the partner from whom it is derived.[49] A surviving partner, in a proper case, may sell the real estate of the firm, and though he can not convey the legal title which passed to the heir or devisee of the deceased partner, his sale will yet invest the purchaser with the equitable ownership of all the land and the right to compel a conveyance of the title from the heir or devisee in a court of equity.[50]

Conveyances of partnership realty should be executed by each and all of the partners in the same manner as deeds by tenants in common, and it seems that a deed executed by one partner only in the name of the firm will convey only the undivided portion of the estate owned by such partner,[51] or rather only a contingent right to such part after the debts are paid, while the authorities are unanimous in declaring that a firm name, as "Jno. Smith & Co.," is not a proper legal designation either of grantor or grantee, and is effective in either case only for or against the persons specifically named.[52]

47 2 Sugd. V. and P. 427 (Perkins' notes); Dyer *v.* Clark, 5 Met. 562; Cobble *v.* Tomlinson, 50 Ind. 550.

48 Collins *v.* Warren, 29 Miss. 236; Holland *v.* Fuller, 13 Ind. 195; Shearer *v.* Shearer, 98 Mass. 111.

49 Burnside *v.* Merrick, 4 Met. 537.

50 Dupuy *v.* Leavenworth, 17 Cal. 262; Shanks *v.* Klein, 104 U. S. 18.

51 Dillon *v.* Brown, 11 Gray, 179. Nor will it render the other partners liable on the covenants: Hobson *v.* Porter, 2 Col. T. 28.

52 Arthur *v.* Webster, 22 Mo. 378; Winter *v.* Stock, 29 Cal. 407; Gossett *v.* Kent, 19 Ark. 607; Barnett *v.* Lachman, 12 Nev. 361. A sealed instrument (deed or other specialty), executed by one partner in the name of the firm, may be treated as the deed of all the partners, upon proof that prior to the execution the others had authorized him to execute the instrument, and after execution, with full knowledge, acquiesced in what he had done: Gibson *v.* Warden, 14 Wall. (U. S.) 244; Cady *v.* Shepard, 11 Pick.

§ 250. **Corporate Conveyances.** There are three classes of corporations recognized by our laws: Public municipal corporations, corporations technically private, but of a *quasi* public character, as railroads, etc., and corporations strictly private, all of whom, under general or special conditions, have the power to acquire, hold, and transmit the title to land. Though regarded in law as persons for certain purposes, they are not entitled to the privileges of citizens,[53] as guaranteed by the Federal Constitution, neither in the State of their creation, nor in other States which they may enter for the purpose of business. Their right to acquire and transmit property is a statutory one in the home State, and in a foreign State is based upon the comity between the States. In the latter case it is a voluntary act of grace of the sovereign power,[54] and is inadmissible when contrary to its policy or prejudicial to its interests.[55]

A corporation has only such powers as its charter gives it, either expressly, or as incident to its existence, and in determining whether a given act is within the power of a corporation, it is necessary to consider, first, whether the act falls within the powers expressly enumerated in the charter or defined by law; and second, whether it is necessary to the exercise of one of the enumerated powers,[56] and these apply both

(Mass.) 400; Peine *v.* Weber, 47 Ill. 45; the difficulties attending such proof will be readily seen, however, and while by no means insurmountable they are of such a nature as to make it almost imperative on counsel to demand that the title be assured by a better deed.

53 Although a corporation is not a citizen within the several provisions of the Constitution, yet where rights of action are to be enforced by or against a corporation, it will be considered as a citizen of the State where it was created: Railway Co. *v.* Whitton, 13 Wall. 270. This, however, applies more particularly to controversies in the Federal Courts.

54 Ducat *v.* Chicago, 48 Ill. 172; Ins. Co. *v.* Commonwealth, 5 Bush (Ky.), 68; State *v.* Fosdick, 21 La. Ann. 434.

55 Carroll *v.* East St. Louis, 67 Ill. 568.

56 Vandall *v.* Dock Co., 40 Cal. 83; Pullan *v.* R. R. Co., 4 Biss. 35; Weckler *v.* Bank, 42 Md. 581; Matthews *v.* Skinner, 62 Mo. 329. In determining whether a corporation can make a particular contract, it must be considered whether its charter, or some statute binding upon it, forbids or permits it to

to the acquisition and transfer of real property.[57] Land which a corporation can not hold in its own name it can not hold in the name of another, and when a corporation can not hold the legal title to land, it can not take a beneficial interest in it.[58]

It would seem, therefore, that the organic act, or some portion thereof, should supplement every conveyance purporting to pass title to a corporation as constituting one of the strongest assurances of the validity of subsequent conveyances,[59] but in practice this is seldom done, though the authority to make a deed frequently constitutes one of the recitals in conveyances from corporations. As corporations are now almost universally organized under general laws, which define their powers in this respect,[60] the matter presents fewer intricacies than formerly, yet as a rule, whenever the title under examination passes through a corporation, and the deeds furnish no internal evidence to demonstrate their validity, a requisition should be made by the examining counsel for such information as, in his opinion, may be necessary to show same.

make such a contract; and, if the charter and valid statutory law are silent upon the subject, whether the power to make such a contract may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfill the purpose of its existence, or whether the contract is entirely foreign to that purpose: Weckler *v.* Bank, 42 Md. 581; Watson *v.* Water Co., 36 N. J. L. 195.

57 Franco-Texan Land Co. v. McCormick, 85 Tex. 416.

58 Coleman *v.* R. R. Co., 49 Cal. 517.

59 At the present time corporations are organized under general laws which define their powers and capacities. Hence, in the case of modern corporations no difficulty will usually be experienced in determining questions of capacity. The suggestion of the text applies more particularly to corporations organized during the period when special legislation of this kind was permitted. In the case of domestic corporations the published volumes of private and local laws will supply the desired information. In case of foreign corporations a requisition for further information will often become necessary.

60 The filing of articles of incorporation in one of the county offices and with the Secretary of State is now the usual manner of organizing corporations. The law and the articles so filed, taken together, are considered in the nature of a grant from the State, and constitute the

§ 251. **Statutes of Mortmain.** The common law right of corporations to take and hold real estate has been restrained in England from an early day, by a series of laws called statutes of mortmain, which were passed to repress the grasping spirit of the church which, it was claimed, was absorbing in perpetuity the best lands in the kingdom.[61] "They were called statutes of mortmain," observes an eminent writer, "because designed to prevent the holding of lands by the *dead clutch* of ecclesiastical corporations, which in early times were composed of members dead in law, and in whose possession property was forever dead and unproductive to the feudal superior and the public." [62] This system of restraint, though originally confined to religious corporations was subsequently extended to civil or lay corporations.

The English statutes of mortmain, though they have been held in some of the States to be the law, so far as applicable to present political conditions, have not been re-enacted in this country; yet the policy has been retained and is manifest in the general and special enactments of every State. To prevent monopolies, and to confine the action of incorporated companies strictly within their proper sphere, the acts incorporating them almost invariably limit not only the amount of property they shall hold, but frequently prescribe in what it shall consist, the purposes for which it shall alone be purchased and held, and the mode in which it shall be applied to effect those purposes. Special legislation for corporations, in most of the States, has been abolished, and companies are incorporated under general laws of uniform application, but the policy above outlined is still vigorously maintained.

§ 252. **Power of Acquisition — User.** There is a broad distinction between the power of acquisition of property and the use to which it is to be applied, and the effect of

charter of the company: Abbott *v.* Smelting Co., 4 Neb. 416; Mining Co. *v.* Herkimer, 46 Ind. 142; Whetstone *v.* Ottawa University, 13 Kan. 320; Hunt *v.* Bridge Co., 11 Kan. 412; State *v.* Leffingwell, 54 Mo. 458.

61 1 Black Com. 479.

62 Ang. & Ames on Corp., § 148; 3 Co. Lit. 2 b.; 1 Black Com. 479.

the distinction upon the rights of third persons is equally marked. Where the charter of a corporation, or the general law under which it is organized, prohibits the purchase of lands for any purpose, a deed to it would be an utter nullity, as its capacity to take is determined by the instrument or act which gave it existence;[63] but, having the power to purchase and take, though for a specific purpose only, it becomes fully invested with title by a deed properly executed, even though the property be acquired and used for a purpose forbidden by the organic act.[64] As a rule, deeds to and from corporations are effective to convey the title to the lands therein described, and titles so derived can not be impeached collaterally, nor their validity be questioned by third persons, on the ground that the transaction was beyond the corporate power; for where a corporation exceeds its powers, the remedy is by a direct action in the name of the State,[65] who alone can interfere.[66] Parties dealing with corporations are chargeable, however, with notice of the limitations imposed by the charter upon their powers.[67]

§ 253. **Municipal Corporations.** Municipal corporations are creatures of the statute, and can exercise only such powers as are expressly conferred, or such as arise by implication from general powers granted. Where the charter empowers a municipal corporation to buy and hold real property,

63 Leazure *v.* Hillegas, 7 S. & R. (Pa.) 319. Yet whether real estate has been acquired in excess of the corporate powers to take and hold can not be made a question by any party, except the State, who alone must assert her policy in that regard: Alexander *v.* Tolleston Club, 110 Ill. 65; Baker *v.* Neff, 73 Ind. 68.

64 Hough *v.* Land Co., 73 Ill. 23.

65 Smith *v.* Sheeley, 12 Wall. 358; Kelly *v.* Transportation Co., 3 Oreg. 189; Conn., etc., Ins. Co. *v.* Smith, 117 Mo. 261. The only exception to the rule which prohibits attack by private suitors on conveyances or other unauthorized acts of a corporation is where such attack is authorized by express legislative permission. See, Martindale *v.* R. R. Co., 60 Mo. 508; Bank *v.* Mathews, 98 U. S. 621.

66 DeCamp *v.* Dobbins, 29 N. J. Eq. 36; Hayward *v.* Davidson, 41 Ind. 214. The doctrine of *ultra vires* is generally applied only to such contracts as remain wholly executory: Thompson *v.* Lambart, 44 Iowa, 239.

67 Franklin Co. *v.* Lewiston Inst. for Savings, 68 Me. 43.

it must be understood to be purchases made in the ordinary way, and for corporate purposes only; and a grant to purchase for particular purposes would seem to be a limitation on the power of such corporations, and to exclude, by necessary implication, all purchases for mere speculation and profit. "Power to purchase for speculative purposes," says Scott, J., "is not among the usual powers bestowed on municipal corporations, nor does such power arise, by implication, from any of the ordinary powers conferred on such corporations." [68]

Municipal corporations, under a general grant of power to buy and hold land, may purchase, within the corporate limits, such property as may be necessary for corporate purposes, and may even buy and hold land beyond the corporate limits, for the location of cemeteries, pest houses, drainage, etc.,[69] but in the absence of any enabling statute, can not become the purchaser of lands or lots at a tax sale, and on compliance with the statute in that regard obtain a deed that will invest such corporations with the title to the property.[70]

Deeds by a municipal corporation stand upon a somewhat different footing from private corporations generally, and for their proper proof it is necessary that the authority for their execution should also appear.[71] This authorization will usually take the form of a resolution by the municipal legislature. The resolution should always appear in the abstract in connection with the deed made pursuant thereto. Practical examples will be given further on.

§ 254. **Conveyances to Corporations.** By common law, and in the absence of statutory prohibitions, corporations aggregate,[72] in whatever manner created, can take, like nat-

[68] City of Champaign *v.* Harmon, 98 Ill. 491; and see 2 Dill. Mun. Corp., § 433.

[69] 2 Dill. Mun. Corp., § 435. The general rule is that municipal corporations can not purchase or hold real estate beyond their territorial limits, unless this power is conferred by the legislature: 2 Dill. Mun. Corp. § 435; and see Denton *v.* Jackson, 2 Johns. Ch. 336; Chambers *v.* St. Louis, 29 Mo. 543.

[70] City of Champaign *v.* Harmon, 98 Ill. 491.

[71] Ward *v.* Lumber Co., 70 Wis. 445.

[72] Corporations sole, though comparatively common in England, are

ural persons, by every method of conveyance known to the law.[73] No particular words of grant are necessary, other than those in common use in conveyances to natural persons, though it is usual to insert, as a word of limitation, the term "successors." The word is not necessary, however, to convey a fee, independent of the statute which provides for a fee, for, admitting that such a grant is strictly only a life estate, yet as a corporation, unless of limited duration, never dies, such estate for life is perpetual, or an equivalent to a fee simple, and therefore the law allows it to be one.[74]

As between the parties, where the corporation is authorized by its charter or the law under which it is organized, to purchase land, receive conveyances thereof, and hold title to the same, but is prohibited from purchasing and holding for any other than a prescribed purpose, the question of the validity of the title conveyed can not be inquired into. The title vests in the corporation by a deed duly executed, and the question as to whether the corporation has exceeded its power can be raised only by the State or by a stockholder.[75] A distinction must, however, be observed between the power of acquisition and the use to which the land is to be applied, but, as a general rule, a proper and legitimate purpose is always presumed on the part of a corporation in accepting a conveyance of land.[76]

§ 255. **Conveyances by Corporations.** All private corporations have an incidental right to alien or dispose of their lands, without limitation as to objects, unless restrained by the act of incorporaton, or by statute; and the power to mortgage,

seldom created in the United States. The general laws for the organization of corporations all provide for a number of corporators. But, under former laws instances of sole corporations will be found. Thus, "The Catholic Bishop of Chicago" is a corporation sole by virtue of a special act of Legislature."

73 Am. Bible Society *v.* Sherwood, 4 Abb. (N. Y.) App. 227; Ang. & Ames on Corp. 140.

74 Ang. & Ames on Corp. 141; 2 Blk. Com. 109; Overseers *v.* Sears, 22 Pick. 122; Congregational Society *v.* Stark, 34 Vt. 243.

75 Hough *v.* Land Co., 73 Ill. 23; Smith *v.* Sheeley, 12 Wall. 358; Baker *v.* Neff, 73 Ind. 68; Kelly *v.* Transportation Co., 3 Oreg. 189.

76 Life Ins. Co. *v.* Smith, 117 Mo. 261.

when not expressly given or denied, will be regarded as an incident to the power to acquire and hold land, and to make contracts concerning same.[77] In general, they convey their land in the same manner as individuals, the laws relating to the transfer of property being equally applicable to both,[78] and the only features that particularly distinguish this class of conveyances from individual deeds are in the execution and acknowledgment.

The orderly parts of the deed follow closely the ordinary deeds in common use, the full name of the corporation appearing in the premises as the grantor, while the body of the deed frequently contains a recital showing the inducement of the instrument and the authority for its issuance. The execution, in most of the States, is regulated by express statute which provides for a specific method of signing and sealing and sometimes for acknowledgment as well. The seal is usually indispensable to a perfect execution and its absence is a defect that calls for notice. "A corporation," says Blackstone, "being an invisible body, can not manifest its intentions by any personal act or discourse; it therefore acts and speaks by its common seal. For, though the particular members may express their private consents to any act, by words or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole."[79] This is now true, however, only in a very limited sense, as corporations do contract by officers and agents without the use of the seal, but in the conveyance of land the rule is still maintained, and the deed of a corporation without the corporate seal is inadmissible in evidence unless the authority of the officers executing it is shown. A mere recital of such authority in the deed is not sufficient for this purpose.[80] The seal must be the common seal of the body, either originally or by adoption, and must be affixed by competent authority.[81]

77 Agricultural Society *v.* Paddock, 80 Ill. 263.

78 Ang. & Ames on Corp. § 193.

79 1 Bl. Com. 475.

80 Gashwiler *v.* Willis, 33 Cal. 11.

81 Jackson *v.* Campbell, 5 Wend.

Whatever light the instrument sheds upon itself by way of recital or otherwise should always be stated, either literally or with little deviation from the original, the literal transcriptions being indicated by quotation marks. Here follows an example of an abstract of a simple deed by a corporation:

South Park Commissioners, a public corporation existing under and by virtue of the laws of Illinois,
to
William Thomas.
Doc. 128,288.

Quitclaim deed.
Dated Aug. 1, 1880.
Recorded Aug. 10, 1880.
Book 120, page 540.
Consideration $100.00.
Conveys and quitclaims all interest said corporation acquired or derived under, through, or by virtue of a certain tax sale deed to said corporation by the County Clerk of Cook County, Illinois, dated June 1, 1879, and recorded in Book 85 of Records, page 640, in and to the following described real estate, situated in said Cook County, to wit: [Here follows the description.] *Said interest acquired being a tax claim covering the 1st, 2d, 3d, 4th, 5th, 6th, 7th and 8th installments of the South Park Special Assessment.*

"In witness whereof, said corporation hath caused this indenture to be signed by its President and attested by its Secretary, and its official seal to be hereto affixed."

Signed:
"J. R. WALSH, President.
Attest:
"H. W. HARMON, Secretary."

Acknowledged by said President and Secretary as the free and voluntary act of said South Park Commissioners.

Certificate of acknowledgment dated Aug. 1, 1880.

572. The seal is itself *prima facie* evidence that it was affixed by proper authority: Solomon's Lodge *v.* Montmallin, 58 Ga. 547; Bank *v.* Kortright, 22 Wend. 348; Reed *v.* Bradley, 17 Ill. 321; Flint *v.* Clinton Co., 12 N. H. 434.

§ 256. **Continued — Execution — Acknowledgment.** In the preceding example, it will be observed that the execution and accompanying recitals are quoted, and this practice is recommended as being conducive of greater certainty, and as presenting an answer to every question that can arise. The mode of execution of corporate conveyances is usually prescribed by statute, and ordinarily consists of the signature of the president or corresponding officer who subscribes as such officer, and the affixing of the corporate seal. In addition to this, even when not required by statute, it is customary for the secretary or person having the custody of the seal to attest the same under his hand. Whatever may be the law, a full exemplification of the execution will present all the questions that can arise under it. The seal, when shown of record, should be copied or described, and its absence specifically noted as a serious defect. It does not seem, however, that it is necessary that the record should contain a *fac simile* of the corporate seal.[82]

The seal of a corporation, when affixed to any deed or contract by proper authority,[83] is not distinguishable in its legal effect from that of an individual, and renders the instrument a specialty.[84] It is the highest evidence of assent, and was formerly the only requisite necessary to bind the corporation. In some of the States, the deed must be signed with the name as well as sealed with the seal of the corporation.[85]

Where the execution conforms to the law of the State where the land conveyed is situate, no questions will probably arise.

82 See, Anthony *v.* Bank, 93 Ill. 225.

83 When the deed is shown to have been duly executed by one having authority, proof that the seal affixed is the corporate seal is unnecessary; Phillips *v.* Coffee, 17 Ill. 154.

84 Clark *v.* Manf. Co. of Benton, 15 Wend. 256; Benoist *v.* Carondelet, 8 Mo. 250. In the absence of the common seal, or of proofs of facts whence the authority of the officers of a corporation to execute a conveyance may be inferred, such authority can only be established by resolution of the directors or trustees entered in the proper book of the corporation: Southern Cal. Colony Assoc. *v.* Bustamente, 52 Cal. 192.

85 Isham *v.* Bennington Iron Co., 19 Vt. 251.

Where it does not so conform, recourse must be had by counsel, in the absence of other evidences of conformity, to the law of the State where the conveyance was executed, or where the "home office" is located. Appended matter, showing authority, conformity, etc., should as a rule, be fully presented. Where several officers sign, an acknowledgment by one only in behalf of the corporation is sufficient.[86] But, in any case, the persons appearing must acknowledge as officers and not as individuals; failing in this the acknowledgment will be fatally defective.[87]

In the absence of statutory provisions to the contrary, where a deed, purporting to be the deed of the corporation, is signed by its officers, as such officers, and has the corporate seal affixed, it is admissible in evidence as a deed of the corporation, and is itself presumptive evidence of the regular and duly authorized execution of same.[88] The following is a good example of an abstract of execution, acknowledgment, and appendant matter:

"In witness whereof the said Union Mutual Life Insurance Company hath caused its Corporate Seal to be hereunto affixed, and these presents to be subscribed by John E. De Witt, its President, duly authorized by vote of the Finance Committee of the Board of Directors of said Corporation,[89] *a certificate of which is hereto attached," etc.*

86 Merrill *v.* Montgomery, 25 Mich. 73. "The officer of the corporation intrusted with its common seal, and who subscribes his name to the deed as the evidence that he is the person who has affixed the common seal to the same, stands also in the character of a subscribing witness to the execution of the deed by the corporation; and may be examined by the officer taking the proof to prove that the seal affixed by him is the common seal of the corporation, whose deed the conveyance or instrument to which it is affixed purports to be." Willard's Conveyancing, 393; Lovett *v.* Steam Mill Association, 6 Paige, 60; Johnson *v.* Bush, 3 Barb. Ch. 207.

87 Bernhart *v.* Brown, 122 N. C. 587.

88 Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543; Sawyer *v.* Cox, 63 Ill. 130; Solomon's Lodge *v.* Montmallin, 58 Ga. 547.

89 A purchaser of land from a corporation, being a stranger to the corporation, is not bound to know that there is a by-law of the com-

Signed:

"UNION MUTUAL LIFE INSURANCE COMPANY,

"By JOHN E. De WITT,[90]
President."

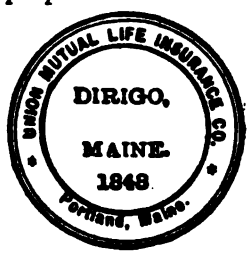
Acknowledged by said President as his free and voluntary act and deed, and as the act and deed of said Company.

Certificate of acknowledgment dated August 10, 1883.

APPENDED IS

Extract from Article 9 of the By-Laws of the Union Mutual Life Insurance Company:

"The Finance Committee may authorize the foreclosure of mortgages in any manner provided by the laws of the State or country in which the mortgage property is situated and may direct the sale of any real estate held by the Company, or in trust for the Company; and when they shall direct any such sale of property held by the Company, the President, and in his absence the Vice President, is authorized to execute the proper instrument of conveyance."



Attest:

JAMES SIMMONS,
Secretary.

pany requiring an order of the board of directors to authorize a sale of land owned by the company. The rule is the same where a purchaser receives a bond from a corporation for a deed for land purchased, and he will be entitled to the deed according to the provisions of the bond, notwithstanding there was no order of the board of directors authorizing the sale: Wait v. Smith, 92 Ill. 385.

[90] It is presumed, when the common seal of a corporation is affixed

At a meeting of the Finance Committee of the Board of Directors of the Union Mutual Life Insurance Company, held on August 10, 1883, the foregoing Deed was approved, and the President directed to execute, acknowledge and deliver the same.

Attest: *JAMES SIMMONS,*
Secretary of the Finance Committee.

As a general rule the president of a corporation has power to bind it, within the scope of its powers, and as its rules and by-laws are not usually open to public inspection, particularly where the home office is in a distant State, such rules and by-laws can have no appreciable effect upon persons having no knowledge of their existence; and notwithstanding such officer may have no power to make contracts or conveyances under the private rules and regulations of the corporation, yet, as to strangers, without notice, it will be estopped to deny the power of its officers to perform the specific acts.[91] As a matter of safety, however, where no authority specifically appears from the instrument itself or matter appended thereto, a requisition should be made for further information.

§ 257. **Acts of Officers in Excess of Charter Powers.** The observations of the foregoing section suggest another thought before leaving this branch of our subject. It must always be borne in mind, in construing deeds of the character now under consideration, that a corporation is not vested with the capacities of a natural person, but only such as its charter confers,[92] and that acts done in excess of the power so conferred are void, in the sense that they can have no effect to divest the corporation of any right in or to property belonging to it.[93] Every person attempting to contract with a corpora-

to an instrument together with the signatures of the proper officers, that such officers did not exceed their authority: Kansas *v.* R. R. Co., 77 Mo. 185; Mullanphy Savings Bank *v.* Schott, 135 Ill. 655.

91 Life Ins. Co. *v.* White, 106 Ill. 67.

92 Davis *v.* R. R. Co., 131 Mass. 259.

93 Martin *v.* R. R. Co., 8 Fla. 370; Franco-Texan Land Co. *v.* McCormick, 85 Tex. 416.

tion must, at his peril, take notice of the legal limits of its capacity and of the powers conferred upon it by its charter.[94] If the officers of a corporation have no power under the charter to make conveyances, or, having such power, can only convey for special purposes, a deed showing such excess of power would not be binding on the corporation and all persons claiming through or under such deed would be affected with notice of every fact therein recited.[95]

But, if a corporation has power to make conveyances for a stated purpose, and its officers execute a deed reciting compliance with its charter powers, then, notwithstanding the recital may be false, a person ignorant of its falsity would probably take as an innocent purchaser and be protected. In such a case, as the conveyance would be within the apparent power of the agents of the corporation the person receiving such deed, or one claiming under him, would be entitled to rely upon the express, or even the implied, representation that the facts existed which empowered them to execute the deed.[96]

§ 258. **Record of Seal.** In all the examples given in this chapter, the seals have been shown as they were appended to the original instruments, but not infrequently the defects of the record will render this impossible. Where the seal has not been recorded, but only alluded to, the suggestion, as made upon the record, should be shown as it appears, thus:

Seal is recorded, "Corporate Seal."

Or should the record merely disclose a scrawl, then the scrawl may be shown with accompanying words, if any. In recording an instrument purporting to be executed by a corporation, in the absence of statutory requirements to the contrary, the corporate seal, if attached thereto, may, it seems, be represented

94 Elevator Co. *v.* R. R. Co., 85 Tenn. 703.

95 Jemison *v.* Bank, 122 N. Y. 135; Franco-Texan Land Co. *v.* McCormick, 85 Tex. 416. In this case the corporation had power to sell its lands for cash. It did not sell for cash but exchanged them for personal property, notes and bonds, which fact was recited in the deed. *Held*, that the deed was void upon its face.

96 Franco-Texan Land Co. *v.* McCormick, 85 Tex. 416.

by a scrawl, a *fac simile* of the seal or device not being absolutely necessary.[97]

§ 259. **Conveyances by Incorporated Religious Societies.** The class of corporate conveyances to which allusion has been made in the preceding paragraphs are those executed by public corporations or private corporations organized for business purposes. There remains, however, another class of private corporations which occupy, so far as regards their legal corporate existence, a peculiar position in commercial circles, and these are incorporated religious and kindred societies not organized for pecuniary gain. The legal title to the property held by these societies in their corporate capacity is usually vested in trustees, and conveyances by such societies are effected through the media of these trustees. More than ordinary care should be observed in abstracting such conveyances, and a number of the incidents that do not call for explicit mention in other deeds, must, in this class of instruments, be set out in full. The method of conveyance, if pointed out or prescribed by the statute, is of the essence of the deed, and where the abstract does not disclose a statutory compliance, it should be sent back to the examiner for further investigation.

The sufficiency of a deed of this kind under the statute of Illinois — and the same requisites are essential in all other States whose statutes have been examined — requires that the individual names of the trustees should be inserted as grantors, with the addition of words descriptive of the character in which they act. The granting clause should witness that the said grantors, as trustees of, for, and by the direction of, the society for which they purport to act, for the consideration, do grant, bargain, etc. The attestation clause should be, that the said first parties, as such trustees, "have hereunto set their hands and seals," or their official style should be added to their signatures, and the instrument should be acknowledged by the individuals in their proper character as trustees.[98]

§ 260. **Heirs at Law.** The unsatisfactory character of

[97] Illinois, etc., R. R. *v.* Johnson, 40 Ill. 35.

[98] Lombard *v.* Sinai Congregation, 64 Ill. 477.

conveyances purporting to be made by the heirs at law of a deceased person has already been shown. The recital in a deed that the parties making it are the heirs at law of a former owner is no evidence of the fact recited, except as against the parties to the deed and their privies. Where the abstract furnishes no information, other than that contained in the deed, to prove the character of the parties, death of the ancestor, etc., a requisition should always be made by counsel for further information, which, unless a probate is had, usually consists of affidavits in support of the facts, made by persons who are supposed to be cognizant of them.[99]

On the other hand, grave questions may arise from conveyances by third persons made in derogation of the rights of heirs. Particularly will this be the case where said rights consist only of equities. Matters of this kind may not be disclosed by the abstract, yet will readily appear by inquiries *in pais*. For this reason counsel should always direct the attention of clients to the actual occupation of the land and the rights of the persons in possession, if any. The possession of land by a person at the time of his death is *prima facie* evidence of ownership at the time, and a subsequent purchaser of the legal title will be conclusively presumed to know that whatever rights such deceased person had in the land, not disposed of by will,[1] and of an inheritable character, devolved on his heirs, and his possession being constructive notice of his rights at the time of his death, it becomes the duty of such purchaser to make all necessary inquiries to ascertain the extent of the interest of such heirs.[2]

§ 261. **Post Obit Conveyances.** The conveyance by an heir apparent of his expectancy in land owned by his living

99 Yahoola, etc., Mining Co. *v.* Irby, 40 Ga. 479. For a precedent of an affidavit of this kind see chap. 30.

1 See "Descents," *infra*.

2 The above rule was applied in a case where a person holding a bond for a deed died, and his widow upon payment of the sum due on the land, procured the legal title to be made to her, and then conveyed same to a third person, who had notice of the equitable title of the heirs. McVey *v.* McQuality, 97 Ill. 93.

ancestor, which would descend to him if he survived his ancestor, and the latter should die intestate owning the same, is a conveyance of a mere naked possibility not coupled with an interest and passes no estate or interest in the land. Such a title can not operate to defeat the grantor's own title afterward acquired by descent, except by way of estoppel, and, if the deed was without warranty, such grantor is not precluded from asserting an after-acquired title.[3] But where a conveyance of this character is made with covenants of warranty, it will operate to pass the title by estoppel if the land descends to the heir.[4]

§ 262. **Conveyances by Delegated Authority.** Every deed executed by virtue and in pursuance of a power should bear upon its face a recital of authority, but deeds purporting to be the direct act of the grantor though performed by an attorney in fact are sufficiently formal if the execution and authentication affirmatively show the fact. It is therefore recommended that the description of the parties grantor should, in all cases of delegated authority, be taken from the execution and not from the premises, which as a rule, does not, and as a matter of correct form, should not, show the vicarious act. The recital of acknowledgment should also be drawn to show the substitution of persons. Aside from these two points the abstract of a deed executed by an attorney in fact differs in no material respect from one executed by the grantor *in personam*. The points mentioned may be shown in this manner:

John Smith, by William Strong, his attorney in fact, to James Robinson.	*Warranty Deed. Dated, etc.*
	* * * * *
	* * * * *

[3] Hart *v.* Gregg, 32 Ohio St. 502; Boynton *v.* Hubbard, 7 Mass. 112. In this case a covenant was made by an heir to convey, on the death of his ancestor, if he should survive him, a certain undivided part of what should come to him by descent, and same was held to be void at law as well as in equity.

[4] Rosenthal *v.* Mayhugh, 33 Ohio St. 158; Bohon *v.* Bohon, 78 Ky. 408.

Acknowledged June 1, 1882, by William Strong, as the act and deed of said John Smith.

If desired, however, the abstract of the deed may be made in the usual manner, the caption reciting the name of the grantor as found in the premises. In such case the execution may be shown as follows:

Said grantor signs and acknowledges by William Strong, his attorney in fact.

Erroneous or imperfect execution or acknowledgment must be indicated in the manner already pointed out. The instrument is properly and legally executed if it bears the name (signature) and seal of the grantor, showing the procurement of the attorney and purporting to be the act of the principal; but in making the acknowledgment, the attorney, being the person who actually executes the instrument, must acknowledge it; yet this he does as and for his principal.

As to what constitutes a proper signing there is some conflict of authority, the earlier cases holding it to be immaterial whether the attorney sign "A, attorney for B,' or "B, by his attorney A," [5] on the theory that no particular form of words is necessary to bind the principal, provided the agency of the attorney appears from the deed itself.[6] It is now well established, however, that a conveyance made by an attorney must be in the name of the principal, and purport to be executed by him,[7] and where the agent assumes either to grant or to execute, as where he signs and seals, although describing his office, the deed will be void as to the principal.[8] It has also

[5] Jones *v.* Carter, 4 Hen. & M. 184; Montgomery *v.* Dorion, 7 N. H. 475; Wilkes *v.* Back, 2 East, 142.

[6] Magill *v.* Hinsdale, 6 Conn. 464; Worrall *v.* Munn, 1 Seld. 229.

[7] Pensonneau *v.* Bleakley, 14 Ill. 15; Elwell *v.* Shaw, 16 Mass. 42; Thurman *v.* Cameron, 24 Wend. (N. Y.) 90; Stinchfield *v.* Little, 1 Me. 231; Hale *v.* Woods, 10 N. H. 470. Less strictness is required where the instrument is not under seal, it being sufficient, in such case, if the intent to bind the principal appears in any part of the instrument: Townsend *v.* Hubbard, 4 Hill (N. Y.), 351.

[8] Fowler *v.* Shearer, 7 Mass. 14; State *v.* Jennings, 10 Ark. 428; McDonald *v.* Bear River Co., 13 Cal. 235; and this, even though in the

been held that signing the principal's name, but making no mention of the attorney, is not a valid execution.[9] It would seem, therefore, that in all conveyances by attorneys in fact, both the name of the principal and of the attorney must substantially appear in the execution of the deed, showing not only that the grant and seal are those of the principal, but by whom these acts are done;[10] and where there are two grantors, and one of them acts as the attorney in fact of the other, he must subscribe his name twice, once as attorney in fact for the other, and once for himself. One signature and a second seal is not equal to a second subscription.[11]

It is not necessary, however, that any particular form of words should be used to render the instrument valid and binding upon the principal, provided it shows upon its face that it was intended to be executed as the deed of the principal, and that the seal affixed is his seal and not that of the attorney; and it has been held, that where a deed is executed for several parties, it is not necessary to affix a separate and distinct seal for each signature if it appears that the seal affixed was intended to be adopted as the seal of each of the parties.[12]

§ 263. **Powers of Attorney.** Immediately following the abstract of every deed purporting to have been made by the procurement of an attorney in fact, should appear the warrant or power which authorized the act; for an unauthorized deed would be void for all purposes, and the proof of this power can only be shown by an instrument executed with all the formalities necessary to a valid deed of conveyance.[13] The instrument usually recites the scope of the attorney's powers, yet

body of the instrument it is stated that it is the agreement of the principal by his attorney, and that the principal covenants, etc., while in the testimonium clause it is alleged that A. B. (the agent), as the attorney of the principal, has set his hand and seal: Townsend *v.* Corning, 23 Wend. 435.

9 Wood *v.* Goodridge, 6 Cush. 117.

10 See 3 Wash. Real Prop., *573, and cases cited.

11 Meagher *v.* Thompson, 49 Cal. 189.

12 Townsend *v.* Hubbard, 4 Hill (N. Y.), 351.

13 Fire Ins. Co. *v.* Doll, 35 Md. 89; Watson *v.* Sherman, 84 Ill. 263; Clark *v.* Graham, 6 Wheat. (U. S.) 577; Videau *v.* Griffin, 21 Cal. 389.

even where it is deficient in some particular, others, which are necessary to the proper exercise of the powers expressly enumerated, will be implied as incidental thereto; as, where a power is expressly given to sell or lease the property of the principal, a power to contract to sell, as well as to convey and transfer, will be implied.[14] The usual rule, however, is to construe instruments of this kind strictly; hence, a power to "sell and convey," will not be extended by interpretation to include a power to mortgage, or otherwise to dispose of the property than by a sale and conveyance.[15]

The right of revocation is, as a rule, always reserved, but this is a right incident to the power given, and a principal may always revoke the authority of his agent at his mere pleasure without a reservation of such express right, or even though the power may be expressly declared to be irrevocable.[16] The only exceptions to this rule are when the authority or power is coupled with an interest or where it is given for a valuable consideration, or where it is part of a security, in all of which cases it is irrevocable, whether so expressed or not.[17]

As before remarked, powers of attorney must be strictly construed, yet the rule does not require a construction that will defeat the manifest intention of the parties, and where such intention fairly appears from the language used, it must prevail,[18] but the authority can not be extended beyond that which is clearly given in terms, or which is necessary and proper for carrying the authority given into full execution.[19] In this respect there is a marked difference as compared with powers

14 Hemstreet *v.* Burdick, 90 Ill. 444.

15 Minnesota, etc., Co. *v.* McCrossen, 110 Wis. 316; Colesburg *v.* Dart, 61 Ga. 620; Hawxhurst *v.* Rathgeb, 119 Cal. 531.

16 Walker *v.* Denison, 86 Ill. 142; Brown *v.* Pforr, 38 Cal. 550.

17 Walker *v.* Denison, 86 Ill. 142; Gilbert *v.* Holmes, 64 Ill. 548; Brown *v.* Pforr, 38 Cal. 550.

18 Hemstreet *v.* Burdick, 90 Ill. 444.

19 Pool *v.* Potter, 63 Ill. 533. Hoyt *v.* Jaques, 129 Mass. 286; Gilbert *v.* How, 45 Minn. 121. Thus, a power of attorney jointly executed by husband and wife for the sale of all their property, and in which the words, "we" "ours," etc., are exclusively used, has been held insufficient to authorize a sale of

of appointment created by deeds and wills, and powers introduced in connection with uses.

The formal requisites to be observed, apart from such as are incident to all sealed instruments, are the constituent words, which are "make, constitute and appoint;" the powers delegated; the reservation of the right of revocation, and the power of substitution, if any is given.[20] The recital of the power always calls for minuteness in transcription, and when coupled with an interest or created upon a valuable consideration, it should be rendered with literal fidelity. The arrangement of the synopsis is much the same as other grants. An example is appended:

John Smith, *to* *William Strong.*	*Power of Attorney.* *Dated, etc.* * * * * *

First party makes, constitutes and appoints second party his true and lawful attorney, for him and in his name, place and stead, to [here follows the special purpose of the power, literally rendered].

Full power of substitution and revocation.

Acknowledged, etc.

An unexecuted power, if still subsisting, should, as a rule, be set out in full, though many examiners show such instruments only by way of note. This latter method may be resorted to with propriety only in a few instances, and unless there has been an implied revocation, as where the constituent

the individual property of either, or at least in the absence of proof of the non-existence of joint property: Dodge *v.* Hopkins, 14 Wis. 630.

[20] Where the authority of the attorney is to execute deeds of conveyance the power, as a rule, cannot be delegated. Where it relates to other matters it is often permitted to be exercised by persons whom the attorney may appoint or substitute for himself and to such persons the attorney may entrust the same or more limited powers as are given to him by the principal. If the letters contain no powers of substitution this cannot be done.

has afterward made conveyance himself, or where there has been an expiration by limitation, or some other circumstance of like character, such a course is not recommended. The following will serve to illustrate the method:

NOTE.— *In Book 20, page 168, we find recorded a power of attorney from Thomas J. Walsh to Austin Bierbower, authorizing him to sell and convey the North East quarter of Section 13, aforesaid (and other property), but as no action (appearing of record) has been had under said power (as regards the premises in question) we do not show it herein.*

§ 264. **Revocations.** The recall of a power or authority conferred, or the vacating of an instrument previously made, is called a *revocation.*[21] A power of attorney may be revoked in a variety of ways; as by the death of the principal, which operates as a revocation of every power uncoupled with an interest;[22] the marriage of the principal, the power having been given while he was a single man;[23] an adjudication in bankruptcy; or a conveyance by the principal of the subject-matter of the power before the agent has had an opportunity to dispose of it.[24] But the giving of a second power to another agent, without specially revoking the first, would not act as a revocation, and if either power is executed, both will be exhausted.[25] In the foregoing instances the revocation occurs by operation of law. The principal may revoke by a special instrument of revocation, which, when recorded with the power, will operate as constructive notice of such fact. An unexercised power, followed by revocation, sheds no light on the title, and may, with propriety, be disregarded, but if it should be deemed desirable to show same, a brief mention among the appendices would seem to be all that is required. Should the

21 2 Bou. Law Dict., 477.

22 Blayton *v.* Merrett, 52 Miss. 353; Davis *v.* Savings Bank, 46 Vt. 728.

23 Henderson *v.* Ford, 46 Tex. 627.

24 Walker *v.* Denison, 86 Ill. 142.

25 Cushman *v.* Glover, 11 Ill. 600.

examiner desire to show the transaction in regular course it should be treated much in the same manner as a satisfied mortgage, that is, the power should be exhibited in brief terms in its proper place and the revocation should immediately follow. This would be a sufficient reference to the revocation:

John Smith	}	*Revocation.*
to		*Dated, etc.*
William Strong.		* * * * *

Sets forth the execution of the power of attorney shown as No. 10, ante, and countermands and revokes same, and all power and authority thereby given to said William Strong. Acknowledged, etc.

It is important that sufficient evidence should always be provided as to the continuance of a power at the time of its exercise. An unrevoked power duly recorded furnished sufficient evidence as far as it goes, but unless the abstract also discloses the fact that the principal was living at such time, or had not been subjected to the disability of bankruptcy or other disqualifying cause, prudence would suggest that an inquiry *in pais* be made to ascertain such facts. If the examiner is personally cognizant of the fact that a donor of a power of attorney was alive at the time of the execution of the power he may, if so disposed, testify to this fact. This may be accomplished by a note as follows:

NOTE.— *To my knowledge, John Smith, the grantor named in the foregoing deed, was alive on August 1, 1902.*

This course is purely optional with the examiner, but it will often be of great service to counsel.

§ 265. **Conveyances in Trust.** Trust deeds were formerly of very common occurrence, but are now rarely employed, save in a few States where mortgages are made in that form. They were used to convey the beneficial interest to persons who were incapable of holding the legal title, or in whom it was

not desirable to have the legal title vest. With the gradual disuse of uses and trusts in some States, and their summary abolition in others, conveyances of this character have become infrequent, while no estate or interest, legal or equitable, will vest in the trustee under the statutes of some of the States, but the beneficiary takes the entire legal estate of the same quality and duration, and subject to the same conditions as his beneficial interest.[26]

The character of the instrument, as well as its effect, may be readily determined by inspection; if it imposes on the trustee active duties with respect to the trust estate, such as to sell and convert into money, or to lease the same and collect the rents, pay taxes, etc., and to pay the net proceeds to the beneficiary, it creates an active trust which the statute does not execute,[27] but if there is simply a conveyance to the trustee for the use of, or upon a trust for, another, and nothing more is said, the statute immediately transfers the legal estate to the use, and no trust is created, although express words of trust are used.

[26] Witham *v.* Brooner, 63 Ill. 344; Roth *v.* Michalis, 125 Md. 325. This applies more particularly to "dry" or passive trusts. Express trusts are still generally permitted to be created for the following purposes:

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 use of any person during the life of such person, or for any shorter term, subject to the rules prescribed by the statute fixing the quantity and duration of estates.

4. To receive the rents and profits of lands and to accumulate the same for the benefit of any married woman, or for any of the purposes and within the limits of the statute prescribing the nature and quality of the estates.

5. For the beneficial interests of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations, as to the time and the exceptions thereto, relating to literary and charitable corporations, prescribed by the statute.

Trusts resulting from implication of law are always recognized, but the doctrine has been very much circumscribed, as described in the preceding chapter.

[27] Kirkland *v.* Cox, 94 Ill. 400; Kellogg *v.* Hale, 108 Ill. 164.

When conveyances in trust are allowed, the nature, quality and extent of the trust should be very explicitly stated; while in States where only a few enumerated express trusts are recognized, every part of the instrument necessary to bring it within one of the classes named in the statute must be shown. The trust is ordinarily sufficiently disclosed by the recitals of the habendum, but where there is a power of appointment, and certain reservations for various purposes, a very full synopsis of every part of the deed will be absolutely necessary for a proper understanding of it. In the latter case there should be shown the special matter of inducement as recited in the premises; the grant; the habendum; the reservation, explicitly rendered; the enumeration of the trusts and powers, and the power of appointment, or successor in trust, if named.

No particular form of words is requisite to create a trust, the intent only being regarded by courts of equity,[28] yet the habendum usually makes a formal recital after the preliminary words "to have and to hold," etc., by continuing, "in trust nevertheless," or some similar expression. These words, however, are not essential and trusts must, in all cases, be construed according to the intention of the parties as gathered from the entire instrument.[29] Thus, when a gift is expressed to be for the "use and benefit" of another, or "to the end" that the donee shall apply it to certain purposes, this will be sufficient to raise a trust in such donee.[30]

Where a trust is intended by a conveyance, but fails entirely, so that the grantee takes no estate in the land under the conveyance, it may nevertheless create in him a valid power in trust,[31] the legal title remaining in the grantor.[32] Where the deed creates a valid trust, the entire estate vests in the trustee, subject only to the execution of the trust, except as otherwise

28 Fisher *v.* Field, 10 Johns. 494.

29 Kerr v. Verner, 66 Pa. St. 326; Guion *v.* Pickett, 42 Miss. 77.

30 Randolph *v.* Land Co., 104 Ala. 355.

31 Fellows *v.* Heermans, 4 Lans. (N. Y.) 230.

32 This is now the general statutory doctrine.

provided; and where the deed gives a power of sale to the trustee at the request and for the benefit of the beneficiary under the deed, no power of revocation being reserved, no estate in the premises is left in the grantor which is capable of being transferred.[33] Where the legal title is vested in a trustee, nothing short of reconveyance can place the same back in the grantor or his heirs, but under certain circumstances such reconveyance will be presumed without direct proof of the fact.[34] Trust estates are subject to the same rules as legal estates in every case, dower excepted.[35]

§ 266. **Revocation of Trust.** It is competent, in some cases, for the settler of a trust to reserve a right to revoke the same, and such reservation is not inconsistent with a valid trust. The reserved power to revoke does not operate to destroy the trust, which remains absolute and effective until the right is exercised, and if it is not exercised during the lifetime of the grantor the trust remains as though there had never been a provision for revocation.[36] Where an instrument of this character is found, and the trust is unexecuted, the reservation should be copied in full.

§ 267. **Declaration of Trust.** To establish an express trust, the evidence must all be in writing, and sufficient to show that there is a trust, and what it is,[37] but where land has been conveyed by a deed absolute in form, if designed simply for a holding in trust, the grantee may make a valid admission of the trust in a separate instrument.[38] Such instruments are known as "declarations of trust," and, unless required by statute, need not be by deed, but any writing subscribed by the

33 Marvin *v.* Smith, 46 N. Y. 571; Leonard *v.* Diamond, 31 Md. 536.

34 Kirkland *v.* Cox, 94 Ill. 400; reversing 81 Ill. 11; 80 Ill. 67.

35 Danforth *v.* Lowry, 3 Haywood (N. C.) 68.

36 Lines *v.* Lines, 142 Pa. St. 149; Van Cott *v.* Prentice, 104 N. Y. 45; Nichols *v.* Emery, 109 Cal. 323.

37 Cook *v.* Barr, 44 N. Y. 156; Steere *v.* Steere, 5 Johns. Ch. 355; 1 Green. Cruise, 335. But this does not apply to resulting trusts, which may be established by parol: Faris *v.* Dunn, 7 Bush (Ky.), 276; McGinity v. McGinity, 63 Pa. St. 38.

38 Elliott *v.* Armstrong, 2 Blackf. 198; McLaurie *v.* Partlow, 53 Ill. 340; Cook *v.* Barr, 44 N. Y. 156; Fast *v.* McPherson, 98 Ill. 496; or by the pleadings in a chancery suit: Ibid.

trustee will be sufficient if it contain the requisite evidence.[39] Although it is not essential that the writing by which the trust is manifested and proven should be in any particular form, it is customary for the trustee to declare same in a formal document, reciting the matter of inducement, declaring the nature of the trust estate, and frequently covenanting against his own acts, and for conveyance to the beneficiary. Whatever may be the form of the instrument, the nature and quality of the trust declared, and the terms and conditions upon which it is held, should sufficiently appear to show the full intention of the parties as manifested by the instrument. An illustration is herewith given:

Andrew Baxter,
Trustee,
to
Whom it may concern:

Declaration of Trust.
Dated, etc. * * * *
Recites, that Charles Denton, by deed bearing even date herewith, in consideration of $1,500.00, conveyed to said first party in fee simple the following described lands, to wit: [describing same] *as by said deed will more fully appear. And that said first party has "this day" executed and delivered to said Charles Denton a mortgage upon said premises, as collateral security for the payment of his bond for the payment of $1,000.00* [stating the terms] *being part purchase money expressed in said deed.*

Therefore, said first party, makes known, and declares, that said premises so conveyed to him, he now holds, and will continue to hold, in trust only, for the use and benefit of George

[39] Cook *v.* Barr. 44 N. Y. 156. By the English statute of 29 Charles II, Chap. 3, § 7, it was enacted "that all declarations or creations of trust or confidence of any lands, tenements or hereditaments, shall be manifested or proven by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." This statute provided, not for the creation of trusts, but for proving them, and is the basis of American statutes on the same subject. Though a trust of lands can not be established by parol, yet if the trustee execute the trust, he is bound by the act.

Zeigler, son and heir at law of Henry Zeigler, deceased, and that he has no beneficial interest therein, except what may arise by legal or equitable implication from the circumstances attending the execution of said mortgage.

Said first party further admits that the residue of the consideration money expressed in said deed to him, to wit: the sum of $500.00, was paid by William Zeigler, for the benefit of said George Zeigler.

And said first party covenants to and with said William Zeigler and George Zeigler, that he will convey said premises by "good and sufficient" deed, to said George Zeigler, or his assigns, as he or they may direct, whenever and as soon as said mortgage shall have been paid off and discharged, or otherwise fully secured to said first party, and that free, clear and discharged from all and every incumbrance therein by said first party.

First party further covenants against his own acts.

§ 268. **Removal or Substitution of Trustees.** Where a trustee is dead, the trust being still alive and unexecuted, a court of equity will carry it out if necessary, through its own officers and agents,[40] and may appoint a new trustee,[41] and it seems that in some States, even where the trust deed contains a power of appointment, in the event of the death of the trustee without executing the trust, the *cestui que trust* can not appoint a new trustee, but the exercise of this right devolves exclusively on a court of chancery.[42] A trustee may always be removed in the discretion of the court upon proper cause shown.[43]

40 Batesville Institute *v.* Kauffman, 18 Wall. 120. It is a rule in equity, that a trust shall never fail for want of a trustee: Buchan *v.* Hart, 31 Tex. 647.

41 Curtis *v.* Smith, 60 Barb. 9; Hunter *v.* Vaughan, 24 Gratt. (Va.) 400.

42 Guion *v.* Pickett, 42 Miss. 77. As a general rule, a court of chancery has jurisdiction to control the exercise of the power of appointment when vested in an individual so far, at least, as to prevent an abuse of discretion: Bailey *v.* Bailey, 2 Del. Ch. 95.

43 Att'y-Gen. *v.* Garrison, 101 Mass. 223; Ketchum *v.* R. R. Co., 2 Woods, 532; Scott *v.* Rand, 118 Mass. 215.

§ 269. **Resignation — Refusal to Act — Successor.** A trustee can not divest himself of the obligation to perform the duties of his trust without an order of court, or the consent of all the *cestuis que trust*,[44] and where he refuses to act, equity will compel him to do so, or appoint a suitable person in his place.[45] It is customary, however, in some classes of trust deeds, to appoint a successor in trust, in the event that the trustee becomes disabled or refuses to act, and where a deed contains an appointment of this kind it is always well to show it. If the trust is, in fact, executed by the successor, the original appointment must be shown. This will often occur in cases of trust deeds in the nature of mortgages.

[44] Thatcher *v.* Candee, 4 Abb. App. Dec. (N. Y.) 387; Cruger *v.* Halliday, 11 Paige (N. Y.) 314.

[45] Sargent *v.* Howe, 21 Ill. 148; Wilson *v.* Spring, 64 Ill. 14.

CHAPTER XVII.

OFFICIAL CONVEYANCES.

§ 270. Defined and distinguished.
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§ 270. **Defined and Distinguished.** Official deeds comprise all those forms of conveyance wherein the maker acts by virtue of an office and not in his individual or personal capacity. They cover a wide portion of the field of conveyancing and assume a variety of shapes, but may be reduced to two general classes, viz.: those made in a fiduciary capacity, as the deeds of trustees, executors, etc.; and those made in a ministerial character, as the deeds of sheriffs, commissioners, masters, etc.[1] The rules for construing deeds are much the same, whether the deed be made by a party in his own right, or by a fiduciary or officer of the court.[2]

1 For a further discussion of the subjects of this chapter, the reader is referred to the chapters, "Execution and Judicial Sales," "Chancery Proceedings," "Judgments and Decrees" and "Probate Proceedings and Descents."

2 White *v.* Luning, 93 U. S. 515.

§ 271. **Official Deeds Generally.** It is the policy of the law to invest the sheriff, master in chancery, administrator, or other officer making sales of real estate in a purely ministerial capacity, with only a mere naked power to sell such title as the debtor, deceased person, etc., had, without warranty, or any terms, except those imposed by law. Hence purchasers at such sales assume the risk of the title, as well as the validity of the proceedings under which the sale is made.[3] The power to sell lands, however conferred, must, as a rule, be strictly pursued, otherwise the sale will be void and no title will pass,[4] and a deed which shows on its face an excess of authority in the officer executing it, will not be sufficient to sustain the title of one claiming under it.[5] Much detail will frequently be required in the abstract of an instrument of this character, which should show substantially all the material parts of the deed, including the recitals necessary to a full compliance with the law, even though the instrument may seem at times to be unreasonably long. A judicious condensation, where the full spirit of the original is retained, may be observed to good purpose, and the labor of examiner and counsel be thereby perceptibly lightened, but, in a matter of this kind, it is better to err by inserting too much than too little.

§ 272. **Recitals.** It is customary, and in many cases necessary, to show all the material recitals in official deeds, notwithstanding that such recitals are regarded only as matters of inducement;[6] but where the form of a deed is prescribed by statute they become substance[7] and must always be shown

3 Bishop *v.* O'Connor, 69 Ill. 431.

4 King *v.* Whiton, 15 Wis. 684; White *v.* Moses, 21 Cal. 44.

5 G. B. & M. C. Co. *v.* Groat, 24 Wis. 210; French *v.* Edwards, 13 Wall. 506. The deed in this case was by a sheriff under a judgment for taxes. The deed recited the sale of the property to the highest bidder, when he was authorized by the statute only to sell the smallest quantity of the property which any one would take and pay the judgment and costs, and was held void on its face.

6 Leland *v.* Wilson, 34 Tex. 79; Foulk *v.* Coburn, 48 Mo. 225; Warner *v.* Sharp, 53 Mo. 598; Jones *v.* Scott, 71 N. C. 192. A clerical error in the recitals is not to be regarded in equity: Stow *v.* Steele, 45 Ill. 328.

7 Atkins v. Kinman, 20 Wend. 249.

or indicated in some manner. The main reason why such recitals should be shown, arises from the fact that they are usually regarded as evidence against the grantee and those claiming under him,[8] and as to such parties are conclusive.[9] The recitals are further regarded as presumptive evidence of the facts stated,[10] and will prevail until the contrary is shown. These remarks, however, have reference more to ministerial officers than to fiduciaries. The recitals in the deeds of the latter are material to show a due execution of the powers given.

§ 273. **Covenants.** There are no implied covenants in official deeds,[11] but where express covenants are inserted they have been held to bind the officer personally.[12] Sometimes the deed will contain what is known as the "trustee covenant," which is to the effect that the vendor has done no act to encumber the estate. If express covenants of any kind are made they should be shown in the abstract.

§ 274. **Sheriff's Deed — On Execution.** A sheriff's deed made in pursuance of a sale on execution must be to the person to whom the certificate of purchase was issued or to his assignee, and if the deed is made to another, though it recites that he is the assignee of the certificate, it is a nullity if, in fact, the certificate was not assigned.[13] It would seem, therefore, that in case of an assignment the certificate thereof should affirmatively appear of record or its absence be noted as a substantial defect.[14]

To establish a title to land under a sheriff's sale on execution all that is necessary to be shown as a general rule, is a

8 French *v.* Edwards, 13 Wall. 506; Fisk *v.* Frores, 43 Tex. 340; Lamar *v.* Turner, 48 Ga. 329.

9 Durette *v.* Briggs, 47 Mo. 356; Pringle *v.* Dunn, 37 Wis. 449; Robertson *v.* Guerin, 50 Tex. 317.

10 Chase *v.* Whiting, 30 Wis. 544.

11 Webster *v.* Conley, 49 Ill. 13.

12 Prouty *v.* Mather, 49 Vt. 415; Sumner *v.* Williams, 8 Mass. 162; Mitchell *v.* Haven, 4 Conn. 485; Aven *v.* Beckom, 11 Ga. 1; Craddock *v.* Stewart's adm'r, 6 Ala. 77; Magee *v.* Mellon, 23 Miss. 586.

13 Carpenter *v.* Sherfy, 71 Ill. 427; compare Bowman *v.* Davis, 39 Iowa, 398.

14 Where there has been an assignment of the certificate of sale the recital in the sheriff's deed of such certificate and assignment is evidence of their existence, and after the execution of the deed such certificate and assignments thereof cease to be

valid judgment, or, as has been held, a judgment by a court of competent jurisdiction, no matter if it be erroneous on its face;[15] execution duly issued;[16] and a sheriff's deed.[17] But in all cases the judgment is the foundation of the title,[18] and proof of such judgment is indispensable to its validity.[19] As the sheriff is only the executor of a naked power it is necessary that his deed should show substantial compliance with the terms creating the power as well as its proper execution, yet the recitals of a sheriff's deed, as a general rule, are to be regarded only as inducement,[20] and where the deed substantially complies with the statutory requirements, it is not invalidated by ambiguous recitals or omissions which do not mislead.[21]

It is said that the statute requiring recitals in a sheriff's deed was not intended to make deeds void which do not contain them, but was only intended to make the recitals evidence of the facts recited; and when such recitals are full, they dispense with the necessity of introducing the judgment and execution in evidence. So far as such a statute requires recitals beyond what are necessary to show the authority of the officer to sell, it is merely directory,[22] and where the deed discloses sufficient to show the authority to sell, even though the particular judgment and execution be not recited, so long as it appears to be by virtue of a judgment and execution, the sale and conveyance will be valid, if, at the time of such sale, the sheriff had in his hands a valid execution.[23] Defects of

essential muniments of title (Gardner *v.* Eberhart, 82 Ill. 316), yet, as a precautionary measure, it is always well to display these facts in the abstract.

15 Mayo *v.* Foley, 40 Cal. 281; and see Den *v.* Taylor, 16 N. J. L. 532.

16 Fischer v. Eslaman, 68 Ill. 78; Den *v.* Despreaux, 12 N. J. L. 182.

17 Riddle *v.* Bush, 27 Tex. 675; Hughes *v.* Watt, 26 Ark. 228; Splahn *v.* Gillespie, 48 Ind. 397; Lenox *v.* Clark, 52 Mo. 115.

18 Atkins *v.* Hinman, 2 Gilm. (Ill.) 437; Leland *v.* Wilson, 34 Tex. 79; Todd *v.* Philhour, 24 N. J. L. 796.

19 Carbine *v.* Morris, 92 Ill. 555.

20 Leland *v.* Wilson, 34 Tex. 79.

21 Allen *v.* Sales, 56 Mo. 28; Jones *v.* Scott, 71 N. C. 192; Loomis *v.* Riley, 24 Ill. 307; Keith *v.* Keith, 104 Ill. 397.

22 Clark *v.* Sawyer, 48 Cal. 133; Jordan *v.* Bradshaw, 17 Ark. 106; Holman *v.* Gill, 107 Ill. 467.

23 Jones *v.* Scott, 71 N. C. 192; Clark *v.* Sawyer, 48 Cal. 133; Perkins *v.* Dibble, 10 Ohio 443.

form are leniently regarded, and the instances are very rare, observes Mr. Freeman, "in which a deed, issued in pursuance of an execution or chancery sale, is void for errors, defects, or mistakes in form." [24]

Where a deed alone is relied upon it must show upon its face the officer's authority as well as all other essential requirements of a valid sale,[25] but it may always be aided by the return on the execution,[26] and where the judgment and execution are both shown omissions in the deed are generally immaterial, provided the deficiency is supplied by the writ and return.[27]

§ 275. **Continued — Acknowledgment.** Unlike voluntary conveyances between individuals, it is essential to the validity of a sheriff's deed, for land sold by him under an execution, that it should have been legally acknowledged. It is true that a sheriff's deed gives the vendor an inceptive interest in the land, but he has no right to enter, and no claim upon the property, as against the former owner, until after the deed is acknowledged. The property is conveyed against the will of the judgment debtor; the conveyance is not his act, but the act of the law; and the law, when acknowledgment is requisite, must be strictly complied with.[28] Where the acknowledgment is defective the deed is not aided by record.[29] Proof of official character is rarely necessary, however, for the law recognizes such officers as sheriffs and deputy sheriffs, and instruments executed by them in the course of their official duties are usually sufficient in themselves to prove that

[24] Freeman, Void Jud. Sales, § 45. The deed, however, must be what it purports to be, hence a deed lacking a seal conveys no title: Hinsdale *v.* Thornton, 74 N. C. 167; Kruse *v.* Wilson, 79 Ill. 233.

[25] Hill *v.* Reynolds, 93 Me. 25.

[26] Welsh *v.* Joy, 13 Pick. (Mass.) 477; Stinson *v.* Ross, 51 Me. 556.

[27] Hayward *v.* Cain, 110 Mass. 273.

[28] Ryan *v.* Carr, 49 Mo. 483; Adams *v.* Buchanan, 49 Mo. 64. But see contra, Stephenson *v.* Thompson, 13 Ill. 186, where it is held that the deed may be proved by other evidence ,and though unacknowledged it is still valid.

[29] Samuels *v.* Shelton, 48 Mo. 444.

they were the officers, in fact and in law, which by their acts they profess to be.[30]

§ 276. **Continued — Operation and Effect.** A sheriff's deed is *prima facie* evidence that the grantee holds all the title and interest in the land that was held by the judgment debtor at the time of the rendition of the judgment, and operates back, by relation, to the date of such rendition so as to extinguish all rights and equities in and to the premises derived from the judgment debtor in the meantime.[31] And not only the entire interest of the judgment debtor passes by the deed, but also such covenants of title as run with the land.[32] If made to a *bona fide* purchaser, and regular in itself, it is effectual as a conveyance, and can not be impeached in any collateral proceeding for mere irregularity, in any of the proceedings, judgment, execution or return.[33]

It will operate against the judgment debtor by estoppel, and he will be precluded from setting up an outstanding title to avoid the sale by the sheriff, or to deny the title thereby acquired by the purchaser.[34] As an exception to this rule, it has been held, that if, after the sale, the judgment debtor abandons the land, and afterward returns to it, and is sued in ejectment, he may show an outstanding title, provided he also shows that he has taken possession and holds under it, and the same rule applies to a purchaser holding under the judgment debtor or defendant in execution.[35]

[30] Ochoa *v.* Miller, 59 Tex. 460.

[31] Shields *v.* Miller, 9 Kan. 390; White *v.* Davis, 50 Mo. 333; Ferguson *v.* Miles, 3 Gilm. (Ill.) 358; Miller *v.* Wilson, 32 Md. 297; Kirk *v.* Vanberg, 34 Ill. 440.

[32] Whiting *v.* Butler, 29 Mich. 122; White *v.* Whitney, 3 Met. 81; Leport *v.* Todd, 32 N. J. L. 124.

[33] Landets *v.* Brant, 10 How. 371; Draper *v.* Bryson, 17 Mo. 71; Maurior *v.* Coon, 16 Wis. 465.

[34] Matney *v.* Graham, 59 Mo. 190; Reid *v.* Heasley, 2 B. Mon. (Ky.) 254; Jackson *v.* Bush, 10 Johns. 223; Jackson *v.* Hagaman, 1 Wend. 502; Gould *v.* Hendrickson, 6 Ill. 599. But see Kenyon *v.* Quinn, 41 Cal. 325, where it is held, that a statutory provision to the effect that a conveyance of land in fee simple shall convey the legal estate afterward acquired by the grantee, has no application to a sheriff's deed made under execution sale.

[35] Gould *v.* Hendrickson, 96 Ill. 599.

The recording of a sheriff's deed operates as constructive notice only to those who hold or claim under the judgment defendant; strangers, and those claiming under an independent or hostile title, are not affected thereby.[36]

§ 277. **Continued — Imperfect Description.** The only remedy for a false description in a sheriff's deed is to obtain a new deed in the court whence the process issued. Equity will not aid the imperfect execution of a statutory power.[37] It follows, therefore, that if the description fails to show with certainty what property was in fact sold, or if in order to ascertain such fact it becomes necessary to institute an extraneous inquiry, the deed is void[38] and no title will pass thereunder. Where the deed has been lost before registration, the officer may, it seems, execute a substitute.[39]

§ 278. **Statutory Sheriff's Deeds.** To overcome the consequence of mis-recitals, prevent collateral impeachment, and give the full desired effect of conveyances by the sheriff, the legislatures of a majority of the States have prescribed certain forms of official deeds and declared their legal effect. As in case of statutory forms of deeds between individuals, these instruments contemplate but little verbiage, the statute supplying what was formerly obtained by long and technical recitals. Only enough matter of inducement is given to identify the judgment, execution, and sale, and to show the authority of the officer, while the granting portion is confined to the fewest legal essentials. The deed, in itself, is little else than an abstract, and contains scarcely anything that must not also be shown in presenting a synopsis of it. The example which follows is an abstract of the form now in use in Illinois,

[36] Gardner *v.* Jaques, 42 Iowa, 577.

[37] Ware *v.* Johnson, 55 Mo. 500. But where a sheriff executed a deed at the proper time, but omitted to affix a seal or scrawl thereto, the successor of the sheriff executed another deed in proper form, and it was held that this subsequent deed would relate back to the date of the first one: Kruse *v.* Wilson, 79 Ill. 233.

[38] Evans *v.* Ashley, 8 Mo. 177; Jackson *v.* Delancey, 13 Johns. (N. Y.) 536; Cunningham *v.* McCollum, 98 Ind. 38.

[39] McMillan *v.* Edwards, 75 N. C. 81.

but which, so far as the observation of the writer has gone, differs but slightly from those now employed in other States.

Seth Hanchett, Sheriff of Cook County, Ill., to William B. Denton.	*Sheriff's Deed. Dated, etc.* * * * * * * * * *

Recites that whereas, A. B. did, at the May term of the Circuit Court of Cook County, 1880, recover a judgment against C. D. for the sum of $100.00,[40] *and costs of suit, upon which an execution was issued dated June 2, 1880, directed to said sheriff to execute, by virtue of which the said sheriff levied upon the premises*[41] *hereinafter described; and the time and place of the sale thereof having been duly advertised according to law, the same were struck off and sold to William B. Denton, he being the highest and best bidder therefor.*

Therefore, said sheriff, in consideration of the premises, conveys to said second party the following described parcel of land [describing the same].

Acknowledgment.

The legal effect of this brief deed, as declared by statute, is to convey to the grantee therein named, all the title, estate, and interest of the person against whom the execution was issued, of every nature and kind, in and to the lands thereby conveyed, but implies no covenants on the part of the officer executing same. It is further *prima facie* evidence that the

40 A statutory provision which prescribes the form of a sheriff's deed, so far as it requires the amount of the judgment to be inserted in the deed, is merely directory. It is sufficient if it clearly appears, that the deed is made by the officer in his official capacity, and in consummation of the legal proceedings upon which it is founded, with such references to the proceedings themselves that they may be readily found and identified: Holman *v.* Gill, 107 Ill. 467.

41 This word, although erroneously employed, is the one generally prescribed by statute, and, when such is the case, should be shown in the abstract as found in the deed. It is only another illustration of the careless and bungling manner in which legal terms and phrases are sometimes employed by the law-makers.

provisions of law in relation to the sale of the property for which it is given were complied with; and in case of the loss or destruction of the record of the judgment, or of the execution or levy thereon, is *prima facie* evidence of the recovery and existence of the judgment, and of the issuing and levy of the execution as therein recited.[42]

§ 279. **Sheriff's Deed — Under Decree.** Though a master, commissioner or referee is the medium through which a court of chancery ordinarily executes its decrees, the duty not infrequently devolves upon the sheriff either by virtue of his office or through special appointment. While acting under a decree he occupies the same position as a commissioner, and is but a ministerial officer of the court, to whom he must make reports of his acts and by whom they must be confirmed before conveyances can be lawfully made.[43] His deed, like a master's, recites his authority, details his acts, and takes effect as a conveyance in the same manner.[44]

§ 280. **Masters', Commissioners' and Referees' Deeds.** The conveyances of a master in chancery, commissioner, or referee, differ in no material respect from those of a sheriff acting under a decree, the power exercised being the same in each instance, and the principles which govern the one operating with equal force upon the others. Like the conveyances of the sheriff, their deeds are without warranty, or any terms except those imposed by law, and they convey only such titles as the defendant possessed. The recitals of this class of deeds are usually long and verbose and should be judiciously condensed by the examiner to show all that is material in as few words as possible. The special formal parts are those which relate to the title and authority of the officer, and the recitals showing a due compliance with the decree. In the abstract the deed immediately follows the court proceedings and certificate of sale, and may be shown briefly, as follows:

42 R. S. Ill. 1874, Ch. 77.

43 Taylor *v.* Gilpin, 3 Met. (Ky.) 544; Hunting *v.* Walker, 33 Md. 60.

44 See the remarks relative to deeds of other ministerial officers, and the chapter on "Execution and Judicial Sales."

Henry W. Bishop, as Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois,
to
Silas Wegg, Jr.
Doc. 124,354.

Master's Deed.
Dated June 10, 1881.
Recorded, July 12, 1881.
Book 410, page 65.

Sets forth that in pusuance of a decree entered March 13, 1881, by said Court in a certain case then pending therein wherein John Doe was Complainant, and Richard Roe, Defendant, the said Master duly advertised, according to law, the lands and tenements hereinafter described, for sale at public auction to the highest and best bidder, for cash, at two o'clock P. M., on Monday, June 1, 1880, at the north door of the U. S. Custom House and Post Office, in the City of Chicago, Cook County, Illinois. That at the time and place so as aforesaid appointed for said sale, the said Master attended to make the same, and offered said premises for sale at public auction, to the highest and best bidder, for cash, and thereupon Silas Wegg, Jr., offered and bid therefor $125.00, and that being the highest and best bid offered, said Master accordingly struck off and sold to said Silas Wegg, Jr., for said sum of money, the said premises, and did thereupon sign, seal and deliver to said Silas Wegg, Jr., the usual Master's Certificate therefor, and that said premises have not been redeemed from said sale. Now, therefore, in consideration of the premises conveys; [Here follows the description of the property.]

Certificate of acknowledgment dated June 10, 1881.

§ 281. **Trustees.** A trustee is defined as a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another,[45] and though the name is technically applied to a particular class, it also, to a certain extent, comprises executors, administrators, guardians, assignees, etc. Where the legal title of a trus-

[45] 2 Bou. Law Dict. 616.

tee is created by the owner of the property, the right of the trustee to enforce it will be recognized everywhere; but where such title is derived solely from some act of the law, the effect of that act is confined to the territorial jurisdiction over which the law extends.[46] Upon the death of a trustee, the legal title to the estate devolves upon his heir at law; and the heir takes the same estate, and is subject to exactly the same duties and responsibilities as his ancestor.[47]

But in case of more than one trustee, the rule would be different, for by the common law, and usually by the statute as well, the estate of trustees is held in joint tenancy, and hence, upon the death of one of several trustees nothing passes to the heir or personal representatives, but the whole estate devolves upon the survivors.[48]

Being founded on personal confidence, it necessarily results that a trustee can not delegate his trust to others,[49] neither can he profit by his trust estate,[50] nor become a purchaser at any sale thereof by him,[51] while the power under which he acts must in all cases be strictly pursued to render such acts valid.[52]

A joint power of sale must be executed by all, provided all

46 Curtis *v.* Smith, 6 Blackf. (Ind.) 537.

47 Watkins *v.* Specht, 7 Coldw. (Tenn.) 585; McMullen *v.* Lank, 4 Houst. (Del.) 648. By force of the statute the trust sometimes vests in some tribunal in the county in which the trust property is situated, which, upon the application of some person interested in the trust, forthwith appoints a successor to the deceased trustee, whereupon the trust vests in the newly appointed trustee: Collier *v.* Blake, 14 Kan. 250.

48 Golder *v.* Brewster, 105 Ills. 419.

49 Grover *v.* Hale, 107 Ill. 638. But where the trustee conveys the legal title to one having knowledge of the trust, or where such other person in any manner acquires the legal estate with such knowledge, he holds the property subject to the trust and may be compelled in equity to execute it: Ryan *v.* Doyle, 31 Iowa, 53; Smith *v.* Walser, 49 Mo. 250.

50 Faucett *v.* Faucett, 1 Bush (Ky.), 511.

51 Terwelliger *v.* Brown, 44 N. Y. 237. This is the universally accepted doctrine, but is subject to some qualifications, the law not exacting the same rigid degree of strictness in all the States. Clark *v.* Clark, 65 N. C. 655, and see "Trustees as Purchasers," *infra*.

52 Huntt *v.* Townshend, 31 Md. 336.

are living and in condition to act,[53] unless the instrument creating the trust provides otherwise,[54] for the interest held by several trustees is an entirety, and can only pass as a whole; hence all the trustees living, having an interest in the property, must join in the conveyance, otherwise it will be wholly inoperative.[55] But in case of the death of one or more of the trustees, the survivor or survivors will hold the trusts and may execute the powers.[56] A deed by the survivors, representing the entire title, will be good, even though they are authorized to fill the vacancy, as it is only where the terms of the power creating the trust imperatively require the vacancy to be filled, that the acts of the survivors will be invalid.[57]

The questions suggested by the foregoing statements are many, and will readily present themselves to counsel upon the examination of an abstract. To satisfactorily solve them the grant of power must be exhibited in the chain, or, if made prior to the commencement of the search, a requisition for its production must be made, that it may satisfactorily appear, from actual inspection, that the proceedings of the trustees have been regular and in conformity to the terms of the instrument creating the trust.

§ 282. **Transfers of the Legal Estate by Trustees.** The doctrine of the obligation of purchasers to observe the proper application of the purchase money, in cases of sales by trustees and other fiduciaries, was formerly very intricate, abounding in many technicalities and subtilties; but these, in a large measure, have been swept away by special statutes in England, while in the United States the old English doctrine has rarely been administered except in cases of fraud in which the purchaser was a participant. The general rule now is, and for years past has been, that a purchaser who in

[53] Learned *v.* Welton, 40 Cal. 349.

[54] Gould *v.* Mather, 104 Mass. 283.

[55] Golder *v.* Brewster, 105 Ill. 419; Brennan *v.* Willson, 71 N. Y. 502.

[56] Lane *v.* Debenham, 11 Hare, 188.

[57] Golder *v.* Brewster, 105 Ill. 419.

good faith pays the purchase money to a person authorized to sell, is not bound to look to its application; and there is no difference in this respect between lands charged in the hands of a devisee with the payment of debts, and lands devised to a trustee to be sold for that purpose.[58]

"The present well-established rule of law in regard to trust estates is," says Mr. Redfield,[59] "that when the trustee holds the trust estate for the purpose of sale and conversion into money, or with a power of sale and conversion, any one who in good faith accepts such transfer upon adequate compensation, will acquire a valid title. But if the trustee has no power of sale the purchaser will acquire no title unless he show that the purchase money has been applied to the purposes of the trust. It is this which marks the true distinction between the cases, where the purchaser is bound to see to the application of the purchase money and where he is not. For if the trustee has no power of sale, any transfer by him will be wholly inoperative and the trust will attach to the trust property in the hands of the vendee the same as in the hands of the trustee, until it appears that the money paid by the vendee, to the full value of the trust property, has been applied to the purposes of the trust."[60]

§ 283. **Power of Sale and Trust of Sale Distinguished.** In the execution of testamentary trusts questions of title are frequently raised on the construction of the authority under which the trustee effected the sale, but the same questions may sometimes arise under deeds of trust. "The more common case of trusts with power of sale," observes Mr. Redfield,[61] "is where the testator devises his estates, together with all his personalty, directing that the latter be first applied in the payment of debts and legacies; and in default of it proving suffi-

[58] Cryder's Appeal, 11 Pa. St. 72; Champlin *v.* Haight, 10 Paige (N. Y.), 275; White *v.* Carpenter, 2 Paige (N. Y.), 217; Gardner *v.* Gardner, 3 Mason (C. Ct.), 178, and see Warvelle on Vendors, § 573.

[59] 3 Redf. on Wills (3d Ed.), 620.

[60] And see, Hughes *v.* Tabb, 78 Va. 325; Turner *v.* Hoyle, 95 Mo. 337; Jacks *v.* State, 44 Ark. 61.

[61] 3 Redf. on Wills (3d Ed.), 551.

cient, that the real estates be sold by the trustees, either generally, in their discretion. or in some order named in the will." In such case, the learned author contends that it would be the duty of the trustees to assure themselves that a deficiency in the personalty has really occurred before they can properly proceed to sell real estate, and distinguishes between a trust and power of sale in this manner: "A power of sale, in the event of the personal estate proving insufficient to pay debts or legacies, or both, is a power depending upon a condition precedent, and will not attach unless the condition occur; and a sale under such a power, when the condition had not in fact occurred, will, of course, convey no title. It is, therefore, in a case of this kind essential, that all persons interested in the purchase and in acquiring a good title, should assure themselves that the power has really attached. In such a case the receipt of the money by the appointee will have no effect upon the passing of the title, and will commit no one to its application or repayment except the person receiving it. But in the case of a trust for sale under a will, the title having passed to the trustee, the title will pass upon any such sale as rests upon an apparent occurrence of the emergencies justifying a sale; and the payment of the money by the purchaser to the trustee, and his receipt for same, will exonerate the purchaser from all responsibility." [62]

The exercise of trusts and powers is now very generally controlled by statute. A trust not allowed by the statute is wholly invalid and no estate vests in the trustees; but a trust directing or authorizing the performance of any act which may be lawfully performed under a power, will still be valid as a power in trust,[63] subject to the provisions of the statute in relation to powers. Where the trust given does not purport to be a trust of sale, but simply a power in trust, a deed made by the executor under it, will convey title to the purchaser, and

[62] 3 Redf. on Wills (3d Ed.), 552, citing Walker *v.* Smallwood, Amb. (Eng. Ch.), 676.

[63] Downing *v.* Marshall, 23 N. Y. 366.

this, notwithstanding the fact that the land in question is devised absolutely by the will.[64]

§ 284. **Trustees' Deeds.** Titles derived through trustees' deeds require close scrutiny, for where a deed of trust minutely and particularly prescribes the circumstances under which, and the manner in which, the trustees shall have authority to sell the trust property, they have no power or authority to dispose of such property under any other circumstances or in any other manner.[65] Fiduciaries and trustees, if they exceed or violate their authority, are responsible, though no bad faith prompted their acts; and those who deal with them on the faith of the trust estate, must be aware that they exercise only limited and delegated powers, and are bound, at their peril, to take notice of such powers and see to it that they confine themselves within their scope.[66]

A trustee having once accepted the trust in any manner, a purchaser can not safely dispense with his concurrence in a sale of the trust estate, notwithstanding he may have attempted to disclaim, and although he may have released his estate to his co-trustees. All the trustees, in case of several, must unite in a disposal of the trust property, and a deed by two, while a third is living, is not valid. The trustees take as joint tenants, and must all unite in the execution of the trust, and especially in a deed of lands.

A trustee can not delegate any duty, unless the power to delegate is expressly given, which involves the exercise of any discretion or judgment. Mere mechanical or ministerial duties may be performed by others. The particular medium of advertisement, the manner of conducting the sale, the best method of offering the property, the question of postponement of the sale, and the sale itself, are matters regarding which,

64 Crittenden *v.* Fairchild, 41 N. Y. 289. In this case it was held that such power was not inconsistent with the devise, but the estate vested in the devisees, subject to the execution of the power.

65 Huntt *v.* Townshend, 31 Md. 336.

66 Owen *v.* Reed, 27 Ark. 122; Vernon *v.* Board of Police, 47 Miss. 181; Ventres *v.* Cobb, 105 Ill. 33.

when they are not prescribed by the instrument under which he acts, special trust and confidence are reposed in the trustee; and they can not be delegated to an agent.[67] All these duties are usually matters of recital in the trustee's deed, and it is advisable that they be shown in the abstract substantially as there stated.

Where the trust deed forms a portion of the examination, the trusts and conditions should fully appear in the abstract of that document, and reference to them will be sufficient in preparing the synopsis of the trustee's deed. Should the trust deed not be included in the examination the conditions as recited in the deed may be given, or a note substantially embodying them may be appended, as per the example shown. Here is an example of a trustee's deed made on foreclosure and in pursuance of a power of sale:

Pliny B. Smith,
Trustee,
to
William Thompson,
Document 1008.

Trustee's Deed.
Dated Jan. 5, 1882.
Recorded Jan. 6, 1882.
Book 500, page 520.

Recites, that John Peterson and Maria, his wife, by a Trust Deed, dated May 1, 1880, and recorded May 3, 1880, in book 410, page 512, conveyed to Pliny B. Smith, as Trustee, all the lands hereinafter described, to secure the payment of $1,000, to Hiram Jones, in one year from May 1, 1880, evidenced by said Peterson's one promissory note of even date with said Trust Deed.

Also sets forth the power of sale in said Trust Deed contained.[68]

And default having been made in the payment of said note, and Hiram Jones, the legal holder thereof, having applied to first party, as such Trustee, to cause the said lands hercin de-

[67] Bales *v.* Perry, 51 Mo. 449; Grover *v.* Hale, 107 Ill. 638.

[68] The power of sale may be set out here as directed, but if the trust deed has already been exhibited in the chain, this, of course, would be unnecessary, and the simple recital shown in the text will be sufficient.

scribed to be sold for the purposes mentioned in, and in accordance with the provisions of said Trust Deed,[69] *first party on Dec. 5, 1881, caused a due notice to be published in the Legal Adviser, a newspaper published (printed) in the City of Chicago, Cook County, Illinois, that said lands hereinafter described would, on Jan. 5, 1882, at one o'clock P. M., be sold at public auction, at the North door of the Court House,*[70] *in the City of Chicago, Ills., to the highest bidder for cash, by virtue of the power and authority in him vested by said Trust Deed; which said notice was (printed) published for thirty days in said paper, commencing on Dec. 5, 1881, and ending on Jan. 4, 1882, the date of the first paper containing the same, being Dec. 5, 1881, and of the last of Jan. 4, 1882.*

And said lands having been, by said first party, on Jan. 5, 1882, at one o'clock P. M., in the manner prescribed in and by said Trust Deed, and at the place last aforesaid, in pursuance of said notice, offered for sale at public auction, to the highest bidder for cash, and second party having been the highest bidder therefor, and having bid for the tract hereinafter named, $1,050, he was duly declared the purchaser thereof.

Now, therefore, in consideration of the sum so bid, grants, bargains, sells, aliens, remises, releases and confirms the following described land in Chicago, Cook County, Illinois, to wit: [Here set out the description of the property conveyed.]

Together, with all and singular, the tenements, hereditaments, and appurtenances thereunto belonging, as the same

[69] This is an important recital and should always be set out. Where a trust deed gives the trustee the power to advertise and sell the mortgaged premises on default of payment, when so requested by the holder of the indebtedness, and the trustee, without being so requested, advertises the property for sale, his act will be unauthorized under the power, and the sale may be avoided and set aside as made in violation of its terms: Equitable Trust Co. *v.* Fisher, 106 Ill. 189.

[70] A power to sell "at the north door of the court house," may be well executed, if the building has meantime been destroyed by fire, by a sale at the ruins of the north door. The meaning of the phrase consists in identifying a place of sale, not in the identity of the door: Waller *v.* Arnold, 71 Ill. 350.

are described and conveyed in and by the said Trust Deed; and also, all the estate, right, title, interest, property, claim, and demand whatsoever, both in law and equity, of the said John Peterson and wife, as well as of the said first party, of, in, and to the above described premises, with the appurtenances, as fully to all intents and purposes, as first party hath power and authority to grant, sell, and convey the same by virtue of the said Trust Deed.

Ackgt., dated Jan. 5, 1882.

Should no trust deed be shown in the examination, append the power of sale under which the trustee's deed is given, as follows:

NOTE.—*The Trust Deed from John Peterson and wife to Pliny B. Smith, dated May 1, 1880, and recorded May 2, 1880, as Doc. 252, in book 410 of Records, page 512, provides in trust, that in case of default in the payment of said note, or any part thereof, according to the tenor and effect of said note, then, on application of the legal holder of said note, to sell and dispose of the said premises, and all the right, title, benefit and equity of redemption of said first party, their heirs and assigns therein, at public auction, at the North door of the Court House, in Chicago, Illinois, or on said premises, as may be specified in the notice of such sale, for the highest and best price the same will bring in cash, at least thirty days' public notice having been previously given of the time and place of such sale, by advertisement in one of the daily or weekly newspapers at that time published in said City of Chicago; and to make, execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, * * * * which sale or sales so made shall be a perpetual bar, both in law and in equity, against the said first party, their heirs and assigns, and all other persons claiming the premises aforesaid, or any part thereof, by, from, through, or under said first party, or any of them.*

Second party, with or without re-advertising, is hereby authorized and empowered to postpone or adjourn said sale from time to time at his discretion, and also to sell said premises entire, without division or in parcels, as he may think best.

In case of a breach of any of the covenants or agreements herein, by first party, said premises shall be subject to sale and conveyance, on request of the legal holder of said note, in like manner and with the same effect as if the said indebtedness had matured.

First party covenants and agrees that in case of a sale and conveyance, as aforesaid, of said premises, the deed and deeds of conveyance made in pursuance of such sale shall be prima facie evidence of the due compliance with and performance of the terms, conditions and requirements of this deed of trust, by second party or his successor in trust aforesaid, in advertising and making such sale and conveyance, to the extent of the recitals contained in such deed or deeds.

Where a trustee's deed, made upon a sale under a valid deed of trust, shows that such sale was conducted in strict conformity with the power contained in the trust deed, and the purchaser has had no notice of any irregularities in the sale, his title will be protected, as respects such irregularities, if any there were, as that of an innocent purchaser;[71] but the payment of the debt secured by a deed of trust defeats the power of sale, and a purchaser at such sale must see to it that the grantor in the trust deed is in default, and that some part of the debt is due and unpaid.[72]

§ 285. **Mortgagees' Deeds.** Mortgagees' deeds, made in pursuance of a power of sale, differ in no important particular from conveyances by trustees, the mortgagee being, for the purposes of the conveyance, an executor of an express trust. He is held to the same strict rules that regulate the conduct of other trustees, and can not exceed the express powers under

71 Hosmer *v.* Campbell, 98 Ill. 572; Montague *v.* Dawes, 14 Allen (Mass.), 369.

72 Ventres *v.* Cobb, 105 Ill. 33.

which he acts. A mortgagee may sell the equity of redemption of the mortgagor and such interest as is conveyed to him by the mortgage under which he sells, but he can not sell the equity of redemption by itself; nor can he sell an undivided portion of his interest in the land included in the mortgage. A proper execution of the power of sale requires him to sell all he is entitled to under it,[73] and for the same reason he has no right to sell a greater interest than the mortgage gives him or authorizes him to sell. A violation of these rules will render the sale invalid.[74]

The recitals of a mortgagee's deed are material to its validity, as tending to show a due execution of the power and compliance with the conditions of the trust,[75] and should be shown in the abstract in the same manner as indicated in case of trustees' deeds.[76] The original purchaser at a sale by a mortgagee, under a power of sale contained in the mortgage, is chargeable with notice of defects and irregularities attending the sale, and can not evade their effect,[77] but it would seem that as to remote purchasers, the sale is only voidable on proof of actual knowledge of such defects acquired before the consideration has been paid.[78] It has been held, however, that a properly executed deed reciting strict conformity, the purchaser having no actual knowledge or notice of any irregularity and taking such deed upon the strength of the assurances therein contained, will protect the title of such purchaser.[79]

§ 286. **Executors and Administrators.** The real estate

[73] Fowle *v.* Merrill, 10 Allen, 350; Torrey *v.* Cook, 116 Mass. 163.

[74] Donohue *v.* Chase, 130 Mass. 137.

[75] Gibbons *v.* Hoag, 95 Ill. 45.

[76] Where a deed for land sold under a power in a mortgage, reciting correctly all the facts showing a right to make the sale, is recorded in apt time, the record thereof will affect all persons thereafter claiming under the mortgagee with constructive notice that there had been a valid sale under the power, although the deed may be defectively executed so as not to pass the legal title: Gibbons *v.* Hoag, 95 Ill. 572.

[77] Hamilton *v.* Lubukee, 51 Ill. 415. But see Hosmer *v.* Campbell, 98 Ill. 572.

[78] Grover *v.* Hale, 107 Ill. 638.

[79] Hosmer *v.* Campbell, 98 Ill. 572.

of a deceased person is frequently conveyed through the media of what are known as "personal representatives," consisting of executors, or persons specifically designated for that purpose by the decedent, and administrators, who act by virtue of an appointment under the law.[80] An executor may sell and convey lands held in special trust without the intervention of a court, but not such lands as are sold in due course of administration to pay decedent's debts, while an administrator can do no act affecting lands without the special order of a court. In case of sales by either officer no title passes until the execution and delivery of a deed,[81] and without such title as the deed conveys, the purchaser can not maintain or defend ejectment against or by the heir.[82]

§ 287. **Executors' Deeds.** A testamentary executor stands in the place of and represents his testator. He derives his power primarily from the will, and in this respect differs somewhat from an administrator, whose sole power is derived from the law and the directions of the court.[83] When acting under a naked testamentary appointment, his powers are co-extensive with those of an administrator, and he is bound by the same rules, and subject to the same restrictions. But the executor may also be a trustee,[84] and, when acting as such, the scope of his powers is measured and limited by the will which appoints him. The distinction therefore, must ever be kept in view of the powers and duties of an executor, as such, and those which may devolve upon him as trustee, and not as executor.[85] Under his testamentary authority, he may sell land, and otherwise execute the trusts and exercise the powers

80 "Legal" or "Personal representative" in the commonly accepted sense, means administrator or executor. But this is not the only definition. It may mean heirs, next of kin, or descendants: Warnecke *v.* Lembea, 71 Ill. 91.

81 A properly conducted sale, after confirmation vests the equitable title in the purchaser.

82 Doe *v.* Hardy, 52 Ala. 291; Gridley *v.* Phillips, 5 Kan. 349.

83 Walker *v.* Craig, 18 Ill. 16. Van Wickle *v.* Calvin, 23 La. Ann. 205; Gilkey *v.* Hamilton, 22 Mich. 283.

84 Pitts v. Singleton, 44 Ala. 363.

85 Warfield *v.* Brand, 13 Bush (Ky.), 77; White *v.* Clover, 59 Ill. 462.

enumerated and conferred in the will, subject to the general regulations of the statute, and free from the control or intervention of a court.[86] But where authority is not expressly given, or where, during the administration, he performs the ordinary offices of an executor, as where land is sold to pay the debts of decedent, no express power being given, he must first obtain authority or license from the probate court, and his sale must be reported to and confirmed by such court, before a deed can lawfully issue to the purchaser.

An executor's deed, therefore, will be governed by the law relating to trustees or administrators, according as he may convey in the one or the other capacity, and the reader is referred to the remarks on those classes of deeds respectively.[87] In either case, the authority of the deed must precede it; in the one case the will, showing the power of sale or trust, and the manner, if stated, in which the power must be exercised or the trust executed, and in the other, the license, report of sale and confirmation, while a synopsis of the probate of the will must be shown in both instances. As in all other cases of fiduciary conveyances, the deed itself must show substantial compliance with the requirements of the will and of the law, and be in other respects regular.

An executor's deed, under power, should always expressly state that it is made in execution of such power, and where the executor also possesses individual interests in the land conveyed and his deed does not purport to be in pursuance of his delegated authority or in execution of the power with which he is invested, it will be insufficient to pass the interest of the testator.[88]

§ 288. **Administrators' Deeds.** An administrator is re-

86 Buckingham *v.* Wesson, 54 Miss. 526; Whitman *v.* Fisher, 74 Ill. 147; Cronise *v.* Hardt, 47 Md. 433; Jelks *v.* Barrett, 52 Miss. 315; Hughes *v.* Washington, 72 Ill. 84. But the power must be explicit; general words do not confer power to sell lands: Skinner *v.* Wood, 76 N. C. 109.

87 See "Judicial and Execution Sales," and the chapter on Testamentary Conveyances.

88 Cohea *v.* Hemingway, 71 Miss. 22; Davenport *v.* Young, 16 Ill. 548.

garded as an executive officer of the court, while he also occupies the relation of trustee to the estate, its creditors and distributees.[89] Although he may not possess as much power as an executor, the latter deriving his authority from the testator and the law, and the administrator from the law only,[90] he yet possesses the necessary power to sell property, negotiate securities, and to settle and pay debts,[91] but always under the order and direction of the court. He takes neither an estate, title, nor interest in the lands of his intestate,[92] but a mere naked power to sell for specific purposes.[93] He takes the land as he finds it,[94] and having no interest therein, can maintain no action to perfect the title or relieve it of any burden,[95] and must sell it as he finds it.[96]

An administrator's deed derives its primary validity from the order of the court directing the sale of the land in question, and this order, together with a synopsis of the preliminary proceedings which induced it, and the report of sale and confirmation, should precede the deed in every instance.[97] The power to sell is a personal trust, which can not be delegated,[98] and the sale being a fiduciary act based upon statute, must show affirmatively a strict compliance with the law.[99] In addition

89 Wingate *v.* Pool, 25 Ill. 118; State *v.* Meagher, 44 Mo. 356. These remarks will also apply to some phases of the office of executor. See foregoing section.

90 Gilkey *v.* Hamilton, 22 Mich. 283.

91 Walker *v.* Craig, 18 Ill. 116. Real estate cannot be sold by an administrator unless the personal estate is insufficient to pay the liabilities; and, ordinarily, only so much should be sold as is necessary for that purpose: Newcomer *v.* Wallace, 30 Ind. 216; Foley *v.* McDonald, 46 Miss. 238.

92 Ryan *v.* Duncan, 88 Ill. 144; Stuart *v.* Allen, 16 Cal. 473.

93 Smith *v.* McConnel, 17 Ill. 135; Floyd *v.* Herring, 64 N. C. 409.

94 Gridley *v.* Watson, 53 Ill. 186.

95 LeMoyne *v.* Quimby, 70 Ill. 399; Ryan *v.* Duncan, 88 Ill. 146.

96 Martin *v.* Beasley, 49 Ind. 280.

97 See Probate Proceedings, *infra*.

98 Chambers *v.* Jones, 72 Ill. 275; Gridley *v.* Philips, 5 Kan. 349.

99 Fell *v.* Young, 63 Ill. 106; Lockwood *v.* Sturdevant, 6 Conn. 386; Corwin *v.* Merritt, 3 Barb. 341. An administrator's deed for land is not admissible as evidence without proof that the maker was administrator: Ury *v.* Houston, 26 Tex. 260.

to the report of sale, a substantial account of same is also incorporated into the deed, and this, together with all other material recitals tending to show a full compliance with the decretal order and statutory requirements should be stated with reasonable detail in the abstract. A form is here appended for further illustration:

Nathaniel M. Jones, as administrator of the estate of John R. Thompson, deceased, late of Cook County, Ills., to James McHenry Doc. 125416.

Administrator's Deed. Dated July 15, 1882. Recorded Aug. 4, 1882. Book 119, Page 410. Sets forth, that the Probate Court, of Cook County, Illinois, at a regular term thereof, on May 10, 1882, in a certain cause, brought under the statute, wherein said Nathaniel M. Jones, as Administrator of the estate of said John R. Thompson, deceased, was plaintiff, and George R. Thompson and Mary E. Thompson, were defendants, did, by order duly entered, empower and direct said Nathaniel M. Jones, as such Administrator, to sell at public vendue the real estate of said John R. Thompson, deceased, hereinafter described, for the purpose of paying the just claims against his estate.

That in pursuance of said decretal order, said first party, as such administrator, having given due public notice of the intended sale by causing a notice of the terms, time and place of such sale, together with a description of the real estate to be sold, to be previously posted for four weeks, at four of the most public places in the county where such real estate was sold, and also, to be published for four successive weeks prior to said sale, in the Chicago Legal News, a newspaper published in said Cook County, the county where such real estate was sold, agreeably to the order and directions of said Probate Court, and in accordance with the statute in such cases made and provided, did, on June 15, 1882, pursuant to the order and notice aforesaid, sell at public vendue the real estate of

said John R. Thompson, deceased, in said order described, to James McHenry, he being the highest bidder therefor.

That first party made and filed in the office of the clerk of said Probate Court a complete report of his proceedings and sale under said order, and said Probate Court having carefully examined the same on July 10, 1882, finding the same correct, did approve and confirm the same, and ordered said Nathaniel M. Jones, as such administrator, to execute, acknowledge and deliver a deed of said real estate to second party, on his complying with the terms of said sale,[1] *and that second party has in all things complied with the terms of said sale on his part to be performed.*

Now, therefore, first party, in consideration of the premises and $100.00, grants, bargains and sells land in Cook County, Ill., to wit: [Here follows the description of the land according to the deed.]

Together with all and singular the hereditaments and appurtenances thereunder belonging, and all the estate, right, title, interest, claim, and demand whatsoever, at law or in equity, which said John R. Thompson, deceased, had at the time of his death, in and to said premises.

To have and to hold the same unto second party, his heirs and assigns forever, as fully and effectually, to all intents and purposes in law, as second party might, could or ought, to sell and convey the same, by virtue of said decretal order.

Certificate of acknowledgment, dated July 15, 1882.

The doctrine of *caveat emptor* applies to all sales by the administrator,[2] and the purchaser, who is presumed to have made all necessary inquiries, takes the title at his peril,[3] and subject to all liens, except those for the payment of which the land is sold.[4] The purchaser has no right to the land until

1 One who produces an administrator's deed as evidence of his title, must show that its execution was authorized. LaPlante v. Lee, 83 Ind. 155.

2 McConnell v. Smith, 39 Ill. 279.

3 Bishop v. O'Connor, 69 Ill. 431.

4 Henderson v. Whitinger, 56 Ind. 131.

the sale has been confirmed,[5] but where the sale has been made under a proper order of the court, and reported to and confirmed by such court, it conveys title even though the proceedings be irregular.[6]

§ 289. **Administrator with Will Annexed.** An administrator with the will annexed occupies much the same position as an executor and may exercise many of the executor's powers.[7] He acts under the will and, as a rule, any power given to the executor, which is not in the nature of a personal trust, that is, where the power given belongs to the office of executor and not to the person, may be exercised by an administrator with the will annexed.[8] Where the will creates a personal trust which the executor alone could execute without the intervention of a court, the trust will not pass to the administrator with the will annexed, and sales thereunder of real property of the testator by the administrator will be without authority and void.[9] Where the will gives to an executor therein named powers and duties to be performed which do not ordinarily come within the scope of an executor's functions,[10] or where land is devised to him to be sold,[11] an administrator with the will annexed has no power, without the aid of a court, to sell the lands so devised or directed to be sold, or to execute the special powers given to the executor.[12]

[5] Mason *v.* Osgood, 64 N. C. 467; Rawlings *v.* Bailey, 15 Ill. 178; Ury *v.* Houston, 36 Tex. 260.

[6] Thorn *v.* Ingram, 25 Ark. 52; Myer *v.* McDougal, 47 Ill. 278. Compare Chase *v.* Ross, 36 Wis. 267.

[7] An administrator *cum testamento annexo* is appointed on the following occasions: 1. Where no executor is appointed by the will. 2. Where an executor is appointed but dies before the testator. 3. Where from any cause the executor becomes incompetent, disqualified or renounces the office. 4. Where the executor dies before the completion of administration; in this latter case the administrator is also administrator *de bonis non*.

[8] Anderson *v.* McGowan, 45 Ala. 462; Prescott *v.* Morse, 64 Me. 422; Belcher *v.* Branch, 11 R. I. 226.

[9] Anderson *v.* McGowan, 45 Ala. 280; Dunning *v.* Ocean Nat. Bank, 61 N. Y. 497; Ross *v.* Barclay, 18 Pa. St. 179.

[10] Ingle *v.* Jones, 9 Wall. 486.

[11] Nicoll *v.* Scott, 99 Ill. 529; Dunning *v.* Ocean Nat. Bank, 61 N. Y. 497; Gilchrist *v.* Rea, 9 Paige, 66.

[12] Such trusts frequently devolve upon a trustee whom the court may

§ 290. **Guardians' Deeds.** Guardians [13] and conservators [14] frequently make conveyances of the real estate of their wards, either to pay debts, or for the support and education of the ward, or for the purpose of investing the proceeds; and such conveyances, if attended by all the statutory requisites, are effectual to convey all the title which the ward may have possessed at the time of the sale.[15] Sales of this kind are made under the direction of the probate court upon petition by the guardian stating the necessary jurisdictional facts,[16] and after notice of such application, in the manner provided by law.[17] Such sales must be further reported to and confirmed by the court granting the license,[18] but the title of the ward will not be divested until a deed has been ordered and actually executed.[19]

The deed should therefore be preceded in the abstract by brief recitals of the antecedent steps or references to all jurisdictional facts. These would consist of an abstract of the letter of guardianship, but not necessarily of the preliminary matters of inducement, as a letter of guardianship is in the nature of a certificate or commission, and, in the absence of any statu-

appoint for that purpose: Farwell *v.* Jacobs, 4 Mass. 634.

13 The common law recognized four kinds of guardians, to wit: in chivalry, by nature, in socage, and by nurture. The distinctions do not, and never have existed in the United States. The statutory guardianship is the only kind which figures in land titles.

14 The estate, and frequently the person as well, of persons *non compos mentis*, is often confided to the care of a statutory guardian generally called a conservator or committee.

15 Wisenor *v.* Lindsay, 33 La. An. 1211; Mulford *v* Beveridge, 78 Ill. 445; Fitzgibbon *v* Lake, 29 Ill. 165.

16 The petition is of paramount necessity, and, it seems that without such a petition the court gets no jurisdiction to grant a license to sell; Ryder *v* Flanders, 30 Mich. 336.

17 The notice is jurisdictional, and a sale without giving the statutory notice has been held absolutely void: Rankin *v* Miller, 43 Iowa, 11; Kennedy *v* Gaines, 51 Miss. 625. If, however, the notice is defective merely, the jurisdiction is saved: Lyon *v* Vannatta, 35 Iowa, 521.

18 Confirmation is essential to the validity of the sale. People *v.* Circuit Judge, 19 Mich. 296; White *v.* Clawson, 79 Ind. 188; Chapin *v.* Curtenius, 15 Ill. 427.

19 Doe *v.* Jackson, 51 Ala. 514.

tory provision requiring it, it is not essential to its validity as evidence of the appointment that it should recite the mode and particulars of emanation, while all reasonable presumptions must be indulged in favor of its having been regularly issued and after lawful proceedings;[20] a brief synopsis of the petition and notice, or at least references to those instruments; a synopsis of the decree or license of sale; and reference to the guardian's report of sale, and order of confirmation.

§ 291. **Trustees Can Not Become Purchasers.** It is a settled principle of equity, that no person who is placed in a situation of trust or confidence with respect to the subject of the sale can be a purchaser of the property on his own account. The principle is not confined to a particular class of persons, such as guardians, trustees, etc., but is a rule of universal application to all persons coming within its principle, which is, that no party can be admitted to purchase an interest, where he has a duty to perform that is inconsistent with the character of purchaser. The reason of the rule is, not because they might not, in many instances, make fair and honest disposition of it to themselves, but because the probability is so great that they would frequently do otherwise, without danger of detection, that the law considers it better policy to prohibit such purchases entirely than to assume them to be valid except where they can be proved to be fraudulent.

"The rule forbidding conflict between interest and duty is no respecter of persons. It imputes constructive fraud, because the temptation to actual fraud and the facility of concealing it are so great. And it imputes it to all alike, who come within its scope, however much or however little open to suspicion of actual fraud."[21]

The principles which prohibit the trustee from becoming a

[20] Burrows *v.* Bailey, 34 Mich. 64. The proceedings by a guardian to sell his ward's lands are statutory, and a material deviation from the requirements of the statute is, in general, jurisdictional.

[21] Ryan, C. J., in Cook *v.* Berlin Mill Co., 43 Wis., 433; Story's Eq., § 310; Grumley *v.* Webb, 44 Mo. 444; Blauvelt *v.* Ackermann, 20 N. J. Eq. 141; R. R. Co. *v.* R. R. Co., 19 Gratt. (Va.) 592; Boerum *v.*

purchaser extends to all sales of the trust property whether made by the trustee himself, under his powers as trustee, or under an adverse proceeding. As a general trustee of the subject-matter, it is his duty to make it bring as much as possible at any sale that may take place, and therefore he cannot put himself in a situation where it becomes his interest that the property should bring the least sum.[22]

§ 292. **Continued — Qualifications of the Rule.** The foregoing, though stating the generally received doctrine, is yet subject to qualification. While the rules as stated still apply in all their pristine vigor to a large class of fiduciary relations, to certain others their effect has been greatly modified. Thus, a purchase of land by an executor, at his own sale, directly or indirectly, is not ordinarily void, but only voidable at the option of the heirs or beneficiaries seasonably expressed.[23] A clear and unequivocal affirmance of the sale, which must be *bona fide*, may conclude the beneficiary, if under no disability and in full knowledge of the facts, and the acceptance of proceeds by the beneficiary would, in general, amount to an affirmance.[24]

All such sales, however, are viewed by the courts with a jealous eye and set aside for slight cause, and titles derived through or under them are questionable at best. If re-enforced by a quitclaim or confirmation by the heirs or beneficiaries, they become less obnoxious,[25] yet even then they are far from perfect, as the unsatisfied rights of creditors may raise equities sufficient to vacate and annual the deed.

Scheneck, 41 N. Y. 182; Roberts *v.* Roberts, 65 N. C. 27; McGowan *v.* McGowan, 48 Miss. 553; Goodwin *v.* Goodwin, 48 Ind. 584; Sheldon *v.* Rice, 30 Mich. 296.

22 Martin *v.* Wyncoop, 12 Ind. 266.

23 Frazer *v.* Lee, 42 Ala. 25; Smith *v.* Granberry, 39 Ga. 381; Williams *v.* Rhodes, 81 Ill. 571; Froneberger *v.* Lewis, 70 N. C. 456; Dodge *v.* Stevens, 94 N. Y. 209.

24 Boerum *v.* Schenck, 41 N. Y. 182; Brantly *v.* Cheeley, 42 Ga. 209; Scott *v.* Mann, 33 Tex. 721.

25 Where one receiving title from a trustee is chargeable with notice of the disability of his grantor, it is essential, in most cases, that some affirmation of the sale be obtained from the beneficiary.

CHAPTER XVIII.

ASSIGNMENTS, INSOLVENCY AND BANKRUPTCY.

§ 293. Assignments generally.
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295. Validity of assignments.
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§ 293. **Assignments Generally.** An assignment, as defined by Burrill,[1] "is a transfer or setting over of property, or of some right or interest therein, from one person to another; the term denoting not only the act of transfer, but also the instrument by which it is effected." When applied to real estate it indicates a transfer of the entire interest of the assignor in the transferred property, but in popular use is restricted to the conveyance of an estate for life or years. The term is also used to distinguish a peculiar class of conveyances resorted to by persons who find themselves in embarrassed circumstances, or who are unable to satisfy the full demands of their creditors. In this sense assignments are classed as *voluntary,* or such as are made by the free act and deed of the assignor; and *involuntary* or statutory, or such as are made under compulsion of law and in the furtherance of statutes of bankruptcy or insolvency. In all cases they imply a trust and the intervention of a trustee,[2] and conveyances made directly to the beneficiaries, though for the same purpose, are not technically assignments,[3]

1 Burrill on Assignments.

2 Cowles *v.* Rickett, 1 Iowa, 382; Dickson *v.* Rawson, 5 Ohio St. 218; Peck *v.* Merrill, 26 Vt. 686.

3 Beach *v.* Beston, 47 Ill. 521; Keen *v.* Preston, 24 Ind. 395; Johnson *v.* McGraw, 11 Iowa, 151; Griffin *v.* Roger, 38 Pa. 382.

and come under the provisions regulating ordinary deeds of transfer and sale.

§ 294. **Voluntary Assignments.** The power to make an assignment for the benefit of creditors is not derived from any statutory enactment. Every debtor, whether solvent or insolvent, possesses, independent of statutory grant, the right to make any disposition of his property which does not interfere with the rights of others; in other words, to make any honest disposition of his property that he pleases. The right of assignment is clearly within the absolute dominion which the law empowers every man to exercise over his own. Statutory provisions concerning assignments are to be found in all the States, yet such statutes do not confer the right, but merely regulate its exercise, subjecting it, as in other transfers of property, to certain restrictions and limitations which experience has demonstrated to be wise and just; but it is still the assignor's voluntary act, and not the act of the law.

So, also, the power of the assignee is fixed by the instrument of assignment, which is at once the guide and measure of his duty. Beyond that, or outside of its terms, he is powerless and without authority. He distributes the proceeds and disposes of the estate placed in his care according to the dictation and under the sole guidance of the assignment, and the statutory provisions merely regulate and guard his exercise of an authority derived from the will of the assignor. In all things the assignee is the representative of the assignor, and must be governed by the express terms of his trust.[4]

As a general rule, in the absence of special statutory restrictions, a debtor in failing circumstances, acting in good faith, may lawfully prefer one creditor, even to the total exclusion of all the others,[5] and may also, in like good faith, in a reasonable manner, use his property by mortgage, pledge or otherwise in raising money to pay such creditor.[6]

[4] *In re* Lewis, 81 N. Y. 421; Pillsbury *v.* Kingon, 31 N. J. Eq. 619; Bank *v.* Willis, 7 W. Va. 31.

[5] Tomlinson *v.* Matthews, 98 Ill. 178; Thomas *v.* Goodwin, 12 Mass. 140.

[6] Cuendet *v.* Lahmer, 16 Kan. 527.

§ 295. **Validity of Assignments.** In all cases where conveyances are made for the ostensible purpose of securing an equal distribution among creditors, of the property of the debtor, the validity of the conveyance depends upon the intention of the debtor. If the intention be to hinder and delay creditors in the enforcement of their demands against such debtor, rather than to secure an equitable distribution of the property among creditors, and for their benefit, the conveyance is fraudulent and void. It is not the effect of such conveyances that determines their validity, for every such conveyance in effect hinders and delays creditors. It is the intention that controls, and that intention can not be better determined than from the language of the deed of conveyance, although it may be established by extraneous evidence.[7]

A full narration of the recitals and conditions of the trust seems desirable in all cases of recent conveyance, as, where it appears from the face of the deed, that the motive for making it was to prevent a sacrifice of the property; or if there be reserved to the assignor any benefit or advantage out of the property conveyed, the intention as well as legal effect would be to hinder and delay creditors and the conveyance would be void.[8] The consideration expressed is a matter of minor importance, the true consideration being the agreement of the assignee to perform the trusts imposed upon him by the assignment; and that, in contemplation of law, constitutes a full and complete consideration.[9]

§ 296. **Formal Requisites.** Though voluntary assignments are founded on common right, yet, to prevent fraud by the setting up of fictitious transfers claimed to have been made for the benefit of creditors, they must be attended with the prescribed legal formalities of the State where made, or where

[7] German Ins. Bank *v.* Nunes, 14 Reporter, 206; Mackie *v.* Cairns, 5 Cow. (N. Y.) 547; Henderson *v.* Downing, 24 Miss. 106.

[8] Gardner *v.* Com. Nat. Bank, 95 Ill. 298; Vernon *v.* Morton, 8 Dana (Ky.), 263; Phelps *v.* Curtis, 80 Ill. 113; Kayser *v.* Heavenrich, 5 Kan. 324; Lockhart *v.* Wyatt, 10 Ala. 231; Reed *v.* Pelletier, 28 Mo. 173.

[9] Thomas *v.* Clark, 65 Me. 296; Gates *v.* Labeaume, 19 Mo. 17.

the property to be affected is situated; and unless executed in conformity with such laws, are inoperative and void. By the instrument the debtor's property must be unconditionally and without restriction transferred to the assignee, with a general authority to him to receive, hold, and dispose of it for the equal benefit of all the creditors, or in the order of preference, if any, provided for.[10]

The assignment should be executed with the same solemnities that characterize ordinary deeds for the conveyance of land, and be duly acknowledged before an authorized officer.[11] Defects of this nature should be noted by the examiner with the same scrupulous care as in other conveyances between individuals.

No particular form of instrument is needed to constitute an assignment, and any valid transfer, intelligibly indicating the trusts, will suffice.[12] It is usual to set out the real estate conveyed, either in the body of the deed or a schedule thereto annexed, yet such is its force as a conveyance, that, when made only in general terms, it will transfer all the property which the assignor then owns, either in possession or expectancy, and the omission to specifically describe property in the inventory would not prevent the title thereto from passing to the assignee.[13] If the instrument mentions specific property, without a clause of general conveyance, or even makes special exceptions, it will not, for that reason, be void, as the title to such withheld property may still be pursued by creditors, their remedies being neither hindered nor delayed,[14] and so long as there is no reservation of some part of, or some right or interest in, the property actually conveyed, the assignment will be valid.

10 McIntire *v.* Benson, 20 Ill. 500. In some States preferences are not permitted. Consult local statutes.

11 Britton *v.* Lorentz, 45 N. Y. 51.

12 Norton *v.* Kearney, 10 Wis. 443.

13 Roseboom *v.* Mosher, 2 Denio (N. Y.), 61.

14 Knight *v.* Waterman, 36 Pa. St. 258; Ingraham *v.* Grigg, 21 Miss. 22; Bates *v.* Ableman, 13 Wis. 664; Carpenter *v.* Underwood, 19 N. Y. 520.

The statutory requirements relate mainly to the acceptance of the trust by the assignee, filing of bond, notice to creditors, etc., and in these respects a literal compliance is usually necessary. The abstract should show a full synopsis of the proceedings; the operative parts of the instrument of transfer, including the trusts; and such portions of the inventory or schedule as cover the real estate in question.

§ 297. **Title of Assignee.** It is a usual requirement on the part of the assignee, that before taking possession of the assigned estate, he shall, within a stipulated time after the filing of the inventory, execute and file, in the proper office, a bond conditioned for the faithful performance of his duties; and it has been held that the absolute title to the property assigned does not pass until this bond is filed. In the interval between the filing of the assignment and the filing of the bond, the inchoate or conditional title rests under the protection of the court, which has jurisdiction over the property but not over the assignee; and a failure to file the bond, within the prescribed time, is, it is said, equivalent to a declination of trust which terminates all right in the property which the assignee may have acquired by the filing of the assignment.[15] Where, however, there has been a formal acceptance of the trust the transfer is complete and irrevocable, and the title to the property vests in the assignee for the benefit of the creditors.[16]

An assignee is not regarded as a purchaser for value, and has none of the equities of such purchaser. He stands entirely on his naked legal title and this he can acquire only by an observance of the methods prescribed by law. The filing of the bond in such case, unless expressly made so by statute, is not a condition precedent to the vesting of the estate, nor will the failure to give the statutory security within the time limited invalidate the transfer or restore the title of the assigned property to the assignor. In the event of the failure to file a bond, as required by law, the assignee, though invested with title,

[15] Kingman *v.* Barton, 24 Minn. 295.

[16] Hyde *v.* Olds, 12 Ohio St. 591; Forbes *v.* Scannell, 13 Cal. 242; Brown *v.* Chamberlain, 9 Fla. 464; Hall *v.* Dennison, 17 Vt. 310.

has no power or authority to dispose of the property for the purposes of the trust, which would then be a dry trust merely to take possession and hold until he should become qualified and empowered to dispose of it; but having accepted, he can only be relieved of the trust and divested of the estate by the order of a court of competent jurisdiction.[17]

§ 298. **Construction and Effect.** An assignment for the benefit of creditors, conveying property to trustees with power to sell and to apply the proceeds in payment of debts, is an absolute conveyance, by which both the legal and the equitable estate is divested out of the grantor and vested in the assignee, subject to the uses and trusts in favor of the creditors.[18] "An assignment," says Burrill,[19] "is more than a security for the payment of debts; it is an absolute appropriation of the property to their payment. It does not create a lien in favor of creditors upon property which, in equity, is still regarded as the assignor's, but it passes both the legal and equitable title to the property absolutely beyond the control of the assignor. There remains, therefore, no equity of redemption in the property, and the trust which results to the assignor in the unemployed balance does not indicate such an equity." The title in the hands of the assignee is relieved of none of its burdens, but remains subject to all existing liens and equities.[20]

§ 299. **Conflict of Laws — Foreign Assignments.** Deeds of assignment are governed by the same general rules as other conveyances, and when executed in one State but including or operating upon lands in another, their validity and effect, as instruments of conveyance of such lands, must be determined by the laws of the latter State.[21] They have no extra-

17 Brennan *v.* Willson, 71 N. Y. 502; Thrasher *v.* Bently, 59 N. Y. 649.

18 Dwight *v.* Overton, 32 Tex. 390; Van Keuren *v.* McLaughlin, 21 N. J. Eq. 163; Briggs *v.* Davis, 21 N. Y. 574.

19 Burrill on Assignments, 12; and see, Briggs *v.* Davis, 21 N. Y. 577; Hoffman *v.* Mackall, 5 Ohio St. 124; Turner *v.* Watkins, 31 Ark. 437.

20 Williams *v.* Winsor, 12 R. I. 9.

21 Story, Conflict of Laws, § 364; Cutler *v.* Davenport, 1 Pick. 81; Loving *v.* Paire, 106 Iowa, 282; Gardner *v.* Com. Nat. Bank of Providence, 95 Ill. 298.

territorial force, yet, on principles of comity, an assignment valid in the State where it is made, and where the assignor resides, will generally be permitted to operate on the assets of such assignor in each of the other States.[22]

§ 300. **Insolvency.** A special procedure is provided in most of the States for the distribution of the estate and effects of insolvent debtors, and their subsequent discharge from the debts thus satisfied. Such proceedings have the same general effect, within the jurisdiction of the State, as proceedings under the national bankrupt law, and to which they bear a strong analogy. During the continuance of the bankrupt law their operation is suspended, and owing to this and the infrequency with which the remedy has been used, but few instances will occur where conveyances have been made under same. The examples which follow, of abstracts of proceedings under the national bankrupt laws, will serve as illustrations of the method of showing State insolvency matters whenever they may occur. The validity of titles so derived is a matter of local law and construction.

§ 301. **Bankruptcy.** At the date of this writing a national bankrupt law, passed in 1898, is in force, under which many transfers have been made. Numerous transfers under the operation of past laws will also be found of record. Proceedings by virtue of the act of 1841 require but slight notice, the rights of all parties thereunder having become permanently established by the effluxion of time. Proceedings and conveyances under the act of 1867 should be shown in greater detail, yet even here only a brief synopsis seems necessary. The operation and effect of the law of 1898 being recent and continuous, more attention to details will be required.

§ 302. **Jurisdiction and Practice.** By the bankrupt act of 1867,[23] the District Courts of the United States were given original and exclusive jurisdiction and power over all "acts, matters, and things to be done under and by virtue of the bankruptcy," and were authorized, by summary proceedings, to ad-

22 Mowry *v.* Crocker, 6 Wis. 326. 23 14 Stat. at Large, 520.

minister all the relief which a court of equity could administer under the like circumstances upon regular proceedings.[24] A revisory jurisdiction was further conferred upon the federal circuit courts, but all initiate proceedings were confined to the district courts, which, when sitting as courts of bankruptcy, were regarded as separate courts, exercising powers and a jurisdiction distinct from their powers as district courts as originally constituted.[25] Such courts were permitted to exercise extraterritorial jurisdiction in collecting the estate and adjusting the claims of the creditors of the bankrupt, but in all matters of controversy touching the rights of the assignee under the assignment, when the subjects in dispute were of a local nature, the rights of parties could only be determined by actions in local courts.[26] The act of 1898 also gives jurisdiction of proceedings in bankruptcy to the District Court, but the procedure differs in many respects from that observed under former laws.

§ 303. **Classification.** Bankruptcy is either *voluntary,* when precipitated by the debtor's own act; or *involuntary,* when produced by the action of the creditors, the effect upon the property of the bankrupt being the same in either case. In both instances, it is initiated by the filing of a petition, and consummated by adjudication. When, after adjudication and before any assignment has been made, a composition is effected and the bankrupt discharged, there seems no good reason why the abstract should be encumbered by details which are immaterial to the title, and such proceedings may be safely omitted.[27]

[24] Matter of Wallace, Deady, 433; Newman *v.* Fisher, 37 Md. 259; Voorhees *v.* Frisbie, 25 Mich. 476.

[25] Norris' Case, 1 Abb. (U. S. 514.

[26] Whitridge *v.* Taylor, 66 N. C. 273.

[27] This is on the principle that the matter possesses no more force than a satisfied judgment, which is neither a lien nor a cloud upon the title, but only a clog upon the examiner's efforts when shown in an abstract. Many examiners prefer, however, to briefly allude to the filing of the petition and discharge, as the bankrupt, during this period, has no power of disposition over his effects; the adjudication being to deprive him of the power, while the discharge restores same.

§ 304. **Nature and Effect of Bankruptcy.** A person adjudicated a bankrupt is deemed a bankrupt from the day on which he files his petition, and, from the moment the petition is filed, so far as his property is concerned, he is considered as civilly dead. During the interval existing between the filing of the petition and the appointment of a trustee,[28] a condition of things exists not unlike that before the appointment of an administrator in the case of a person dying intestate, no one being authorized to dispose of or assign his assets.[29] Under the law of 1867 a voluntary bankrupt was intrusted with the care of his estate before an assignee was chosen, as a sort of trustee, and in involuntary proceedings a warrant issued to the U. S. marshal, who, as the messenger of the court, took possession provisionally of all the bankrupt's property.[30] Under the law of 1898 a receiver may be appointed to hold the bankrupt's property pending an adjudication, or, in involuntary cases, a warrant may issue to the marshal as heretofore.

§ 305. **Procedure.** It is assumed that both examiner and counsel are familiar with the general procedure of the bankruptcy court, and this chapter is prepared on that hypothesis. It may be well, however, to briefly direct the attention of the reader to the changes of method which are noticeable in the present law when compared with the former practice. Under the law of 1867 the proceedings were conducted under the direction and supervision of an officer called "Register in Bankruptcy," and whenever it became necessary to administer the bankrupt's estate a formal transfer of his property was made by the Register to an officer called an "Assignee." In virtue of the authority thus conferred the assignee took possession of the property, and, if necessary, sold it to satisfy the bankrupt's debts.

28 Under the law of 1867 an assignment was made, the assignee occupying much the same position as a trustee under the present law.

29 Johnston *v.* Geisriter, 26 Ark. 44.

30 *In re* Muller, Deady, 513; *In re* Harthill, 4 Ben. 448; Williams *v.* Merritt, 103 Mass. 184; *In re* Carow, 41 How. Pr. (N. Y.) 112.

Under the law of 1898, after an adjudication of bankruptcy has been entered by the court, the matter is sent to an officer called a "Referee," who thereafter conducts the proceedings. In the event that the creditors shall so desire a "Trustee" is appointed to take the debtor's property and convert it into money. Upon his appointment and qualification the Trustee becomes invested, by operation of law, with all of the bankrupt's titles and rights of ownership, except statutory exemptions, as they existed at the date of the adjudication. Whenever, in the course of the proceeding, the lands of the bankrupt are sold the title thereto is conveyed to the purchaser by the trustee.

§ 306. **Bankruptcy Proceedings — How Shown.** As in chancery proceedings, only a brief outline of the procedure of the bankruptcy court can well be shown in the abstract, which in cases of this nature is rather an index than a transcript. Sufficient, however, should be given to show the apparent regularity of the proceedings, and the degree of detail may be regulated by the wishes of the client. After confirmation, a sale by the assignee or trustee stands in the same relative position, with respect to irregularities, etc., in anterior proceedings, as other sales in chancery, and such anterior proceedings require no greater elaboration. With such changes as may be necessary to suit the exigencies of particular cases, the following will afford a sufficient example. This proceeding, it will be observed, is under the law of 1867.

In the matter of the estate of Andrew Smith, Bankrupt.

U. S. District Court,
Northern District of Illinois.
Case No. 1,000.
Petition filed Nov. 10, 1868.[81]
Schedule of assets and liabilities mentions, [here set out so much of the real estate described as is covered by the

[81] An assignment in bankruptcy relates to the commencement of the proceeding, and the title of the assignee becomes vested as of that date. International Bank v. Sherman, 101 U. S. 403.

caption of the abstract; or, if not mentioned, say: *does not mention property in question.*] *Adjudication entered Nov. 16, 1868.*[32] *Robert E. Jenkins appointed assignee Nov. 16, 1868.*

Petition of said assignee, filed Dec. 1, 1868, praying leave to sell assets of said estate at public auction, etc.

Order entered, Dec. 2, 1868, authorizing said assignee to sell assets as prayed for in said petition, after giving three weeks' public notice by publication, etc., and ten days' notice by mail to creditors.

Assignee's report of sale, with proof of publication and notice of sale attached, filed February 1, 1869, showing sale of [here set out the description of property sold if covered by the search; or, if only one piece is named in schedule, or, if all the property named in schedule is sold to one person, say: *the lands described in schedule of assets and above set forth*] *to Alexander Hamilton for $10,000.*

Assignee's report of sale approved and sale confirmed February 10, 1869.

The subsequent proceedings, relative to the discharge of the bankrupt are immaterial, as he has now been divested of all title to the land in question; but should the examiner desire to add a symmetrical close to his synopsis of the action of the bankruptcy court, he may add:

Petition for discharge filed March 1, 1869.
Register's final report filed March 10, 1869.
Discharge entered and issued May 1, 1869.

§ 307. **The Assignment.** The synopsis given in the last section is taken from the rolls of the district court, and shows

32 In case there should have been a composition and subsequent discharge, the notes of same may, in the examiner's discretion, be entered immediately following. Inasmuch as such proceedings shed no light on the title they are not inserted in the form above given. They would consist of the dates, severally, of the entering and filing of the petition for composition meeting; the Register's report of composition, and decree confirming same; the Register's report of compliance and final discharge.

the general course of the proceedings under the law of 1867. The formal instrument, however, by which the assignee acquired the legal title, was an assignment by the Register, which was duly recorded as a title deed in the registry of deeds of the county wherein the land was situate, and in the abstract it may be shown as follows:

Homer N. Hibbard, one of the Registers in Bankruptcy of the District Court of the U. S. for the Northern District of Illinois,
to
Robert E. Jenkins, assignee of Andrew Smith, Bankrupt.

Assignment.
Dated Nov. 16, 1868.
Recorded Nov. 17, 1868.
Book 691, page 625.

Conveys and assigns all the estate, real and personal, of said Andrew Smith, bankrupt, including all the property, of whatever kind, of which he was possessed, or in which he was interested or entitled to have, on Nov. 10, 1868, with all his deeds, books and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of Sec. 5045, of title 61, Bankruptcy, of the Revised Statutes of the United States.[33]

In trust, for the uses and purposes, with the powers, and subject to the conditions and limitations set forth in said act.

This presents substantially the contents of the assignment, and conveys all the information necessary to be shown in the

33 It should be remembered that only the property actually owned by the bankrupt passes by this assignment, and hence where such bankrupt possesses the legal title only, but no beneficial interest, the title does not vest in the assignee and can not be conveyed by him (Rhodes *v.* Blackiston, 106 Mass. 334); and the mere fact that the assignee inventories certain land as belonging to the estate of the bankrupt, and sells and conveys same under order of court, does not operate as an adjudication that the land was the property of the bankrupt at the time of the filing of the petition, but only that whatever of title the bankrupt then had is conveyed to the purchaser: Wilkins *v.* Tourtellott, 28 Kan. 825.

abstract, but should the examiner so desire he may set forth the instrument in greater detail.

§ 308. **Assignee's or Trustee's Deed.** In order to present the synopsis of bankruptcy proceedings in a connected manner, and as it should appear in the abstract, it is deemed advisable to give the assignee's deed in this place rather than where it more properly belongs, in the chapter devoted to official conveyances. These deeds, like other conveyances by trustees, are usually long and prolix, and considerable discrimination must be exercised in preparing the abridgment, in order to present everything that can shed light on the transaction and yet avoid burdening the abstract with unnecessary particulars or useless verbiage. The following form, prepared from a long and technical deed, will serve to explain the meaning of these remarks and illustrate the methods described:

Robert E. Jenkins, Assignee in Bankruptcy of the Estate and Effects of Andrew Smith, Bankrupt,
to
Alexander Hamilton.

Assignee's Deed.[34]
Dated Feb. 10, 1869.
Recorded Feb. 12, 1869.
Book 100, page 200.

Sets forth that, in accordance with the provisions of the Revised Statutes of the United States, Title "Bankruptcy," a petition was filed in the District Court of the United States for the Northern District of Illinois, on Nov. 10, 1868, by said Andrew Smith, and on Nov. 16, 1868, said Andrew Smith was duly adjudged and declared bankrupt; and on Nov. 16, 1868, said Robert E. Jenkins was duly appointed assignee of the estate and effects of said bankrupt by H. N. Hibbard, one of the Registers in Bankruptcy of said Court, which said appointment was thereafter

[34] This is an abridgement of a deed under the law of 1867. Under the law of 1841 a deed containing a copy of the decree of bankruptcy and of the appointment of the assignee, needs no other recitals and will be good, if in other respects sufficient, the same as a deed made by the bankrupt before the adjudication; Ryder *v.* Rush, 102 Ill. 338.

duly approved and confirmed by said Court, and on Nov. 16, 1868, said Register conveyed and assigned to said Jenkins, as such assignee, all the estate, real and personal, of said bankrupt, including all the property of whatsoever kind, of which said bankrupt was possessed, or in which he was interested, or which he was entitled to have on Nov. 10, 1869 (excepting only such property as is excepted by the 5045th section of said Revised Statutes).

That said bankrupt, Andrew Smith, appears to have been, on said last mentioned date, possessed of or entitled to an interest in real estate and property hereinafter mentioned. And said assignee having first given notice, by publication once a week, for three consecutive weeks, pursuant thereto, on Feb. 1, 1869, offered for sale, and sold said real estate and property at public auction, and at said sale, second party was the highest bidder, and became the purchaser thereof for $10,000.00; which sale was, on Feb. 10, 1869, approved and confirmed by said Court, and said Court did, on the day and year last named, order and direct said assignee to execute and deliver to said second party a deed for the real estate so sold, conveying the same to him, in accordance with the terms of said sale.

Now, therefore, in consideration of the premises, and $10,000.00, remises, releases, sells, conveys and quitclaims, all the right, title, interest, estate, claim and demand of said bankrupt, which he had on Nov. 10, 1868, and of said Robert E. Jenkins, as assignee aforesaid, in and to the following described real estate, to wit: [Here set out the description of the property conveyed, employing the language of the deed], *with all the improvements, rights, privileges and appurtenances thereto belonging, but subject to all unpaid taxes and tax liens, and to all liens and incumbrances, unless expressly excepted, released or discharged by the orders of said Court, concerning said sale, and subject to all the terms and conditions of said sale.*

Certificate of acknowledgment, dated Feb. 10, 1869.

The foregoing will serve to suggest the treatment of a trustee's deed under the law of 1898, and the manner in which its recitals should be shown.

The title conveyed by the assignee or trustee is no better than that held by the bankrupt, and the purchaser takes it charged with all the equities to which it was subject in his hands,[35] and burdened with all liens, by mortgage or judgment, which existed against him at the time of the adjudication.

§ 309. **Discharge in Bankruptcy.** The effect of an adjudication in bankruptcy being to deprive the person adjudged a bankrupt of his power to take or convey property while resting under such sentence, it is proper that his restoration to civil rights should also be shown whenever the abstract discloses him in the character of a grantor or grantee after such

35 Walker *v.* Miller, 11 Ala. 1067; Stow *v.* Yarwood, 20 Ill. 497; Hardin *v.* Osborne, 94 Ill. 571. In this case, the court held that an assignee in bankruptcy does not take the title to the property of the bankrupt as an innocent purchaser without notice, free from latent equities, etc., but as a mere volunteer, standing in the shoes of the bankrupt, as respects the title, and having no greater rights in that regard than the bankrupt himself could assert. The bankrupt had, prior to the time he was adjudged a bankrupt, conveyed land, but the deed remained unrecorded, and the court *held*, that no title would pass to the assignee as against the purchaser holding under the prior unrecorded deed. "Suppose," said Walker, C. J., "the debts had been paid without the sale of the land, does any one suppose the bankrupt could have held it against his former grantee, whether or not his grantee had recorded his deeds? Where the purchaser had paid his money, and received the conveyance, his equities are surely equal to that of other creditors. His deed operated to convey to him the title, and the creditors have advanced nothing to procure a lien on the land, and the appointment only operated as a transfer of whatever interest the bankrupt held for the benefit of his creditors." But the learned judge further observes: "If, however, in such a case the assignee were to sell and convey the land to an innocent purchaser without notice, and he were to place his deed on record before that of the prior purchaser, a different case would be presented." In the case of Holbrook *v.* Dickenson, 56 Ill. 497, where the assignee had sold the land under a similar state of facts, it was held that the prior purchaser could not set up or show his unrecorded deed to defeat the title of the assignee's grantee, and this is the generally received doctrine resulting from the plain construction of the recording acts. And see Bank *v.* Stone, 80 Ky. 109; Wilkins *v.* Tourtellott, 28 Ky. 285.

adjudication. This may be accomplished by a simple note of the fact. Where a composition has been effected, such note would be given in connection with a brief reference to the petition and proceedings in the bankruptcy court. Where the debtor's property has passed from him to the assignee, or where a trustee has been appointed, and the subject of the examination consists of property in which the bankrupt has acquired an interest since the date of such assignment or appointment, the fact of discharge may be shown as an independent circumstance, its legal import being merely to show the removal of disability; thus,

In the matter of the bankruptcy of James L. Sherman.

In the U. S. District Court, Northern District of Illinois.
Case No. 3,529.
Voluntary Petition.
Filed December 19, 1877.
Discharge entered and issued to said Bankrupt, February 28, 1879.

The general effect of a discharge in bankruptcy is to free the bankrupt from all liability with respect to debts proved against his estate, as well as all debts founded on contracts made by him which might have been so proved.

CHAPTER XIX.

AGREEMENTS FOR CONVEYANCE.

§ 310. Land contracts.
311. Relation of parties under land contracts.
312. Effect and operation.
313. Nature and requisites.
314. As affected by recording acts.
315. Construction of land contracts.
§ 316. Formal parts.
317. Assignment of the contract.
318. Performance — Sufficiency of deed and title.
319. Forfeited contracts.
320. Bond for deed.
321. Agreement for conveyance by will.

§ 310. **Land Contracts.** Land contracts, or agreements to deed, are of frequent occurrence on the records, and occasionally bonds for the same purpose will be found, though these latter are now practically obsolete. Should the contract be executory its contents should be set forth with considerable minuteness, particularly such parts as relate to the parties, the subject-matter, and the conditions of conveyance. If, on the contrary, the contract has been consummated by deed, a passing allusion to it, as part of the chain of title, will be sufficient. Where the subsequent deeds do not show a substantial compliance, a full synopsis may become material, although the contract has been executed, and the examiner should, as a precautionary measure, first satisfy himself on this point before abstracting the instrument. In executed contracts, however, this is not of vital importance, for acceptance of a deed ordinarily merges any provisions of the contract of sale which are different from the deed.[1]

1 Davenport *v.* Whisler, 46 Iowa, 287; Bull *v.* Willard, 9 Barb. 641; Jones *v.* Wood, 16 Pa. 25. This is the accepted doctrine, yet it is subject to large qualification. The actual contract as shown by the agreement, will still be competent, where through fraud, inadvertence or mistake, a different deed has been delivered; Snell *v.* Insurance

§ 311. **Relation of Parties Under Land Contracts.** The relation subsisting between the parties to an ordinary contract for the conveyance of land upon the future payment of the purchase money, is analogous to that of equitable mortgagor and mortgagee, the vendor holding the legal title as security for the unpaid purchase money, which security is essentially a mortgage interest. The vendee has an equity of redemption, and the vendor a correlative right of foreclosure upon default in the payments.[2] In this, as in other cases, the mortgage is the incident, the debt the principal, and the vendor has no further interest except to the extent of the security the mortgage affords for his debt.[3]

§ 312. **Effect and Operation of the Contract.** The effect of a valid contract for the conveyance of land, is to vest in the vendee the equitable estate in the land, leaving the legal title in the vendor as a mere lien or security for the unpaid purchase money.[4] The vendor, in such case, is simply a trustee having an interest in the proceeds but not in the land, and this interest, upon his decease, would pass to his personal representatives and not to his heirs. The heirs would, it is true, take the legal title by descent, but only as it was vested in the ancestor, which was as a mere security for the debt.

Co., 98 U. S. 85, and cases cited. Where there has been, by mutual mistake, a failure to embody in the deed the actual agreement of the parties as evidenced by the prior written agreement, and the meaning of the prior agreement is clear, and nothing has occurred between the parties after it was signed and delivered to vary its terms, except the mere fact of the delivery of the deed, and the deed not effecting what both parties intended by the actual contract which they had made, a court of equity will interfere and reform the deed so given in accordance with the original and manifest intention: Elliot *v.* Sackett, 108 U. S. 132. It would seem, therefore, that in case of discrepancy or repugnancy the agreement should be fully abstracted or at least sufficient thereof given to show the repugnancy.

2 Church *v.* Smith, 29 Wis. 492; Button *v.* Schroyer, 5 Wis. 598; King *v.* Ruckman, 21 N. J. Eq. 599; Baldwin *v.* Pool, 74 Ill. 97; Fitzhugh *v.* Maxwell, 34 Mich. 138; Dew *v.* Dellinger, 75 N. C. 300.

3 Strickland *v.* Kirk, 51 Miss. 795.

4 Reed *v.* Lukens, 44 Pa. 200; Cary *v.* Whitney, 48 Me. 516; Miller *v*, Corey, 15 Iowa, 166.

The debt being due to the administrators or executors of the vendor, and the lien being considered as held by the heirs in trust, and simply as a pledge or security for its payment, on payment of the debt the heirs would be compellable in equity to execute the trust by the conveyance of the title, while the purchase money would go to the personal representatives.[5] The equity is a proper subject of devise by the vendee, or, in the event of his dying intestate will descend to his heirs the same as other realty, and in them is vested the equity of redemption.

§ 313. **Nature and Requisites.** The statute of frauds, substantially re-enacted in all the States, provides that no action shall be brought to charge any person upon any contract for the sale of lands, unless such contract or some note or memorandum thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized, and where there is no exception contained in the statute the courts will not create any.[6] No special form is required as an evidence of such contract, and courts seem inclined to allow a wide latitude in this particular.[7] The statute permits the memorandum to be signed by the vendor or his agent, yet it seems that if made by an agent it should still be in the principal's name.[8] If the terms of the contract, the consideration, the subject-matter of the sale, etc., are stated with reasonable certainty, the memorandum is sufficient. Form is not important, nor need it be under seal,[9] the one indispensable requisite being, that it be in writing and signed by the vendor or his agent;[10] and the power

[5] Gerard's Tit. to Real Est. 472; Johnson *v.* Corbett, 11 Paige, 265; Moore *v.* Burrows, 34 Barb. 173. The agreement to deed, above referred to, is very different from the contract of purchase or conditions of sale, under the English system of conveyancing. The former contemplates a sale already made, the latter a sale to be made.

[6] Hairston *v.* Jandon, 42 Miss. 380.

[7] Bemis *v.* Becker, 1 Kan. 226;

[8] Morgan *v.* Bergen, 3 Neb. 209.

[9] Moss *v.* Atkinson, 44 Cal. 5; Ruttenberg *v.* Main, 47 Cal. 213.

[10] Haydock *v.* Stow, 40 N. Y. 363.

to the agent, unless provided otherwise by statute, may be given orally.[11]

It is, however, a familiar rule in this branch of the law, that a contract which equity will specifically enforce, must be certain in its terms, and the certainty required has reference both to the description of the property and the estate to be conveyed. Uncertainty as to either, not capable of being removed by extrinsic evidence, will invalidate the contract.[12] Less particularity is required, however, than in case of actual conveyances of the same land, and, as a rule, any description of the property will be sufficient provided it be such as to enable a surveyor to locate the land.[13] Every contract which gives no means of identifying the boundaries of the land sold,[14] which furnishes no information regarding the terms of the contract,[15] or which by faulty or imperfect description renders the location of the property uncertain,[16] will be incapable of specific enforcement.

§ 314. **As Affected by the Recording Acts.** Interests in land acquired through contracts of purchase fall within the protection of the recording acts. Therefore, although another may be interested as a part owner of land sold by contract, if the record fails to show that interest, and shows the entire title in the vendor, the purchaser from the apparent owner of record, without notice of the real facts, will hold the title, and so of his assignee.[17]

§ 315. **Construction of Land Contracts.** A contract for the sale of land is, for most purposes, regarded in equity as

11 Ruttenberg *v.* Main, 47 Cal. 213; McWhorter *v.* McMahan, 10 Paige, 386.

12 Whelan *v.* Sullivan, 102 Mass. 204; Peters *v.* Phillips, 19 Tex. 74.

13 White *v.* Hermann, 51 Ill. 243.

14 Whelan *v.* Sullivan, 102 Mass. 204; Holmes *v.* Evans, 48 Miss. 247.

15 McGuire *v.* Stevens, 42 Miss. 724. The writing relied upon to establish such a contract need not describe either the consideration or the lands which are the subject of the sale, otherwise than by a reference therein to some extrinsic fact or instrument by means of which the consideration and the land can be known with sufficient certainty: Washburn *v.* Fletcher, 42 Wis. 152.

16 Gigos *v.* Cochran, 54 Ind. 393.

17 Allen *v.* Woodruff, 96 Ill. 11.

if already specifically executed.[18] When consisting of two instruments they will be construed together and effect given as of one entire instrument.[19] Time, unless specifically made of the essence of the contract, will not be construed to the disadvantage of the vendee, and a contract which uses the ordinary terms to express the time for the payment of the purchase money, without any express intention that such time is material, does not make it so.[20]

§ 316. **Formal Parts.** The examiner will note the usual incidents of dates, parties, property, etc., as in other instruments, and in addition, the methods of transfer and conditions and stipulations annexed to the contract, if any. Though usually executed by both parties, this is not a requisite, and an executory contract is valid and binding and can be as effectively enforced by the vendee, if signed by the vendor alone.[21] It is advisable, however, particularly where the contract contains mutual covenants or stipulations, to note a divergency in this respect. The following is submitted as a synopsis of the salient features of an ordinary executory contract:

Alfred Burwell, to (or, with) Charles Dobbson. } *Agreement to Convey* [*or, Land Contract.*]
Dated March 1, 1883.
Recorded March 3, 1883.
Book 210, page 590.

First party, on payment of $500.00, agrees to convey to second party by good and sufficient warranty deed, the following described land situated in the town of Mount Pleasant, Racine County, Wis., described as [here set out the description] *free from all liens and incumbrances, except* [here set out incumbrance recitals, if any].

Second party, in consideration of the foregoing, agrees to

[18] King *v.* Ruckman, 21 N. J. Eq. 599.

[19] Beman *v.* Green, 1 Duer (N. Y.), 382.

[20] Reed *v.* Jones, 8 Wis. 392.

[21] Vassault *v.* Edwards, 43 Cal. 458; Ewins *v.* Gordon, 49 N. H. 444.

pay said sum of $500.00 in manner following, to wit, etc.; [state the terms briefly].

Time to be the very essence of the contract.

Further mutually agreed that said second party shall have no right to the possession of said premises as purchaser, until after full payment of purchase money, and that he takes same as tenant from said first party until the last payment has been made.

Executed by both parties and acknowledged by them March 1, 1883.

§ 317. **Assignment of the Contract.** In the assignment of an executory contract for the sale of land, there is no implied covenant, on the part of the assignor, of title to the land in the vendor; all that can be implied is a warranty that the assignor owned the contract and had the right to assign it, and that the signatures thereto are genuine.[22] Such assignments are usually very brief and informal, and consist of a bare recital of the fact of assignment. Whether appended to the original or made by a separate instrument, they should be attended by the same solemnities relative to execution, etc., as were necessary in case of the original, and should be shown in the abstract as a separate link in the chain. The effect of an assignment is to convey to the assignee all the interest of the assignor therein, and it entitles him to demand and receive a deed of conveyance from the vendor or his heirs upon payment of the purchase money due thereon. He takes it subject to all the equities existing against his assignor, and is entitled to all the beneficial incidents.[23]

The delivery of a contract for the purchase of land by the purchaser to one to indemnify him against loss by becoming a guarantor for the purchaser, without any written assignment thereof, constiutes an equitable mortgage, and a subsequent

22 Thomas *v.* Bartow, 48 N. Y. 193.

23 Tompkins *v.* Seely, 29 Barb. 212; Cromwell *v.* Fire Ins. Co., 44 N. Y. 42; Gerard's Titles, 475; Reeves *v.* Kimball, 40 N. Y. 299; Parmly *v.* Buckley, 103 Ill. 115.

written assignment to another who has no interest in the same, and where no words of conveyance are used, would be inoperative.[24] A written assignment of a deed or contract for the conveyance of land is not necessary to the creation of an equitable mortgage, and the only effect of such written assignment is, that when the instrument and assignment are recorded, they will afford constructive notice of the mortgagee's rights, and also be evidence of the fact of assignment in case of a dispute.[25] The doctrine of equitable mortgages by deposit of title deeds does not at present meet with much favor in this country, however, and strict proof of notice is generally required from the equitable mortgagee to bar the rights of subsequent purchasers or incumbrancers,[26] while in several States the doctrine does not prevail at all.[27]

§ 318. **Performance — Sufficiency of Deed and Title.** A familiar form of expression used by conveyancers in drafting instruments of the character under consideration, in relation to the deed to be given, is, "good and sufficient," though not infrequently the contract expressly calls for a warranty deed. The term "good and sufficient deed," etc., has been the subject of much litigation and productive of a large amount of judicial reasoning, both as regards the form of the instrument and the title conveyed thereby. In this, as in most other much litigated questions, a complete harmony of opinion has not prevailed, but it would seem to be the preponderating doctrine, that a covenant to give a good and sufficient conveyance of land is satisfied by a quitclaim deed,[28] yet with respect to

[24] Allen *v.* Woodruff, 96 Ill. 11; and see Story Eq. Jur. § 1020; 2 Wash. Real Prop. 82; Mandeville *v.* Welch, 5 Wheat. 277.

[25] Chase *v.* Peck, 21 N. Y. 584; Jarvis *v.* Dutcher, 16 Wis. 307; Allen *v.* Woodruff, 96 Ill. 11; Hall *v.* McDuff, 24 Me. 311; Mounce *v.* Beyers, 16 Ga. 469.

[26] Bicknell *v.* Bicknell, 34 Vt. 498; Story Eq. Jur. § 1020.

[27] Bowers *v.* Oyster, 3 Pa. 239; Van Meter *v.* McFadden, 8 B. Mon. (Ky.) 435; Strauss' Appeal, 49 Pa. St. 358.

[28] Kyle *v.* Kavanagh, 103 Mass. 356; Thayer *v.* Torrey, 37 N. J. L. 339; *Contra*, Watkins *v.* Rogers, 21 Ark. 298. That parties have made a written agreement for a sale, without providing for any warranty, indicates that they did not intend there should be any warranty; and if the conveyance made is only of

the title, such a conveyance can only be performed by a deed which conveys the entire estate,[29] and vests in the purchaser an indefeasible title.[30] A contract to execute a good and sufficient warranty deed entitles the purchaser to a warranty deed of the land free from all incumbrances.[31]

In every contract for the sale of lands, whatever may be the language in which it is couched, there is an implied undertaking to make a marketable title, unless such an obligation is expressly excluded by the terms of the agreement,[32] and, in the absence of any stipulation as to the kind of conveyance, the presumption is that the vendor undertook to make such a conveyance as will render the sale effectual.[33] Special attention is directed to these matters in this connection, from the fact that it is at this period of the transaction that an attorney is usually called to pass upon the merits of the proffered title. Whatever may be the medium of transfer, a searching investigation should be given to the title, which, if perfect in the person proposing same, renders the vehicle of conveyance of minor importance; but an offer to make a quitclaim deed, which conveys only the vendor's interest, is not a compliance with an agreement to make title in a case where the chain of title upon the public records is defective or broken, or the land is burdened with liens and incumbrances.[34] In executory contracts the purchaser is never bound to accept a doubtful title.[35]

the right, title and interest of the vendor, he can not be held liable for defects of title, except on the ground of fraud or concealment: Johnston *v.* Mendenhall, 9 W. Va. 112.

29 Taft *v.* Kessel, Wis. 273.

30 Delevan *v.* Duncan, 49 N. Y. 485; Davis *v.* Henderson, 17 Wis. 105; Parker *v.* Parmlee, 20 John. 130.

31 Davidson *v.* Van Pelt, 15 Wis. 341; Burwell *v.* Jackson, 5 Seld. (N. Y.) 536.

32 Holland *v.* Holmes, 14 Fla. 390; Hill *v.* Ressegien, 17 Barb. 162. Compare, Johnston *v.* Mendenhall, 9 W. Va. 112.

33 Hoffman *v.* Felt, 39 Cal. 109; but consult Fitch *v.* Willard, 73 Ill. 92.

34 Holland *v.* Holmes, 14 Fla. 390.

35 Delevan *v.* Duncan, 49 N. Y. 485; Roberts *v.* Bassett, 105 Mass. 407.

Whenever the contract calls for a specific title or method of conveyance, the vendor must convey as specified;[36] thus, where a purchaser has contracted for a title of record, he can not be compelled to take a title depending upon adverse possession under the statute of limitations,[37] although it may be perfectly good.[38] But where the vendor of land assumes no responsibility as to his title, and is to make only a quitclaim or special warranty deed, but is to furnish a satisfactory abstract of title, the purchaser, for a reasonable objection to the title, may elect whether he will accept a conveyance or rescind the sale, provided such election is made with no unnecessary delay.[39] If he elects to take it under a unilateral contract, any delay on his part will be regarded with especial strictness, the fact of objection in such case not justifying great delay in performance, and it has been held, under similar circumstances, that if other written evidences furnished in connection with the abstract, show a marketable title, this will be sufficient, although the abstract of itself does not.[40]

§ 319. **Forfeited Contracts.** Agreements for conveyance which do not contemplate an immediate sale are mainly resorted to by two classes; the one, where, by reason of financial inability, no immediate consummation of the contract of sale can be effected; the other, where parties desire to control the disposition of property for a limited time while awaiting other developments. In each case forfeitures often occur, sometimes evidenced by foreclosure proceedings, but more frequently by an express or implied declaration of forfeiture.

Much stress is often placed by counsel upon the fact of unfulfilled contracts of sale appearing in the chain of title, and objections of a serious nature are frequently founded upon them, yet, as a rule, they are formidable only in appearance. Where a contract for the sale of land provides that if the pur-

36 Scott *v.* Simpson, 11 Heisk. (Tenn.) 310.

37 Delevan *v.* Duncan, 4 N. Y. 485; Tomlin *v.* McChord, 5 Marsh. (Ky.) 138.

38 Page *v.* Greely, 75 Ill. 400.

39 Fitch *v.* Willard, 73 Ill. 92.

40 Welch *v.* Dutton, 79 Ill. 465.

chaser fails to perform any of his covenants the vendor or his assigns shall have the right to declare the contract null and void, a subsequent sale by such vendor to another party for a valuable consideration, after the time fixed for performance, is, in effect, a declaration of forfeiture of the purchasers' contract.[41]

Subsequent purchasers of land, in the absence of express notice of latent equities in others than their grantors, can only be affected by such legal consequences as may be fairly drawn from the record itself; and when the record shows that the claim of prior purchaser has been cut off and defeated by a sale or foreclosure, or by a forfeiture of his contract, such subsequent purchasers will have a right to rely on what is thus disclosed.[42] An unfulfilled contract of recent date, however, should always be closely scrutinized and the fact of forfeiture clearly established, for it must be remembered that a vendor in such a contract can do no act in derogation of his vendee's title when such vendee is not in default. Therefore, should the vendor convey to others while such contract is still subsisting, all persons who claim any interest in the land, with notice of the contract, will be held to perform such contract to the same extent that the original vendor would be bound if he had retained the title.[43]

§ 320. **Bond for a Deed.** Bonds for the conveyance of land or interests therein, though formerly much in vogue, have now fallen into disuse, and when shown are usually in the earlier links of the chain. As in the case of land contracts, when followed by deed only a brief notice is required, while if the condition remains unfulfilled a greater degree of detail is necessary. The usual formal requisites of this class of obligations are equally necessary to bonds for title, and in addition, as it provides for a transfer of land, the essentials necessary to

41 Streeper *v.* Williams, 48 Pa. St. 450; Grey *v.* Tubbs, 43 Cal. 364; Cummings *v.* Rogers, 36 Minn. 317.

42 See Warren *v.* Richmond, 53 Ill. 54; Warder *v.* Cornell, 105 Ill. 169.

43 Tatè *v.* Pensacola, Etc. Co., 37 Fla. 439.

entitle it to record and to afford constructive notice, as acknowledgment and the like; an example is here given:

James Thompson — *Bond for Deed.*
Dated July 1, 1882.
to — *Recorded July 3, 1882.*
Vol. "B" of Deeds, page 252.
Thomas Wilson. — *In the penalty of $1,000.00.*

Conditioned for the conveyance, by "good and sufficient" deed, of land in Kenosha County, Wis., described as the south half of the southeast quarter of Section ten, Town one north, Range twenty-three, east of the 4th principal meridian, on payment of $500.00.

Acknowledged July 1, 1882.

Special provisions, if material, should be shown as they occur. A bond to convey land upon payment of the stipulated price is evidence of a mutual agreement of the obligee to purchase and of the obligor to sell. The agreement of one party is a consideration for that of the other, and it is immaterial that the obligation of the one party is secured by bond, and that of the other is not thus secured.[44] It will be understood that the foregoing remarks have reference only to the right of a vendee to compel performance by the vendor. If relief is sought against the vendee then he must sign the instrument before he can be charged.

§ 321. **Agreements for Conveyances by Will.** Agreements to convey need not provide for the delivery of a deed, for an agreement to devise property by will may be subjected to a specific performance by a court of equity, after the death of the granting party, with the same effect as a contract to convey while living. It has been said by Williamson, C.: "There can be no doubt but that a person may make a valid agreement, binding himself legally to make a particular dispo-

[44] Ewins *v.* Gordon, 49 N. H. 444. The rule is the same in case of agreements to convey signed by vendor only. See Vassault *v.* Edwards, 43 Cal. 458.

sition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure; and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by will as by conveyance, to be made at some specified future period, or upon the happening of some specified future event. It may be unwise for a man to embarrass himself as to the final disposition of his property, but he is the disposer by law of his fortune, and the sole and best judge as to the manner and time of disposing of it. A court of equity will decree the specific performance of such an agreement upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction." [45]

[45] Johnson *v.* Hubbell, 5 Am. Law Reg. 177; Stephens *v.* Reynolds, 6 N. Y. 458; Wright *v.* Tinsley, 30 Miss. 389; Mundorf *v.* Howard, 4 Md. 459.

CHAPTER XX.

LEASES.

§ 322. Nature and requisites.
323. Formal parts.
324. Covenants and conditions.
§ 325. Implied covenants.
326. Agricultural lands.
327. Assignment of lease.

§ 322. **Nature and Requisites.** A lease is a contract for the possession and profits of land and tenements on the one side, and a recompense of rent or other income on the other; or it is a conveyance to a person for life or years, or at will, in consideration of such rent.[1] The estate or interest conveyed by a lease is personal in its nature, whatever may be the duration of the term, and falling below the character and dignity of a freehold, it is regarded as a chattel interest, and is governed and descendible in the same manner.[2] When made in writing, as it generally must be if the term exceeds one year in duration, a lease is usually mutually signed in duplicate and interchangeably delivered by the parties,[3] but if only signed by the lessor, its acceptance by the lessee raises a promise on his part to pay the rent reserved and faithfully observe all the stipulations and conditions which the lease shows were to be observed or performed by him.[4]

Whether an instrument shall be considered a lease, or only an agreement for one, depends on the intention of the parties, as collected from the whole instrument, and the law will rather do violence to the words than break through the intent of the

1 Jackson *v.* Harsen, 7 Cow. 326; 2 Bl. Com. 217.

2 2 Kent Com. 342; Goodwin *v.* Goodwin, 33 Conn. 314.

3 The copy delivered to the tenant is called the *original* lease, the one to the landlord the *counterpart*, but for all practical purposes both are regarded as original: Dudley *v.* Sumner, 5 Mass. 438; Taylor's Landlord and Tenant, 106 (6th Ed.).

4 Pike *v.* Brown, 7 Cush. 134.

parties by construing such an instrument as a lease, when the intent was manifestly otherwise.[5]

The proper definition of a lease embraces only such instruments of conveyance as transfer to the lessee a less estate than is possessed by the lessor, thus leaving a reversion in him,[6] and this in the sense in which the term is now employed, yet formerly it was not uncommon to grant land in fee, reserving an annual rent charge, notwithstanding there was no reversion, and the covenant to pay such rent ran with the land, as well as the condition of forfeiture and re-entry for its non-payment.[7]

§ 323. **Formal Parts.** Where a lease is found upon the records which has expired by its own limitation, it raises a vexed question among examiners as to whether it should be shown or passed without notice. It can in no way affect the title; it is not a charge or incumbrance, nor is it even a cloud. It may with propriety be disregarded unless followed by a subsequent renewal, but should the examiner deem it expedient to note it, as being included in and covered by his certificate of search, a very brief statement by way of appendix would seem fully sufficient. When for a short or almost expired term, being a charge upon the fee, it may be shown briefly, but when for a long term of years it should be shown fully and succinctly. When for ninety-nine years, or renewable forever, it has much of the dignity and many of the attributes of a conveyance of the fee and requires corresponding treatment. When shown fully, the examiner will observe the names of parties as in case of deeds; the dates; the description; the term; the rent reserved; the general and special covenants; the conditions and restrictions, and the special agreements, if any. The execution and authentication should comply with the statute.

Whenever a lease is of sufficient importance to show *in extenso* the entire instrument should be carefully perused and

[5] Jackson *v.* Delacroix, 2 Wend. 433.

[6] Willard's Conveyancing, 425.

[7] Van Rensselær *v.* Hays, 5 Smith, 68; 2 Sugd. Vend. 725, Perkins' Ed. 177; Jackson *v.* Allen, 3 Cow. 220.

the covenants and conditions critically observed. The aid of an experienced conveyancer is frequently dispensed with in preparing instruments of this character; printed forms are generally employed, and, when they are not obtainable, copies are made from books of forms or from old instruments. In this way covenants are created without being well understood, and which often astonish the parties to be bound when occasion arises which calls for the performance of them.

The dates are important in leases, much more so than in absolute conveyances, and frequently are of controlling efficacy in determining the duration of the term. The words of limitation of the term will also be carefully noted, as also the words of forfeiture and ceaser. The proper words to be used in creating a limitation upon a term granted are, "while," "as long as," "during," and "until."[8] The words of grant are, "demise, lease and let," or "to farm let," but these words, as in case of deeds, have lost much of their original technical efficacy, and any other words which show the intention will do as well.[9]

The matter of execution, as sealing, acknowledgment, etc., is statutory, but as a rule neither of the afore-mentioned formalities are necessary. An example is appended:

Robert M. Johnson	*Lease.*
to and with	*Dated, etc.*
Hiram W. Jamison	* * * *
Doc. 120, 140.	* * * *

First party leases, demises and lets to second party the following described real estate in Cook County, Ills., to wit: [describe the property.]

To hold for the term of ten years from the day of the date hereof; [or, a specific date, if inserted], *at the annual rental of $500.00 payable semi-annually.*

[8] Vannatta *v.* Brewer, 32 N. J. Eq. 268.

[9] Hallett *v.* Wylie, 3 Johns. 44*; Taylor's Landlord and Tenant, 114 (6th Ed.).

Said second party covenants: for the payment of the rent reserved; for the payment of all taxes and assessments levied on said premises during the term aforesaid; against waste, against sub-leasing, etc.

Said first party covenants: for quiet enjoyment; for the renewal of the term hereby demised at the expiration thereof for the same time and upon the same terms as this indenture, etc.

Provides, that in case said second party shall neglect, or fail to perform and observe any or either of before-mentioned covenants on his part to be performed, the term hereby demised is to cease and determine, and that first party may enter and repossess said premises, without further notice or demand and expel said second party (and those claiming under him) without prejudice.

*Provides further, that in case the premises shall be destroyed by fire or other unavoidable casualty, that the term hereby demised shall cease (*or, *that the rent be suspended, etc).*

Signed and sealed by both parties.

Acknowledgment.

In many instances it will be necessary to set out the covenants and conditions with greater precision than in the example, particularly in cases of ground leases for long terms and where the land demised has been highly improved with permanent buildings by the tenant. In cases of leases for lives, more detail will be necessary in describing the term, and the provisions looking toward forfeiture.

§ 324. **Covenants and Conditions.** Owing to the ignorance generally prevailing of the legal effects of covenants in leases and other instruments, which are often executed without any particular inspection or knowledge of their contents, people are often surprised into contracts which neither party intended when the instrument was executed.[10] The words "yielding and paying," etc., constitute a covenant for the pay-

10 Phillips v. Stevens, 16 Mass. 239.

ment of rent,[11] which runs with the land, and formerly, if not qualified by any exception or condition, bound the tenant to pay rent during the continuance of the term, notwithstanding the buildings on the premises were destroyed by fire during the tenancy.[12] Covenants for rebuilding, repairing, etc., run with the land and are obligatory upon both parties and their assigns,[13] according as either of the parties are bound. The covenant to pay for any buildings, erected by the tenant, at the expiration of the term, runs with the land and inures to the benefit of the assignee.[14] The covenant for renewal is one of the most important to be noticed by the examiner, and like those just mentioned is incident to the land.[15] A covenant to renew implies the same term and rent, but not the same covenants,[16] and is satisfied, even though providing for renewal under the same covenants contained in the original lease, by a renewal omitting the covenant to renew.[17] A covenant for indefinite renewals at the option of the lessee is, in effect, the creation of a perpetuity, and therefore against the policy of the law.[18] The burden of the payment of taxes and assessments is frequently assumed by the tenant, particularly in long terms, but whether assumed by lessor or lessee it runs with the land, and binds the respective assigns.[19]

11 De Lancy *v.* Ganong, 5 Seld. 9.

12 Hallett *v.* Wylie, 3 Johns. 44.

13 Allen *v.* Culver, 3 Denio, 284.

14 Lametti *v.* Anderson, 6 Cow. 302; Van Ransselær *v.* Pennimar, 6 Wend. 569.

15 Sutherland *v.* Goodnow, 108 Ill. 528.

16 Rutgers *v.* Hunter, 6 Johns. Ch. 218. The covenant for renewal may be especially enforced, provided the application be made within a reasonable time after the expiration of the former lease, and the owner of the reversion or fee will be compelled to execute a new lease. Banks *v.* Haskie, 45 Md. 209.

17 Carr *v.* Ellison, 20 Wend. 178. A covenant to renew which does not state the terms or length of time of such renewal, has been held void for uncertainty: Laird *v.* Boyle, 2 Wis. 431.

18 Brush *v.* Beecher, 110 Mich. 597; Morrison *v.* Rossignol, 5 Cal. 64. A lease renewable forever is an English exotic which never seems to have thrived in our soil. In most of the States such leases are invalid.

19 Post *v.* Kearny, 2 Comst. 394; Oswald *v.* Gilfert, 11 Johns. 443.

The covenants of leases are usually protected by a condition avoiding the estate and working a forfeiture in case of breach, and this condition, which is of the essence of the lease, must always be noticed at such length as its importance seems to demand.

It is not uncommon for the landlord to give the tenant, by an agreement in his lease, an option to purchase the demised premises, and whenever such agreements are inserted they should be displayed in the abstract.

§ 325. **Implied Covenants.** It is a fundamental principle that the law will always imply covenants against paramount title, and against such acts of the landlord as destroy the beneficial enjoyment of the premises.[20]

§ 326. **Agricultural Lands.** To avoid perpetuities, as well as the creation of large manorial estates, a majority of the States have, either by a constitutional provision or an express statutory enactment, prohibited the lease or grant of agricultural land for a longer period than twelve or fifteen years, and leases made in contravention of this prohibition, in which there is reserved any rent or service of any kind, are declared to be void. The leases or grants contemplated by the law, are such as are held by the tenant upon a reservation of an annual or periodical rent or service, to be paid as a compensation for the use of the estate granted. It is still competent to make a grant for life, or lives, upon a good consideration to be paid for the estate, which consideration may be payable at once, or by installments, or in services, so that it be not by way of rent. To bring it within the law there must be a reservation of rent or service.[21] This may seem a subtle distinction, but it is one which the courts have made and which they strenuously en-

20 Streeter *v.* Streeter, 43 Ill. 155; Boreel *v.* Lawton, 90 N. Y. 293. Hamilton *v.* Wright, 28 Mo. 199; Plater *v.* Cunningham, 21 Cal. 233; This results from the principle of law, that every grant carries with it an implied understanding on the part of the grantor that the grant is intended to be beneficial, and that, so far as he is concerned, he will do no act to interrupt the free and peaceable enjoyment of the thing granted. See Dexter *v.* Manley, 4 Cush. (Mass.) 24.

21 Parsell *v.* Stryker, 41 N. Y. 480.

force. A reservation is defined as a keeping aside, or providing, as when a man lets, or parts with his land, but reserves, or provides himself a rent or income out of it for his livelihood; and a rent is said to be a sum of money, or other consideration, issuing yearly out of lands and tenements. It must be profit, but it is not necessary that it should be money. The profit must be certain, and it must also issue yearly.[22]

§ 327. **Assignment of Lease.** To constitute an assignment of a leasehold interest, the assignee must take precisely the same estate in the whole or in a part of the leased premises which his assignor had therein. He must not only take for the whole of the unexpired term, but he must take the whole estate, or in other words, the whole term;[23] for the word "term" does not merely signify the time specified in the lease, but also the estate and interest that passes by the lease; for the term may expire during the continuance of the time, as by surrender, forfeiture, and the like.[24]

The grant of an interest which may possibly endure to the end of the term, is not necessarily a grant of all the estate in the term. Whether the conveyance be in the form of a lease or an assignment, if it provides new conditions with a right of entry, or new causes of forfeiture are created, then the tenant holds by a different tenure and a new leasehold interest arises, which can not be treated as an assignment or a continuation to him of the original term. When an estate is conveyed to be held by the grantee upon a condition subsequent, there is left in the grantor a contingent reversionary interest;[25] and where by the terms of an instrument which purports to be an under lease, there is left in the lessor a contingent reversionary interest, to be availed of by an entry for breach of condition, which restores the sub-lessor to his former interest in the premises,

22 Stephens *v.* Reynolds, 6 N. Y. 458; 2 Blk. Com. 41.

23 Van Rensselær *v.* Gallup, 5 Denio, 454. The purchaser under a mortgage of all the estate of a lessee, is an assignee: Kearney *v.* Post, 1 Sandf. 105.

24 2 Black Com. 144.

25 Austin *v.* Cambridgeport Parish, 21 Pick. 215; Brattle Square Church *v.* Grant, 3 Gray, 147.

the sub-lessee takes an inferior and different estate from that which he would acquire by an assignment of the remainder of the original term; that is to say, an interest which may be terminated by forfeiture, on new and independent grounds, long before the expiration of the original term. If the smallest reversionary interest is retained, the tenant takes as sub-lessee, and not as assignee.[26]

[26] Dunlap *v.* Bullard, 131 Mass. 161; McNeil *v.* Kendall, 128 Mass. 245.

CHAPTER XXI.

MISCELLANEOUS EVIDENCE AFFECTING TITLE.

§ 328. General remarks.
329. Irregular instruments.
330. Municipal ordinances.
331. Executive approval of Ordinances.
332. Operation and effect of ordinances.
333. Municipal resolution.
334. Official certificates.
§ 335. Incorporeal hereditaments.
336. Easements and servitudes.
337. Party wall agreements.
338. Letters.
339. Affidavits.
340. Continued — General requisites.
341. Unrecorded instruments.

§ 328. **General Remarks.** In this chapter it is proposed briefly to notice a variety of instruments which are not susceptible of classification in other divisions of the work, but which have a direct bearing upon the question of title, and must be included in all properly prepared abstracts, whenever they appear upon the records during the period covered by the search. Of this nature are affidavits, municipal ordinances, letters, etc., all of which are proper, and, under certain conditions, competent evidence, in support of the facts so presented.

§ 329. **Irregular Instruments.** This is the name applied by examiners, to all deeds and instruments in which the subject-matter is not sufficiently identified to permit them to be posted in the tract indices. They include "blanket" conveyances, that is, all instruments of conveyance in which the property is mentioned only in general terms and not specifically; letters of attorney giving only a general power; releases, confirmations, etc., which describe no property but allude to other instruments for identification; affidavits of facts not directly connected with land, but which incidentally affect or implicate title; and all other instruments and documents which

do not upon their face indicate the particular parcel of land they affect.

In compiling the abstract these matters should receive careful attention, and not only should all independent instruments which generally affect the title be shown but also appendices to instruments conveying other lands, where such appendices have any appreciable bearing upon the property in question. The following will serve to illustrate:

Appended to Document 347,614, in book 1086, page 631, recorded Sept. 13, 1881 is the following:

Affidavit by Thos. J. Walsh.	*Subscribed and sworn to Oct. 23, 1880.* *That he was a bachelor until July, 1836.*

§ 330. **Municipal Ordinances.** A city council is a miniature legislature, authorized to legislate for a locality, and its ordinances, within the power intrusted, have all the force of laws passed by the legislature. It is restricted, however, to such matters as are not at variance with the general laws of the State, and are reasonable and adapted to, or proper for, the purposes of the corporation. Ordinances must be consistent with public legislative policy, and must not contravene common right. These are general principles universally recognized.[1]

Without entering into a discussion of the nature, requisites and validity of ordinances, which as a rule, must be determined by reference to the organic act or charter of the municipality, it may be stated generally, that such ordinances must be adopted by the proper body, and be published in the manner provided by law,[2] the practical operation of an ordinance dating from its passage and publication. When so passed and published

1 Long *v.* Shelby County, 12 Reporter, 285; Maxwell *v.* Jonesboro. 11 Heisk. (Tenn.) 257; Williams *v.* Augusta, 4 Ga. 509; Mount Pleasant *v.* Breese, 11 Iowa. 399.

2 1 Dil. Municipal Corp. 376; Barnett *v.* Newark, 28 Ill. 62; Conboy *v.* Iowa City, 2 Iowa, 90.

they afford constructive notice to all persons bound to take notice of them.[3]

The only occasion the examiner will have to show the acts of municipal bodies, will be in relation to the opening or vacating of streets and alleys, with an occasional conveyance of municipal property, which should be prefaced by a synopsis of the ordinance or resolution authorizing same. Being in the nature of public laws no record is required in the registry of deeds, though this may be accomplished by the individual, and recourse must usually be had to the corporate records. The abstract should show: the dates respectively of passage and publication, and, when recorded, the date of record; the subject-matter, briefly stated; and the attestation, if any is required. The following will more fully illustrate the subject:

Vacation by The Village of Jefferson. — *Ordinance, No. 1,000. Adopted Sept. 6, 1873. Recorded Sept. 15, 1873. Book 6 of plats, page 13.*

Recites, that whereas, a petition has been duly filed with the Board of Trustees of the Village of Jefferson, signed by Thos. Wilson and Lillie M. C. Wilson, representing that they are the owners of Blocks 76 and 77 in Norwood Park, and praying said board to order a vacation of all that part of Washington Street lying between said Blocks, commencing at Indiana Street and running to Eastern Avenue.

And whereas, satisfactory evidence having been filed by said petitioners of due notice of said application, and no objections appearing, therefore it is,

Ordained by the President and Board of Trustees of the Village of Jefferson, that all that part of Washington Street, in Norwood Park, which lies between Blocks 76 and 77, beginning on Indiana Street and running through to Eastern Avenue, be and same hereby is vacated.

Published Sept. 7, 1873.

3 Palmyra *v.* Morton, 25 Mo. 593; Buffalo *v.* Webster, 10 Wend. 99.

NOTE.— *Appended to the record of the foregoing is a certificate by S. M. Davis, "Village Clerk," that same is a true copy of the original ordinance.*

Not infrequently a discriptive note setting forth the material facts will be sufficient to impart all necessary information. Whenever this method can be advantageously employed its use is recommended, in order that the abstract may not be burdened by unimportant details. This plan will be found to produce eminently satisfactory results in cases where certain acts are required to follow the ordinance before it becomes effective, and in such cases a full resume of the supplementary acts should be embodied in the note. The following example will more fully explain the method:

NOTE.— *From document No. 2708 of the municipal year 1894, of the files of the proceedings of the Common Council of the City of Chicago, on file in the office of the City Clerk of said city, it appears that an ordinance was passed by said Council on May 12, 1895, for the vacation of the East 135 feet of alley in Block 6, Jones' Subdivision of the Northeast quarter of Section 7, Town. 39 North, Range 16 East of the 3d Principal Meridian, but with a proviso that same should not take effect until a new alley 18 feet in width should have been opened from North to South through the South 170 feet of said Block, the East line thereof to be 135 feet West of Blank Street, in accordance with map attached to said ordinance; that said alley should be opened and plat of same placed of record within 30 days from passage of ordinance, otherwise same to be of no effect.*

The new alley referred to in the foregoing note would properly be shown as a subdivision of the block in question and the minutes of survey and plat would immediately follow.

It will often happen that it may be deemed unnecessary or

inexpedient to set forth the terms of an ordinance, or the examiner may be directed to show same briefly with a reference to the record for particulars. Thus, take the case of a transfer of territory from one municipality to another. In such event the action of both municipalities should be shown, yet this may be accomplished briefly, in most cases, by simple notes, as for example:

NOTE.— *There was recorded on April 22, 1887, in Book 2047 at page 206, as Doc. 819,864, an ordinance for the annexation of the territory of the Village of Jefferson, known as Section 36, Town. 40 North, Range 13 East of the 3d Principal Meridian, to the City of Chicago. Approved and ratified at the general election held Tuesday, April 1, 1887.*

Also, Recorded May 25, 1887, as Doc. 833,477, in Book 2047 at page 388, is an ordinance for the annexation to the City of Chicago of the territory embraced within the limits of Section 36, Town. 40 North, Range 13 East of the 3d Principal Meridian, with the map of said annexed territory attached.

For particulars reference is made to the records.

Where the event is ancient and no questions have been raised respecting it, or where all questions growing out of it are settled, this brief mention will be sufficient to impart all the information necessary. On the other hand, if the event is recent a more ample exhibition of the instruments should, perhaps, be made. Matters of this kind, however, do not reach the title to the land and their significance, at best, is only political. The principal object of their insertion in the abstract is to appraise the person perusing it of the proper location of the property.

§ 331. **Executive approval of Ordinances.** In many cases the signature or expressed approval of the Mayor, or some corresponding officer, is required to give validity to an ordi-

nance, and when the submission thereof to the executive of the municipality is made necessary by charter or general laws, a noncompliance will be fatal to the ordinance.[4] In such cases the fact of submission and approval should be noted as a material part of the abstract of the ordinance.

§ 332. **Operation and Effect of Ordinances.** It does not seem that a municipal corporation, more than an individual, can convey the title to real estate in any other manner than by a duly executed deed,[5] and where a conveyance has been attempted by ordinance no title has been held to pass, while such an ordinance has further been held to be so defective as a conveyance as not to give color of title in support of an adverse possession.[6] A release of a right in real property, by ordinance and not by deed, will, it seems, be enforced in equity, when within the scope of the corporate power, and upon consideration,[7] while the legal effect of a vacation of a public street or avenue, is to revest the title of the land embraced within its limits, in the original owner or person who dedicated same.[8]

§ 333. **Municipal Resolutions.** A resolution is an order of the council or governing board, of a special and temporary character,[9] but, as a general rule, has the same effect as an ordinance, as both are legislative acts.[10] Where any matter is committed to the decision of the council by the charter, which is silent as to the mode, the decision may be evidenced by a resolution, and need not necessarily be by an ordinance,[11] hence it is customary in sales of the municipal real estate, to authorize the sale and transfer of same by a resolution which

4 Babbidge *v.* Astoria, 25 Oreg. 417.

5 Dill. Mun. Corp. § 451, and see, Cofran *v.* Cofran, 5 N. H. 458; Ang. & Ames Corp. § 193.

6 Beaufort *v.* Duncan, 1 Jones L. (N. C.) 239.

7 Grant *v.* Davenport, 18 Ia. 179.

8 Hyde Park *v.* Borden, 94 Ill. 26; Gebhart *v.* Reeves, 75 Ill. 301.

9 Blanchard *v.* Bissell, 11 Ohio St. 96.

10 Sower *v.* Philadelphia, 35 Pa. St. 231; Gas Co. *v.* San Francisco, 6 Cal. 190.

11 State *v.* Jersey City, 3 Dutch. (N. J.) 493.

also directs the method of conveyance and nominates the persons who are to execute the deed.[12]

It would seem to be the prevailing doctrine that municipal conveyances of real property which upon their faces are regular, carry with them the presumption of a due and proper execution in pursuance of law;[13] "hence," observes Mr. Dillon, "it is unnecessary for the grantee or party claiming under it to produce the special resolution or ordinance authorizing its execution."[14] This may be true for the ordinary purposes of conveyancing, but can not be regarded as a safe rule in the preparation of an abstract, which should not only disclose sufficient of the deed to show a regular execution upon its face, but also the authority in pursuance of which it was made, that counsel may know from inspection and comparison that it was duly executed,[15] it being the duty of counsel, so far as may be, to reduce presumptions to certainties, and whenever an abstract is presented, showing a municipal deed but no order or resolution in support of it, a requisition should be made for the evidence of the authority under which it was executed. In actions for the trial of disputed land titles, where a deed relied upon is the act of a municipal corporation the authority for its execution must generally be put in evidence,[15a] and it would seem that counsel examining title should insist upon the same proof.

12 If the charter or constituent act of the corporation prescribes a particular mode in which the corporate property shall be disposed of, that mode must be pursued: 2 Dill. on Mun. Corp. § 447, and see McCracken *v.* San Francisco, 16 Cal. 591; Grojan *v.* San Francisco, 18 Cal. 590, where it was held that where municipal officers, under the authority of a void ordinance, had made sales of corporate real estate, no title passed, the ordinance and sales not having been in conformity to the charter which prescribed a rule for such cases.

13 Jamison *v.* Fopiana, 43 Mo. 565; Flint *v.* Clinton County, 12 N. H. 43. See Hart *v.* Stone, 30 Conn. 94.

14 Dill. Mun. Corp. § 450.

15 Conveyances of real property by the officers of a municipal corporation must be made by virtue of a special authority for that purpose: Merrill *v.* Burbank, 23 Me. 538.

15a Ward *v.* Lumber Co., 70 Wis. 445.

§ 334. **Official Certificates.** Certificates of officers having the legal custody or supervision of records, etc., as well as of ministerial officers in the performance of some legal duty, are of frequent occurrence. Usually they are appended to some kind of documentary evidence to which they have special relation, but they may be used as affirmative and independent proof of matters within the certifying officer's jurisdiction. Instances are afforded by the certificates of levy, attachment, etc., made by officers executing the process of courts and which afford internal evidence of the matters therein recited.

Aside from the certificates of officers, and others, reciting their own acts in connection with some particular proceeding in the line of their official duty, there is a class of official custodians who certify from the records, books, files, etc., committed to their care, and to whose certificates, under their official seal, if they have any, the statute in some cases and comity in others, attaches a certain degree of evidentiary value.

When a public officer is required or authorized by law to make a certificate or affidavit, touching an act performed by him, or to a fact ascertained by him in the course of his official duty, and to file or deposit it in a public office, such certificate or affidavit when so filed or deposited is received as presumptive evidence of the facts therein stated, unless its effect is declared by some special provision of law. Under this head come certificates of sale by masters in chancery and of levy and attachment by sheriffs, examples of which will be found further on.

Certificates annexed to other documents for the purpose of proof or verification do not, as a rule, require nor should they receive extended notice, but when standing alone, and as affirmative evidence of some particular fact, they acquire a certain dignity that calls for commensurate treatment. When these certificates, for instance, allude to facts which appear from the books, files and records of the officers of State in regard to the transfer of land by or to the government, Federal or State, or by the State to individuals, the original evidence of which is not accessible, or has been destroyed or lost, they become

of the highest importance and should be shown in detail. As, per example:

Certificate by Ernst G. Timme, Secretary of State, of the State of Wisconsin.

Proof of Conveyance.
Dated, etc.
* * * * *
* * * * *

Said Secretary certifies, that from the books, files and records of the office of Secretary of State, it appears that on the 10th day of June, 1850, the following described real estate, situated in the State of Wisconsin, viz.: [set out description] *was duly transferred by the United States to the State of Wisconsin, and that on the 15th day of July, 1852, the above described real estate was duly transferred by the State of Wisconsin to William Jones.*

Signed by said Secretary and the great (or lesser) seal of the State of Wisconsin affixed.

Where certificates are appendant merely, the degree of notice must be determined by the character of the principal matter; as, if in the foregoing case a transcript of books, files, etc., had been made, the certificate would simply have been by way of verification, and the examiner might have shown this by a formal abstract of the instrument as above, or he might with equal propriety mention it in this manner:

Certificate by Ernst G. Timme, Secretary of State, that the "annexed and foregoing" is a true and correct transcript of all books, files, records, certificates and other written or documentary evidence of title, on file or of record in his office, relating to or appertaining to the title to the lands described in the foregoing transcript, and of the whole thereof, appended.

§ 335. **Incorporeal Hereditaments.** In an English work on titles this subject would occupy no inconsiderable space, while in the compilation and examination of English

abstracts it plays a conspicuous part, yet in the United States the term is seldom used, while the number of strictly incorporeal hereditaments is very small.[16] In this country they are usually such things as come within the definitions and general doctrines of easements and servitudes.

§ 336. **Easements and Servitudes.** An easement is technically understood to be raised or created by a grant, but may be reserved in a conveyance as effectually as by a grant by deed. Separate instruments are rarely employed to create easements, but occasionally grants of rights of way will be found as well as instruments granting riparian rights, and in all cases, where such instruments are matters of record, purchasers of the land affected thereby will take the premises subject to whatever rights they may confer upon others and burdened with the stipulated service.[17] Where an easement is appurtenant or appendant to an estate in fee in lands, or in gross to the person of the grantee for life or for years, it is incapable of alienation or conveyance in fee.[18] When in gross, it is purely personal to the holder, and can not be assigned, nor will it pass by descent;[19] when appurtenant, it is attached to the land as an incident and passes with it, whether the land be conveyed for a term of years, for life, or in fee.[20] Being incident to the land, it can not be separated from or transferred independent of the land to which it inheres.[21] Where an easement is created by a separate instrument, as a grant of a right

16 The principal incorporeal hereditaments according to the common law; are: Advowsons and next presentations, tithes, manors, franchises, offices, commons, rights of way, of light, wood, water, rents and annuities: Lee on Abstracts, *117; 2 Black, Com. 21.

17 Turpin *v.* R. R. Co., 105 Ill. 11.

18 Wash. Easements, 10; Kœlle *v.* Knecht, 99 Ill. 496.

19 Smiles *v.* Hastings, 22 N. Y. 217; Kœlle *v.* Knecht, 99 Ill. 496.

20 See "Easements and Servitudes," *supra*, p. 21.

21 Wash. Easements, 10; Kœlle *v.* Knecht, 99 Ill. 496. "They are in the nature of covenants running with the land," says the court in Garrison *v.* Rudd, 19 Ill. 558, "and like them, must respect the thing granted or demised, and must concern the land or estate conveyed. They pass by a conveyance of the land, under the term 'appurtenances,' without being expressly named."

of way, the essential terms should be fully stated in the abstract and, for this purpose, the better way is to employ the exact language of the deed.

§ 337. **Party Wall Agreements.** In populous localities party wall agreements are of frequent occurrence, and, though not technically conveyances of land, their legal effect is to give to each of the parties an easement on the other's land which becomes appurtenant to their several estates and passes to their respective assignees by any mode of conveyance that may be effectual to transfer the land itself. While the authorities are not altogether harmonious with respect to the legal effect of covenants and agreements providing for the construction of party walls between adjacent proprietors, the decided weight of authority fully establishes the propositions above stated, and an agreement under the hands and seals of the parties, containing mutual covenants and stipulations made binding on their respective heirs and assigns, will, when duly delivered and acted upon, create cross-easements in the respective owners of the adjacent lots with which the covenants in the agreement will run, so as to bind all persons succeeding to the estates to which such easements are appurtenant.[22] Purchasers from such parties take with constructive, if not actual, notice of the agreement, and are presumed to have assumed the burdens as well as the benefits which are incident to it.[23] "We concede," says Mulkey, J., "the general doctrine, that where the relation of landlord and tenant does not exist, only such covenants as are beneficial to the estate will run with the land; but we do not regard the doctrine as applicable to cases where adjacent proprietors have so contracted as to create mutual easements upon each other's estates, and entered into covenants with respect to the same. The new relation

22 Hart *v.* Lyon, 90 N. Y. 663; Thompson *v.* Curtis, 28 Iowa, 229; Standish *v.* Lawrence, 111 Mass. 111.

23 Roche *v.* Ullman, 104 Ill. 11; Main *v.* Cumston, 98 Mass. 317; Dorsey *v.* R. R. Co., 58 Ill. 65; Rindge *v.* Baker, 57 N. Y. 209; Rogers *v.* Sinsheimer, 50 N. Y. 646; Hart *v.* Lyon, 90 N. Y. 663; Thompson *v.* Curtis, 28 Iowa, 229.

thus created being of an intimate character, involving reciprocal duties with respect to each other's estates, may be regarded as an equivalent for the absence of tenure, so as to give effect to all covenants without regard to whether they are beneficial or onerous." [24] The abstract should disclose all the material facts. An example is appended:

Hiram Thompson
with
Jared B. Lake.

Party Wall Agreement.
Dated, etc.
* * * * * *

Recites, that first party is the owner of the following described land [describing same] *and that second party is the owner of certain land adjoining same described as* [describing same] *and that said first party proposes to erect on his said land a brick building, and is desirous of having the wall between the two above described lots built one-half on each of of said lots for their mutual benefit, and that second party has assented to same, on condition that he shall have the right of using the said wall as hereinafter expressed.*

And said parties covenant and agree to and with each other as follows:

Said second party agrees that if first party shall build at any time a partition wall, he may erect and maintain one-half of same on his, second party's land [state conditions if any] *and may enter on same with workmen and materials; and further agrees that whenever he shall make use of same, he, or his heirs and assigns, will pay to said first party one-half of the whole cost of said partition wall.*

Said first party agrees that second party, his heirs and assigns, may use said partition wall for the benefit of any building he may hereafter erect or place on his said land, provided he does not cut into said wall beyond his own half thereof, and pays the price stipulated above.

[24] Roche *v.* Ullman, 104 Ill. 11.

Signed by both parties, and acknowledged by them August 1, 1879.

§ 338. **Letters.** For a large variety of matters relating to interests in land, and sales and conveyances of such interests, which by law are not required to be under seal or attested by any solemnity, epistolary correspondence, notes and memoranda, are competent evidence. This is particularly the case in regard to trusts, agreements and conditions of sale, and sometimes in supplying missing information relative to descents, etc. Hence, it is not uncommon to find letters of record relating to or concerning interests in land. A contract for the sale of land made by letter correspondence between the parties is valid and will be enforced, if the consideration to be paid, and the time of payment, and description of the property appear sufficiently certain to enable a court to make a decree.[25] Where a person acquires title to land in trust for another, and writes him a letter showing clearly that he holds the same in trust, this will be sufficient to manifest the trust as required by the statute of frauds.[26] The abstract of a letter consists of little else than its recitals.

§ 339. **Affidavits.** In abstracting the proceedings of courts, in matters relating to title, affidavits will occasionally be met with, but as a rule they are of such a nature that their contents are immaterial to the examination and they may be disposed of in a single line and frequently passed without notice. There is, however, another class of affidavits, resorted to by conveyancers under a choice of difficulties, which frequently figure on the records and in the abstract. These are the *ex parte* sworn statements of individuals respecting some question raised by the examination, usually relating to deaths, marriages, births, etc., concerning which no other or better evidence can be found. Family records are not universal, nor even where, as is the custom of many of the States, a record of

[25] Neufville *v.* Stewart, 1 Hill, 166; Firth *v.* Lawrence, 1 Paige, 434.

[26] Moore *v.* Pickett, 62 Ill. 158.

births, deaths and marriages is kept by proper officers, can the requisite information be always obtained. When such is the case resort must be had to the next best and most available testimony, which is usually supplied by the affidavit of some person setting forth his knowledge of the matters under inquiry. Such an instrument, it is true, possesses no legal validity, and not being made under the sanction of a court, or in any legal proceeding, is not strictly evidence for any purpose,[27] yet being usually all that can be adduced, it has been, as it were, by common consent of the profession, adopted as evidence in the examination of titles and the testimony taken as corroborative of general reputation, concurrent possession, etc.[28] Such affidavits, though possessing no legal efficacy, should yet be attended with the same solemnities and formalities that are required in affidavits for use in court.

Ordinarily where an affidavit is required, and the statute does not designate the particular officer before whom the act may be performed, it may be made before any officer having general authority under the statute to administer and certify oaths.[29] No legal rules can apply to affidavits of this nature, except inferentially, but, so far as the same may apply, they should be construed by the same standard as affidavits in legal proceedings.[30] The contents of an affidavit may be shown in this manner:

Affidavit
by
William O. Jones.

Subscribed and sworn to Aug. 4, 1883.
Recorded Aug. 8, 1883.
Book 119, page 220.
Venue, Cook County, Ills.

Recites that, affiant was well acquainted with Robert Simpson, the identical person named as grantor in a deed from

27 Quinn *v.* Rawson, 5 Ill. App. 130.

28 Lee on Abstracts, 215; Taylor on Titles, 136.

29 Dunn *v.* Ketchum, 38 Cal. 93; Wood *v.* Bank, 9 Cow. 194.

30 An affidavit is simply a declaration on oath, in writing, sworn

Robert Simpson to Walter Scott, dated June 1, 1879, and recorded June 2, 1879, in Book 52, page 521 of the records of Cook County, Ills., as document 2,110, and that at the date of said deed said Robert Simpson, to the knowledge of affiant, was an unmarried man.

Jurat by "William Black, Notary Public." No Notarial seal of record. No other designation of officer.

§ 340. **Continued — General Requisites — Sufficiency.** It is usual, though not necessary, for the affiant to subscribe the affidavit, but, in the absence of positive requirements, an affidavit which appears by jurat and signature of an officer thereto to have been duly sworn to, is sufficient.[31] On the other hand, if the officer fails to sign the jurat the affidavit is invalid.[32] An affidavit relied upon as evidence of facts must allege the facts positively. Averring them to exist "as affiant believes" proves nothing.[33] The venue is generally regarded as a material fact in all affidavits, yet courts have exhibited great leniency in this particular and it has been held, that notwithstanding the instrument is without venue yet if it is subscribed by an officer duly empowered to administer and certify oaths, it will be presumed that the oath was taken only in the county where the officer was authorized to act.[34]

§ 341. **Unrecorded Evidence.** A loose and dangerous habit prevails with many examiners, of incorporating in their examinations evidences of facts not disclosed by the records. This is often the case with respect to affidavits, releases, etc., the examiner usually putting such unrecorded matter in the shape of a note, and stating: "Mr. Blank has this day exhibited to us an affidavit by Wm. Parsons, of Providence, R. I.,

to by a party before some person who has authority under the law to administer oaths, and need not be in any particular form: Harris *v.* Lester, 80 Ill. 307.

31 Turpin *v.* Road Co., 48 Ind. 45; Cappock *v.* Smith, 54 Miss. 640.

32 Morris *v.* State, 2 Tex. App. 502.

33 Thomson *v.* Higginbotham, 18 Kan. 42; Murphy *v.* McGrath, 79 Ill. 594.

34 Hertig *v.* People, 159 Ill. 237.

wherein he states that John Jones was a bachelor and that he died at Providence, R. I., unmarried," etc. But this is the mildest form, for, in an abstract now before the writer, made by a responsible firm, is the full abstract of an instrument inserted at the request of their client, and which they state in a foot-note, is "not recorded in Blank County, Ills." Under no consideration should this ever be done except in the solitary case of titles emanating from the government. Where the examiner possesses reliable data, procured from the only authentic sources, the general land offices of the government, statutes, etc., this is not only permissible but should be done as a matter of course. In all other cases, if the client deems his evidence of sufficient importance to be inserted in the abstract, it should first be filed for record in the offices of registration where it will be properly covered by the examiner's certificate of search.

CHAPTER XXII.

MORTGAGES.

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§ 342. **Nature of Mortgages.** A mortgage, as defined by Chancellor Kent, is a conveyance of an estate by way of pledge for the security of a debt, to become void on the payment of it.[1] The term "mortgage" has a technical signification in law, and when used in legal proceedings as descriptive of a written instrument, must be taken and construed according to its technical legal import. An equity of redemption is an essential ingre-

[1] 4 Kent Com. 136; Marvin *v.* Titsworth, 10 Wis. 320; Cooper *v.* Whitney, 3 Hill, 95. Any instrument of conveyance that on its face purports to be given to secure a payment, is merely a mortgage: Cowles *v.* Marble, 37 Mich. 158.

dient and is always implied, even though no defeasance is expressed in the instrument itself.[2]

A mortgage, in form, purports to convey a present legal estate to the mortgagee, liable to be defeated only by performance of stipulated conditions, and so it was long held that the legal effect of the instrument was to vest title in the mortgagee, subject only to the expressed condition or proviso,[3] and the mortgagor's right to regain his estate, after condition broken, which was by application to a court of chancery, was called "the equity of redemption." The modern doctrine is, however, that a mortgage is but a lien on land, by way of security for the debt, the legal title remaining in the mortgagor, subject only to the lien of the mortgage, and that the "equity of redemption" is a legal right.[4] The right of a mortgagee to hold the mortgaged premises as security for his debt is not an estate in land and passes only by an assignment of the debt.[5]

§ 343. **Different Kinds of Mortgages.** Conveyances for the security of a debt or the protection of creditors, may be divided into three classes. The first includes mortgages properly so called, being conveyances from debtor to creditor, ex-

2 Walton *v.* Cody, 1 Wis. 420; Peugh *v.* Davis, 96 U. S. 332; Wing *v.* Cooper, 37 Vt. 169; Bearss *v.* Ford, 108 Ill. 16. "Once a mortgage, always a mortgage," is a universal rule in equity, and no agreement in a mortgage to change it into an absolute conveyance upon any condition or event whatever, will be allowed to prevail: Clark *v.* Henry, 2 Cow. 324.

3 Croft *v.* Bunster, 9 Wis. 503; Drayton *v.* Marshall, 1 Rice's Eq. (S. C.) 373; Stewart *v.* Barrow, 7 Bush (Ky.), 368. This doctrine still prevails in a few States, and in a modified form in others; as, after condition broken or default, the legal title is held to pass to the mortgagee: Johnson *v.* Houston, 47 Mo. 227; Fuller *v.* Eddy, 49 Vt. 11.

4 Vason *v.* Ball, 56 Ga. 268; Wing *v.* Cooper, 37 Vt. 169; Fletcher *v.* Holmes, 32 Ind. 497; Carpenter *v.* Bowen, 42 Miss. 28; Woods *v.* Hildebrand, 46 Mo. 284; Astor *v.* Hoyt, 5 Wend. 602. This was originally the equitable doctrine, established to prevent the hardships springing by the rules of law from a failure in the strict performance of the conditions attached to the conveyance, and to give effect to the just intent of the parties in contracts of this description, but has gradually been adopted by the courts of law.

5 Mack *v.* Wetzlar, 39 Cal. 247. This would seem to be generally true even in those States which regard a mortgage as a substantive form of conveyance.

pressed to be by way of a pledge or security for the payment of an indebtedness, or for the indemnification of the grantee against a particular loss, and containing a clause of defeasance upon the performance of the stipulated conditions. To this division also belongs that class of mortgage securities technically known as "Trust Deeds," wherein the debts are specified and the creditors named or described, but because of their large number, or to allow greater freedom in the transfer of the evidences of the indebtedness, or from other circumstances making a conveyance directly to them less convenient, the deed is made to a mortgagee who combines the office of trustee, the creditors standing in the position of *cestuis que trust*.[6]

The second division consists of conveyances which are absolute in form, but being intended as security for debt only, courts of equity will give effect to the intention of the parties whatever may be the form of the conveyance, and treat the transaction as a mortgage, except as against the rights of *bona fide* purchasers or other intervening equities.[7] These are known as "equitable mortgages," and being usually dependent on undisclosed intention, are to be treated and considered in the abstract only according to their manifest legal import.

The third division contemplates all deeds of trust or assignments for the payment of creditors generally,[8] the mortgagee in such case representing the rights of the mortgagor only.[9] Mortgages may assume a variety of shapes and their identity become almost concealed, but the fact of security is always sufficient to furnish an indication of their true character.[10]

[6] Hurley *v.* Estes, 6 Neb. 386; Turner *v.* Watkins, 31 Ark. 429. A trust deed executed to secure a debt does not vest in the trustee the legal title to the land, which can only be taken away from the grantor by foreclosure or other legal process in substantial accord with the deed: Ingle *v.* Culbertson, 43 Iowa, 265.

[7] Sweet *v.* Mitchell, 15 Wis. 641; French *v.* Burns, 35 Conn. 359; Shays *v.* Norton, 48 Ill. 100.

[8] Bank *v.* Lanahan, 45 Md. 396.

[9] Spackman *v.* Ott, 65 Pa. St. 131.

[10] A penal bond to reconvey lands has been held to be a mortgage: Reynolds *v.* Scott, Brayt. (Vt.) 75. So of a deed with a bond for reconveyance: Wing *v.* Cooper, 37 Vt. 199; but otherwise upon

§ 344. **The Equity of Redemption.** The estate remaining in the mortgagor is popularly, but erroneously, called an "equity of redemption," retaining the name it had when the legal estate was vested in the mortgagee, and the right to redeem existed only in equity. Although a misnomer, it does not mislead. The term is convenient and its meaning well understood. The legal estate remains in the mortgagor and is subject to dower and curtesy; the lien of judgments; may be sold on execution; and may be the subject of mortgage and sale, the same as any other estate in lands, while the mortgagee has but a lien upon the land as a security for his debt, and the same is not liable to his debts, nor subject to any of the incidents of an estate in lands.[11] The mortgagor retains and is possessed of an estate in the land in virtue of his former and original right, and there is no change of ownership. So far as the entire estate is concerned, there is but one title and this is shared between the mortgagor and mortgagee, the one being the general owner and the other having a lien which, upon a foreclosure of the right to redeem, may ripen into an absolute title, their respective parts, when united, constituting one title.[12] The possession of the mortgaged premises in no

facts stated: Rich *v.* Doane, 35 Vt. 125. So also of a deed with a stipulation that title shall not vest until the purchase money is paid: Pugh *v.* Holt, 27 Miss. 461. And generally any conveyance expressed to be to secure a payment: Cowles *v.* Marble, 37 Mich. 158; Bearss *v.* Ford, 108 Ill. 16; Parks *v.* Hall, 2 Pick. (Mass.) 211.

11 Odell *v.* Montross, 68 N. Y. 499; 2 Wash. Real Prop. 152; Gorham *v.* Arnold, 22 Mich. 247; White *v.* Rittenmeyer, 30 Iowa, 268. This is the general doctrine, yet in some States it is still held that, after the expiration of the law day, the mortgagor or one occupying his position, is considered as tenant at sufferance of the mortgagee, and liable to be evicted without notice to quit. The mortgagee, in such case, has a right of entry which he may peaceably assert without notice and without action; or he may, with or without notice to quit, bring ejectment, and may recover possession of the land and damages for use and occupation after notice to quit, and if no notice, then after the service of the writ, and this either against the mortgagor or his assignee: Mason *v.* Gray, 36 Vt. 311; Collame *v.* Langdon, 29 Vt. 32; Welsh *v.* Phillips, 54 Ala. 39.

12 Odell *v.* Montross, 68 N. Y. 499.

way affects the right of the one to redeem or the other to foreclosure.[13]

A party taking a mortgage on land pending a bill to foreclose a prior mortgage or lien, will be bound by the decree and sale made in the pending suit the same as if made a party to the bill to foreclose, and will be bound to redeem from such sale within the period allowed by law. If he fails to do so his equity of redemption will be barred,[14] and his rights under his mortgage will be extinguished and lost.

§ 345. **Rights of Mortgagor.** The mortgagor, possessing the legal as well as the equitable title, may perform any valid act relative to the property, and make any contract with reference to the title, subject to the lien of the mortgage, but he can, it seems, do no act which shall be prejudicial to his mortgagee's interests or essentially change the legal character of the land. Hence, no dedication to public use of portions of a parcel of land, made by the general owner after giving a mortgage upon it, can affect the lien of the mortgage, and a purchaser at a sale on foreclosure will take title free of the dedication.[15]

§ 346. **Mortgages as Affected by Estoppel.** It is a well settled principle of law, that if one who has no title to lands nevertheless makes a deed of conveyance, with warranty, and afterward himself purchases and receives the title, the same will vest immediately in his grante, who will hold the land in virtue of his deed with warranty, as against such grantor, by estoppel. In such case the estoppel is held to bind the land, and create an interest in it. The grantor, being at the same time the warrantor of the title which he has assumed the right to convey, will not be heard to set up a title in himself against his own prior grant, nor to say that he had not the title at the date of the conveyance, or that it did not pass to his grantee in virtue of his deed.[16]

[13] Parsons *v.* Noggle, 23 Minn. 328.

[14] Pratt *v.* Pratt, 96 Ill. 184.

[15] Hague *v.* West Hoboken, 23 N. J. Eq. 354; Walker *v.* Summers, 9 W. Va. 533.

[16] Teft *v.* Munson, 57 N. Y. 97; Work *v.* Wellend, 13 N. H. 389;

The doctrine is equally well settled that the estoppel binds not only the parties, but all privies, whether of blood, law, or estate;[17] and in such case, the title is treated as having been previously vested in the grantor, and as having passed immediately upon the execution of his deed, by way of estoppel. So where a party makes a mortgage with express or implied warranty of title, he thereby becomes estopped from disputing that, at the date of the mortgage, he had the title and conveyed it; and this estoppel applies equally to all persons to whom such party may make subsequent conveyances, by deed, after he has obtained a title. Such subsequent grantees are estopped from denying that the original grantor had title to the land at the date of the mortgage, and he must, therefore, for every purpose as against his grantees, be treated as having had the title at that date.[18] Nor does this doctrine at all militate against the rule, that the record of a conveyance made by one having no title is a nullity, and constructive notice to no one.

When a mortgage is in the statutory form it is equivalent to one containing all the usual covenants of title, and subsequently acquired titles inure to the benefit of the mortgagee.[19]

§ 347. **Merger.** One of the most perplexing incidents of title that can come to the notice of the examiner in connection with mortgages, is that which forms the caption to this section, and as it is impossible, in the brief limits of this work, to enter into any extended discussion of the subject, only passing reference can be made to it. The doctrine, as formulated by the earlier decisions, is that whenever a greater and a less estate unite in the same person, without any intermediate estate, the lesser is merged,[20] and where the legal and equitable estates meet and unite in the same person without an intervening interest outstanding in a third person, the equi-

Jackson *v.* Bull, 1 Johns. Cas. 81; White *v.* Patten, 24 Pick. 324; Pike *v.* Galvin, 29 Me. 183.

17 Teft *v.* Munson, 57 N. Y. 97.

18 Teft *v.* Munson, 57 N. Y. 97; White *v.* Patten, 24 Pick. 324; Elder *v.* Derby, 98 Ill. 228; R. & M. R. R. Co. *v.* Trust Co., 49 Ill. 331.

19 Elder *v.* Derby, 98 Ill. 228.

20 Jackson *v.* Roberts, 1 Wend. 478; James *v.* Morey, 2 Cow. 246.

table is merged in the legal estate, the latter alone subsisting. Thus, a conveyance by the mortgagor to the mortgagee extinguishes the mortgage.[21]

Later decisions have greatly modified this rule and it is now held, that where two estates meet as above described, a merger does not necessarily follow, but will depend upon the intent and interest of the parties, and where it becomes necessary to advance the ends of justice, the two estates will be kept separate; thus, a deed from a mortgagor to a mortgagee, intended as additional security only, and not as a satisfaction of the mortgage, will not merge the mortgage in the greater estate so as to give priority to another mortgage which is a second lien.[22] So, also in the absence of a special agreement to that effect, the taking of a new mortgage, from the same party and on the same property, will not merge or extinguish a prior one.[23] The rule, as first stated, though inflexible at law, is in equity controlled by the express or implied intention of the party in whom the interests or estates unite, and the mortgage interest will in equity be held to have merged the fee, or otherwise, according to the actual or presumed intention of the mortgagee.[24]

With respect to merger no general rule can be laid down, for the question will depend in each case upon the interests and intent of the parties, and the demands of justice and equity.[25] The most rigid investigation must be made by counsel wherever

21 Jackson *v.* Devitt, 6 Cow. 310.

22 Huebsch *v.* Schnell, 81 Ill. 281.

23 Christian *v.* Newberry, 61 Mo. 446.

24 Aiken *v.* R. R. Co., 37 Wis. 469; Morgan *v.* Hammet, 34 Wis. 512; Powell *v.* Smith, 30 Mich. 451; Waterloo Bank *v.* Elmore, 52 Iowa, 541; Tower *v.* Divine, 37 Mich. 443.

25 Franklyn *v.* Hayward, 61 How. Pr. (N. Y.) 43. Where a mortgagor sells the morgaged premises, subject to the mortgage, and a third party, having purchased the mortgage, afterward, through mesne conveyances, obtains title to the land, he thereby becomes vested with the estates of both mortgagor and mortgagee; the owner of the mortgage having acquired the primary fund for its payment, which is of value equal to the mortgage, he thereby occupies the position of one who has effected a strict foreclosure and the mortgage debt must be regarded as paid: Lilly *v.* Palmer, 51 Ill. 331.

an apparent merger occurs in the title, as the record does not impart notice of merger, or of any other fact which depends alone on the intention of the parties, or other extrinsic evidence, and if any one takes a conveyance upon the assumption that a former mortgage to his grantor has been merged in a subsequent conveyance of the fee, he does so at his peril.[26]

§ 348. **Equitable Mortgages.** It is an established doctrine that a court of equity will treat a deed absolute in form, as a mortgage when it is executed as security for a loan of money, for the court looks beyond the terms of the instrument to the real transaction, and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties.[27] Such a deed carries with it all the incidents of a mortgage, and the rights and obligations of the parties to the instrument are the same as if it had been subject to a defeasance expressed in the body thereof, or executed simultaneously with it.[28] It is a further established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security the borrower has in a court of equity a right to redeem the property upon payment of the loan, and this right can not be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates. "Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities, will often submit to ruinous conditions, expecting or hoping to be able to repay the loan

26 Or. & Wash. Trust Co. *v.* Shaw, 5 Sawyer (C. Ct.), 336.

27 Peugh *v.* Davis, 96 U. S. 332; Klein *v.* McNamara, 54 Miss. 90; Carr *v.* Carr, 52 N. Y. 251; Shays *v.* Norton, 48 Ill. 100; Turner *v.* Kerr, 44 Mo. 429; Moore *v.* Wade, 8 Kan. 380; Kerr *v.* Agard, 24 Wis. 378. The rule that parol proof is admissible to show that a conveyance of real estate, absolute upon its face, was intended to be a mortgage or security merely, is recognized and applied for the reason, that such evidence is received not to contradict an instrument of writing, but to prove an equity superior to it: Saunders *v.* Stewart, 7 Nev. 200; Wilcox *v.* Bates, 26 Wis. 465.

28 Odell *v.* Montrose, 68 N. Y. 499.

at its maturity and thus prevent the conditions from being enforced and the property sacrificed." [29]

In view of these statements how is counsel to determine, on perusal of the abstract, what are and what are not mortgages, if all the instruments appear absolute on their face? There is but one answer to the question. He can not. The legal import of an absolute conveyance is that it carries the fee,[30] and any contradiction of its apparent effect must arise from extrinsic evidence. This latter counsel can not know, nor is he expected to have such knowledge. The record rarely furnishes any clue to the true character of this class of conveyances, the facts governing their equitable nature resting entirely in parol, hence questions of this kind can seldom arise in the preparation of abstracts and only incidentally in passing upon titles. The examiner can judge of the legal sufficiency and effect of instruments only as they are presented on the record.[31] Subsequent purchasers for value, without notice, will be protected by the record, and where one in possession of land, under a conveyance absolute on its face, sells the same, his grantee, without notice that his vendor's deed was but a mortgage, will hold the property free from any equity of redemption; [32] and even though a court of equity afterward decides that the conveyance was in fact a mortgage, and that the

29 Field, J., in Peugh *v.* Davis, 96 U. S. 332; Clark *v.* Henry, 2 Cow. 324; and see Walton *v.* Cody, 1 Wis. 420; Bearss *v.* Ford, 108 Ill. 16.

30 A conveyance of the legal title to secure the payment of money differs from a statutory mortgage in that the legal title passes to the grantee, the grantor reserving the right in equity to redeem. This right, however, may become barred by the statute of limitations, and when so barred that an action for affirmative relief can not be maintained thereon, it can not be interposed as a defense to an action by the grantee to recover possession of the property: Richards *v.* Crawford, 50 Iowa, 494. See, Edwards v. Trumbull, 50 Pa. St. 509; Shaw *v.* Wiltshire, 65 Me. 485. This result always follows if the instrument be recorded in the record of deeds and not of mortgages: Brown *v.* Dean, 3 Wend. (N. Y.) 208.

31 It is the settled policy of the law to give security to, and confidence in, titles to the landed estates of the country which appear of record to be good: McVey *v.* McQuality, 97 Ill. 93.

32 Jenkins *v.* Rosenburg, 105 Ill. 157.

mortgagor is entitled to his equity of redemption, yet the title to the property will not be disturbed, but judgment *in personam* will be given against the mortgagee for the amount equitably due by him to the mortgagor.[33]

Where a lien on land is expressly reserved in the deed conveying such land, which is duly recorded, a clear equitable mortgage is created of which every one is bound to take notice;[34] but something more than a mere reservation of a right to purchase, or covenant to reconvey, must be shown in order to convert a deed absolute on its face into a mortgage.[35] There is no positive rule that a covenant to reconvey shall be regarded, either in law or equity, as a defeasance. The owner of lands may be willing to sell at the price agreed upon, and the purchaser may also be willing to give the vendor the right to repurchase, upon specified terms. Such a contract is not opposed to public policy, nor is it in any sense illegal.[36]

Equitable mortgages arising from the deposit of title deeds are not generally recognized,[37] and the common-law doctrine respecting pledges of this kind can not be said to prevail in this country.

§ 349. **Vendor's Liens.** It has long been settled that the vendor of real property, notwithstanding he has conveyed the legal title, has a lien on such property for the unpaid purchase

33 Baugher *v.* Merryman, 32 Md. 186; Jackson *v.* McChesney, 7 Cow. 360; Grimstone *v.* Carter, 3 Paige, 421.

34 Davis *v.* Hamilton, 50 Miss. 213; Armentrout's Exr. *v.* Gibbons, 30 Gratt. (Va.) 652; Dingley *v.* Bank, 57 Cal. 467; as where a deed contains a stipulation that no title shall vest until the purchase money has been paid (Pugh *v.* Holt, 27 Miss. 461; Austin *v.* Downer, 25 Vt. 558, or that the deed shall be absolute on the payment of certain notes, but in default thereof to be void (Bank *v.* Drummond, 5 Mass. 321). So if it be for the performance of any other duty, such as maintenance of the grantor during life, etc.: Lanfair *v.* Lanfair, 18 Pick. (Mass.) 299.

35 But see Peterson *v.* Clark, 15 Johns. (N. Y.) 205.

36 Hanford *v.* Blessing, 80 Ill. 188; Henly *v.* Hotaling, 41 Cal. 22; Glover *v.* Payn, 19 Wend. 518.

37 Probasco *v.* Johnson, 2 Disney (Ohio), 96. The registry of a mortgage is a substitute for the deposit of the title deeds: Johnson *v.* Stagg, 2 Johns. 510.

money while it remains in the hands of the vendee, or volunteers or purchasers with notice. This, however, applies mainly to implied liens, for where there is a distinct reservation of lien upon the face of the deed, it has been held to constitute a specific charge upon the land as valid and effectual as a deed of trust or mortgage,[38] and, further, that the lien being set forth in the very first link of the vendee's claim of title, purchasers from him have just as much notice of it as they would have had of a lien on the land by mortgage or trust deed.[39] "Indeed," says Staples, J., "it may be a question whether a reserved lien is not of a higher nature than a mere mortgage security. In many cases the mortgage is treated as a mere incident to the debt, whereas the lien reserved is an express charge inherent in its nature upon the land which, in quity, is the natural primary fund for its payment." [40]

§ 350. **Mortgages Proper.** A mortgage may be made by an absolute conveyance with a defeasance back, but this form has never been in general use in the United States, and is now obsolete. The class of conveyances to which this name is technically applied consists of an instrument in form purporting to convey a present estate to the mortgagee, liable to be defeated by the performance of stipulated conditions, and is always between the principals to the transaction. Where the mortgage remains a valid and subsisting lien, it is advisable to narrate its essential terms quite fully, and when followed by foreclosure, if other than by suit in chancery, to relate with minuteness of detail the power of sale and other provisions, by authority of which the foreclosure was made. Where the mortgage has been fully paid, satisfied and discharged, there exists no good reason why it should appear at all, any more than a judgment which has been satisfied; yet it is the universal custom of abstract makers to show, in the regular course of title, both the mortgage and its subsequent assignments, if any,

[38] Armentrout's Ex'rs *v.* Gibbons, 30 Gratt. (Va. 632); Carpenter *v.* Mitchell, 54 Ill. 126.

[39] Patton *v.* Hoge, 22 Gratt. (Va.) 443; Hines *v.* Perkins, 2 Heisk. (Tenn.) 395.

[40] Coles *v.* Withers, 33 Gratt. (Va.) 186.

and the discharge. Questions may sometimes arise that render an abstract of satisfied liens convenient or material, yet, as a rule, only the briefest outline should be presented, sufficient, in fact, to show the transaction and no more, that confusion may not result from the mingling of satisfied and unsatisfied liens. An unsatisfied, unforeclosed mortgage may be sufficiently presented as follows:

Richard Thompson and Elvira, his wife, to Mortimer Giddings. } *Mortgage. Dated May 1, 1880. Recorded May 2, 1880. Book 590, pg. 253. To secure the payment of $500.00 in one year from the date hereof, with interest at six per cent. per annum, evidenced by said Richard Thompson's one promissory note of even date herewith.*[41]

Conveys land in Brown County, Ills., described as lot one, in block one, of the Village of Cherry Vale, being part of the northeast quarter of section ten, town one north, of range five east of the third Principal Meridian.

Power of sale given on default after thirty days' notice.[42]

Homestead rights waived.

Acknowledged May 1, 1880.

The above sufficiently designates the character and effect of an ordinary mortgage between individuals before default or foreclosure, or if followed by foreclosure in equity. When foreclosed by advertisement, if the mortgagee's deed is shown

41 It is the universal custom to witness the obligation of payment by a bond or promissory note, the mortgage simply stipulating that if the money be paid by the day named, the mortgage as well as the obligation shall be void; but it may often happen that no separate obligation is taken, and the absence of a bond or other express obligation to pay the money will not make the instrument any less effectual as a mortgage, provided, of course, that the mortgagor had the money.

42 When followed by foreclosure under the power, set out the terms thereof fully. See the example of foreclosure of trust deed.

in the same examination, instead of the reference to the power of sale above given, set out the entire clause and accompanying conditions. When a foreclosure by advertisement and sale follows a mortgage shown in a former examination, or one appearing prior to the commencement of the search, a note, embodying the power of sale, should be appended to the abstract of the mortgagee's deed, in the same manner as the example given of a trustee's deed, to which the reader is referred. Where the mortgage is given by a corporation, married woman, person under guardianship or other disability, a greater degree of detail is of course required, and all special matter, relating to capacity, power to act, character of parties, etc., should be shown as in cases of absolute conveyance by deed. So, also, unusual clauses, conditions, stipulations or covenants, tending to shed light on the transaction, or to limit or define the nature of the lien or security given, must in like manner be specifically shown. The example given in this section is to be considered rather as a suggestion than as a form, as are many other examples in this book, and whenever any of the above mentioned incidents occur they should find appropriate mention.

A mortgage, after judicial foreclosure, although in some sense merged in the decree, remains a muniment of title which passes to the purchaser at the mortgage sale, to be looked to, not only for the purpose of ascertaining the time at which the mortgage lien attached, but also, in the absence of express directions in the decree limiting the estate to be sold, the quantity and quality of the estate conveyed by way of mortgage.[43]

§ 351. **Statutory Forms.** As in case of absolute deeds, statutory forms for mortgages are now prescribed in many States, but, like such deeds, from their meagerness of detail, have not come into very general use in many localities. The statutory words of conveyance and pledge are "mortgage and warrant" and in all abstracts of such mortgages the operative words should be inserted as they appear in the original. The word "mortgages" is sufficient, under the statute, to create a

[43] Vallejo Land Assoc. *v.* Viera, 48 Cal. 572.

mortgage in fee, while the addition of the words "and warrants" carries the legal import and effect of full covenants of seizin, right to convey, freedom from incumbrances, quiet enjoyment and general warranty.

§ 352. **Uncertainty or Error of Description.** The observations heretofore made[44] in regard to uncertain or erroneous descriptions in deeds are all applicable to mortgages, for the policy of the law requires that they give definite information, not only as to the debt secured, but as to the property mortgaged as well.[45] Material omissions, or even misdescription, will not invalidate the instrument, where other adequate elements of identification exist,[46] but purchasers without notice will be bound only by the description furnished by the mortgage.[47]

It is a rule of general observance that a mortgage, to be effective, must in some way describe and identify the indebtedness it is intended to secure. Literal accuracy in describing the debt is not required, but the description must be correct as far as it goes and must be full enough to define the obligation with reasonable certainty, or, it must direct attention to other sources where correct information concerning the debt may be obtained. In every event it must be of such a character as not to mislead or deceive, either as to the nature of the debt or its amount.[48] If the mortgage is given to secure an ascertained debt, then the amount of the debt should be stated; if it is intended to secure a debt not ascertained such data should be furnished respecting the debt as would put any one interested in the inquiry upon the track leading to the discovery. If it is given to secure an existing or future liability, the foundation of such liability should be set forth.[49]

44 See "Errors, Omissions and Defects," page 182.

45 Herman *v.* Deming, 44 Conn. 124; Simmons *v.* Fuller, 17 Minn. 485; Galaway *v.* Malchou, 5 Neb. 285; Murphy *v.* Hendricks, 57 Ind. 593.

46 Slater *v.* Breese, 36 Mich. 77; Boon *v.* Pierpont, 28 N. J. Eq. 7.

47 Disque *v.* Wright, 49 Iowa, 538; Simmons *v.* Fuller, 17 Minn. 485.

48 New *v.* Sailors, 114 Ind. 407; Pettibone *v.* Griswold, 4 Conn. 158; Bullock *v.* Battenhousen, 108 Ill. 36; Curtis *v.* Flynn, 46 Ark. 70.

49 Bullock *v.* Battenhousen, 108 Ill. 36.

§ 353. **Covenants in Mortgages.** As mortgages are now drawn personal covenants are not usually inserted, but whenever they are inserted they have the same operation as in deeds of bargain and sale. A brief allusion to the covenants of a mortgage may be profitably made, and where the words of grant which imply covenants are employed, and no express covenants are inserted in the instrument, such words should always be stated as in case of deeds. The words "grant, bargain and sell" are sufficient to create an estoppel, and any subsequent interest the mortgagor may acquire in and to the mortgaged premises will pass by the mortgage or any sale that may be made pursuant to its terms.[50]

It is a rule, however, in ordinary cases of foreclosure, that the title ordered to be sold is only the title which was held by the mortgagor at the date of the mortgage,[51] and when a mortgage containing no covenant of warranty has been foreclosed, and the relation of mortgagor and mortgagee has been extinguished by a sale of the mortgaged lands, the former is under no duty to protect the title of the purchaser, nor is he precluded from subsequently acquiring and claiming under an outstanding and paramount title.[52] "The purchaser is presumed to know the conditions of the title which he purchases," says Andrews, J., "and if it is defective his bid is regulated in view of such defect. If the premises bring enough to satisfy the mortgage debt it would be inequitable to allow him to claim an interest subsequently acquired by the mortgagor, and which he did not purchase and was no part of the consideration of the sale. If there is a deficiency, that becomes a personal charge against the party bound to pay the debt, in favor of the creditor. Different considerations would apply when the mortgage contained covenants of warranty. In that case the consideration paid would represent the value of the land as warranted, and the mortgagor would be estopped from setting up

50 Gibbons *v.* Hoag, 95 Ill. 45; Teft *v.* Munson, 57 N. Y. 97.

51 Kreichbaum *v.* Melton, 49 Cal. 51.

52 Jackson *v.* Littell, 56 N. Y. 108.

an after acquired title, against which he covenanted in the mortgage." [53]

§ 354. **Effect of Special Covenants.** In addition to the ordinary covenants of title and warranty, a series of special covenants are found in mortgages which do not, as a rule, directly affect title. These covenants are sometimes annexed to conditions and stipulations, but may be separate from them and from the subject to which the stipulations allude. Of this nature is the covenant to keep the mortgaged property insured for the benefit of the mortgagee. Such a covenant creates a specific equitable lien upon the insurance money, which is valid as against the creditors of the mortgagor. The mortgage being recorded, the covenant acts upon the insurance as soon as affected, runs with the land, and furnishes notice to third persons; and no subsequent assignment or other act can affect the rights of the mortgagee. It is not necessary that the policies be assigned, nor that the mortgagee select the companies, and any acts of the mortgagor without the consent of the mortgagee will not defeat the effect of the covenant.[54]

§ 355. **Special Stipulations and Conditions.** Many mortgagees insist upon a number of special stipulations and conditions in mortgages accepted by them, and frequently they are of such a nature that they can not be consistently passed by the examiner without notice.

The stipulation for insurance for the mortgagee's benefit, being intended to afford security supplementary to and connected with the mortgage, and to keep the mortgaged property itself so far intact as a means of security as to perpetuate the safety of the mortgagee's interest in case the buildings should burn, is in equity a sort of adjunct to the mortgage, and is binding on the mortgagor and all others who may succeed to his rights with notice.[55]

53 Jackson *v.* Littell, 56 N. Y. 108. And see, Vallejo Land Assoc. *v.* Viera, 48 Cal. 572.

54 In Re Sands' Ale Brewing Co., 3 Biss. 175. In this matter, the question was raised by the assignee in bankruptcy of the mortgagor.

55 Miller *v.* Aldrich, 31 Mich. 408. A failure in this respect constitutes such a default as will justify the

The stipulation that in case of a default in the payment of interest the principal shall immediately become due and payable, and that the mortgagee may immediately proceed to foreclose, is an essential part of the contract and may be enforced,[56] and the same rule applies to the similar stipulation relative to the non-payment of taxes.[57]

A provision that the mortgagee, upon default, shall be entitled to the immediate possession of the premises is generally regarded as valid, and of this provision subsequent purchasers and incumbrancers are charged with notice.[58]

A stipulation, whereby the mortgagee assumes and agrees to pay a prior mortgage on the premises, does not impose upon the mortgagee a personal liability for the prior mortgage debt, which can be enforced against him by the prior mortgagee, for the stipulation in such cases is not a promise made by the mortgagee to the mortgagor for the benefit of the prior mortgagee, but is a promise for the benefit of the mortgagor only; it is to protect his property by advancing money to pay his debt.[59] In this respect it differs from a similar stipulation contained in an absolute conveyance.

All stipulations which are essential parts of the contract, or which tend to induce foreclosure before the expressed time of the maturity of the debt, particularly when the mortgage contains a power of sale by advertisement, should be stated or definitely alluded to.

§ 356. **Effect of Informality in Mortgages.** Mortgages, or conveyances by way of security in the nature of mortgages, are seldom void for informality unless the informality or omission goes to the groundwork of the instrument, and a

mortgagee in selling under the power in the mortgage: Walker *v.* Cockey, 38 Md. 75.

56 Gulden *v.* O'Byrne, 7 Phil. (Pa.) 93; Malcom *v.* Allen, 49 N. Y. 448; Meyer *v.* Graeber, 19 Kan. 165; Cook *v.* Clark, 68 N. Y. 178.

57 Stanclifts *v.* Norton, 11 Kan. 218.

58 Felino *v.* Lumber Co., 64 Neb. 335; and see, Frink *v.* LeRoy, 49 Cal. 314.

59 Garnsey *v.* Rogers, 47 N. Y. 233. The same rule applies to a deed absolute on its face, but, in fact, intended as a mortgage.

mortgage or trust deed, otherwise complete but lacking in some formal particular, though it may be denied legal effect, will yet be enforced in equity as an equitable mortgage, and this protection will extend to the assignee as well as to the original mortgagee.[60] The rule has been held to apply in case of a trust deed which omitted the name of the trustee;[61] and to a mortgage which did not purport to be sealed;[62] and where the seal had been omitted;[63] where the instrument was imperfectly witnessed, as where there was but one witness, and the statute required two;[64] to imperfectly acknowledged instruments;[65] and even to the want of an acknowledgment.[66] Whenever a mortgage is sufficient as between the parties it will affect all third persons who have actual knowledge or notice of its existence,[67] and purchasers with such notice will take subject to the equities created by such defective mortgage.[68]

§ 357. **Purchase Money Mortgages.** A mortgage expressed to be for the whole or a part of the purchase money of the mortgaged property should be so described in the abstract, as such mortgages stand upon a somewhat different footing from other conveyances by way of security. The peculiar qualities of a purchase money mortgage are derived from statutes, under which it becomes a lien upon the entire estate of the mortgagor in the land, freed from any contingent claim of the wife, whether she be a party to the mortgage or not;[69] neither will she be a necessary party to a suit for foreclosure of a purchase money mortgage, in the execution of which she

60 McQuie *v.* Peay, 58 Mo. 56; McClurg *v.* Phillips, 49 Mo. 31.

61 McQuie *v.* Peay, 58 Mo. 56.

62 Jones *v.* Brewer, 58 Me. 210.

63 Harrington *v.* Fortner, 58 Mo. 468; Van Riswick *v.* Goodhue, 50 Md. 57.

64 Gardner *v.* Moore, 51 Ga. 268; Sanborn *v.* Robinson, 54 N. H. 239.

65 Haskill *v.* Sevier, 25 Ark. 152; Zeigler *v.* Hughes, 55 Ill. 288.

66 Black *v.* Gregg, 58 Mo. 565.

67 Gardner *v.* Moore, 51 Ga. 268; Sanborn *v.* Robinson, 54 N. H. 239; Wilson *v.* Reuter, 29 Iowa, 176.

68 Gardner *v.* Moore, 51 Ga. 268.

69 Fletcher *v.* Holmes, 32 Ind. 497; Amphlet *v.* Hibbard, 29 Mich. 298; Thompson *v.* Lyman, 28 Wis. 266.

had not joined, if such suit be brought in the lifetime of the husband.[70]

So, too, a purchase money mortgage, executed contemqoraneously with the deed of purchase, will take precedence over the lien of a prior judgment against the mortgagor.[71]

The fact in itself is important, but it may be stated in very brief terms, which is usually done by a parenthetical clause in connection with the recital of the indebtedness; thus:

To secure the payment of $4,000.00 (part purchase money) evidenced by four notes, etc.

The same fact may, if so desired, be stated more fully, by a distinct allusion to the purchase money clause in the body of the instrument, in this manner:

This mortgage is given (it is stated) to secure the payment of (a portion of) the unpaid purchase money for said above described premises.

§ 358. **Mortgages of the Homestead.** The jealous care with which the law guards the homestead is never more fully exemplified than in the safeguards and restraints which it has placed upon all attempts to incumber it; and in all conveyances of property, whether by deed or mortgage, the character of the premises, considered in relation to its use and occupancy, is an inquiry never to be omitted. In some States no valid mortgage of the homestead can be effected;[72] in a majority of the others such mortgage is effectual, only when there has been a special release and waiver of the homestead right;[73] while in all the States, the free and voluntary assent of the

70 Fletcher *v.* Holmes, 32 Ind. 497.

71 Stewart *v.* Smith, 36 Minn. 82; Cake's Appeal, 23 Pa. St. 186.

72 Van Wickle *v.* Landry, 29 La. Ann. 330; and see Moughon *v.* Masterson, 59 Ga. 835; Campbell *v.* Elliott, 52 Tex. 151.

73 Trustees *v.* Beale, 98 Ill. 248; Browning *v.* Harriss, 99 Ill. 456; Balkum *v.* Wood, 58 Ala. 642.

wife, the mortgagor being a married man, is a condition precedent to the vesting of the lien.[74] Where the statute prescribes formalities relative to acknowledgment, such formalities become matters of substance, and their due observance is in all cases necessary;[75] but where no particular mode is prescribed, any joint action, properly acknowledged, will probably satisfy the requirement of the voluntary signature and assent of the wife.[76] Where the statute requires an express waiver, this may be shown briefly, in all properly executed mortgages, by a simple recital of the fact; as,

Homestead rights waived,

while the absence of any words indicative of such intention may, with propriety, be also noted.

The only exception to the rules above stated is, when the mortgage is given to secure all or a portion of the unpaid purchase money, and in such case they all yield to the superior equity of the vendor's lien.[77] In examinations of title an inquiry *in pais* is always raised by mortgages purporting to be executed by the husband only, as well as when the joint action of husband and wife is shown, but unaccompanied by any expression indicative of release or waiver of homestead, when such expressed waiver is a statutory essential, unless the mortgage in terms purports to be a security for the purchase price.

§ 359. **Mortgage of After-acquired Property.** As to the effect of deeds and mortgages of property to which the grantor or mortgagor has no present legal title, and which con-

74 Long *v.* Mostyn, 65 Ala. 543; Anderson *v.* Culbert, 55 Iowa, 233; Griffin *v.* Proctor, 14 Bush (Ky.), 571; Sherrid *v.* Southwick, 43 Mich. 515; Chambers *v.* Cox, 23 Kan. 393.

75 Mash *v.* Russell, 1 Lea (Tenn.), 543; Balkum *v.* Wood, 58 Ala. 642; Warner *v.* Crosby, 89 Ill. 320. The fact that the deed recites a waiver does not help a defective acknowledgment: Best *v.* Gholson, 89 Ill. 465.

76 Forsyth *v.* Preer, 62 Ala. 443. Local statutes must decide these matters; the laws and decisions of other States shed but little light on questions of this character.

77 Fletcher *v.* Holmes, 32 Ind. 497; Amphlet *v.* Hibbard, 29 Mich. 298; Thompson *v.* Lyman, 28 Wis. 266.

tain no covenants or other words creating an estoppel, there seems to be much diversity of judicial opinion, though the authorities are in the main harmonious in declaring equitable interests and estates to be proper subjects of conveyance by mortgage.[78] The question frequently arises in regard to mortgages of incipient or inchoate rights under the United States land laws, and such mortgages have usually been upheld by the State courts, particularly when the transaction was shown to be one of good faith,[79] and, when congress has imposed no positive restrictions, the right is usually accorded to one rightfully in possession of the soil to make any valid contract concerning the title to same predicated upon the hypothesis that he may thereafter lawfully acquire it.[80] So, too, where a railroad company made a mortgage on the property "then belonging to or thereafter to be acquired" by said company, with covenants for further reasonable and necessary conveyances as to subsequently acquired property, it was held that the mortgage became a valid lien upon any interest in real as well as personal estate subsequently acquired by the company for the use of its road, even superior to a vendor's lien for the purchase money of the lands.[81]

Courts of equity will enforce specific execution of contracts, and give relief in numerous cases of agreements relating to lands and things in action, or to contingent interests or expectancies, upon the maxim that equity considers that done, which, being agreed to be done, ought to be done,[82] and in furtherance of this principle, where no rule of law is infringed, and the rights of third persons are not prejudiced, will, in

78 Bank of Greensboro *v.* Clapp, 76 N. C. 482.

79 Woodbury *v.* Dorman, 15 Minn. 338; Wallace *v.* Wilson, 30 Mo. 335; Clark *v.* Baker, 14 Cal. 615; Reasoner *v.* Markley, 25 Kan. 635.

80 Lamb *v.* Davenport, 18 Wall. 307.

81 Pierce *v.* Milwaukee, etc., R. R. Co., 24 Wis. 551; and see Morrill *v.* Noyes, 56 Me. 458. Such mortgages from an exception to the general rule that property not in existence can not be conveyed.

82 Sillers *v.* Lester, 48 Miss. 513; Stevens *v.* R. R. Co., 45 How. (N. Y. Pr.) 104.

proper cases, give effect to mortgages of subsequently acquired property.[83]

§ 360. **Record of Mortgages.** Mortgages come within the provisions of the recording acts, and impart notice in like manner as deeds.[84] They are governed in this respect by the same general rules as affect other conveyances, while in several States they are further regulated in regard to priority, etc., by special laws. The registry of a mortgage is notice only to the extent of the sum specified in the record,[85] and of the property therein described,[86] and intending purchasers are only chargeable with notice of such facts as the record discloses, and not of undisclosed intent.[87]

If a mortgage is given to secure an ascertained debt, the amount of the debt should be stated; and if it is intended to secure a debt not ascertained, such data should be given respecting it as will put any one interested in the inquiry upon the track leading to a discovery. If it is given to secure an existing or a future liability, the foundation of such liability should be set forth. Without this, a subsequent *bona fide* purchaser, with no actual knowledge or notice of the facts, is not chargeable with notice of the amount secured.[88]

As between two mortgages, the first recorded is the prior

83 Beall *v.* White, 94 U. S. 382; Rice *v.* Kelso, 57 Iowa, 115.

84 Johnson *v.* Stagg, 2 Johns. 510; Rice *v.* Dewey, 54 Barb. (N. Y.) 455; Hickman *v.* Perrin, 6 Coldw. (Tenn.) 135; Shannon *v.* Hall, 72 Ill. 354; Van Aken *v.* Gleason, 34 Mich. 477.

85 Beekman *v.* Frost, 18 Johns. 544; North *v.* Belden, 13 Conn, 376. Even though there has been a mistake in recording: Bullock *v.* Battenhousen, 108 Ill. 28; Lowry *v.* Davis, 69 Ind. 589. But it would seem that the recorder would be liable in damages to any one who might suffer from the error: Lowry *v.* Davis, 69 Ind. 589.

86 Simmons *v.* Fuller, 17 Minn. 485; Galway *v.* Malchou, 5 Neb. 285; White *v.* McGarry, 2 Flip. (C. Ct.) 572.

87 Disque *v.* Wright, 49 Iowa, 538; Galway *v.* Malchou, 5 Neb. 285; Herman *v.* Deming, 44 Conn. 124.

88 So held where the record merely stated that the grantor had on the same date as the mortgage made his promissory note, payable, etc., without giving the amount: Bullock *v.* Battenhousen, 108 Ill. 28; Hart *v.* Chalker, 14 Conn. 77. But see North *v.* Knowlton, 23 Fed. Rep. 163, where *en semble* a contrary doctrine is indicated.

lien,[89] and where a mortgage and a deed of conveyance of the same property are made at the same time, the mortgage, if recorded first, will take precedence of the deed.[90]

The rights of the mortgagee are fixed when he places his mortgage on record, and the subsequent destruction of the record, will not, it seems, extinguish or destroy the notice afforded by registration, nor injuriously affect the rights of the mortgagee,[91] while as between the original parties,[92] and their heirs,[93] the mortgage will still be valid and effective although unrecorded.

§ 361. **Notice Imparted from Possession.** If the real owner of property allows it to stand recorded in the name of another, by a title translative of property, he puts it in the power of that other to create a valid mortgage on it;[94] yet one who takes a mortgage from the record owner of lands, which are in the notorious and exclusive possession of another, is bound to inquire as to the claims or interest of the person so in possession, and is chargeable with whatever he might have learned by reasonable inquiry, notwithstanding he has searched the records and found no deed.[95] Hence, it is always well for counsel, in framing an opinion of title, to specifically call attention to the rights of persons in possession if other than the record owner.

§ 362. **Re-records.** A re-record of a mortgage is treated the same as a re-record of a deed; bare mention is sufficient provided the two records show a literal conformity, otherwise they are to be regarded as independent instruments. Re-records of mortgages, like re-records of deeds, are frequently made

89 Ripley *v.* Harris, 3 Biss. 199; Odd Fellows Sav. Bank *v.* Banton, 46 Cal. 603; Van Aken *v.* Gleason, 34 Mich. 477.

90 Odgen *v.* Walkers, 12 Kan. 282.

91 Shannon *v.* Hall, 72 Ill. 354.

92 Cavanaugh *v.* Peterson, 47 Tex. 197.

93 McLaughlin *v.* Ihmsen, 85 Pa. St. 364.

94 Hunter *v.* Buckner, 29 La. Ann. 604; Shepard *v.* Shepard, 36 Mich. 173.

95 School District *v.* Taylor, 19 Kan. 287; and see Parsell *v.* Thayer, 39 Mich. 467.

to correct errors of the former record, and in every instance the two should be carefully compared.

When it satisfactorily appears that the instrument under consideration is a re-record it should be placed immediately after the abstract of the first record, whenever such a course is practicable, and may be shown somewhat as follows:

Robert Dennis and Frances, his wife, to David K. Tone.	*Mortgage. Dated, etc.*	*	*	*	*	*
		*	*	*	*	*

Apparently a re-record of the preceding mortgage, signed by both Dennis and wife, with an additional certificate of acknowledgment of both, dated June 2, 1898.

§ 363. **Trust Deeds.** Trust deeds in the nature of a mortgage were once in very common use, but the changes produced by the abolition of the common law doctrine of uses and trusts and the limitation of powers, have now confined them to a few States, and even in those States, under the influence of recent legislation, mortgages are to some extent taking their place. In general effect a trust deed of the character now under consideration is the same as a mortgage, and like a mortgage is, in equity, a mere security for the payment of money, or for the performance of certain undertakings by the grantor. It is simply an incident to the debt which it secures, and upon which it depends.[96]

The same general principles are applicable to this class of conveyances as to other deeds intended only as security, and the chief feature which distinguishes them from mortgages is, that here the conveyance is not made to the creditor direct, but to a trustee who holds a naked trust for the benefit of the legal holder of the evidence of the indebtedness, which, if negotiable, passes from hand to hand as other commercial paper, the incident of the lien following the note to the hands

[96] Life Ins. Co. *v.* White, 106 Ill. 67.

of the last indorsee, who, on default, may call upon the trustee to execute the trust according to its terms.

The grantor in a trust deed, in declaring the trust, may mold and give it any shape he chooses, and he may provide for the appointment of a successor or successors to the trustee upon such terms as he may choose to impose, but when imposed the terms must be pursued, to render the acts of the successor valid. It is alone by the force of the powers delegated by the deed that the trustee can perform any act with reference to the trust property, and in executing those powers he must strictly pursue them, or his acts will be void.[97]

An unexecuted trust, if still an existing lien, is treated in the same manner as mortgages under like conditions. The abstract should show the trustee; the successor in trust, if any is appointed; the *cestui que trust* if named;[98] and a general description of the indebtedness as in case of ordinary mortgages. An illustration is herewith given:

James Johnson
to
Americus B. Melville,
Trustee.

Trust Deed.
Dated June 1, 1882.
Recorded June 5, 1882.
Book 129. Page 510.

To secure the payment of $1,000 and interest thereon at eight per cent. per annum, in two years from the date hereof, evidenced by said first party's one certain promissory note, bearing even date herewith, and payable to the order of George W. Smith (or, *payable to his own order and by him endorsed).*

Conveys land, etc. [here set out the description of the property conveyed] *in trust and upon the conditions therein specified and enumerated.*

Power of sale given on default after thirty days' notice.

97 Equitable Trust Co. *v.* Fisher, 106 Ill. 189; Ellis *v.* R. R. Co., 107 Mass. 12.

98 It is now a very general practice to make the notes payable to the maker's own order and after he has endorsed them they then pass by mere delivery. In such case the fact should be noticed in the abstract.

Homestead rights waived.
Monroe A. Fulkerson, successor in trust.
Acknowledged June 1, 1882.

If followed by foreclosure in pursuance of the power, and the trustee's deed appears in the same examination, insert the power of sale in full as found in the instrument, immediately after the description of the property, thus:

*In trust, nevertheless, that in case of default in the payment of the note secured hereby, or any part thereof, according to the tenor and effect of said note, or in case of waste or non-payment of taxes or assessments, or neglect to procure or renew insurance as hereinafter provided, or in case of the breach of any of the covenants or agreements herein mentioned, then it shall be lawful for the said party of the second part or his successor in trust, on application of the legal holder of said promissory note (or either of them), to enter upon, possess, hold and enjoy the above granted premises, and either with or without such entry to sell and dispose of said premises, and all right, title, benefit and equity of redemption of said party of the first part, his heirs and assigns therein, at public auction, at the front door of the court house in Chicago, Illinois, or on said premises, or any part thereof, as may be specified in the notice of such sale, for the highest and best price the same will bring in cash, thirty days' previous notice of such sale having been given by publication once in each week, for four successive weeks, in the Chicago Legal News, or in any newspaper at that time published in said city of Chicago, and to make, execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold. * * * * Which sale or sales so made shall be a perpetual bar, both in law and equity, against the said party of the first part, his heirs and assigns and all other persons claiming the premises aforesaid, or any part thereof, by, from, through or under said party of the first part (or any of them).*

Second party, with or without re-advertising, is hereby au-

thorized and empowered to postpone or adjourn said sale from time to time at his discretion; and also to sell the said premises, entire, without division, or in parcels, as he may prefer or think best.

It is agreed that in case of default in any of said payments of principal or interest, according to the tenor and effect of said note, or any part thereof, or of a breach of any of the covenants or agreements herein, by the party of the first part, his executors, administrators or assigns, then, and in that case, the whole of said principal sum hereby secured, and the interest thereon to the time of sale, may at once, at the option (without notice thereof to said party of the first part, his heirs, assigns or legal representatives) of the legal holder thereof, become due and payable, and the said premises be sold in the manner and with the same effect, as if the said indebtedness had matured.

First party covenants that in case of a sale and conveyance as aforesaid, of said premises, any deed or deeds of conveyance made in pursuance of such sale shall be prima facie evidence of the due compliance with and performance of the terms, conditions and requirements of this deed of trust, by second party, or his successor in trust aforesaid, in advertising and making such sale and conveyance, to the extent of the recitals contained in such deed or deeds.

§ 364. **Power of Sale.** The power of sale contained in a deed of trust or mortgage must be strictly pursued,[99] and the utmost fairness must be observed in its execution; but such strictness and literal compliance should not be exacted as would destroy the power.[1] Where title is claimed through a trustee or mortgagee acting under a power, a reasonable de-

99 Cranston *v.* Crane, 97 Mass. 459.

1 Walter *v.* Arnold, 71 Ill. 350. Parties to a mortgage may, by stipulation, regulate the terms of a power of sale of the premises by the mortgagee; and the courts will not interfere to control the right, in the absence of fraud, or of some statutory regulations on the subject: Elliott *v.* Wood, 45 N. Y. 71.

gree of detail is necessary in the abstract, which should show sufficient of the proceedings, as evidenced by the trustee's or mortgagee's deed, to indicate a substantial compliance with every essential requisite. When permitted by statute, the sale of a mortgaged estate, made in pursuance of a valid power given by the owner, vests in the purchaser an estate in fee, free from the original condition and from any right of redemption,[2] and the power, being coupled with an interest, is irrevocable, and hence may be exercised even after the death of the mortgagor.[3]

Though one who undertakes to execute a power is bound to a strict compliance therewith, as well as the observance of good faith [4] and a suitable regard for his principal, yet a dereliction in this respect will not usually affect a purchaser in good faith, who, being a stranger to his proceedings and finding them all correct in form, takes the property; [5] yet as the payment of the debt secured by the trust deed or mortgage defeats the power of sale, a purchaser at a sale made under such power must see to it that the grantor in the deed or mortgage is in default, and that some part of the debt is due and unpaid.[6]

The omission of the power from a trust deed or mortgage merely limits the mode of foreclosure to bill in equity,[7] while its insertion does not oust the jurisdiction of a court of equity, nor preclude a party from resorting to that tribunal. It is cumulative only.[8] In its general nature it is a power coupled with an interest, is irrevocable, appendant to the land, and

2 Kinsley *v.* Ames, 2 Met. 29.

3 Berger *v.* Bennett, 1 Caine's Cas. (N. Y.) 1. Local statutes may, however, serve to modify the statement of the text.

4 If a sale is made by a mortgagee under a power in a mortgage, not in good faith, but in fact for himself, to whom the purchaser conveys, the sale is not void, but only voidable in equity, and it may be set aside while the title remains in the mortgagee, but not after transfer to a *bona fide* purchaser: Gibbons *v.* Hoag, 95 Ill. 45.

5 Montague *v.* Dawes, 14 Allen, 369.

6 Ventres *v.* Cobb, 105 Ill. 33.

7 Cowles *v.* Marble, 37 Mich. 158.

8 McAllister *v.* Plant, 54 Miss. 106.

passes by an assignment of the mortgage and secured debt;[9] it is not impaired by the death of the mortgagor, nor by lapse of time, if not unreasonable, in closing the sale made under it; and covers the equity of redemption, not only of a husband, but also that of his wife surviving him.[10]

At the present time power of sale mortgages are infrequent and in many States no foreclosure is permitted except in equity. But even in these States many examples of this species of security will be found upon the records and in the past history of titles, and when so found should be treated as above indicated.

§ 365. **Assignment.** The interest of a mortgagee, whether regarded as a lien or an estate, is assignable in law by a proper instrument purporting to convey the same, while the assignment of the notes secured by the mortgage operates in equity as an assignment of the mortgage itself.[11] In the latter case, the assignment of the debt carries with it the security for the debt, and ordinarily whoever owns the debt is likewise the owner of the mortgage.[12] Assignments of mortgages, however, are usually made by an instrument in writing and under

9 McGuire *v.* Van Pelt, 55 Ala. 344; Strother *v.* Law, 54 Ill. 413; Hyde *v.* Warren, 46 Miss. 13; Brown *v.* Delaney, 22 Minn. 349.

10 Strother *v.* Law, 54 Ill. 413.

11 Holmes *v.* McGinty, 44 Miss. 94; Moore *v.* Cornell, 68 Penn. St. 322; Blake *v.* Williams, 3 N. H. 39; Croft *v.* Bunster, 9 Wis. 503; Potter *v.* Stevens, 40 Mo. 229. An assignment in law is not recognized in some States.

12 Kurtz *v.* Sponable, 6 Kan. 395; Nelson *v.* Ferris, 30 Mich. 497; Preston *v.* Morris Case & Co., 42 Iowa, 549; Mulford *v.* Peterson, 35 N. J. L. 129; Conner *v.* Banks, 18 Ala. 42; Bell *v.* Simpson, 75 Mo. 485. Where a party is so related to a mortgage that he is not personally liable upon it, but is obliged to pay it to save his estate, and he does pay it, the payment will be presumed to be made for that purpose, and in such case no assignment of the mortgage to the person paying it, nor proof of an intention on his part to keep it alive, is necessary to give him the benefit of it: Walker *v.* King, 44 Vt. 601; and in like manner a party paying a decree of foreclosure becomes invested with the rights of the mortgagee and the assignee in equity of the mortgage; although in this case the mortgage is in fact paid, yet equity will require it to subsist until every party who owes a duty under the mortgage shall have dscharged it: Wheeler *v.* Willard, 44 Vt. 640.

seal, which, when recorded, affords constructive notice of the rights of the assignee to all persons, as against any subsequent acts of the mortgagee affecting the mortgage, and protects as well against an unauthorized discharge as against a subsequent assignment by the mortgagee.[13]

The law does not, as a rule, require the assignment to be recorded, as essential to its validity, nor is it necessary for the purposes of foreclosure; and assignments are excepted from the operation of the recording laws of many of the States. With respect to the necessity of registration for priority of title, the same general rule prevails between different assignees of a mortgage as between grantees in ordinary deeds,[14] and a release by the mortgagee, no assignment appearing of record, will effectually divest the lien, notwithstanding an assignment has in fact been made.[15]

In a few States, a mortgage is not assignable, either by the statute or by the common law; the assignment of the note carries the mortgage with it, but only in equity, and trust deeds given as security for a loan, being regarded in the nature of mortgages, stand upon the same footing as regards assignability.[16]

§ 366. **Operation and Effect of Assignments.** Though there are not wanting authoritative decisions to the contrary, yet the better and more generally received doctrine seems to be, that an assignment of a mortgage is to be regarded only as the transfer of a mere chose in action, and not an interest in lands, the debt being considered as the principal and the

13 Viele *v.* Judson, 82 N. Y. 32; Stein *v.* Sullivan, 31 N. J. Eq. 409; Torrey *v.* Deavitt, 53 Vt. 331.

14 Wiley *v.* Williamson, 68 Me. 71; Trust Co. *v.* Shaw, 5 Sawyer (C. Ct.), 336; McClure *v.* Burris, 16 Iowa, 591; Torrey *v.* Deavitt, 53 Vt. 331; Bacon *v.* Van Schoonhover, 87 N. Y. 446.

15 Mitchell *v.* Burnham, 44 Me. 303, Bank *v.* Anderson, 14 Iowa, 544; Johnson *v.* Carpenter, 7 Minn. 176; Union College *v.* Wheeler, 61 N. Y. 88; Baldwin *v.* Sager, 70 Ill. 505; Ayers *v.* Hays, 60 Ind. 452; Swartz *v.* Leist, 13 Ohio St. 419.

16 Olds *v.* Cummings, 31 Ill. 188; Walker *v.* Dement, 42 Ill. 272; Baily *v.* Smith, 14 Ohio St. 396.

land, or security, only the incident;[17] and that the assignee takes it charged with the notice which his assignor had of prior incumbrances, and subject not only to any latent equities that exist in favor of the mortgagor, but also subject to equities in favor of third persons.[18]

§ 367. **Formal Requisites of Assignments.** Though the earlier decisions hold that the interest of a mortgagee may be transferred or conveyed by the same forms of deeds by which the owner of the legal estate can convey it,[19] the current of later cases pronounces a contrary doctrine. The mortgagee's interest, being a mere chattel, is inseparable from the debt it is given to secure,[20] and, not constituting an estate or interest in the land, will not pass by any conveyance thereof. Hence a deed of all the grantor's "estate, title and interest" in the mortgaged premises,[21] or a conveyance of all his "lands, tenements and hereditaments,"[22] will not operate as an assignment of a mortgage; and generally, any conveyance or attempted conveyance of the mortgagee's interest before foreclosure, not accompanied by a transfer of the debt secured, is a nullity.[23]

17 Delano *v.* Bennett, 90 Ill. 533; Hitchcock *v.* Merrick, 18 Wis. 357; Paige *v.* Chapman, 58 N. H. 333; Bennett *v.* Saloman, 6 Cal. 134.

18 Sims *v.* Hammond, 33 Iowa, 368; Mason *v.* Ainsworth, 58 Ill., 163; Schofer *v.* Reilly, 50 N. Y. 61; Crane *v.* Turner, 67 N. Y. 437; Coffin *v.* Taylor, 16 Ill. 457; Olds *v.* Cummings, 31 Ill. 188. The text states the general rule but the statute, in some States, has changed this rule so as to cut off latent equities.

19 Welch *v.* Priest, 8 Allen (Mass.), 165; Cutler *v.* Davenport, 1 Pick. 81. And see Connor *v.* Whitmore, 62 Me. 186; Stewart *v.* Barrow, 7 Bush (Ky.), 368. But this is when the legal estate passes to the mortgagee.

20 Mack *v.* Wetzler, 39 Cal. 247; Seckler *v.* Delfs, 25 Kan. 159; Trim *v.* Marsh, 54 N. Y. 599.

21 Swan *v.* Yaple, 35 Iowa, 248; Runyan *v.* Messercan, 11 Johns. 534; Delano *v.* Bennet, 90 Ill. 533.

22 Mack *v.* Wetzlar, 39 Cal. 247.

23 Delano *v.* Bennett, 90 Ill. 533; Swan *v.* Yaple, 3 Iowa, 248; Johnson *v.* Corbett, 29 Ind. 59; Ellison *v.* Daniels, 11 N. H. 274. But if the mortgagee is in possession under his mortgage his conveyance, while it would be ineffectual as regards the title, might yet be sufficient to confer on his grantee a right of possession. Welsh *v.* Philips, 54 Ala. 309.

The interest owned by the mortgagee has reference solely to the mortgage debt, and any instrument which describes the parties and the indebtedness, and sufficiently identifies the mortgage, will be effective as an assignment without reference to the mortgaged property, while the instrument, in form, should purport to be a transfer of the mortgage itself and of the debt thereby secured, and not of the land pledged for the payment of such debt.[24]

§ 368. **Release and Satisfaction.** Where no release or satisfaction of a mortgage appears of record, the law will presume a payment of the debt it was given to secure, where the mortgagee has failed to exercise his right of foreclosure for the period of twenty years[25] after the maturity of the debt, and the mortgage will cease to be a lien after the expiration of that period.[26] The mortgage may also be satisfied by foreclosure, but the term "satisfaction" as ordinarily used, refers to a specific acknowledgment of payment of the debt and discharge of the lien, evidenced by some written instrument. Though the terms "release" and "satisfaction" are used interchangeably, there is yet a distinction between them. A satisfaction implies a payment of the debt, and *ipso facto* an ex-

24 When the mortgage is regarded as a mere incident to the debt this would be sufficient, but more, perhaps, would be required in States where the mortgagee holds the legal title and estate. In such States an assignment of the mortgage, in terms which does not profess to act upon the land, would not pass the mortgagee's estate in the land, but only the security it affords to the holder of the debt: Williams *v.* Teachey, 85 N. C. 402.

25 Goodwin *v.* Baldwin, 59 Ala. 127; Lawrence *v.* Ball, 14 N. Y. 477; Emory *v.* Keighan, 88 Ill. 482; Howland *v.* Shurtleff, 2 Met. (Mass.) 26. The presumption is disputable, however: Cheever *v.* Perley, 11 Allen (Mass.), 588. Delaney *v.* Brunette, 62 Wis. 615.

26 This follows as a result of the statute of limitations. See also Blackwell *v.* Barnett, 52 Tex. 326; Whitney *v.* French, 25 Vt. 663; Pollock *v.* Maison, 41 Ill. 516; Locke *v.* Caldwell, 91 Ill. 417; and consult 4 Kent's Com. 189; Jackson *v.* Wood, 12 Johns, 242. In some States a shorter limitation period is provided. Thus, in Illinois, the lien ceases at the expiration of ten years after maturity. But even in these States, as between the parties, the lien may be extended by payments until the expiration of the full limitation period.

tinguishment of the lien, whereas a release or discharge may relieve the land from the burden of the debt without in the least impairing its legal efficacy as a personal claim against the debtor.[27]

§ 369. **Form and Requisites of Release.** The general requisites of a release of mortgage differ somewhat, according to the light in which it is to be regarded. Where the mortgage retains its common law character of a conveyance of the legal estate, a deed under seal with apt words of conveyance will be necessary to revest the title of the mortgagor, which may be effected by a deed of release and quit-claim;[28] but where it is regarded only as a lien or security, any instrument showing an intention to relieve the land from the burden, or acknowledging payment or satisfaction of the debt secured by the mortgage, will be sufficient to divest the lien and restore the land to its original condition.[29] The latter instrument is that now generally used, and, as a rule, it is required by statute to be executed by the mortgagee or his assignee, and acknowledged or proved in the manner provided by law to entitle conveyances to record, and must specify that such mortgage has been paid, or otherwise satisfied or discharged. No other formalities seem necessary, and such certificate, popularly known as a "satisfaction piece," has the same effect as the old deed of release. In a few States, a modified form of a release deed is still preserved, though its operation and effect is almost identical with the certificate of payment, or "satisfaction piece" of the other States. It is customary, but not necessary, to describe the property, and, except in case of partial releases, such description has no other effect than to give greater certainty to the instrument in the identification of the land. A release or satisfaction immediately follows the mortgage it affects, and may be shown in brief terms.[30] Thus:

27 Adington v. Hefner, 81 Ill. 341.

28 Waters *v.* Jones, 20 Iowa, 363; Allard *v.* Lane, 18 Me. 9; Perkins *v.* Pitts, 11 Mass. 125; and see 2 Jones on Mortgages (2d Ed.), § 972 *et seq.*

29 Headley *v.* Gaundry, 41 Barb. 279; Thornton *v.* Irwin, 43 Mo. 153; Lucas *v.* Harris, 20 Ill. 165.

30 A satisfaction piece is a conveyance within the meaning of the recording acts, and one who buys

Millard F. Riggle
to
James Enright.

Release.
Dated, etc.
* * * * * * *
Consideration, $1.00, etc.[31]

Releases all right, title, interest, etc., acquired by mortgage, executed by second party to first party, bearing date April 1, 1880, and recorded April 2, 1880, in book 306 of Records, page 597, to the premises therein described (describing same) or, *to the premises therein described as follows, etc.* [Where the release is partial; *to so much of the premises therein as is described as follows:*]

Acknowledgment.

This is an abstract of the release deed in use in Illinois. A satisfaction or certificate of payment will require only slightly different treatment.

§ 370. **Release by Trustee.** Where by a trust deed, duly recorded, land is conveyed to trustees in fee, and they are authorized to execute a release to the grantor upon payment of the indebtedness thereby secured, a release before payment would be a breach of their trust and would be unavailing in equity to any one who had knowledge of the breach.[32] But, being vested with the legal title the same would pass by their deed of release to the releasee,[33] and a second conveyance by him to one having no knowledge of such breach, the records, or a conveyancer's abstract thereof, showing the land to be unincumbered, would vest the legal title in such grantee, or

or advances money to be secured by mortgage on the premises is a *bona fide* purchaser within the provisions of said acts: Bacon *v.* Van Schoonhoven, 87 N. Y. 446. It takes the place of a release: *Ibid.*, and see Merchant *v.* Woods, 27 Minn. 396.

[31] The original clause usually recites "and other good and valuable considerations." This alludes to the payment of the mortgage debt. It is unnecessary to set out the clause; "$1.00, etc.," sufficiently indicates its nature.

[32] Ins. Co. *v.* Eldredge, 102 U. S. 545.

[33] Taylor *v.* King, 6 Munf. (Va.) 358; Den *v.* Trautman, 7 Ired. (N. C.) 155.

if made by way of pledge, would entitle the indebtedness thereby secured to priority of payment.[34]

This is a subject, however, upon which there is not an entire unanimity of judicial opinion. Of course, if the trustee releases the trust deed before payment of the money which it was given to secure, in contravention of his trust, such release, as between the immediate parties, as well as all others who have notice of the facts, will be void and the lien will be unaffected thereby, as the rights of the *cestui que trust* are superior to those of any person chargeable with notice that the trust deed was released in violation of its terms. There are cases which seem to hold that an unauthorized release is void as to all persons, even subsequent purchasers in good faith,[35] but the better rule, and that which is sustained by the volume of authority, is that the public records import verity; that being maintained for the purpose of furnishing evidence of title a purchaser may rely thereon and will be protected by what is there shown, unless he has notice, or is in some way chargeable with notice of some title or claim inconsistent therewith.[36] It has further been held, that the mere fact that a trust deed is released of record prior to the time of the maturity of the indebtedness thereby secured, is not a circumstance to excite inquiry on the part of an intending purchaser.[37]

But, in any event, a far greater degree of care must be observed in passing the release of a trustee than of a mortgagee, and purchasers are chargeable with notice of all the recitals of the trust deed. They are bound to observe the limited power of the trustee to release the pledged property; the time the notes for which it was given have to run, and the terms which authorize a reconveyance; and where a release is made

34 Williams *v.* Jackson, 107 U. S. 478; Barbour *v.* Scottish-American Mtg. Co., 102 Ill. 121.

35 See, McPherson *v.* Rollins, 107 N. Y. 316.

36 Day *v.* Brenton, 102 Iowa, 482; Lennartz *v.* Quality, 191 Ill. 174.

37 Livermore *v.* Maxwell, 87 Iowa, 705; Lennartz *v.* Quilty, 191 Ill. 174; But see, McPherson *v.* Rollins, 107 N. Y. 316; Atkinson *v.* Greaves, 70 Miss. 45.

before the maturity of the notes, they being negotiable, a prudent counsel should insist upon their production or of satisfactory evidence showing that they have been surrendered or paid. Another feature is presented where the trust has been placed in two trustees, and counsel in making examinations should be careful to see that both trustees have united in the release, for no point is better established than that the release of lands by one of two joint trustees is not, in itself, sufficient to discharge the land from the lien of the mortgage.

Not infrequently releases are executed by the successor in trust, the trustee having died or become disqualified. Where provision is made therefor in the trust deed such a release is valid and effectual upon the happening of the contingency. If the trust deed is shown in the examination the power of the successor should be inserted in the abstract. If the trust deed is not shown, as where the release is exhibited in a continuation, or if the power of the successor is not given in the abstract of the trust deed as it appears in the former examination, a note embodying the essential facts should be appended to the abstract of the release. The following will serve as a suggestion:

NOTE.— *The Trust Deed from Thomas Smith to James Brown, recorded Oct. 30, 1891, as Doc. 15605, in Book 50 of Records, at page 301, provides that in case of the death, resignation, removal from Cook county, Illinois, or other inability to act of said grantee, then Olney B. Stuart is thereby appointed and made successor in trust therein with like power and authority as is vested in said grantee.*

§ 371. **Marginal Discharge.** A release or discharge made by entry upon the margin of the record of the mortgage or other instrument, is in common use in all the States, and when made by the owner of the mortgage, with whatever formalities may be prescribed by law, is as effectual in divesting the lien of record as a formal and separate satisfaction piece

or release.[38] It will be understood, however, that the authority of the person so undertaking to make the discharge must affirmatively appear of record, for a marginal entry of satisfaction by a stranger, without authority, is void, although he claims to be the assignee of the mortgage and owner of the indebtedness,[39] and where a person purporting to be the "assignee of said mortgage" assumes to discharge same, but no assignment appears of record, this constitutes a radical defect in the title[40] which should be remedied before it is accepted. A marginal release or satisfaction should immediately follow the mortgage it affects, and being brief itself the abstract is correspondingly so, consisting principally of a recital of the release; thus,

On the margin of the record of the foregoing is:

Thomas Smith (Assignee)[41] *to William Jones.* } *Satisfaction of Mortgage. Dated June 21, 1883. Recites that "within" mortgage has been fully paid, satisfied and discharged.*

Not witnessed.[42]

When a mortgage or deed of trust is duly recorded, the person whose property is incumbered thereby is entitled upon fully paying and satisfying the debt, to secure which such mortgage or trust deed was given, to have satisfaction of the same entered upon the margin of the record. And a mortgagee or trustee who fails or refuses, when duly requested, to

38 A purchaser finding a mortgage satisfied of record by a marginal entry, and upon the faith of which, without actual notice of a mistake, pays the purchase price, will take the title clear of the mortgage, although it turns out that the entry was a mistake which would be rectified as between the parties: Ayers *v.* Hays, 60 Ind. 452.

39 De Laureal *v.* Kemper, 9 Mo. App. 77.

40 Torrey *v.* Deavitt, 53 Vt. 331.

41 When such is the case.

42 Marginal releases must, as a rule, be witnessed by the recorder or officer having charge of the records.

enter up such satisfaction or to execute a deed of release, is liable in damages to the party aggrieved.[42]

It will sometimes happen that the release is made, not by the mortgagee, but by some person acting for him, as an attorney in fact; or it may be that the mortgagee has died and the release is by his personal representative. In either event the authority should in some manner appear. A note, in many instances, will be sufficient, and when the release is made, say by an executor, the essential facts of authority may be shown in this manner:

NOTE.—*The Probate records of Cook County, Illinois, show that William Dinsmore died Oct. 19, 1895, leaving a last will and testament in and by which he appointed Charles E. Pope executor thereof; that said will was duly proved and admitted to record and Letters Testamentary thereon were issued to said Charles E. Pope, on Oct. 29, 1895.*

§ 372. **Foreclosure.** Foreclosures by entry and possession, or strict foreclosures, are now rarely pursued or allowed in a majority of the States, while in many they are positively prohibited. They are regarded by courts as severe remedies, inasmuch as they transfer the absolute title without sale, and sometimes without notice, no matter what the value of the premises. In like manner foreclosures by advertisement and sale, so called, are now generally discountenanced even where allowed, and resort is usually had to a court of equity to perfect a title acquired through this channel. In foreclosure by advertisement the mortgagee's or trustee's deed recites the proceedings, while foreclosures in equity are shown by a summary of the proceedings, decree and report of sale.

§ 373. **Proof of Title under Foreclosure.** To sustain a title under foreclosure it would be necessary to show: the

[42] Verges *v.* Giboney, 47 Mo. 171; Sherwood *v.* Wilson; 2 Sweeny (N. Y.), 648. This is the general statutory doctrine.

mortgage; the judgment roll; the decree; the sale; and the officer's deed. The abstract, therefore, should disclose in a connected and orderly manner the essential features of each of the steps and proceedings above enumerated, and whenever practicable, in the order here given. The mortgage need not be minutely described, nor is it necessary that the power of sale be shown.[44] General references are sufficient. The judgment roll must show the regularity of the proceedings and the jurisdiction of the court both as to the subject-matter and the parties. Final and interlocutory decrees must show every material point passed upon. The sale is evidenced by the officer's certificate of sale, report and confirmation. The deed follows as a part of all that has preceded it, and the whole constitutes but one transaction. Each of the several separate features are integral and necessary parts.

[44] This feature derives most of its importance where there has been a foreclosure by advertisement under the power.

CHAPTER XXIII.

WILLS.

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§ 374. **Generally Considered.** The subject of testamentary conveyances can only be treated briefly and in outline. They occur in every title of long standing, and present a greater variety of phases and give rise to more questions in construction than any other species of conveyance. They have

been the subject of much legislation, and of a vast number of inharmonious, conflicting and sometimes contradictory decisions. As muniments of title they should be of equal dignity with deeds, after proper probate and administration; but the subtleties which have been incorporated into the laws governing their construction have rendered them less so, except in cases of direct, absolute and unincumbered gifts. In the following paragraphs an attempt has been made to briefly enumerate a few of the leading characteristics of this class of conveyances, and to point out, in a general way, some of the questions that arise in examination of titles acquired by way of testamentary gift. This has been done in a suggestive, rather than an exhaustive manner, for the narrow limits of our book will permit of none other, and what follows is intended merely as clues or reminders to stimulate the examiner, and direct his attention to matters that otherwise might have escaped his observation.

§ 375. **Nuncupative Wills.** Oral declarations of a testamentary character made *in extremis* are available only in the disposition of personal property, and hence are not considered in the examination of titles.[1]

§ 376. **Nature of Testamentary Titles.** One who takes under a will is regarded as a purchaser equally with him who takes under a deed, but the estate and title in the hands of a devisee, while as full and ample as though derived by deed, does not always possess that indefeasible character which attaches to it in the latter case. An innocent purchaser by deed takes the title unaffected by latent equities, and the undisclosed rights of third persons, but the devisee acquires only the title of the testator as it existed at the time of his death, with all its infirmities and imperfections, and subject to all equities and liens in favor of strangers. Such title, though comprising the fee, or whatever interest may have been granted, is further liable to be defeated during the course of adminis-

1 Lewis *v.* Aylott, 45 Tex. 190; Campbell *v.* Campbell, 21 Mich. 438. Smithdeal *v.* Smith, 64 N. C. 52;

tration by a sale by the executor in satisfaction of the debts of the decedent;[2] or by the very instrument of its conveyance, when legacies thereby given are expressly charged upon the realty and there exists a deficiency of personal assets;[3] or where the devise is couched in ambiguous or uncertain language requiring a judicial construction. The two former contingencies can arise only prior to final settlement in the due course of administration; the latter at any time before the bar of the statute has intervened.

The title to land devised vests in the devisee immediately upon the death of the testator; and such devisee is entitled to the immediate possession of the land, and to hold the same until, when necessary, it is subjected by the executor to the payment of debts.[4]

§ 377. **Definitions.** "Devise" is the generic term employed to denote a gift of real property by a person's last will and testament, and is distinguished from "legacy," which applies only to personalty. By analogy, the person to whom the gift is made is called a devisee, and the testator is frequently spoken of as the devisor. The term "bequest" is of indiscriminate application and includes both "devise" and "legacy."[5]

§ 378. **Operation and Effect of Devises.** It is a rule of the common law that a will operates only upon lands owned by the testator at the time such will was made, and the title to which he retained to the time of his decease. This rule has been very generally changed by statute, which substitutes therefor a more reasonable rule to the effect, that every will that shall be made by a testator in express terms, of all his real

[2] Hill *v.* Treat, 67 Me. 501; Vansyckle *v.* Richardson, 13 Ill. 171.

[3] Wood *v.* Sampson, 25 Gratt. (Va.) 845; Lewis *v.* Darling, 16 How. 1. A devisee who takes an estate under a will assumes the payment of legacies imposed upon him by the terms of the will, and equity will regard him as a trustee and entertain a bill to compel him to perform his trust: Mahar *v.* O'Hara, 4 Gilm. (Ill.) 424; Burch *v.* Burch, 52 Ind. 136.

[4] Hall *v.* Hall, 47 Ala. 290; Hamilton *v.* Porter, 63 Pa. St. 332.

[5] Dow *v.* Dow, 36 Me. 211; Ladd *v.* Harvey, 1 Fost. (N. H.) 514; Lallerstedt *v.* Jennings, 23 Ga. 571.

estate, or in any other terms denoting his intent to devise all his property, shall be construed to pass all the estate which he was entitled to devise at the time of his death.[6] It is the application of this rule which gives to the residuary clause much of its present importance. Intention, however, is, after all, the true test of a will, and where the intention is manifest, the will speaks from the time intended by the testator,[7] even though before his death.[8]

§ 379. **Validity of Devises.** The several States possess inherent power to define the tenure of real property within their respective limits; to prescribe the mode of its acquisition and transfer, the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners as well as the persons or classes of persons who may take under such disposition.[9] Resort must therefore be had to the statute to determine the validity of all bequests, and, where that describes or enumerates the persons or classes who may take, a devise to persons or classes not therein specified will, it seems, be void.[10] Where a devise is void by the rules of law, the land descends to the heirs at law of the testator.[11]

§ 380. **Testamentary Capacity.** Every work on wills is largely devoted to the subject of testamentary capacity. This is a subject, however, that will rarely be presented in exam-

6 Canfield *v.* Bostwick, 21 Conn. 550; Peters *v.* Spillman, 18 Ill. 373; Haley *v.* Gatewood, 74 Tex. 281; but though it is a general rule, that a will is held to speak from the death of the testator, it is otherwise where the language used repeals the presumption, taking into consideration the entire instrument: Updike *v.* Tompkins, 100 Ill. 406.

7 Gold *v.* Judson, 21 Conn. 616; Dunlap *v.* Dunlap, 74 Me. 402.

8 Phillipsburg *v.* Burch, 37 N. J. Eq. 482.

9 United States *v.* Fox, 94 U. S. (4 Otto) 315; Kerr *v.* Dougherty, 7 N. Y. 327.

10 Thus, by a statute of New York, a devise of lands in that State can only be made to natural persons, and to such corporations as are created under the laws of the State and are authorized to take by devise; a devise, therefore, of lands in that State to the government of the United States was held void: United States *v.* Fox, 94 U. S. 315.

11 Deford *v.* Deford, 36 Md. 168; James *v.* James, 4 Paige, 115; Hayden *v.* Stoughton, 5 Pick. 528.

inations of title, otherwise than as it incidentally appears in the proceedings relative to probate. The right of testamentary disposition is controlled by statute, but is given generally to all persons of full (legal) age, being of sound mind and memory, and extends to all species of property and to every right, title and interest therein. Alienage and coverture, formerly constituted common law or statutory disabilities, but a gradual removal of restraints on alienation has virtually or expressly abolished such disabilities in the United States. Infants and persons of insufficient mind are about the only persons upon whom any restrictions are now placed. The facts of legal age and a sound and disposing mind[12] are matters of primary investigation and proof in all probates of wills, and the questions thus presented and presumably satisfactorily answered at the outset, are not again raised during the examination.

§ 381. **Construction of Wills.** Upon the ground that wills are often made in haste, and by inexperienced persons, a devise is not construed strictly and technically, like a deed, but liberally, and according to the intent of the testator, and such intent may be gathered, in case of doubt, not from detached clauses, but from the whole will, so that every word may have its effect, if possible.[13] On the other hand, there is a certain degree of strictness in the construction of wills that is almost wholly wanting in the case of deeds, and while courts may look beyond the written words yet extrinsic evidence is never admissible to alter, detract from or add to what is there set down.

It is a cardinal rule in the construction of wills, that a testator is always presumed to use the words in which he ex-

12 To be of sound and disposing mind, the law simply requires that the testator be able to manage his own affairs, and to know intelligently what disposition he is making of them: Harvey *v.* Sullen's Heirs, 56 Mo. 372.

13 Welch *v.* Huse, 49 Cal. 507; Butler *v.* Huestis, 68 Ill. 594; Lytle *v.* Beveridge, 58 N. Y. 592; Moran *v.* Dillehay, 8 Bush. 434; Bergan *v.* Cahill, 55 Ill. 160.

presses himself, according to their strict and primary acceptation, unless from the context it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed,[14] and technical words are presumed to be used in their legal sense, unless there is a plain intent to the contrary.[15] The general intent will prevail over expressions indicating a different particular intent,[16] though every expressed particular intent must be carried out when it can be,[17] and when a will is susceptible of a two-fold construction, one of which avoids and the other upholds it, the latter must be adopted.[18] The general rule, however, that wills are to be construed according to the intention of the testator, must be understood as the intention of the testator as expressed in the will; and this must be judged of exclusively by the words of the instrument, as applied to the subject-matter and the surrounding circumstances,[19] and not from extrinsic matter or evidence *aliunde*.[20]

These are the fundamental principles that govern the con-

14 Luce *v.* Dunham, 69 N. Y. 36; Edwards *v.* Bibb, 43 Ala. 666; Mead *v.* Jennings, 46 Mo. 91; Feltman *v.* Butts, 8 Bush (Ky.), 115. Words may be considered in an order other than that in which they are placed, if the intent of the testator is better served thus: Ferry's Appeal, 102 Pa. St. 207.

15 Butler *v.* Huestis, 68 Ill. 594; France's Estate, 75 Pa. St. 220; DeKay *v.* Irving, 5 Den. 646.

16 Bell *v.* Humphrey, 8 W. Va. 1; Parks *v.* Parks, 9 Paige, 107; Schott's Estate, 78 Pa. St. 40; Watson *v.* Blackwood, 50 Miss. 15.

17 Bell *v.* Humphrey, 8 W. Va. 1; Lepage *v.* McNamara, 5 Iowa, 124.

18 Mason *v.* Jones, 2 Barb. 229.

19 Bell *v.* Humphrey, 8 W. Va. 1; Wheeler *v.* Hartshorn, 40 Wis. 83; Blanchard *v.* Maynard, 103 Ill. 60.

20 McAlister *v.* Butterfield, 31 Ind. 25; Brownfield *v.* Wilson, 78 Ill. 467; Caldwell *v.* Caldwell, 7 Bush (Ky.), 515; Sherwood *v.* Sherwood, 45 Wis. 357. It is true that the condition of the testator at the time of execution, the state of his property, his family and the like, may be shown in order to throw light upon his intention, yet as the writing is the only outward and visible expression of his meaning, no other words, as a rule, can be added to or substituted for those used. Hunt *v.* White, 24 Tex. 643; Mackie *v.* Story, 93 U. S. 589; Abercrombie *v.* Abercrombie, 27 Ala. 489; Herrick *v.* Stover, 5 Wend. (N. Y.) 580. See, however, the succeeding section on "repugnancy."

struction of wills, and to them little can be added that is of general application. The donor of property by testamentary disposition has an almost unlimited scope within which to exercise his judgment or to gratify his caprice, and while multitudes of wills are daily presented for construction it is seldom that we find any two of them exactly similar. Unlike deeds of conveyance in this respect, they are as multiform and distinct in their structure, phraseology and purposes as are the mental operations, motives and feelings of the different testators. The intention must in all cases be sought for and if possible ascertained; and this intention, when it is not in conflict with the settled policy of law, will always be respected and allowed to operate.[21] Any construction which will result in partial intestacy is to be avoided, unless the language of the will compels it.[22]

The questions of construction more frequently presented in the examination of titles, arise through the failure of the testator to make a full and explicit disclosure of the method of disposition. The rule is fundamental, in such cases, that the deficiencies cannot be supplied, nor the inaccuracies corrected by extrinsic evidence, and so strict are the courts in applying this rule that they will not permit the terms of the will to be altered even where the testator has, by mistake, misdescribed lands, by substituting those which can clearly be proved, he intended to devise.[23] This is in pursuance of the old and well known principle that extrinsic evidence cannot be received to change or vary a solemnly executed instrument. Yet the rule is subject to some qualification in the case of erroneous descrip-

21 Douglass *v.* Blackford, 7 Md. 22; Summit *v.* Yount, 109 Ind. 506.

22 Vernon *v.* Vernon, 53 N. Y. 351; Cate *v.* Cranor, 30 Ind. 292. The state of the law at the time of the execution of a will often affords material assistance in arriving at the intention of the testator, when it would otherwise be doubtful, but the rights of parties taking under the will are always to be determined by the law as it existed at the time the will took effect: Carpenter *v.* Browning, 98 Ill. 282.

23 See, Kurtz *v.* Hibner, 55 Ill. 514; Starkweather *v.* Bible Society, 72 Ill. 50. The text states the general rule, but this seems to have been disputed in some States.

tions where by striking out a word or phrase shown to be false a partial intestacy may be avoided.

§ 381a. **Errors of Description.** Not infrequently, through inadvertence or mistake, a testator will devise lands which he does not own and omit to dispose of lands which he does own, thereby creating a partial intestacy. Thus, the devise may be of Lot A, a tract which the testator did not own, either at the time of making the will or at his death. It may be that he did own Lot B, and that this fact is known to counsel. Here, then, we have what is known as a latent ambiguity and the questions which it raises are very perplexing. The general rule is, that, however many errors there may be in the terms of description employed in a will, whether of the devisee or the subject-matter of the devise, the gift will not be avoided if, after rejecting the errors or false words, enough remains to show with reasonable certainty what was intended by the testator. Hence, a devise of land by a description partly false, as where a wrong section number is given, may yet be effective if what remains, after rejecting the false, will serve to identify the particular tract which was intended.[24]

But this rule is for the guidance and direction of courts in the construction of wills. A court, in a proper case, may strike out false or ambiguous words, and may then read the will with the false words eliminated therefrom. Counsel, however, in the examination of a title, has no such privilege. His own knowledge of the actual facts may serve to indicate a course to be pursued in order to perfect title, but he cannot himself construe the will, nor should he attempt to apply the rule, however certain he may be that the rights of the parties will be determined by it. In a case such as we are now considering counsel can do no more than point out the latent defect and suggest a remedy that will serve to cure it.

The strong tendency of modern decisions is to avoid even

[24] See, Pate *v.* Bushong, 161 Ind. 116; Stewart *v.* Stewart, 96 Iowa 533; Whitcomb *v.* Rodman, 156 Ill. 620.

partial intestacy, and while extrinsic evidence may not be resorted to for the purpose of changing or varying the words of a will, yet it is now well settled that when a latent ambiguity is disclosed by extrinsic evidence it may be removed by extrinsic evidence.[25]

§ 382. **Repugnancy.** It is a well established rule, that where two or more provisions in a will are clearly repugnant or irreconcilable, the last should prevail,[26] as being indicative of the testator's latest wish;[27] yet it is a rule that is only applied in cases of absolute necessity, as where the provisions are totally inconsistent with each other, and the real intention of the testator is incapable of determination.[28] A prior provision, however, will never be disturbed, further than is absolutely necessary to give effect to a subsequent one,[29] nor will the expression of a particular intent be sufficient to overcome the manifest general intent.[30] Thus, where the first clause absolutely disposes of all testator's property, a subsequent clause providing for the distribution of a fund which would or might at some future time accrue to his estate would not affect the antecedent general disposition, for in such case, no residuum being contemplated, there could be no residuary legatees.[31] Similarly, where there is a devise of an unlimited power of disposition of an estate in such manner as the devise

25 Whiteman *v.* Whiteman, 152 Ind. 263; Patch *v.* White, 117 U. S. 210; Decker *v.* Decker, 121 Ill. 341; Merrick *v.* Merrick, 37 Ohio St. 126.

26 Hamlin *v.* Express Co., 107 Ill. 443; Fulton *v.* Hill, 41 Ga. 554; Bradstreet *v.* Clarke, 12 Wend. (N. Y.) 602; Van Nostrand *v.* Moore, 52 N. Y. 12; Evans *v.* Hudson, 6 Ind. 293; Miller *v.* Flournoy, 26 Ala. 724; Pickering *v.* Langdon, 22 Me. 430.

27 Rountree *v.* Talbot, 89 Ill. 246.

28 Covenhoven *v.* Shuler, 2 Paige (N. Y.), 122; Oxley *v.* Lane, 35 N. Y. 340; Newbold *v.* Boone, 52 Pa. St. 167; Bartlett *v.* King, 12 Mass. 542; Thrasher *v.* Ingram, 32 Ala. 645; Siceloff *v.* Redman, 26 Ind. 251.

29 Taggart *v.* Murray, 53 N. Y. 233; Kenzie *v.* Roleson, 28 Ark. 102; Parker *v.* Parker, 13 Ohio St. 95; Stickle's Appeal, 29 Pa. St. 234.

30 Hamlin *v.* Express Co., 107 Ill. 443; Bell *v.* Humphrey, 8 W. Va. 1; Cook *v.* Holmes, 11 Mass. 528; Pickering *v.* Langdon, 22 Me. 413; Schott's Estate, 78 Pa. St. 40; Watson *v.* Blackwood, 50 Miss. 15; Miller *v.* Flournoy, 26 Ala. 724.

31 Henning *v.* Varner, 34 Md. 102.

may think proper, a limitation over is inoperative and void, by reason of its repugnancy to the principal devise.[32]

Under the application of the rule that a will should be so construed as to effectuate the intention of the testator as far as possible, express words must sometimes yield to the otherwise manifest intention, and words will even be added where it is absolutely necessary to avoid absurdity or give effect to such manifest intention.[33]

§ 383. **Void Devise — Descent or Purchase.** It was a maxim of the common law that title by descent was a worthier or better title than one accruing by purchase, and occasionally some belated American court announces the same doctrine.[34] As a consequence of this doctrine a rule was formulated that a devise giving exactly the same estate in quantity and quality as the devisee would take by descent if the devisee had not been made, is void, and the title so acquired is held by descent and not by purchase. This rule, it would seem, still obtains in a few States.[35]

This was one of the subtleties of the medieval lawyers and grew out of the legal notions involved in old feudal system. Under that system there was but one heir, and that, usually, was the oldest or only son. In case there were several daughters and no son the legal fiction was preserved and they all took as one heir. There were a number of reasons that might be assigned for such a rule at the early day in which it was promulgated,[36] but these reasons never had any force in this coun-

32 Hamlin *v.* Express Co., 107 Ill. 443. Although the limitation over might, under some circumstances, become effective should the doner of the power fail to exercise it.

33 Welsch *v.* Savings Bank, 94 Ill. 191; Wright *v.* Dunn, 10 Wheat. 204; Bartlett *v.* King, 12 Mass. 537; Ruston *v.* Ruston, 2 Dall. 244.

34 Kellett *v.* Shepard, 139 Ill. 433.

35 Akers *v.* Clark, 184 Ill. 136; Biedler *v.* Biedler, 87 Va. 300.

36 In England title by descent was favored by the courts, first, because land in the hands of the heir at law by descent was chargeable with the payment of the ancestor's debts, and then again because it favored the right of escheat upon the failure of heirs on the part of the ancestor from whom the lands descended. On the other hand, land acquired by purchase was not liable for debts, and upon

try while the rule itself has been abolished in England by statute.

Where one devises property to his heirs it is but fair to presume that he intended they should take the property under the will, and in furtherance of this principle the rule first stated has been set aside in a majority of the American States, and the devisees in such cases held to take by purchase and not by descent.[37] Where, however, gifts to heirs at law are made to them simpliciter, the persons to take and the proportions of their respective shares must be determined by the statutes of descent and distribution.[38]

§ 384. **Words of Grant.** As in deeds so in wills, there must be apt words of grant or conveyance or words indicative of testamentary intent, but any form of expression will be sufficient to pass title, provided the intent is manifest. "Give," "devise," or "bequeath" are the words commonly in use, and all or either will be sufficient to pass real estate, though the technical word for this purpose in a properly drawn will is "devise."[39] Words of advice, desire, recommendation, etc., are not ordinarily sufficient,[40] although, in some cases, they may be sufficient to raise trusts.[41]

§ 385. **Words of Purchase and Limitation.** In pre-

the death of the owner, it descended first to the heirs on the paternal side, and upon failure of such heirs, then to the heirs on the part of the mother. Title by descent was considered the worthier title and where the will gave to a devisee the same estate in quantity and quality which he would have taken as heir at law, he was adjudged to take not under the will, but by descent or operation of law. Donnelly *v.* Turner, 60 Md. 81.

37 Gilpin *v.* Hollingsworth, 3 Md. 190. When heirs take by purchase they do not take as heirs, but as a class of persons to whom by that means the testator has selected to devise his property, and as they take in their own right, the distribution is to be made *per capita* and not *per stirpes:* Campbell *v.* Wiggins, 1 Rice's Ch. (S. C.) 10; and see Robinson *v.* Le Grand, 65 Ala. 111.

38 Richards *v.* Miller, 62 Ill. 417.

39 Acceptance of a devise where it is beneficial to the devisee and attended with no charge or risk, is always presumed: Brown *v.* Thorndike, 15 Pick. 388.

40 Gilbert *v.* Chapin, 19 Conn. 342; Bohn *v.* Barret's Ex'r, 79 Ky. 378.

41 See "Precatory Trusts" *infra.*

paring the synopsis of wills, the attention of the examiner is particularly directed to what are known as the words of "purchase" and "limitation." These are the words used in connection with gifts to specific persons, and show, as in case of deeds, the nature or quality of the estate conveyed. They consist of such words as "heirs," "heirs of the body," "issue," etc., and accordingly as the word is used may be either a word of purchase or of limitation. Sufficient of the context must be given to show the sense in which the word is employed and to permit a proper construction. The word "issue" presents the largest number of questions and has been productive of an almost innumerable number of decisions. As a word of limitation it is collective, and signifies all the descendants in all generations; but as a word of purchase it denotes a particular person or class of persons to take under the devise. The term may be employed in either manner, as will best effectuate the testator's intention, and is the most flexible word that can be used.[42] Courts more readily interpret the word "issue" as the synonym for "children," and as a mere description of the person or persons to take, than they do the words "heirs" or "heirs of the body."[43]

The usual and ordinary words for conveying a fee simple in wills as well as in deeds, are "heirs," or "heirs and assigns forever;" but a devise to a man "forever," or to one "and his assigns forever," or to one in "fee simple," will pass an estate of inheritance to the devisee, notwithstanding the omission of the legal words of inheritance,[44] while the

42 Timanus *v.* Dugan, 46 Md. 402; Daniel *v.* Whartenby, 17 Wall. 639. Words in the introductory or other parts of a will indicating an intention of the testator to dispose of his whole estate, although not conclusive that he intends to pass a fee, always favor such construction: Geyer *v.* Wentzel, 68 Pa. St. 84; Fearing *v.* Swift, 97 Mass. 413.

43 In England the word "issue" is a word of limitation and not of purchase, unless the contrary clearly appears: 2 Jarm. on Wills, 328.

44 Coke Lit. 9 b; 2 Black. Com. 108; Meyers *v.* Anderson, 1 Strobh. Eq. (S. C.) 344; Timanus *v.* Dugan, 46 Md. 402; Tatum *v.* McClellan, 50 Miss. 1; Wetter *v.* Walker, 62 Ga. 142; Edwards *v.* Barnard, 84 Pa. St. 184.

statute, in a majority of the States, will compensate for the deficiency and give to the devisee an estate in fee, none other being mentioned.[45]

Questions, as to whether a devisee takes the fee or a lesser estate, occur most frequently where the testator in his anxiety to make his gift effective makes several bequests in the alternative, or limits one estate upon another, and are usually to be decided by the application of the rule in Shelly's case as modified by local law. No rule of general application can be formulated, and from a review of the reported cases on thus subject one can well appreciate the remark of a learned writer, that, "the liberality of the law in construing wills has opened the flood-gates of legal chaos."[46] It would seem, however, that whenever the intention of the testator can be ascertained it will overcome all technical rules,[47] and this intention turns, not upon the quantity of interest given to the first taker or person specified, but upon the nature of the estate intended to be given to the "heirs."[48]

§ 386. **The Rule in Shelly's Case.** Though entailed estates are no longer permitted, the rule in Shelly's case still

45 Leiter *v.* Sheppard, 85 Ill. 243; McConnell *v.* Smith, 23 Ill. 617; Mirfitt *v.* Jessop, 94 Ill. 158. The statute very generally enacted throughout the Union provides, substantially, that every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law.

46 O'Hara on Wills, 27, and see Clark *v.* Boorman's Ex'rs, 18 Wall. 493.

47 Goodrich *v.* Lambert, 10 Conn. 448; Baker *v.* Scott, 62 Ill. 90; Butler *v.* Huestis, 68 Ill. 601. The decisions of the local courts will furnish the best guide for construing estates under wills, as, between the States, diametrically opposed views will frequently be met with on the same admitted facts.

48 Baker *v.* Scott, 62 Ill. 90; 4 Kent. Com. 221. The rule in Shelly's case, that is, the technical application of the words "heir" and "heirs," is not now received in all its original vigor, from the fact that it often operates to defeat the testator's intention, and in many States it is regarded of no especial force except as an aid to construction and intention: Blake *v.* Stone, 27 Vt. 475.

has a modified force, and is often invoked in the construction of devises to determine the operation of the will and settle conflicting claims. This rules provides that, where the ancestor takes an estate of freehold, and in the same gift or conveyance, an estate is limited, either mediately or immediately to his heirs, either in fee or in tail, the term "heirs" is a word of limitation and not of purchase,[49] and when applied to wills is ordinarily confined to cases in which the remainder is limited in terms to the "heirs" and not to "children" or "issue."[50] When invoked, as a rule, it is not a real exception to the fundamental doctrine that the intention of the testator must guide in interpreting a will; it merely sacrifices a particular intent to a general intent. It does not interpret a will, but takes effect when the interpretation has been ascertained.[51]

§ 387. Interpretation of Particular Words and Phrases. Though the testator is presumed to use technical

[49] Baker *v.* Scott, 62 Ill. 90; Estate of Utz, 43 Cal. 200.

[50] Akers *v.* Akers, 23 N. J. Eq. 26; Estate of Utz, 43 Cal. 200. But see, Haley *v.* Boston, 108 Mass. 576. The word "children" in its usual sense is a word of purchase and not of limitation, and is always to be so regarded unless the testator has unmistakably used it otherwise: Stump *v.* Jordan, 54 Md. 631; 2 Wash. Real Prop. (4th Ed.) 603. While not infrequently the word "heirs," or even the words "heirs and assigns forever" are held not to operate as words of limitation because corrected or explained by words which follow and which are irreconcilable with the notion of descent: Shreve's Case, 43 Md. 399.

[51] Yarnall's Appeal, 70 Penn. St. 335. Greater latitude, however, is given in the construction of wills than in that of deeds, and courts will look to the whole will. Thus, the rule as stated in the text, while of general controlling efficacy in deeds, where it may usually be safely applied, is subject to a wide latitude in wills, and while in some States it may be rigidly enforced, in the majority, when explanatory words are found in the will showing the intention of the testator that the words "heirs," or "heirs of the body" are employed to show that such persons shall take under the devise as a description of persons, they will be treated as words of purchase and not of limitation: Butler *v.* Huestis, 68 Ill. 594. When such appears to be the testator's intention "heirs" have been construed to mean "children."

words according to their technical meaning,[52] this can hardly be asserted as a rule, or should it be so asserted, it must be taken subject to that other all powerful rule that the intention of the testator must prevail.[53] The construction of words in a will is much less technical than that of the same words in a deed, for though in deeds effect will always be given to the true intention of the parties,[54] yet the words employed govern such intention, while in a will the intention, in one sense, governs the words.[55] The use of the word "descend," does not operate to work a descent in the legal, strict sense of the term, as inheritance is only through operation of law; its employment, therefore, unless some other meaning is apparent, is to be taken as indicating the desire of the testator that his property shall follow the same channel into which the law would direct it.[56] "Children" is generally taken in its primary and strict signification, and does not include grandchildren,[57] unless there is something in the context to show that the testator intended to include grandchildren, or unless such construction is necessary to render the provisions of the will operative.[58] "Issue" means heirs of the body.[59] "Heirs," as a rule, means statutory heirs, of every kind and degree,[60] but under certain circumstances may be confined to children.[61] The words "next of kin" limit the devise to blood relations, and do not

52 France's Estate, 75 Penn. St. 220.

53 Smyth *v.* Taylor, 21 Ill. 296; Heuser *v.* Harris, 42 Ill. 425; Meade *v.* Jennings, 46 Mo. 91; Robertson *v.* Johnson, 24 Ga. 102.

54 Peckham *v.* Haddock, 36 Ill. 38; Churchill *v.* Reamer, 8 Bush (Ky.), 256.

55 Edwards *v.* Bibb, 43 Ala. 666; Brownfield *v.* Wilson, 78 Ill. 467.

56 Dennett *v.* Dennett, 40 N. H. 498.

57 Hopson *v.* Commonwealth, etc., 7 Bush (Ky.), 644; Moffat *v.* Carrow, 7 Paige, 328; Gernet *v.* Lynn, 31 Penn. St. 94; Cummings *v.* Plummer, 94 Ind. 403.

58 Feit *v.* Vanata, 21 N. J. Eq. 84; Houghton *v.* Kendall, 7 Allen (Mass.), 72. The words "children forever" in a devise, when construed with the context, were held to be words of inheritance, and to have been used in the sense of heirs. See Moran *v.* Dillehay, 8 Bush (Ky.), 434.

59 Kleppner *v.* Laverty, 70 Penn. St. 70.

60 Richards *v.* Miller, 62 Ill. 417.

61 Butler *v.* Huestis, 68 Ill. 594. Where the context shows that the

include husband or wife,[62] unless accompanied by other words clearly manifesting a purpose to extend their signification.[63] The term "relatives" contains no elements of legal certainty.[64]

There are, however, no arbitrary or unbending rules in the construction of the words of a will. No two wills are in all respects alike. Where the same precise form of expression occurs as may have been the subject of some former adjudication, unaffected by any indication of a different intention in other parts of the instrument, the courts, with a view to certainty and stability of titles, will follow the precedent; yet, the cardinal canon still holds good, that the intention of the testator of each will separately is to be gathered from its own four corners,[65] and where the intention satisfactorily appears it should prevail over any artificial rule of construction.[66]

§ 388. **Words Which Pass Real Estate.** Sometimes wills contain no specific allusions to land, or particular bequests may be made in general terms, and in such cases grave questions of construction may arise when real estate is claimed under them. The liberality of courts is nowhere more manifest than in the solution of these questions. The words "property" and "estate" when used in a general sense, are always held sufficient to embrace all the testator's property, real as well as personal,[67] but when coupled with directions applicable only to personalty, they will not have this effect, nor where

testator used the words "heirs" in the sense of children, it will be so construed: Haverstick's Appeal, 103 Pa. St. 394; Hinton *v.* Milburn, 23 W. Va. 166.

62 Townsend *v.* Radcliffe, 44 Ill. 446; Murdock *v.* Ward, 67 N. Y. 387; Tillman *v.* Davis, 95 N. Y. 17.

63 Haraden *v.* Larrabee, 113 Mass. 430.

64 Handley *v.* Wrightson, 60 Md. 198.

65 Provenchere's Appeal, 67 Penn. St. 463.

66 Kennedy *v.* Kennedy, 105 Ill. 350; Suydam *v.* Thayer, 94 Mo. 49.

67 Fogg *v.* Clark, 1 N. H. 163; Jackson *v.* Housel, 17 Johns, 281; Wheaton *v.* Andress, 23 Wend. 452; Hunt *v.* Hunt, 4 Gray (Mass.), 190; Korn *v.* Cutler, 26 Conn. 4; Monroe *v.* Jones, 8 R. I. 526. This is directly contrary to the earlier and more technical rule, which confined these words entirely to personalty unless there was something in the context to show that the testator intended a more enlarged meaning.

subsequent particulars clearly indicate that the testator had only personalty in contemplation.[68] The word "effects," though savoring strongly of personalty[69] may, when the context clearly shows the intention, as when used in connection with the word "real,"[70] be sufficient to pass land.[71] "Goods," according to its natural, grammatical, and ordinary meaning, does not include lands. General usage has given it a meaning as consisting of personalty only, and this is its primary legal signification.[72] The context may sometimes enlarge this meaning, and where it satisfactorily appears that the testator intended to use the word in a different and more comprehensive sense, so as to embrace real estate, courts will give effect to that intent. The phrase, "all my worldly goods," if used without specific enumeration, may reasonably be supposed to embrace lands, and in some instances has been so construed; but if attempt is made at designation the restricted meaning implied from such designation will prevail.[73]

The question will frequently occur in constructions of the bequest of the residuum, and courts seem inclined to favor any construction which will avoid even a partial intestacy.[74]

Yet while no particular words are necessary to pass real estate, enough must appear to evidence the intention to convey, and words can not be supplied to meet the deficiency, even though they may have been omitted by what might seem to be palpable error,[75] and where specific mention is made of

68 Smith *v.* Hutchinson, 51 Mo. 83.

69 Indeed, this term when used in a will, is generally construed to refer to personalty only, unless there is everything in the context to require a more extended application.

70 As, "all my effects, real and personal."

71 Paige *v.* Foust, 89 N. C. 447.

72 Farish *v.* Cook, 78 Mo. 212.

73 As where testator bequeaths "all my wordly goods, consisting of," etc., the enumeration describing only personalty; real estate not specifically mentioned or otherwise referred to will not pass.

74 Vernon *v.* Vernon, 53 N. Y. 351; Cate *v.* Cranor, 30 Ind. 292; Damon *v.* Bibben, 135 Mass. 458.

75 As where testator, after making certain bequests and devises, gave "all the rest of my estate — *personal*" to his four sons, and in a codicil stated that he had disposed of his "estate, *real and* personal," to said sons, and revoked

certain property, other property not alluded to or covered by general terms will not pass.[76]

§ 389. **Limitations and Remainders.** A large part of the litigation arising out of testamentary conveyances is occasioned by questions relative to the construction of limitations and remainders. The subject has been incidentally discussed in several of the preceding paragraphs, and in addition to what has been there said, but little can be stated without entering into the matter at greater length than the exigencies of this chapter will permit. Local statutes are very effective in the settlement of such questions, so far as the validity of the remainder limited is concerned, as well as the persons who take, when particular words are accorded a statutory definition.

All words of purchase, as "children,"[77] "issue," etc., create remainders according to their import, while "heirs" when construed as a word of purchase, designates not only the persons who are to take, but also the manner and proportions in which they take.[78] The utmost liberality is displayed in the reported decisions construing remainders, and the circumstance that the first taker has it in his power to dispose of the whole estate and thus defeat a limitation over, is not of itself conclusive that the expectant estate is void, when a contrary intention appears from the will.[79] The intention of the testator must, in all cases, be carried out when such intention can be ascertained from the language employed by the will, and in no case can the intention thus ascertained be defeated by a technical construction of the language so employed.[80]

the share left to a certain son, *held*, that the court could not supply the words "real and" before "personal" in the will, and that testator died intestate as to his real estate, except a portion by another clause specifically devised. Graham *v.* Graham, 23 W. Va. 36.

76 Farish *v.* Cook, 78 Mo. 212.

77 Beacroft *v.* Strawn, 67 Ill. 28.

78 Rand *v.* Sanger, 115 Mass. 124. The rules of descent in such case are presumed to be the intended guide.

79 Terry *v.* Wiggins, 2 Lans. (N. Y.) 272; Burleigh *v.* Clough, 52 N. H. 267. Compare Clark *v.* Tennison, 33 Md. 85.

80 Terry *v.* Wiggins, 2 Lans (N. Y.), 272.

Limitations to survivors have produced a vast amount of litigation, but the questions arising under such a devise may now be considered as well settled, and the general rule seems to be that the word "survivor" is to be taken in its natural and literal import, unless the context plainly indicates a different intention, and should not be construed as equivalent to the word "other."[81] Where the courts have given the word "survivor" the force of "other," it has been done to avoid some consequence which it was very certain the testator could not have intended.[82]

§ 390. **Devise to a Class.** It is a rule of the common law that a devise to a class of persons takes effect in favor of those who constitute the class at the death of the testator, that being the time when the will first speaks. But this rule has been greatly modified in many States, so that when an estate is devised to the children or other relatives of the testator, the lineal descendants of a devisee, who dies before the testator, take the share of their ancestor.[83] In the absence of such a statute, however, the common law prevails and only those who are living at the time the devise takes effect are entitled to participate. Those who die before the gift becomes effective are not regarded as ever having belonged to the class, and the whole estate inures to the survivors.

§ 391. **Gift of the Income of Realty.** It is well settled that a gift of the income of land or of the "rents and profits," or "benefits" is, in effect, a gift of the land itself.[84] Those to whom the testator has given the income for life will take a life estate, and those to whom he has given the perpetual income will take a fee simple estate.[85] Such gift, however, to

81 This is the construction which now obtains both in England and the United States: 2 Jar. on Wills, 648; 2 Redf. on Wills, *372.

82 Leeming *v.* Sheratt, 2 Hare (Eng.), 14; 2 Jar. on Wills, 658; Consult Passmore's Appeal, 23 Pa. St. 381; Moore *v.* Lyons, 25 Wend. 119; Martin *v.* Kirby, 11 Gratt. (Va.) 67.

83 Jamieson *v.* Hay, 46 Mo. 546; Smiley *v.* Bailey, 59 Barb. 80; Rudolph *v.* Rudolph, 207 Ill. 266.

84 Johnson *v.* Johnson, 92 Tenn. 559.

85 Reed *v.* Reed, 9 Mass. 372; But-

accomplish this purpose must be without qualification or restriction, and, in order to determine whether there is such qualification or restriction, recourse must be had to the whole will, with the view of ascertaining the sense in which the terms were used by the testator. When it appears from other parts of the will that the fee is otherwise disposed of, such terms can not be held to convey the fee.[86]

§ 392. **Devise with Power of Disposition.** Where an estate is given to a person generally or indefinitely, with a power of disposition, it carries the fee, unless the testator gives to the first taker an estate for life only, and annexes 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. This is the doctrine laid down by Kent.[87] and the English writers,[88] and substantially followed by later American decisions.[89] The question often arises where life estates are created by implication, as where the testator devises property generally, without a specification of the quantity of interest, and adds some power of disposition with a remainder or limitation over. In such case, where an absolute power of disposition is annexed to the gift, a limitation over is of no effect,[90] but where the power of disposal is not an absolute power, but a qualified one, conditioned upon some certain event or purpose, and there is a remainder or devise over, the words last used restrict and

terfield *v.* Haskins, 33 Me. 392; Earl *v.* Rowe, 35 Me. 414; Collier *v.* Grimsey, 36 Ohio St. 17; Drusadow *v.* Wilde, 63 Pa. St. 170; Morgan *v.* Pope, 7 Coldw. (Tenn.) 541.

86 Collier *v.* Grimsey, 36 Ohio St. 17; Morgan *v.* Pope, 7 Coldw. (Tenn.) 541.

87 4 Kent Com. *535.

88 Cruise Dig. tit. § 38, c, 13, § 5; Jar. on Wills (Bigelow), *873.

89 Ramsdell *v.* Ramsdell, 21 Me. 288; Jones *v.* Bacon, 68 Me. 34; Smith *v.* Bell, 6 Pet. 68; Gifford *v.* Choate, 100 Mass. 346; Burleigh *v.* Clough, 52 N. H. 267; Jackson *v.* Robbins, 16 Johns, 537; Ayer *v.* Ayer, 128 Mass. 575; Downey *v.* Borden, 36 N. J. L. 460; Benker *v.* Jacoby, 36 Iowa, 273; Hamlin *v.* Express Co., 107 Ill. 443.

90 Rand *v.* Meir, 47 Iowa, 607; Seigwald *v.* Seigwald, 37 Ill. 430; Roseboom *v.* Roseboom, 81 N. Y. 356.

limit the words first used, and reduce what was apparently an estate in fee to an estate for life only.[91]

Where there is a devise for life, in express terms, a power of disposal annexed can not enlarge it to a fee;[92] nor is it opposed to any rule of law to create a life estate with a power to sell and convey, and limit a remainder after its termination.[93] To satisfy the doubts that must naturally arise in construing devises of this character, it is necessary that the entire clause relating to the devise be substantially, and in many cases literally, set forth, and, as the construction will often be influenced by other parts of the instrument, a corresponding treatment will be required of all such portions as directly or indirectly concern the particular devise under consideration.

A conveyance by a devisee for life, but with an absolute power of disposal of the reversion, will vest in the grantee of such devisee an estate in fee,[94] while in case the power has not been exercised, the land, on the death of such devisee, goes to the heirs of the devisor.[95] An important distinction will, however, be observed between an absolute and unconditional power of disposal in the discretion of the devisee and a power restricting the disposition both as to time and manner. The devise of an estate for life, with authority in the devisee to dispose of the land by last will and testament, does not convey absolute ownership,[96] nor would the further fact that the will devising same charged the payment of the debts

91 Stuart *v.* Walker, 72 Me. 145; Merrill *v.* Emery, 10 Pick. 512; Jar. on Wills (Bigelow), *879. A devise with power of disposition, although providing for an ultimate remainder of what remains undisposed of at the death of the first taker, will vest a fee, or a right to convey in fee: Lyon *v.* Marsh, 116 Mass. 232.

92 Hamlin *v.* Express Co., 107 Ill. 443.

93 Ward *v.* Amory, 4 Curtis, 425; Jar. on Wills (Bigelow), *873; Welsch *v.* Savings Bank, 94 Ill. 191; Jassey *v.* White, 28 Ga. 295; Downey *v.* Borden, 36 N. J. L. 460. A different rule prevails in some States: See Hazel *v.* Hagan, 47 Mo. 277.

94 Funk *v.* Eggleston, 92 Ill. 515; Hazel *v.* Hagan, 47 Mo. 277; Levy *v.* Griffiths, 65 N. C. 236; Lyon *v.* Marsh, 116 Mass. 232.

95 Fairman *v.* Beal, 14 Ill. 244.

96 Bryant *v.* Christian, 58 Mo. 98; and see Terry *v.* Wiggins, 2 Lans. (N. Y.) 272.

on the devisee be sufficient to enlarge the life estate to a fee simple.[97] The right of testamentary disposition is a mere power, and though the authorities are not altogether harmonious as to the right of the devisee to exercise such power by deed, it would yet seem that a warranty deed in fee simple, executed by the devisee, which made no reference to the will by which the power of disposition was given, and contained no evidence of an intention to execute the power, conveys only the life estate of the devisee.[98] The question seems to turn upon the fact of intention in the donee of the power to execute it, and when there are co-existing interests, one within and the other without the power, it would seem that the intention to execute the power, whether by deed or will, must be apparent and clear, but that intention, however manifested, whether directly or indirectly, positively or by just implication, will, when established, render a conveyance by the devisee valid and operative.[99] No state of facts, in an examination of title, presents graver questions, or questions more difficult of solution.

97 Dunning *v.* Van Dusen, 47 Ind. 423; Jassey *v.* White, 28 Ga. 295; Jar. on Wills (Bigelow), *873.

98 Dunning *v.* Van Dusen, 47 Ind. 423; Funk *v.* Eggleston, 92 Ill. 515. It may be laid down as a general rule, that in all cases where by the terms of the will there has been an express limitation of an estate to the first taker for life, and a limitation over, any general expressions apparently giving the tenant for life an unlimited power over the estate, but which do not in express terms do so, must be regarded as referring to the life interest only, and, therefore, as limited by such interest: Welsch *v.* Bellville Savgs. Bank, 94 Ill. 191.

99 Funk *v.* Eggleston, 92 Ill. 515. In this case, the subject of a devise for life with power of disposition, is very exhaustively treated in a learned and able opinion by Baker, J. The fundamental principle deducible from the English decisions is that there should be a certain ascertainment of the intention of the donee of the power to act under the power. Three classes of cases arose in which it was demonstrated to an absolute moral certainty there was an intention to execute the power, and these were, (1,) when there was a reference to the power; or (2,) to the subject or property covered by the power; or (3,) when the instrument would be inoperative without the aid of the power. The cases ranging themselves in one or the other of these three classes, it was judicially announced in some of the cases that there could be no execution of a power unless the case fell in one or the other of

§ 393. **Indeterminate Devise.** Owing to the liberal construction now accorded to wills as well as sweeping statutory enactments relative to the limitation of estates, fewer questions will now arise in regard to the quantity or duration of estates than formerly. Wills drawn by the testator, or holographic wills, frequently fail to express clearly such testator's intentions, and as they are usually copied from the ever ready "form book" and adapted to his wants, they not infrequently fail to expressly define the nature or extent of the estate he seeks to convey. A devise indeterminate in its terms and with-

these three classes. See Sir Edward Clere's case, 6 Coke, 17; Standen *v.* Standen, 2 Ves. Jr. 589. But in furtherance of the general rule that the intention of the testator (in case of disposition by will) is the pole star to guide in the interpretation, the English rule, which requires the existence of one of the three elements above enumerated, is made altogether subordinate and secondary in its character, and if circumstances arise that indicate clearly the intention of the donee to work by the power, the artificial rule, predicated upon former experience, must give way, and the primary and fundamental rule, which requires only that the intention must be clear and manifest, will prevail. "The main point," says Mr. Justice Story (Blagge *v.* Miles, 1 Story, 427), "is to arrive at the intention and object of the donee of the power in the instrument of execution, and that being once ascertained, effect is given to it accordingly. If the donee intends to execute, and the mode be in other respects unexceptionable, that intention, however manifested, will make the execution valid and operative." But the intention must be clear and apparent, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then the doubt will prevent it from being deemed an execution of the power: Blagge *v.* Miles, 1 Story, 427; Dunning *v.* Van Dusen, 47 Ind. 423. Kent says, with reference to the execution of powers: "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." 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 particular reference to the power, it will be applied to the interest, and not to the power. 4 Kent, Comm. (12th Ed.) p. 334; 2 Wash. Real Prop. *325, § 33. The subject of the execution of powers is exhaustively examined in Blagge *v.* Miles, 1 Story, 427. The following cases are also in point: Jones *v.* Wood, 16 Pa. St. 25; Towles *v.* Fisher, 77 N. C. 437; Brunswick *v.* Crossman, 76 Me. 577.

out words of limitation, which, standing alone and unaided by statute, would create only an estate for life, will generally be enlarged to a fee by the imposition of a charge upon the person of the devisee, or on the *quantum* of the interest devised to him;[1] but not if the lands are merely devised subject to a charge.[2] Where the charge is on the estate, and there are no words of limitation, the devisee takes an estate for life only,[3] but where the charge is on the person of the devisee in respect of the estate in his hands, he takes a fee by implication.[4] If the charge be on the person of the devisee, the amount is unimportant if the sum is to be paid absolutely.[5] But this, it will be understood, applies only to indefinite devises. Where the estate is given for life in express terms, and some other determinate estate is expressly given or arises by necessary implication from the language of the devise over, the rule is inoperative to enlarge such an estate to a fee.[6]

§ 394. **Devise on Condition Precedent.** This frequently occurs where land is given on condition that the devisee pay certain legacies, or perform certain acts, etc., and performance of the condition is essential to the vesting of the estate.[7] Where the conditions are limited as to time, and are not performed within that time, the devise does not take effect,[8] but becomes inoperative and void. A devise upon condition, therefore, frequently raises an inquiry *in pais* upon the examination of a

1 Tracy *v.* Kilborn, 3 Cush. (Mass.) 557; Baker *v.* Bridge, 12 Pick. 27; Barheydt *v.* Barheydt, 20 Wend. 576.

2 Hawkins on Wills, 134.

3 Fox *v.* Phelps, 17 Wend. 393. By force of the statute a general devise will pass all the testator's estate, including the fee, unless a contrary intent fairly appears.

4 Jackson *v.* Bull, 10 Johns. 148; Funk *v.* Eggleston, 92 Ill. 515; Merritt *v.* Brantly, 8 Fla. 226; Cook *v.* Holmes, 11 Mass. 528; Wait *v.* Belding, 24 Pick. 129.

5 Colliers' Case, 6 Rep. 16; 2 Jarm. on Wills, 171; Jackson *v.* Merrill, 6 Johns. 186; Barheydt *v.* Barheydt, 20 Wend. 576; Jackson *v.* Harris, 12 Wend. 83.

6 Jarm. on Wills, 173; Groves *v.* Cox, 40 N. J. L. 40.

7 Nevius *v.* Gourley, 95 Ill. 206. A court of chancery will never vest an estate when, by reason of a condition precedent, it will not vest in law: Id.

8 Nevius *v.* Gourley, 97 Ill. 356 (2d hearing); Den *v.* Messenger, 33 N. J. L. 490.

title proffered by the devisee, and before passing or accepting same, a requisition should be made for further information relative to the due performance of the condition.

§ 395. **Conditional Devise — Marriage.** Estates for life are frequently devised to surviving husbands or wives, subject to a defeasance in the event of a second marriage, and occasionally unmarried people are made the objects of such testamentary bounty so long as they may remain single. A title involving such an estate, whether offered by the life tenant or remainderman, demands and should receive the closest scrutiny.

The rule is well settled, both in England and this country, that conditions in general restraint of marriage, whether of man or woman, are void in law, being against public policy.[9] But this rule does not extend to special restraints, such as against marriage with a particular person, or before attaining a reasonable age, or without consent. Nor is it ever extended to

[9] It appears from the early English cases that this doctrine was borrowed by the English ecclesiastical courts from the Roman civil law, which declared absolutely void all conditions in wills restraining marriage, whether precedent or subsequent, whether there was any gift over or not. But the courts of equity found themselves greatly embarrassed between their anxiety on the one hand to follow the ecclesiastical courts, and their desire on the other to give more heed to the plain intention and wish of the testator as manifested by the whole will. Thereupon the process of distinguishing commenced for the purpose of preventing obvious hardships arising from the application of that technical rule to particular cases. As a result there has been ingrafted upon the doctrine a multitude of curious refinements and subtle distinctions respecting real and personal estate, conditions and limitations, conditions precedent and conditions subsequent, gifts with and without valid limitations over, and the application of the rule to widows and other persons. Indeed it may be said of the decisions upon the subject that "the more we read, unless we are very careful to distinguish, the more we shall be confounded." The whole subject as to what conditions in restraint of marriage shall be regarded as valid and what as void would seem to be involved in great uncertainty and confusion both in England and in this country. There is clearly discernible however, through all the decisions of later times, an anxiety on the part of the judges to limit as much as possible the rule adopted from the civil law.

the case of a second marriage of a woman; but in all such cases the special restraint by condition is allowed to take effect, and the devise over will be good on breach of condition. A condition, therefore, that a widow shall not marry, is by all the authorities held not to be unlawful.[10] In the decided cases a distinction is taken between those where the restraint is made to operate as a condition precedent, and those where it is expressed to take effect as a condition subsequent, and the decisions have generally been made to turn upon the question, whether there be a gift or devise over or not. But if the devise be to a person until he or she shall marry, and upon such marriage then over, this is a good limitation as distinguished from condition; as in such case there is nothing to carry the interest beyond the marriage. There can be no doubt, therefore, that marriage may be made the ground of a limitation of estate, either ceasing or commencing, and this, whether the devisee be man or woman, or other than husband and wife.[11]

§ 396. **Contingent Remainders.** Under devises similar to those mentioned in the preceding paragraph, many questions will arise relative to the devise over, which, according as the phraseology used, will be either a vested or contingent remainder. These questions are of great importance. The examiner should, therefore, exercise the greatest care in transcribing all devises of this character, and for greater certainty it is recommended that they be presented with little or no abbreviation. The essence of the contingent remainder is, that it is limited to take effect on an event or condition that may never happen or be performed, or which may not happen or be performed until after the determination of the preceding particular estate.[12] Thus where a devise over operates at the death or marriage of the first devisee to such of testator's children as shall then be living, this would give a contingent remainder

10 Bostick *v.* Blades, 59 Md. 231; Clark *v.* Tennison, 33 Md. 85; Little *v.* Giles, 25 Neb. 313; Knight *v.* Mahoney, 152 Mass. 523.

11 Bostick *v.* Blades, 59 Md. 231; Arthur *v.* Cole, 56 Md. 100; Brown *v.* Brown, 41 N. Y. 507.

12 Bou. Law Dict. 435.

to the children living when such contingency of death or marriage happened. The children of the testator who may have died after the testator and prior to the happening of the contingency would take no estate, nor would their heirs,[13] and the fact that the words "to them, their heirs," etc., followed the mention of the children would not affect the result, for such words do not describe the devises but only the quantity of their estate, and merely show the estate taken by the previous words to be fee.[14]

§ 397. **Contingent Reversion.** A contingent reversion, so called, may be created either by deed or will, but more frequently occurs under the latter. It is not strictly a reversion, however, but rather a possibility of reinvesture in the grantor or his heirs, and occurs where a conveyance is made to one for life or years with a contingent remainder. Thus, in case of a devise to an unmarried woman, and to the "heirs of her body" or "children;" here the devisee named would take a life estate only, while a contingent remainder is created in favor of her specified heirs, who, when born, would take the fee. The will in such case, effectually divests the heirs of the testator of all estate but a contingent reversion,[15] dependent upon the devisee's dying without issue.[16]

§ 398. **Devise to Married Woman.** In a former chapter[17] the subject of conveyances to married women was quite

13 Olney *v.* Hall. 21 Pick. 311; Emmison *v.* Whitelsey, 55 Mo. 254.

14 Thompson *v.* Ludington, 104 Mass. 193.

15 Strictly speaking there is no such a thing as a contingent reversion. What is really meant by that phrase is a possibility of reverter, but in practice the term has acquired a currency in the manner indicated in the text and is constantly so used both by courts and writers.

16 Frazer *v.* Supervisors Peoria Co., 74 Ill. 282; 2 Bl. Com. 164; Blair *v.* Vanblarcum, 71 Ill. 290. This reversionary interest may itself be the subject of devise: Austin *v.* Cambridgeport, 21 Pick. 215; and will pass under a residuary clause: Steel *v.* Cook, 1 Met. 281; and the right to same may be asserted by the heirs of such residuary devisee after his death: Clapp *v.* Stoughton, 10 Pick. 462. This doctrine, however, does not coincide with the common law rules relative to naked possibilities.

17 See Chap. XVI.

fully discussed and the general principles there laid down will apply with equal force to a devise by will. The general rule of construction, in the absence of statutory provisions to the contrary, is, that in order to exclude the marital rights of the husband from attaching to property coming to the wife during coverture, or belonging to her at the time of marriage, an intention on the part of the testator to vest in the wife a separate estate ought to appear from the terms or provisions of the will so clearly as to be beyond the reach of reasonable controversy.[18] This is accomplished, in most cases, by the insertion of technical words, as "sole and separate use," or other words of similar import, while the same end may be attained by provisions excluding the marital rights of the husband, or by giving to the wife powers concerning the estate inconsistent with the disabilities of coverture.[19] The statute, however, is a potent factor in solving questions of this character. In a majority of the States the common law disabilities of coverture have ceased to exist, and in those States the foregoing remarks have no application.

§ 399. **Devises to Executors in Trust.** It is a rule in equity, that the language employed in devises in trust must be such as to show that the object is certain and well defined, and that the beneficiaries be either named, or capable of easy ascertainment within the rules of law which are applicable to such cases; and further, that the trusts shall be of such a nature that a court can direct their execution; failing in this the property will fall into the residue of the estate.[20]

Devises in trust are frequently made to executors to promote some educational, charitable or religious purpose, the beneficiary being an institution devoted to the furtherance of those

18 Schouler Dom Rel. (2d Ed.) 189; 2 Perry on Trusts, § 647; Hill on Trustees, 611.

19 Vail *v.* Vail, 49 Conn. 52. The statutes now in force in most of the States will afford all the protection that was formerly sought to be attained by testamentary provisions.

20 Holmes *v.* Mead, 52 N. Y. 332; Powell on Devises, 418; Darling *v.* Rogers, 22 Wend. 494; 2 Story Eq. Jur. § 979; Wheeler *v.* Smith, 9 How. (U. S.) 55.

objects, though it is not uncommon to make beneficial devises to individuals in the same manner. It is usual, though not necessary, to specifically name or describe the intended beneficiaries, and numerous authorities sustain devises to executors or trustees which confer upon them authority to divide the trust estate among such persons as they may select from certain classes which are designated, and among such children or relatives, who are intended to be provided for, as they may deem proper.[21]

Where the devise is too indefinite to give certainty, or the trust is such that a court can not execute, resort is usually had to a court of chancery for a construction of the will, and where, as a result, the devised property falls back into the residuum, such proceedings become a necessary link in the chain of the title to such particular property. A devise in trust for such object of benevolence and liberality as the trustee, in his discretion, shall approve, would have the effect last mentioned.[22] So, also, would a power of appointment to one to give or devise property "among such benevolent, religious, or charitable institutions as he may think proper," [23] be vague and indefinite. A power of disposition, to such members of a specified branch of a family as the trustee might consider most deserving, has been held void, for the same reason.[24] A direction to give a fund in "private charity" is too indefinite,[25] or to give what they might choose,[26] but when the beneficiaries are capable of identification, although not named, the trust will yet be valid, and a testator may commit to competent persons the power to designate who of certain persons shall participate in a

21 Power *v.* Cassidy, 79 N. Y. 602; Bull *v.* Bull, 8 Conn. 48; Norris *v.* Thompson's Exrs., 19 N. J. Eq. 307; McLoughlin *v.* McLoughlin, 30 Barb. 458.

22 Morice *v.* Bishop of Durham, 10 Ves. (Eng.) 522.

23 Norris *v.* Thompson's Exrs., 19 N. J. Eq. 307.

24 Stubbs *v.* Sargon, 3 Myl. & Cr. (Eng. Ch.) 507.

25 Ommanny *v.* Butcher, 1 T. & R. (Eng. Ch.) 260.

26 Wetmore *v.* Parker, 52 N. Y. 450.

specified portion of his estate, and in what proportions the property shall be divided.[27]

§ 400. **Gift to Devisee by Description.** The observations of the last section are in a measure applicable to direct gifts, for a devisee, whether a corporation or a natural person, may be designated by description, as well as by name.[28] It is only necessary that the description of the devisee be by words that are sufficient to denote the person meant by the testator, and to distinguish him from all other persons.[29] In such cases, however, a judicial construction will be necessary in order to fully perfect the title of the imperfectly designated devisee, and the decree rendered upon such construction, together with the will, forms the basis of the devisee's claim of title. Devises to corporations are particularly subject to the rule above stated, as the testator, through inadvertence, ignorance, or mistake, frequently fails to insert the strictly legal name of the corporation. Parol evidence is always admissible to remove latent ambiguities, and where there is no person or corporation in existence precisely answering to the name or description in the will, parol evidence may be given to ascertain who was intended by the testator. "A corporation," says Allen, J., "may be designated by its corporate name, by the name by which it is usually or popularly called and known, by a name by which it was known and called by the testator, or by any name or description by which it can be distinguished from every other corporation; and when any but the corporate name is used, the circumstances to enable the court to apply the name or description to a particular corporation and identify it as the body intended, and to distinguish it from all

27 Williams *v.* Williams, 4 Seld. (N. Y.) 548; Owens *v.* Miss. Soc., 14 N. Y. 386; 2 Redf. on Wills, 779; White *v.* Fisk, 22 Conn. 31; Lefevre *v.* Lefevre, 59 N. Y. 434.

28 Lefevre *v.* Lefevre, 59 N. Y. 434.

29 Button *v.* Am. Tract Soc'y, 23 Vt. 336; McAllister *v.* McAllister, 46 Vt. 272; Minot *v.* Curtis, 7 Mass. 441; Holmes *v.* Mead, 52 N. Y. 332; Gardner *v.* Heyer, 2 Paige, 11.

others and bring it within the terms of the will, may, in all cases, be proved by parol." [30]

§ 401. **Precatory Trusts.** Precatory trusts grow out of words of entreaty, wish, expectation, request, or recommendation frequently employed in wills, and the authorities, both English and American, are, in the main, harmonious in declaring that a trust will be created by such words as "hope," "wish," "request," etc., if they be not so modified by the context as to amount to no more than mere suggestions to be acted on or not according to the caprice of the immediate devisee, or negatived by other expressions indicating a contrary intention. But, to effect this result, both the subject and object must be certain.[31] An absolute gift to one person, accompanied with a request to appropriate a particular sum to another person, creates in the immediate devisee a trusteeship, to the extent of such sum, nor does the absolute gift contravene either an express or implied trust annexed to the gift, as it is a common thing to invest the legal title and trusteeship in the same person who is to receive the benefit in the event of a failure of the trust. It is equally well settled, however, that a mere direction by a testator, that a devisee shall pay a legacy, does not thereby create a charge on the land; to accomplish this there must be express words, or necessary implication from the whole will, that such was the intention.[32]

There has been a tendency manifested by some courts to restrict the application of this rule, or to qualify it, and, in some instances, to reject it altogether, and to adopt, as more reasonable, the presumption that words precatory in form are meant to imply a discretion in the donee, and should be so construed unless clearly shown to be used in an imperative

30 Lefevre *v.* Lefevre, 59 N. Y. 434; St. Luke's Home *v.* Asso'n for Indigent Females, 52 N. Y. 191.

31 Bohon *v.* Barret's Ex'r, 79 Ky. 378; Hill on Trustees, 92; Perry on Trusts, 4; Gilbert *v.* Chapin, 19 Conn. 342.

32 Cable's Appeal, 9 Reporter, 57; Lupton *v.* Lupton, 2 Johns Ch. 614; Chapin *v.* Gilbert, 19 Conn. 342; Pennock's Estate, 20 Penn. St. 268; Walter's Appeal, 95 Penn. St. 305; Taylor *v.* Dodd, 58 N. Y. 335; Read *v.* Cather, 18 W. Va. 263.

sense from other parts of the will;[33] but the weight of authority sustains the principles first stated, and precatory words are generally held to be creative of trusts, when the contrary does not appear from the context or by necessary implication.[34]

§ 402. **Perpetuities.** Attempts are frequently made in wills, though seldom in deeds, to create what the law regards as perpetuities, and this occurs whenever there is a suspension of the power of alienation for a longer period than a life or lives in being at the creation of the estate,[35] or of such lives in being and twenty-one years and nine months at the farthest,[36] the rule varying somewhat in different States. In construing dispositions of property with reference to the statute against perpetuities, the rule is settled that any limitation is void as in violation of the statute, by which the suspension of the power of alienation will not necessarily, under all possible circumstances, terminate within the prescribed period. It is not enough that it *may* terminate; it *must,* and if by any possibility, the vesting of the estate may be postponed beyond the statutory period, the limitation will be void.[37] In all cases, where the limitation is void as being too remote, the will should be construed as if no such clause were in it, and the first taker will hold his estate discharged from the limitation over.[38]

§ 403. **Lapsed Devise.** When a devisee named in a will dies during the lifetime of the testator, the devise is said to lapse; that is, it does not go to the heirs of such deceased devisee, but falls back into the estate of the testator. The rule, though frequently acknowledged to be productive of great hardship, and to be often contrary to the intention of the testator, is too firmly established to be questioned. It is regarded

33 Pennock's Case, 20 Pa. St. 272.

34 Reed's Adm'r *v.* Reed, 30 Ind. 313; Warner *v.* Bates, 98 Mass. 274.

35 Schettler *v.* Smith, 41 N. Y. 328; Knox *v.* Jones, 47 N. Y. 389.

36 Stephens *v.* Evans, 30 Ind. 39; see 1 Jar. on Wills, 226.

37 Schettler *v.* Smith, 41 N. Y. 328; Stephens *v.* Evans, 30 Ind. 39; Lorrillard *v.* Coster, 5 Paige, 172; Hawley *v.* Northampton, 8 Mass. 3.

38 Wood *v.* Griffin, 46 N. H. 234; Anderson *v.* Grable, 1 Ark. 136.

as a rule of necessity, and merely amounts to this: That if there be no devisee, there is in effect no devise.[39] The statute, in some States, has slightly modified this rule, particularly where the devise is to children, but in the absence of such statutes the rule seems to be inflexible.

§ 404. **Devises for the Payment of Debts.** Land devised to trustees for the payment of debts and legacies is usually regarded in equity as money,[40] but the heir at law has a resulting trust in such land, after the debts and legacies are paid, and may restrain the trustee from selling more than is necessary to pay such debts and legacies; or, he may pay them himself, and have conveyance of that portion of the land not sold in the first case, and the whole in the latter, which property will, in either case, be land and not money.[41] Equity will extend the same privilege to the residuary legatee.[42]

A mere charge upon land stands upon a different footing, and the executor possesses no power to sell or dispose of the land in such case except by license or direction of the probate court.[43] The land in the hands of the devisee is burdened by the charge,[44] and should he renounce the devise such land will descend to the heir at law subject to the charge; [45] but the executor having no status as a trustee, takes no interest in same, and no power can be implied from the mere charge of the debts and legacies upon the lands devised.[46]

§ 405. **Charges on Lands Devised.** Real estate is not, as of course, charged with the payment of legacies. It is never so charged unless the testator intended it should be, and that intention must be either expressly declared, or fairly and satisfactorily inferred from the language and dispositions of the will.[47] Mere directions to pay debts and legacies are not suf-

39 Davis' Heirs *v.* Taul, 6 Dana, 52.

40 Craig *v.* Leslie, 3 Wheat. 463; Story Eq. § 552; Dill *v.* Wisner. 88 N. Y. 153.

41 Craig *v.* Leslie, 3 Wheat, 463.

42 Craig *v.* Leslie, 3 Wheat. 463.

43 Dill *v.* Wisner, 88 N. Y. 153.

44 Gridley *v.* Gridley, 24 N. Y. 130; Harris *v.* Fly, 7 Paige, 421.

45 Birdsall *v.* Hewlett, 1 Paige, 32.

46 *In re* Fox, 52 N. Y. 530.

47 Okeson's Appeal, 59 Pa. St. 99;

ficient to create a charge,[48] but where the testator devises his real estate, after the payment of debts and legacies, or with a direction that debts and legacies shall be first paid, then the real estate is charged with the payment of them and they become liens upon the land.[49] If the devisee accepts the devise, he becomes personally liable for the legacies,[50] which still remain, however, a charge upon the land.[51] When the same sentence or clause by which land is devised imposes on the devisee the duty of paying an annuity, and no other fund is provided out of which the payment is to be made, the annuity is a charge upon the land;[52] and in like manner, where a testator, without creating an express trust to pay legacies, makes a general residuary disposition of his whole estate, blending the realty and personalty together in one fund, the real estate is constructively charged with the legacies.[53]

In every instance, therefore, where legacies are directly or constructively charges or liens upon the realty, satisfactory assurance must be given that the legacies have been paid or the lien released before the title is accepted by a purchaser from the devisee. Frequently these facts will appear from the executor's final report, and in the abstract of this document, in connection with the probate proceedings, statements of this kind should always be shown.

Kirkpatrick *v.* Chestnut, 5 S. C. 216; Lupton *v.* Lupton, 2 Johns. Ch. 614; Cable's Appeal, 91 Pa. St. 327. Legacies are primarily payable out of the personal estate.

48 Taylor *v.* Dodd, 58 N. Y. 335; Walter's Appeal, 95 Pa. St. 305.

49 Lupton *v.* Lupton, 2 Johns. Ch. 614; Wood *v.* Sampson, 25 Gratt. (Va.) 845.

50 Birdsall *v.* Hewlett, 1 Paige, 33; Burch *v.* Burch, 52 Ind. 136.

51 "It seems to be well settled," says Mr. Redfield, "that where lands are held by subsequent *bona fide* purchasers for value, but who are obliged to trace title through a devise, whereby a charge is created upon the land for the payment of legacies, such purchasers will be constructively affected with notice of such charge, and equity will enforce it upon the land in their hands:" 2 Redf. on Wills, ¶ 210, citing Harris *v.* Fly, 7 Paige, 421; Wallington *v.* Taylor, Saxton, 314; and see Aston *v.* Galloway, 3 Ired. Eq. (N. C.) 126.

52 Merrill *v.* Bickford, 65 Me. 118.

53 Lewis *v.* Darling, 16 How. 1; Nichols *v.* Postlethwaite, 2 Dall. 131; Hill on Trustees, 860; Gallagher's Appeal, 48 Pa. St. 121.

In this connection an important distinction should be noted, with regard to the estate possessed by the devise, between such legacies as constitute a personal charge upon the devisee, and such as are expressly charged upon the estate. Where an estate is devised subject to the payment of legacies, if the legacies are made a personal charge upon the devisee, an acceptance of the devise operates to make such legacies a personal liability of the devisee, while he will take the estate devised as a purchaser in fee; but if the legacies are charged upon the estate devised, the devisee does not take as a purchaser for value, but as a beneficial devisee.[54]

§ 406. **Equitable Conversion.** It is a fundamental principle in equity, long established and universally recognized, that where a testator directs that his real property be converted into money on or before a given time, it becomes, for practical purposes, money, and will be treated as personalty from the moment of his death. In such case, therefore, the heir takes no interest in the land, which is held by the executor as other personal property, and can make no conveyance of same that will defeat or impair the rights of a purchaser from the executor. Yet to effect this change the intention of the testator must appear by unequivocal declaration.[55] There must be an imperative and unmistakable direction to sell, and if the power to sell, or the sale itself is coupled with terms or dependent upon a contingency, there is no conversion until the terms have been complied with or the contingency has happened,[56] and, as courts are always averse to sanctioning a change in the quality of an estate, if there be any doubt as to the intention of the testator the original character of the property will be retained.[57] The policy of the law favors the vesting of estates and the provisions of a will should always be construed as creating a vested estate if possible.[58]

54 Funk *v.* Eggleston, 92 Ill. 515.
55 Ducker *v.* Burnham, 146 Ill. 9.
56 See, Estate of Machemer, 140 Pa. St. 544.
57 Orrick *v.* Boehm, 49 Md. 104; Peter *v.* Veberly, 10 Pet. (U. S.) 533.
58 Scofield *v.* Olcott, 120 Ill. 362.

§ 407. **The Residuary Clause.** In a majority of wills there is inserted at the close a general devise of everything that the testator has not succeeded in disposing of in former parts of the will, which is called the residuary clause. This portion of the instrument should, as a rule, be copied entire, as it is often of vital importance in determining questions of title under lapsed devises and of fixing the ownership of lands not specifically granted or alluded to elsewhere in the instrument. Where the language of a residuary clause has sufficient scope and extent, evincing the intent of the testator to take up and carry into the residuary estate all of his estate remaining at his death undisposed of for any reason, the residuary clause will receive and pass a lapsed legacy and devise,[59] as well as such as may fail for want of use of proper language to create the same, or to designate the devisee.[60] But when the residuary clause does not by its own terms take in a lapsed legacy or devise, so as to disclose the intent of the testator to pass the lapsed estate into the residue, the rule is different.[61] Void and illegal legacies or devises come under the rule first above stated,[62] and generally, unless a contrary intention is manifested, the residuum will take and pass everything of the nature above indicated.[63]

A different rule, however, applies to the residue itself, for if a gift of the residue, or any part of it fails, whether by lapse, illegality, or revocation, to the extent that it fails, the will is inoperative, and the subject of the gift passes to the heirs or next of kin according to the statute of descents.[64]

[59] Youngs *v.* Youngs, 45 N. Y. 254; Patterson *v.* Swallow, 8 Wr. (Pa.) 490; Hillis *v.* Hillis, 16 Hun (N. Y.) 76. Local statutes will sometimes materially affect the doctrine stated in the text.

[60] Lovering *v.* Allen, 129 Mass. 97.

[61] Yard *v.* Murry, 86 Pa. St. 113.

[62] Burnet *v.* Burnet, 30 N. J. Eq. 595. A distinction is made in some States between legacies and devises. The legacy falling into the residuum; the lapsed devise descending to the heirs: See Orrick *v.* Boehm, 49 Md. 2.

[63] Thayer *v.* Wellington, 9 Allen (Mass.), 283. The residuary clause will carry the estate devised in a clause which the testator has revoked by striking it out of his will. Biglow *v.* Gilbert, 123 Mass. 102.

[64] Burnet *v.* Burnet, 30 N. J. Eq. 595.

§ 408. **Codicils.** A codicil is defined as some addition to, or qualification of, a last will and testament.[65] Where it is in irreconcilable conflict with the will, it must prevail as a revocation, since it is the last expression of the testator's intent in the disposition of his property.[66] Usually, however, a codicil imports not a revocation, but an addition to, or explanation, or alteration of the will, in reference to some particular, and assumes that in all other particulars it is to be in full force and effect.[67] The authorities fully establish the proposition that a codicil which does not in terms revoke a clause in the will, but modifies it in some of its features entirely consistent with the retention of its other provisions, will be allowed to have that partial effect, and the clause thus changed will remain as the embodiment and expression of the testator's intent, while if duly executed with all the formalities required by law, it will operate to confirm and republish the rest of the will,[68] unless the testator declares that he does not intend that it shall have that effect.[69]

It will thus be seen that the codicil plays a most important part both in the disposition of the property and in the matter of validating that which has preceded it, and which, by reason of defective execution or other circumstance, has become inoperative.[70] It is an established rule not to disturb the dispositions of the will further than is absolutely necessary to give effect to the codicil,[71] and the intent of the testator is always sought to give effect to both instruments when they can operate in perfect harmony.[72] But where the absolute and unqualified gift in the codicil is incompatible with the disposition of the land made in the will, and must have a re-

65 Bou. Law Dict. 285.

66 Hallyburton *v.* Carson, 86 N. C. 290.

67 Wetmore *v.* Parker, 52 N. Y. 450.

68 O'Hara on Wills, 6; Brown *v.* Clark, 77 N. Y. 369; Van Cortlandt *v.* Kip, 1 Hill, 590; Mooers *v.* White, 6 Johns. Ch. 375; 1 Jarm. on Wills, 78.

69 Van Cortlandt *v.* Kip, 1 Hill, 590.

70 See Wms. on Executors, 97; 1 Jarm. on Wills, 78.

71 Jarm. on Wills, 343, note.

72 Hallyburton *v.* Carson, 86 N. C. 290.

voking efficacy or be itself nugatory, the will must yield to the codicil.[73] A codicil depending upon the body of the will for interpretation or execution can not be established as an independent will, when the will itself has been revoked.[74]

§ 409. **Revocation.** The question of revocation will arise during the examination of a title, if at all, only by implication. A proper probate disposes of all questions of this kind and establishes the will. But facts and circumstances may be disclosed which create legal inferences and when such is the case the duty of the examiner is to fully investigate and solve any question that may be so presented. A change of condition or domestic relation after the making of a will and which involves new or different moral duties, will generally raise a presumption of change of intention on the part of the testator.[75] Hence, the marriage of a *feme sole;* birth of issue; and divorce, under certain conditions, may all tend to create this presumption.

§ 410. **Formal Requisites.** There are a number of indispensable requisites to a valid will, which, though of the highest importance generally, do not require more than passing mention in this work. These requisites do not relate to form, but go to the very substance of the instrument. They relate mainly to the testamentary capacity of the testator as dependent on soundness of mind, etc., and to his surroundings and the effect of fraud, duress, undue influence, and the like. All of these questions, however important they may be, do not arise in the examination of a title derived through or under a will, for they are all supposed to have been duly investigated during the probate and satisfactorily answered before the will was permitted to become operative as a conveyance.

With respect to the strictly formal parts a very simple and untechnical document will be sustained as a will, where the writing relied on has been executed in conformity to the stat-

73 Wainwright *v.* Tuckerman, 120 Mass. 232; Vaughan *v.* Bunch, 53 Miss. 513.

74 Youse *v.* Forman, 5 Bush (Ky.) 337.

75 4 Kent's Com. 521; 2 Greenl. Evid. § 684.

ute, and shows upon its face a declaration by the testator that it is his will.[76] The essence of a will is, that it is a disposition to take effect at death,[77] and the form of the instrument, therefore, is immaterial if its substance is testamentary.[78] The statute usually requires the paper to be signed by the testator, but the signature may be original or by adoption,[79] and, as a rule, it must be attested by two or more subscribing witnesses, who, at the testator's request, affix their signatures in his presence.[80] As the execution and publication are also matters of strict proof in the probate court they may be presumed to have been in conformity to law after the will has been duly presented and admitted in such court. Should, however, the examiner observe palpable defects of form they should be presented in the abstract that proper inquiries may be founded on them.

§ 411. **Abstract of Wills.** An eminent English conveyancer[81] once said, that he could scarcely admit of a will being abstracted at all, and strongly recommended that it be copied instead, in order that counsel might have an opportunity of judging by the context as well as by the particular words of the devise or bequest.[82] The reason assigned by the English conveyancer is a good one,[83] yet in preparing the abstract of a will it is not usually necessary that the entire in-

76 3 Wash. Real Prop. *681; Turner *v.* Scott, 51 Pa. St. 126; Burlington University *v.* Barrett, 22 Iowa, 60; Wall *v.* Wall. 30 Miss. 91. Although an instrument be in the form of a deed, and called such, still if its purpose be testamentary, and it is only to be consummated by the death of the maker, effect will be given to it as a will and not as a deed: Gillham *v.* Mustin, 42 Ala. 365.

77 Not *after* death, as the books frequently state.

78 Wilson's Ex'rs *v.* Van Leer, 103 Pa. St. 600.

79 A mark has been held a good signature even when the statute uses the word *subscribed:* Van Honswyck *v.* Wiese, 44 Barb. 494; Jackson *v.* Jackson, 39 N. Y. 153.

80 Consult Hopper's Will, 1 Tuck. (N. Y. Sur.) 378; Lawrence's Will, Id. 243; Holloway *v.* Galloway, 51 Ill. 159.

81 Mr. Barton.

82 Moore on Abst. 39.

83 This observation derives additional force from the fact that, formerly real estate wills were not proved in England.

strument should appear, but only such parts as have special or general reference to the property in question. Modern wills in many instances, and ancient wills uniformly, contain a preamble dedicating the testators' souls to God, expressing the soundness of their minds, the health or debility of their bodies, and other particulars of no special importance and which have no necessary connection with or relation to the subject of the examination, and may in all cases be safely omitted. The bequests and gifts of personalty are always omitted, except where a legacy constitutes a charge upon the land, in which case it becomes material. Devises of realty, other than the subject of the examination, may be advantageously omitted, but the residuary clause, though couched in general terms, should, as a rule, be inserted.

The language employed by the will, aside from the strictly formal parts, should be closely if not literally followed, as well in respect to the property devised as the particular estate therein granted. The essential features of a modern will consist of the parties, testator, legatees and devisees; the legacies which are a charge on land; the specific devises; the trusts and powers; the appointment of executors; the residuary clause; and the execution and attestation.[84] In drawing the synopsis the general form of presenting conveyances by deed is followed as closely as may be; the particular words employed in creating the estates devised are given, and all in-

[84] Mr. Preston says (with reference to the method of abstracting wills) the points to be attended to are to show to whom the lands are devised; the words used in description of the lands; the words of limitation by which the estate is devised, the power, if any, in pursuance of which the devise is made: the words of modification, or of severance of the tenancy, if there be any; the words of qualification which may abridge or defeat the estate; the uses and trusts, if any are created; the conditions, or conditional limitations by way of executory devise, or otherwise, annexed to the devise or appointment; the charges imposed on the devisee; the indemnity, if any, against seeing to the application of the purchase money, or mortgage money; such powers, if any, as are material to the title; and when leasehold lands are the subject of the title, the appointment of executors: " Prest. on Abst. 180.

artificial expressions rendered with literal exactness. Imperfect designation of persons or property, and manifest omissions, errors and irregularities, are noted in the same manner as in case of deeds. The execution, if regular, may be passed without notice, as the proof of probate constitutes proof of the due and proper execution and publication of the will, yet where the execution is manifestly erroneous, or not in compliance with law, it is recommended that same be shown as fully as in case of defective execution by deed, and be supplemented by the special proof offered on the hearing before the probate court.

§ 412. **Method of Arrangement.** There are two methods of showing abstracts of wills: one, in case of record as a conveyance, as an independent circumstance, the same as other instruments of conveyance, and forming a separate link in the chain; the other, in connection with the proceedings had in the probate court relative to the proof of the will and the administration of the estate. Either method may be adopted as will best serve the examiner's purpose, but it is believed the former method possesses advantages over the latter, and is that which should be adopted whenever the will has been recorded as directed by law. In the event of the first named method being used, the proof adduced before the probate court, or a summary thereof, should also be appended, such proof being required by statute to be recorded with the will. The proceedings relative to the settlement of the estate then follow as a separate showing. When the latter method is employed, a digest of the will should be inserted at the beginning of the synopsis of the proceedings. When conveyances have been made by heirs or devisees prior to probate or record, the chronological arrangement should follow the dates of execution, rather than of proof or record, except in the case of *post obit* conveyances.

§ 413. **Practical Examples.** Following this will be found a practical example of an abstract of a will and proof of probate. The will selected is of the most simple form, and no attempt has been made to illustrate special clauses, though

an example of these occurs in the form given in connection with the abstract of probate proceedings. The proof of probate is that now in use in Wisconsin, Minnesota and other western States, and will serve to indicate the method of showing these matters even where the record of proof is different:

Last Will and Testament[85] *of Thomas W. Watson, deceased.*

Dated Oct. 10, 1880.
Admitted to Probate, May 1, 1883.
Recorded July 1, 1883.
Book 100, page 550.

Directs, that all just debts, including funeral expenses and expenses of administration, be paid by his executor.[86]

Gives and bequeaths to his wife, Annie Watson, one thousand dollars annually, to be paid, etc., [set out such legacies as constitute a charge on the land] *together with sundry other bequests and legacies.*

Devises and bequeaths to his son, George Watson, etc., [set out the specific devises].

Gives, devises and bequeaths all the residue and remainder of his estate to, etc., [set out the residuary bequests].

Appoints John Williams his executor, etc., [note the trusts and powers, if any].

Add facts of execution.[87]

85 If desired, the ordinary caption of a deed may be used; as,— to —, the nature of the instrument being indicated by its name in the margin. The method employed in the example is, however, the better way.

86 "The direction of payments of debts and funeral expenses," observes Mr. Redfield, "is now merely formal, except that as it may sometimes aid in the construction of a will, by showing that the subject of the testator's debts was brought distinctly to his mind, at the time of executing his will:" 1 Redf. on Wills, *674. The direction of a testator to his executors to pay his debts does not give to them a power of sale for that purpose, or vest them with any authority for their payment, other than the law itself creates, by expressly charging all the property of a decedent with the payment of his debts, whether he die testate or intestate. Will of Fox, 52 N. Y. 530; Harris *v.* Douglas, 64 Ill. 466; Carrington *v.* Manning's Heirs, 13 Ala. 611.

87 The examiner will notice whether any of the witnesses are

If the proof of the will is appended, as is usually the case, this would doubtless be sufficient to show testator's death, but, if desired, a note embodying such information may be appended, thus:

NOTE.—*By the records and files in the office of the County Court of Kenosha County, Wis., it appears that Thomas W. Watson died on or about April 28, 1883; that letters testamentary were granted to John Williams, May 1, 1883.*

Where a codicil is appended it should be abstracted as a separate instrument and its terms fully set forth, particularly when it tends to revoke any provision of the will, or alters the prior disposition of the real estate of the decedent. In such case say:

Appended to the foregoing is,

and then, as in case of the original, follow in the margin with,

Codicil to the last will and testament, etc.,

giving the date and substance of the codicil. With all wills filed for record as conveyances the law requires the "proof of probate" to be also filed. Such proof is generally in the shape of a certificate by the judge or clerk of the probate court, and a synopsis of same should immediately follow; thus,

named in the will as devisees or legatees, and in case of a correspondence of names show the same. As a rule, any person taking any benefit under a will is excluded from being a witness to same, or else the provision in their favor is rendered void.

Appended is:

Certificate by Edward Martin, County Judge of Kenosha County, Wis. — *Proof of will. Dated July 1, 1883. Recites that on the 15th day of March, 1883, at a regular term of the County Court of Kenosha County, Wis., pursuant to notice duly given as required by law, William Jackson and James Smith, subscribing witnesses to the last will and testament of Thomas W. Watson, late of the County of Kenosha, dec'd, which is "hereto annexed," were produced, sworn and examined (and the said will being contested, and other witnesses as well for the contestant as for the proponent of said will, having been produced, sworn and examined),*[88] *and proofs having been heard before said court, and the court having thereupon found that said instrument was in all things duly executed as his last will and testament by said Thomas W. Watson, on the 10th day of October, 1880; that he was then of full age, and of sound mind, and that said instrument was duly subscribed and attested (in his presence).*[89]

Thereupon said instrument being duly proved,[90] *was by said court duly allowed, and probate thereof granted as and for the last will and testament of said Thomas W. Watson, dec'd.*

Signed by said Judge, and the seal of the Kenosha County Court affixed.

88 This of course depends on local laws.

89 Where a will is properly signed by the testator and two or more attesting witnesses, both of whom testify that they were present, and saw the testator sign the will in their presence, or that the testator acknowledged same, and that they believe he was of sound mind and memory at the time of executing it, this, in the absence of any proof of fraud, compulsion, or other improper conduct, is sufficient to make out a *prima facie* case and entitle the will to probate. Heirs of Critz *v.* Pierce, 106 Ill. 167.

90 The certificate of probate of a will need not set out in detail the evidence upon which the will was proved. If conclusions of law are stated, it is sufficient: Mosley *v.* Wingo, 7 Lea (Tenn.), 145.

§ 414. **Probate of Wills.** Probate of a will has been defined as, the proof, before an officer authorized by law, that an instrument offered to be proved or recorded is the last will and testament of the deceased person whose testamentary act it is alleged to be.[91] It is the authentication of the instrument, and that which gives to it its legal effect and validity as a conveyance, and nothing, says Lord Kenyon,[92] "but the probate or letters of administration with the will annexed, are legal evidence of the will," language which has been repeated and approved by the Supreme Court of the United States.[93] A will, therefore, which has not been admitted to probate, though admissible perhaps in connection with proof of adverse possession, is not evidence of title in a court of law,[94] nor would it afford constructive notice if recorded.

§ 415. **Effect of Probate.** The probate of a will, if decreed by a court of competent jurisdiction, establishes the facts: (1) that the instrument in question is the last will of the testator and that it was duly executed and published with all solemnities required by law; (2) that the testator at the time of executing the instrument, was of sound and disposing mind and memory, capable of understanding the act he was doing, and the relation in which he stood to the object of his bounty, and to the persons to whom the law would have given his property if he had died intestate; (3) that the instrument was executed without fear, fraud or undue influence by which his own intentions were controlled and supplanted by those of another; (4) that he executed the instrument *animo testandi,* with an understanding and purpose that it should be his last will and testament;[95] and (5) it is presumptive evidence of the death of the person whose will it purports to

91 Bou. Law Dict. 378; Pettit *v.* Black, 13 Neb. 142.

92 Rex *v.* Inhab. of Neatherseal, 4 T. R. (Eng.) 258.

93 Armstrong *v.* Lear, 12 Wheat. 175.

94 Willamette, etc., Co. *v.* Gordon, 6 Oreg. 175; Wood *v.* Matthews, 53 Ala. 1; Pitts *v.* Melser, 72 Ind., 469; Shumway *v.* Holbrook, 1 Pick. 114; Ochoa *v.* Miller, 59 Tex. 460; Pettit *v.* Black, 13 Neb. 142.

95 Barker *v.* Comins, 110 Mass. 477.

establish.[96] Such decree is generally regarded as in the nature of a judgment *in rem*,[97] and in the absence of statutory provisions, is conclusive as against all the world, as to the validity of the will,[98] and affirms the title of the beneficiary under it from the time of the testator's death, relating back so as to make valid whatever has been previously done, which, under the will, after probate, the beneficiary could lawfully have done.[99]

But, though probate establishes the sufficiency of the will, and confirms the claims of those holding under it so far as to make it evidence of title, it does not determine the title to the property, nor establish the validity of any devise given by it, the will having no greater effect after probate than other legal conveyances.[1]

§ 416. **Foreign Probate.** In order to entitle a devisee of lands under a will probated in a foreign jurisdiction, to deduce legal title to same in the courts of the State where the land is located, it is frequently necessary that the will be also probated in the local courts. This matter is governed by statute which generally provides that the copy of the will presented must be accompanied by a certificate of the foreign probate and duly authenticated, these together constituting the one instrument or subject-matter to be acted upon under the statute; and all are, as a rule, essential to authorize the probate court to exercise jurisdiction.[2] Whenever this ancillary probate is resorted to it is generally allowed as a matter of course and without inquiring into the validity of the will or

[96] Carroll *v.* Carroll, 6 Thomp. & C. (N. Y.) 294; Belden *v.* Meeker, 47 N. Y. 307.

[97] Hall *v.* Hall, 47 Ala. 290; Crippen *v* Dexter, 13 Gray (Mass.), 330; State *v.* McGlynn, 20 Cal. 233.

[98] Brock *v.* Frank, 5 Ala. 85; Janes *v.* Williams, 31 Ark. 175; Tucker *v.* Whitehead, 58 Miss. 762. *In re* Williams, 1 Lea (Tenn.), 529; Orr *v.* O'Brien, 55 Tex. 149.

[99] Stuphen *v.* Ellis, 35 Mich. 446; Allaire *v.* Allaire, 37 N. J. L. 312; Dublin *v.* Chadbourn, 16 Mass. 433.

[1] Fallon *v.* Chidester, 46 Iowa, 588; Greenwood *v.* Murray, 26 Minn. 259; Ware *v.* Wisner, 4 McCrary (C. Ct.), 66.

[2] Pope *v.* Cutler, 34 Mich. 150; Ward *v.* Oates, 43 Ala. 515.

the sufficiency of the proofs upon which the court granting the original probate acted, provided such original probate was granted by a court of competent jurisdiction and is properly authenticated.[8]

But even where ancillary probate is not required to establish a foreign will it may yet be essential to perfect title in the devisees. Thus, a creditor of a decedent is not required to go into a foreign jurisdiction to prove his claim. If such decedent leaves land in the State of the creditor's domicile it will be affected by the statutory lien of the debt and may be sold in satisfaction thereof. Hence, it may often become necessary or expedient to probate a foreign will for the sole purpose of extinguishing creditors' liens, and where the property under examination is valuable this course can never be safely omitted unless the statute has run against possible debts. In any event an attorney examining title should note the absence of ancillary probate of a foreign will and found such objections upon the fact as he may deem proper.

§ 417. **Abstract of Probate Proceedings.** It is estimated that about once in every twenty-five years all the real property in the country passes under the supervision of the probate courts, and whether the estimate be based on correct or incorrect data, it is certain that there are but few titles of twenty-five years' duration that do not show testamentary conveyances or descents. The records and proceedings of these courts, therefore, have a direct and important bearing on every title of long standing, and are among the muniments that go to give stability and security to the possession of the party asserting such title.

The ordinary proceedings of county and probate courts which have a direct influence upon land titles are: the probate of wills and issuance of letters testamentary and of administration; the inventory and collection of the effects of

[8] Brock *v.* Frank, 51 Ala. 89; Apperson *v.* Bolton, 29 Ark. 418; Newman *v.* Willetts, 52 Ill. 98; Russell *v.* Hart, 87 N. Y. 19; Markwell *v.* Thorne, 28 Wis. 548.

deceased persons; the proof of payment of debts and legacies; the assignment of dower and homesteads; the sale of lands by executors and administrators; the allowance, distribution and partition of the estates of deceased persons; and incidentally of proceedings relative to guardians and wards, adoption, etc. Sometimes the peculiar exigencies of the case may include all of the different matters just enumerated; again the desired end may be attained with a showing of but one or two. So, too, it will sometimes be necessary that a very full exemplification must be given of the matters presented and the action had thereon, while under other circumstances only a brief mention will be required. The matter will therefore rest, in a large measure, in the discretion of the examiner.

Upon the probate of wills, the abstract of the proceedings should show: the proof of the will;[4] the acceptance or renunciation of the trust by the executor; the issuance of letters testamentary,[5] and qualification of the executor; the inventory of real estate; the proof, allowance and payment of claims. This much is indispensable, but other steps and proceedings may often be profitably shown. The degree of detail to be observed must be governed in most respects by the judgment of the examiner in the absence of instructions from the client. A summary is presented by way of illustration, and which, perhaps, is full enough for ordinary cases:

[4] A transcript of the record of probate of a will devising lands, made before a proper tribunal, is competent evidence of title in an action of ejectment, if the record contains the proofs taken before the court, as required by the statute; and, if the proofs contained in the record show that the will was executed with all the formalities required by statute, the probate will be *prima facie* evidence, and will of itself be sufficient to establish title, if not overcome by counter proof: Allaire *v.* Allaire, 37 N. J. L. 312.

[5] The issuance of letters presumptively establishes the fact of death: Carroll *v.* Carroll, 6 Thomp. & C. (N. Y.) 294; Holmes *v.* Johnson, 42 Pa. St. 159; Pick *v.* Strong, 26 Minn. 303.

In the matter of the estate of William H. Black, deceased.

County Court, Kane county.
In Probate.
Case No. 3, in Box 153.[6]
Will of William H. Black.
Dated May 2, 1877.
Filed October 13, 1880.

Proven and admitted to record, January 28, 1881.

Recorded in Vol. 2, page 383.

Said testator disposes of his estate as follows:

Directs the payment of all his just debts and funeral expenses.

Devises to his executor (or his successor) his "home place," consisting of house and barn, and about two acres of land on the west side of Park Place, and running through to Tenth street, and lying between Forrest avenue and Grinnell street, in the city of Elgin, Kane county, Ills., in trust, to lease same or to sell same and apply income and proceeds for the use and comfort of his wife, Anna Black, during her natural life, and for the support and education of his son, Walter Black, and at the death of said wife, if undisposed of, to be transferred and conveyed to his son, Walter Black, if then living, or to his issue, if any, if he be not living, or to testator's heirs at law, if his said son shall be then dead, leaving no issue.

Gives and devises to his nephew, John Black, son of his brother, James Black, etc.

If it is desired to set out the entire will, which will seldom be necessary, the devises and bequests will follow here in narrative form. As the inquiry will rarely cover more than one specific tract, the particular devise which has reference to such tract is shown in detail, and general reference made to all others; as,

Devises to various other persons, certain real estate not now in question (or, *not covered by this examination*).

[6] This has reference to the depository of all the papers in the case.

Unless there are legacies which are charged upon the land, the personal bequests may be disregarded except the residuary clause which next follows:

Gives, devises and bequeaths all the rest and residue of his property, real and personal, including lapsed legacies and devises, unto his son, Walter Black, subject to the payment of the following annuities, to wit:

To his mother, etc., [set out the annuities].

Appoints his brother, James Black, sole executor and trustee, and in case of his death, declination, resignation or inability to act, directs that Clarence D. Perry act in his place, waiving security, and giving his executor full power to sell any part or parts of the real estate herein devised to his son Walter, at public or private sale, and to give good and sufficient deeds thereof to the purchaser or purchasers so that they shall not be answerable for the application of the purchase money, and in case of such sales the proceeds, after paying debts, legacies and annuities, to go to his son Walter as part of the residue of his said estate.

Three witnesses.

Renunciation of James Black of his appointment as executor and trustee, filed January 28, 1881.

Petition of Clarence D. Perry for proof of will and letters testamentary, filed January 29, 1881.

Said petition represents that William H. Black died testate May 27, 1880, leaving him surviving Anna Black, his widow, and Walter Black, his son, his only heir at law.

Sworn to Nov. 26, 1880,

Letters testamentary to Clarence D. Perry, issued, dated Jan'y 31, 1881. Recorded in Vol. 2, pg. 273.

Bond in sum of $80,000.00, security waived, filed and approved Jan'y 31, 1881. Recorded in Vol. 2, pg. 273.

Warrant to appraisers issued, dated January 31, 1881.

Appraisers' report filed and approved June 8, 1881, shows no property belonging to said estate subject to appraisement.

Appraisement of widow's award filed and approved June 8, 1881. Total value, $2,800.00.

Inventory filed and approved June 8, 1881. Recorded in Vol. 10, pg. 627.

Mentions real estate as follows:

Lots 19 and 20, Block 1, etc.

Proof of publication and posting of notices for adjudication filed July 12, 1881, approved in open court July 18, 1881.

Adjudication ordered July 18, 1881.

Sundry claims filed and allowed amounting to the sum of $5,042.30.

Continue in this manner, showing all important steps, until final settlement and discharge of executor. The synopsis should close with an abstract of the final order showing payment of the widow's award and of all proved debts.

CHAPTER XXIV.

LIENS, CHARGES, AND INCUMBRANCES.

§ 418. Liens generally.
419. How created.
420. Operation and effect.
421. Method of arrangement.
422. Mortgages.
423. Dower.
424. Judgments and executions.
425. Judicial and execution sales.
426. Lis pendens and attachment.
427. Decedent's debts.
428. Taxes.
§ 429. Municipal liens.
430. Official bonds.
431. Leases.
432. Vendor's liens.
433. Mechanic's liens.
434. Continued — Priority.
435. Estate to which the lien attaches.
436. Limitation of lien.
437. Assignability.
438. Foreclosure.

§ 418. **Liens Generally.** A lien is defined as a hold or charge which one person has upon the property of another as a security for some debt or charge,[1] and in its broad sense would cover all burdens, charges or incumbrances placed on land, including mortgages, judgments, taxes, etc., as well as common law and statutory liens, and liens arising by implication of law. In its more restricted signification it is used to denote certain preferred or privileged claims given by statute or arising by implication of law, and indicates a mere right to hold the property until the claim has been satisfied. Even in this latter sense, as it is now employed in conveyancing and the compilation of abstracts, its popular meaning confines it to certain classes enumerated by statute; as the lien of mechanics and material men, attachment, *lis pendens,* etc., and liens arising by operation of law, as decedent's debts, purchase money liens, etc.

Liens are also classified as legal and equitable. The latter,

[1] 2 Bou. Law Dict. 47

being generally unknown to the world, and frequently operating injuriously on the rights of creditors and purchasers, are never enforced except in cases where the right is clearly and distinctly made out.[2] The so-called "vendor's lien" is a conspicuous example of this class.

§ 419. **How Created.** Liens upon lands are created by the statute, to secure the payment of taxes, and other public debts; to protect estates raised out of or incident to the marriage relation; to effectuate the judgments of courts by allowing the land of the defendant to be taken in execution, as well as to anticipate such judgments by way of attachment and *lis pendens;* to secure the payment of debts of deceased persons, and to secure the wages of laborers and mechanics. They are also created by the direct act of the parties, as by leases, mortgages, etc., and arise in a number of cases by operation or implication of law, as to secure unpaid purchase money, etc., these latter being known as equitable liens. Intending purchasers are chargeable with notice of all statutory liens, the provisions of the statute having been substantially complied with, but will take the land, where the sale is made in good faith and for value, freed from the burden of equitable liens of which they had no notice.

§ 420. **Operation and Effect.** Unlike a conveyance, a lien, however created, confers no estate in, or title to, the property to which it attaches, and may be discharged at any time before foreclosure by the payment of the sum, or performance of the obligation, for which the property is held.

§ 421. **Method of Arrangement.** Liens, charges and incumbrances of every kind, with but one exception, are shown, not in the regular course of title, but in appendices to same, and, for better convenience, under classified heads. The exception is in case of mortgages, which, following the custom which prevailed when such instruments were conveyances of the legal estate, are shown in regular chronological order in

[2] Conover *v.* Warren, 1 Gilm. (Ill.) 498; see Walker *v.* Matthews, 58 Ill. 196.

the chain. This arrangement possesses many advantages over any other, the chief one being to preserve the symmetry of the title, which enables counsel to obtain a clearer view thereof than could possibly be obtained if the liens and charges were inserted in the chain in their order of time. An analysis of the abstract should always be prepared in every long examination, and the effect of liens, considered with reference to the fee, can more easily be determined by this arrangement on the compilation of such analysis than if they were allowed to interfere with the primary questions raised by the actual conveyances. These points will be more fully demonstrated in treating of "Opinions of Title."

§ 422. **Mortgages.** The ancient doctrine, by which mortgages were regarded as conveyances of the legal estate, no longer obtains in the United States, or at least but in a very modified form, while in a majority of the States they are regarded simply as liens on land to secure the payment of indebtedness.[3] Considered simply as liens, they might, before default or foreclosure, with propriety, be shown with other liens, and it is the custom of some examiners to follow this method of arrangement; after default and foreclosure they become essentially muniments of title, and must appear in the chain in regular chronological sequence. Mortgages followed by satisfaction are but dead matter, and when forming part of the chain are positive hindrances in passing the title; such mortgages might be shown in appendices under the head of "satisfied liens," the main object being simply to show a proper and legal release.

§ 423. **Dower.** The inchoate right of dower, during the lifetime of the husband, is at least a cloud upon the title in the hands of the husband's alienee, which, in the event of his death before that of the wife, develops into a positive charge

[3] See Chap XXI, Odell *v.* Montross, 68 N. Y. 499; Gorham *v.* Arnold, 22 Mich. 247; White *v.* Rittenmeyer, 30 Iowa, 268; Vason *v.* Ball, 56 Ga. 268; Fletcher *v.* Holmes, 32 Ind. 497; Carpenter *v.* Bowen, 42 Miss. 28; Woods *v.* Hildebrand, 46 Mo. 284; Actor *v.* Hoyt, 5 Wend. 602; Parsons *v.* Noggle, 23 Minn. 328.

upon the land.[4] In the first event it is hardly a lien, while in the latter it is more than a lien, but in both instances it will appear only inferentially, and can not be shown affirmatively in the abstract.

§ 424. **Judgments and Executions.** Judgments, from the time of their rendition, and executions, from the period of issuance or levy, create statutory liens, which necessitate a full exposition in the abstract. The subject is reserved for ample treatment in a subsequent chapter.

§ 425. **Judicial and Execution Sales.** The purchaser of lands sold on execution acquires by his purchase no more than a lien upon the lands for the amount of his bid, and interest during the period, if any, allowed for redemption. He does not obtain the legal title; and if the lands are subject to a mortgage, he does not become the owner of the equity of redemption until after the expiration of the period allowed for redemption from the execution sale.[5]

§ 426. **Lis Pendens and Attachment.** A pending suit involving title conveys notice to intending purchasers, and charges the land, in whosesoever hands it may be, with the consequences of whatever decree may be made, while an attachment reserves the land to satisfy any judgment that may be rendered in the suit and creates a lien in favor of such judgment in advance of its rendition. The attachment is a lien from the time of the levy,[6] but in the case of land this means the filing of the certificate in the office of the recorder of deeds.[7]

§ 427. **Decedent's Debts.** The debts of a deceased person are a lien upon the lands of such decedent in the hands of his heirs or devisees, and the lien continues until paid or barred by the statute. If the heir aliens the lands, the alienee

[4] An inchoate right of dower outstanding is a defect in the title, and an incumbrance upon the estate: Wright *v.* Young, 6 Wis. 127.

[5] Vaughan *v.* Ely, 4 Barb. 159; Farmers Bank of Saratoga *v.* Merchant, 13 How. (N. Y.) 10.

[6] Martin *v.* Dryden, 1 Gilm. (Ill.) 187.

[7] Hall *v.* Gould, 79 Ill. 16.

holds them subject to this lien, and his title may be defeated by a subsequent sale by the administrator.[8]

§ 428. **Taxes.** The lien of the State for taxes attaches to all lands subject to taxation on some day stated, usually the first day of May of each year, and every person owning land, on that day is liable for the taxes due thereon for the year.[9] They take priority of all other liens under the principles applicable to the prerogatives of sovereignty.[10] The subject will be discussed further on.

§ 429. **Municipal Liens.** Liens may be created upon the lands of individuals and corporations by ordinances of cities for municipal expenses; lighting, cleaning or repairing streets; public improvements, etc. All questions relative to the effect of municipal ordinances considered as liens, are local and statutory.

§ 430. **Official Bonds.** A peculiar class of liens arises in many States from official bonds, which are declared to be liens on all the real estate held jointly or severally by the officers giving same, and their sureties, from the time of filing the bonds until such officers shall have been honorably discharged from their trusts. These bonds are most frequently required from collectors of taxes, and it would seem, that where any of the parties vendors named in the abstract, during the period in which an action may be brought on an official bond, have held this position, or have been a surety for any such officer, an examination should be made for liens of this nature. As the bonds are required to be filed or recorded in some of the designated public offices of the county, the files or records should be regularly inspected as often as occasion may require, and references obtained to the information thereby disclosed. The indices to the information thus obtained may consist of special volumes, but a better way is to post same in the "ir-

8 Vansyckle *v.* Richardson, 13 Ill. 171; Hill *v.* Treat, 67 Me. 501; and see Rosenthal *v.* Renick, 44 Ill. 202.

9 Almy *v.* Hunt, 48 Ill. 45. The date of the commencement of the lien has reference to the day on which the citizen is compelled to list his land for taxation.

10 Dunlap *v.* Gallatin Co., 15 Ill. 7; Dennis *v.* Maynard, 15 Ill. 477.

regular" index where the names of the bounden individuals will always be found when compiling the chain. Usually where a bond has the effect of a lien, the principal and his sureties are entitled to have a discharge entered whenever the operation of the bond has ceased, and where the obligation is discharged, by proper entries, it may be disregarded in making up the abstract. Where the bond is apparently a subsisting lien, it must be shown in the same manner as other liens. In abstracting these bonds, the general form already given may be followed, the essential particulars being the parties, penalty and condition of the obligation, which should be fully stated.[11] It has been held that the statutory lien created by giving an official bond does not in any way affect the homestead of the person giving same,[12] but with this exception, it attaches to all the real estate then owned by the obligor or his sureties, and also, as in the case of a judgment, to all after acquired lands.[13]

§ 431. **Leases.** A subsisting lease is rather in the nature of a charge or incumbrance on the fee than a lien. It confers a right of possession, according to its import, to the exclusion of the owner of the fee or reversion. Considered in this light and it can be viewed in no other, it does not properly come within the chain of title, but is appended to it, and should be shown in the abstract after the course of title has been traced. When exhibited in its proper order of time as a part of the chain it may, perhaps, be more readily considered with respect to its effect on subsequent conveyances, but it is the experience of the writer that correct estimates of title are more easily and correctly arrived at by keeping the fee disassociated from all minor estates. The better plan, therefore, seems to be to show leases among the appendices. Should the term extend over a long period of time, with numerous assignments

11 As to the nature, effect and construction of official bonds, considered in their relation to real estate, consult Richeson *v.* Crawford, 94 Ill. 165; and Crawford *v.* Richeson, 101 Ill. 351.

12 Trustees of School *v.* Hovey, 94 Ill. 394.

13 Crawford *v.* Richeson, 101 Ill. 351.

or transfers of any interest less than the term, the leasehold should be traced in a separate chain, with proper subheadings indicating the purport of the search.

§ 432. **Vendor's Liens.** Where there is an express reservation made in a deed of the lien of the vendor, this is equivalent to a mortgage taken for the purchase money contemporaneously with the deed. In fact the purchaser is practically in the same condition as if he had received a deed and given a mortgage for the purchase money, and he has the right to redeem.[14]

But in addition to this form there is a recognized lien of the vendor for unpaid purchase money which is not based upon contract; nor is it an equitable mortgage or resulting trust, but an equity which is raised and administered by the courts, who enforce or deny it as the merits of each particular case may seem to demand. It is never allowed to override or take priority of equities or rights of third persons, which have attached in ignorance of such vendor's equity, and is not in this respect like a mortgage, or any other lien created by express contract, or even by statute.[15] Under the application of this doctrine a purchaser is not, in equity, the owner adversely to the lien of his vendor, but is treated as a trustee for him until the purchase money is paid. The vendor's lien exists against such purchaser, and against volunteers and purchasers under him with notice of his having an equitable title only,[16] or with notice of the vendor's equitable lien.[17] A vendor's lien, of the character now under consideration, is personal in its nature[18] and is raised by construction of equity

14 King *v.* Y. M. Assn., 1 Woods, 386; Smith *v.* Rowland, 13 Kan. 245; Carpenter *v.* Mitchell, 54 Ill. 126.

15 Allen *v.* Loring, 34 Iowa, 499; Swan *v.* Benson, 31 Ark, 728; Moody *v.* Fislar, 55 Ind. 592; Moshier *v.* Meek, 80 Ill. 79.

16 Walton *v.* Hargroves, 42 Miss. 18; Burch *v.* Carter, 44 Ala. 115; Swan *v.* Benson, 31 Ark. 728; Harshbarger *v.* Foreman, 81 Ill. 364; Madden *v.* Barnes, 45 Wis. 135.

17 Graves *v.* Coutant, 31 N. J. Eq. 763; Wilson *v.* Lyon, 51 Ill. 166.

18 Jones *v.* Doss, 27 Ark. 518; Bowlin *v.* Pearson, 4 Baxter (Tenn.), 341.

in favor of the vendor only.[19] It is not a matter of sale and can not be assigned, even by express language, with the note taken for the purchase money,[20] and an assignment of the notes will, as a rule, extinguish the lien,[21] as will also the taking of a distinct and independent security.[22]

Inasmuch as a vendor's lien, as just described, is secret, unknown to the world, and often productive of harm, it will not be extended beyond the requirements of the settled principles of equity, and such liens are not encouraged by the courts.[23] It is not apparent on perusal of the abstract, and will not affect a purchaser for value and without notice.

§ 433. **Mechanic's Liens.** A mechanic's lien is the creature of statute, and depends for its validity solely upon the act creating it. The act itself is an innovation upon the common law affecting property and rights of property, as it authorizes land to be incumbered without or against the consent of the owner, and without a resort to legal process or judicial action. Such an act can not be extended in its operation and effect beyond the fair and reasonable import of the words used, and whoever asserts the lien must bring himself within its terms, and the lien must be shown, not only to have been regular and valid in its inception, but to be a continuing and existing lien under the statute.[24] The design of the law is to protect the mechanic, laborer, and material man to the extent of services performed or materials furnished. The lien is absolute to the extent of the owner's interest in the land affected, and can not be divested by a sale or transfer of same

19 Lindsey *v.* Bates, 42 Miss. 397; Small *v.* Stagg, 95 Ill. 39.

20 Hect *v.* Spears, 27 Ark. 229; Markoe *v.* Andras, 67 Ill. 34. But see *contra*, Bill *v.* Mason, 42 Iowa, 330.

21 Pillow *v.* Helm, 7 Baxter (Tenn.), 545; Hightower *v.* Rigsby, 56 Ala. 126; Bonnell *v.* Holt, 89 Ill. 71.

22 Anderson *v.* Donnell, 66 Ind. 150; Stuart *v.* Harrison, 52 Iowa, 511; Neal *v.* Speigle, 33 Ark. 63; Stevens *v.* Rainwater, 4 Mo. App. 292; Cowl *v.* Varnum, 37 Ill. 181.

23 Cowl *v.* Varnum, 37 Ill. 181, Doolittle *v.* Jenkins, 55 Ill. 400.

24 Mushlitt *v.* Silverman, 50 N. Y. 360; Dinkins *v.* Bowers, 49 Miss. 219; Rothgerber *v.* Dupy, 64 Ill. 452.

after the commencement of performance of the contract.[25] For this latter reason it is always well to call the attention of prospective purchasers to the fact of possible liens not shown of record. A suggestion of this kind will be found in the remarks on opinions of title.

§ 434. **Continued — Priority.** Being dependent on the statute for their force and extent, no general rule can be asserted in regard to the priority of mechanic's liens. They usually take precedence of mortgages given after the commencement of the work, but as between mechanics there can be no priority.[26] Where, however, a mortgage or other lien takes effect after the commencement of one or more mechanic's liens, but before the commencement of others, the latter must be postponed to the mortgage lien.[27] As between a lien upon an equitable interest and one upon a full legal title, the latter, though subsequent in time, may be preferred to the former, if the holder thereof be an innocent holder without notice.[28] Mechanics and laborers asserting a lien upon real property for their work, and claiming priority over mortgagees and others who have acquired interests in the property, must furnish strict proof of all that is essential to the lien,[29] but of what these essentials consist, local law must decide. In abstracting the petition, notice, or other preliminary measure, the examiner will consult the statute and observe that all its material requirements are complied with.

§ 435. **Estate to Which the Lien Attaches.** To render the lien effective, and afford protection to the artificer in every possible case, it is permitted by statute to attach to an estate in fee, for life, for years, or any other estate, or any right of redemption or other interest which such owner may have in

25 Mehan *v.* Williams, 2 Daly (N. Y.), 367; Dunklee *v.* Crane, 103 Mass. 470; Thielman *v.* Carr, 75 Ill. 385.

26 *In re* Hoyt, 3 Biss. 436; Thielman *v.* Carr, 75 Ill. 385; Powder Co. *v.* Loomis, 2 Disney (Ohio), 544.

27 Powder Co. *v.* Loomis, 2 Disnay (Ohio), 544; Williams *v.* Chapman, 17 Ill. 423.

28 Jones *v.* Lapham, 15 Kans. 540.

29 Davis *v.* Alvord, 94 U. S. 545.

the land at the time of making the contract, and whatever right or estate such owner had at that time may be sold in satisfaction of the lien.[30] But the lien affects only the title of the person contracting,[31] and where such person possesses only an equity, the legal title is not impaired.[32] It can not extend to affect or impair the right of dower; [33] nor the estate or title of an infant; [34] nor the title to the fee or reversion, when the contracting party is only a tenant for life or years; [35] nor the property of a third party in the temporary use of another;[36] nor the separate property of a married woman, where the contract is made without her knowledge;[37] nor will it extend against the property of the State.[38] The lien extends to the property of a decedent, and may be enforced against the land in possession of the heirs, but, it seems, can not be made a personal liability against them.[39]

§ 436. **Limitation of Lien.** It is difficult to formulate a statutory rule that shall be of general application, and particularly in so technical a matter as mechanic's liens. In many States they are subject to constant legislative tinkering and continual change, with the result that even the judicial decisions of such States are unreliable guides.

30 Kidder *v.* Aholtz, 36 Ill. 478; Donaldson *v.* Holmes, 23 Ill. 85.

31 Hickox *v.* Greenwood, 94 Ill. 266.

32 McCarty *v.* Carter, 49 Ill. 53; Hickox *v.* Greenwood, 94 Ill. 266; Craig *v.* Swinerton, 15 N. Y. Sup. Ct. 144; Hayes *v.* Fessenden, 106 Mass. 228; Hallahan *v.* Herbert, 11 Abb. (N. Y.) Pr. (N. S.) 326; Knapp *v.* Brown, 45 N. Y. 207.

33 Grove *v.* Cather, 23 Ill. 634.

34 McCarthy *v.* Carter, 49 Ill. 53.

35 Knapp *v.* Brown, 45 N. Y. 207; McCarty *v.* Carter, 49 Ill. 53; Francis *v.* Sayles, 101 Mass. 435; and this even though the lessee is bound to make improvements and leave them on the premises at the expiration of the term: Knapp *v.* Brown, 45 N. Y. 207.

36 Tracy *v.* Rogers, 69 Ill. 662; Thaxter *v.* Williams, 14 Pick. 49.

37 Flannery *v.* Rohrmayer, 46 Conn. 558. Otherwise where such married woman had personal knowledge of the work, or gave directions concerning it: Collins *v.* Megraw, 47 Mo. 495; or the materials were furnished at her request, or had her approval: Greenleaf *v.* Bebee, 80 Ill. 520.

38 Thomas *v.* Industrial University, 71 Ill. 310; Ripley *v.* Gage Co., 3 Neb. 397; Panola Co. Sup. *v.* Gillen, 59 Miss. 198.

39 McGrew *v.* McCarty, 78 Ind. 496.

No lien is given in any of the States unless steps are taken to secure and perfect it within a specified period, usually six months or one year from the time of the last charge for performance of work or furnishing of materials, and in some States there is a special limitation with respect to the commencement of the work; as, when the contract is expressed, no lien is created if the time stipulated for the completion of the work is beyond three years from the commencement thereof, or the time of payment beyond one year from the time stipulated for such completion. Where the contract is implied, no lien is given unless the work shall have been done or the materials furnished within one year from the commencement of the work or delivery of materials. The petition for the enforcement of this lien must state everything necessary to show a due compliance with the statute,[40] and such parts as specifically relate to the demand; the contract upon which it is founded; the dates of performance; the amount due; and the specific property which is sought to be incumbered, together with other material facts in relation thereto, must be shown carefully and in detail, that counsel may see from inspection whether all of the conditions necessary to create the lien are shown to exist and all statutory requisites have been complied with. Unless the petition shows on its face a contract within the statute, no lien will result.[41]

§ 437. **Assignability.** The lien given by the statutes is, in general, a personal right given to the mechanic, material man or laborer for his own protection, and the right can not be assigned or transferred to another,[42] unless the assignment is made for the benefit of the assignor, and to be held as his

40 Mushlitt *v.* Silverman, 50 N. Y. 360; Dinkins *v.* Bowers, 49 Miss. 219; Rothgerber *v.* Dupy, 64 Ill. 452; Davis *v.* Alvord, 94 U. S. 545; Valentine *v.* Rawson, 57 Iowa, 179; Conroy *v.* Perry, 26 Kansas, 472; Rugg *v.* Hoover, 28 Minn. 404.

41 McClurken *v.* Logan, 23 Ill. 79; Rowley *v.* James, 31 Ill. 298; Valentine *v.* Rawson, 57 Iowa, 179; and see Hammond v. Wells, 45 Mich. 11; Treusch *v.* Shryock, 55 Md. 330.

42 Caldwell *v.* Laminer, 10 Wis. 332; Pearsons *v.* Tincker, 36 Me. 384.

agent, so that the lien may be preserved.[43] In some States the lien, while not assignable, will pass as an incident to the debt.[44]

§ 438. **Foreclosure of Lien.** The lien given by statute is not susceptible of immediate enforcement, but must be prosecuted by action of an equitable nature, and where the lien is finally satisfied by sale under a decree, all the intermediate steps should be succinctly stated so as to show a complete divesture of title under the statute. In many of the States a right of redemption does not follow a sale under a decree to satisfy a mechanic's lien, and as the proceedings, in this respect, are of a summary nature, it is essential that in all such instances more than ordinary care be taken in preparing the synopsis.

[43] Rollin *v.* Cross, 45 N. Y. 766. Local statutes may introduce a different rule, but the text states the general doctrine.

[44] Brown *v.* Smith, 55 Iowa, 31.

CHAPTER XXV.

LIS PENDENS AND ATTACHMENT.

§ 439. Doctrine of *lis pendens*.
440. Requisites of *lis pendens*.
441. Effect of dismissal.
442. Notice *lis pendens*.
§ 443. Property drawn incidentally in question.
444. Attachment.
445. Formal requisites of attachments.

§ 439. **Doctrine of Lis Pendens.** It is a rule in equity, long established and acted on, that a purchase of property actually in litigation, or, as the technical phrase runs, a purchase *pendente lite,* although for a valuable consideration and without any actual notice, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree rendered in the suit. "This rule is said to rest," observes Earl, C., "upon the presumption that every man is attentive to what passes in the courts of justice of the State or sovereignty where he resides, and to be founded on public policy; for otherwise alienations and transfers of title made during the pendency of a suit might defeat its whole purpose, and there would be no end to litigation."[1] "A suit in chancery," says Depere, J.,[2] "duly prosecuted in good faith, and followed by a decree, is constructive notice to every person who acquires from a defendant *pendente lite,* an interest in the subject-matter of the litigation, of the legal and equitable rights of the plaintiff as charged in the bill and established by the decree. This effect of a successful litigation in subordinating the title of a purchaser pending a litigation,

[1] Leitch *v.* Wells, 48 N. Y. 585; Story's Eq. Jur. § 405; Jackson *v.* Andrews, 7 Wend. 152; Hayden *v.* Bucklin, 9 Paige, 572; Green *v.* Slater, 4 Johns Ch. 38; Hopkins *v.* McLaren, 4 Cow. 667; Miller *v.* Sherry, 2 Wall. (U. S.) 237; Jackson *v.* Warren, 32 Ill. 331.

[2] Green *v.* Slayter, 4 Johns. Ch. 38.

to the rights of the plaintiff as established in the suit, is not derived from legislation. It is a doctrine of courts of equity of ancient origin and rests not upon the principles of the court with regard to notice, but on the ground that it is necessary to the administration of justice that the decision of the court in a suit should be binding not only on the litigant parties, but also upon those who acquire the title from them during the pendency of the suit. Such a purchaser need not be made a party, and will be bound by the decree which shall be made."[3]

The doctrine of *lis pendens* applies only where a third person attempts to intrude into a controversy by acquiring an interest in the subject-matter of the litigation, and the reason of the rule is, that if a transfer of interest pending a suit were to be allowed to affect the proceedings, there would be no end to litigation; for as soon as a new party was brought in, he might transfer to another, and render it necessary to bring that other before the court, so that a suit might be interminable.[4] It will be understood, however, that the rule, that a party purchasing *pendente lite* is to be regarded as a purchaser with notice, subject to all the equities of the person under whom he claims, and bound by the decree that may be rendered against the person from whom he derives title, applies only to cases in which such purchaser derives title from one of the parties litigant. If he claims adversely to both parties by title paramount, the proceedings to which he is neither party nor privy can not bind him.[5]

§ 440. **Requisites of Lis Pendens.** In applying the doctrine of *lis pendens* three facts are always necessary for its maintenance. The property involved must be of such a character as to be subject to the rule; the court must have jurisdiction, both of the parties and the subject-matter of the suit,

[3] Haughwout *v.* Murphy, 7 C. E. Green (N. J.), 531; 2 Story's Eq. Jur., § 908; Murry *v.* Lyburn, 2 Johns. Ch. 444; Dickson *v.* Todd, 43 Ill. 405; Alwood *v.* Mansfield, 59 Ill. 496.

[4] Murry *v.* Lyburn, 2 Johns. Ch. 444.

[5] Allen *v.* Morris, 34 N. J. L. 159; Scarlett *v* Gorham, 28 Ill. 319; Herrington *v.* Herrington, 27 Mo. 560; Parsons *v.* Hoyt, 44 Iowa, 154.

or thing in controversy; and the thing, or property involved, must be sufficiently described.[6] That is, the property must be so pointed out in the proceedings as to warn the public that they intermeddle at their peril; and anyone reading the bill must be able to learn thereby what property is intended to be made the subject of the litigation.[7]

§ 441. **Effect of Dismissal.** Where a suit at law is dismissed, or the plaintiff suffers a non-suit, or, if in chancery, the bill is dismissed for want of prosecution, or for any other cause not reaching the merits, although in all such cases a new action can be brought, such action will not, it seems, affect a purchaser during the pendency of the first suit; and where a suit is dismissed and afterward reinstated, the doctrine of *lis pendens* is not applicable to one who purchases after the dismissal and before the revival of the suit.[8]

§ 442. **Notice of Lis Pendens.** This common law rule of requiring purchasers, at their peril, to take notice of the pendency of suits in courts of justice for the recovery of the property they are about to purchase, although it is really impossible that they should actually know that such suits have been commenced, has always been considered a hard rule, and is by no means a favorite with the courts.[9] It has always been considered a very harsh rule in its application to *bona fide* purchasers for value, and has only been tolerated by learned judges from a supposed necessity.

In the absence of statutory provisions to the contrary, the bill or complaint is itself a sufficient notice to the world, so as to defeat the transfer of property by the defendant, made subsequent to its filing;[10] but in a large number of the States, particularly where the N. Y. code has been followed, a material

6 Norris *v.* Ile, 152 Ill. 190; Leavell *v.* Poore, 91 Ky. 321.

7 Miller *v.* Sherry, 2 Wall (U. S.) 237; Badger *v.* Daniel, 77 N. C. 251; Brown *v.* Goodwin, 75 N. Y. 409.

8 Herrington *v.* McCollum, 73 Ill 476.

9 Hayden *v.* Bucklin, 9 Paige, 572.

10 Parkinson *v.* Trousdale, 3 Scam (Ill.) 367; Vanzant *v.* Vanzant, 23 Ill. 536; Davis *v.* Life Ins. Co., 84 Ill. 508.

change has been made in this rigorous rule, which provides that the pendency of a suit shall not be notice to a stranger until a notice of *lis pendens* has been filed in the office of the recorder of deeds, or clerk's office, of the county where the land is situated, and that as to one having no actual notice, he may, in good faith, and for a valuable consideration, acquire a valid title until such notice is filed.[11] The *lis pendens* in this case would take effect as constructive notice in the same manner as attachments.

Where the suit is pending, and before the bill or complaint has been filed, the notice *lis pendens* will best be shown by way of appendix, the same as attachments, but, where the abstract gives a synopsis of the proceedings then had, its orderly arrangement would be to precede the synopsis. After decree it appears only as an unimportant incident and is merely alluded to in making the chain. The form and substance of the notice, as well as the validity and effect of same, are matters of local practice and construction, but the following will serve as an example in abstracting:

Circuit Court for Kenosha County.

John Doe
agst.
Richard Roe.

Notice Lis Pendens.
Dated March 1, 1883.
Recorded March 2, 1883.
Vol. 25, page 500.

Recites that an action entitled as above, has been commenced in the above named court, and is now pending therein, on complaint of above named plaintiff against above named defendant, for [here set out the object of the action as stated; as, *"the foreclosure of a mortgage, dated June 10, 1880, executed by said Richard Roe to said John Doe, and recorded in volume 10, page 85, and conveying the following described lands, to wit:"* here set out the description as stated].

11 See N. Y. Code, § 132. This section has been very generally re-enacted in all States having a code practice.

The practical purpose of a notice of pendency of suit is to restrain strangers from acquiring interests in the subject-matter of the litigation during the progress of the suit. It is practically without effect as to persons whose rights existed prior to the filing, nor does it protect the plaintiff in the suit against pre-existing equities.[12]

§ 443. **Property Drawn Incidentally in Question.** Where the rule of *lis pendens* in its original form is still retained, the authorities are generally unanimous in declaring it to apply only, first, where the litigation is about some specific thing which must be necessarily affected by the termination of the suit; and, secondly, where the specific property is pointed out by the proceedings in such a manner as to warn the whole world that they meddle with it at their own peril.[13]

Under the application of these principles, it has been held by an almost invariable uniformity in the decisions on the subject, that the rule does not apply to proceedings in suits which are *in personam*.[14] But the principle involved may be invoked in those suits which, while in form *in personam* are, in fact, suits *in rem*. Thus, the question arises frequently in suits for divorce in which the wife seeks to have a certain subsistence secured to her out of the estate of her husband, and while the general prayer is not sufficient to subject the property of the husband to the application of the rule, it yet seems that where specific property is incidentally drawn in question, either by recitals of the bill or orders of the court, such a *lis pendens* is created as will bind a purchaser *pendente lite*.[15]

§ 444. **Attachment.** The office of an attachment is simply to secure to a creditor the property which a debtor has at the time the writ is levied so that it may be seized and sold in

12 Baker *v.* Bartlett, 18 Mont. 446; Warnock *v.* Harlow, 96 Cal. 298; Parks *v.* Jackson, 11 Wend. (N. Y.) 442.

13 Freeman on Judg't, 196; Green *v.* Slayter, 4 Johns. Ch. 38; Miller *v.* Sherry, 2 Wall. (U. S.) 237; Norris *v.* Ile, 152 Ill. 190.

14 1 Story Eq. Jr., § 196, Almond *v.* Almond, 4 Rand. 662; Brightman *v.* Brightman, 1 R. I. 112.

15 Isler *v.* Brown, 66 N. C. 556; Daniel *v.* Hodges, 87 N. C. 95.

satisfaction of the debt, after judgment and execution shall have been obtained.[16] It creates no estate in favor of the person at whose instance the writ issued,[17] and does not change or alter the estate of the defendant debtor.[18] It places no impediment on the power of alienation,[19] nor will it affect prior *bona fide* liens that may have been placed upon the land.[20] It does create, however, a lien, which nothing but the dissolution of the attachment can destroy,[21] and every person into whose hands the property may subsequently come, takes it charged with this lien, and subject to all the rights of the attaching creditor to have the property seized and sold on execution for the satisfaction of his debt.[22] An attachment can operate only upon the right of the debtor existing at the time the writ was levied and no interest subsequently acquired by the debtor can in any manner be affected by the return thereof, provided he was without title at the time the attachment was made.[23] Being in derogation of the common law, an attachment is dependent entirely upon the statute for its validity and effect, and must conform to statutory requirements in all essential particulars.[24]

§ 445. **Formal Requisites of Attachment.** Though the remedy by attachment is purely statutory, and while there exists in many particulars a wide dissimilarity between the attachment acts of the several States, there is yet a marked uniformity in the general steps that must be pursued to render it available, and its effect in all the States is nearly identical. The suit is instituted by the filing of a statutory affidavit, whereupon a writ is issued. This is followed by a levy, which,

16 Crocker *v.* Pierce, 31 Me. 177.

17 Goddard *v.* Perkins, 9 N. H. 488; Foulks *v.* Pegg, 6 Nev. 136.

18 Bigelow *v.* Wilson, 1 Pick. 485; Blake *v.* Shaw, 7 Mass. 505; Merrick *v.* Hutt, 15 Ark. 331.

19 Warner *v.* Everett, 7 B. Mon. (Ky.) 262.

20 Husbands *v.* Jones, 9 Bush (Ky.) 218.

21 Smith *v.* Bradstreet, 16 Pick. 264; Hannahs *v.* Felt, 15 Iowa, 141.

22 Randolph *v.* Carlton, 8 Ala. 606.

23 Crocker *v.* Pierce, 31 Me. 177.

24 May *v.* Baker, 15 Ill. 89; Haywood *v.* Collins, 60 Ill. 328.

in the case of land, must, of necessity, be a paper levy. The levy is initiated by an endorsement of the fact upon the writ, and perfected by the return thereof, while notice is afforded by the filing of a certificate of levy with the recorder of deeds. Until such certificate has been filed the attachment does not become effective as to third persons without notice.[25]

In preparing the abstract the certificate of levy would probably be all that is required to furnish a notice *lis pendens,* but in practice it is customary also to show a brief synopsis of the court proceedings, and this is the better method, as counsel not infrequently desires same as a reference or index, as well as to see that the formal steps have been properly taken. Neither in this, nor in other cases where court proceedings are shown, is it customary to give more than brief references, or statements of steps taken, and where greater detail is desired it is obtained by a transcript of the record and papers, or by personal inspection of the files. An abstract entry of an attachment showing the court proceedings and sheriff's certificate of levy is appended and will illustrate the method just described:

Liens and Lis Pendens.[26]

In Superior Court of Cook County, Ills.

William R. Smith
vs.
John Savage.

Case No. 89,928.
Attachment.
Affidavit and bond filed, and writ issued May 23, 1881.

Returned levied May 23, 1881, upon all the right, title and interest of above-named defendant in and to the following described real estate, to wit: [Here set out the property as returned.]

No personal service. Notice by publication. (Cause pending.)

25 Groves *v.* Webber, 72 Ill. 606.

26 This is the sub-head under which matters of the kind now under consideration should be shown.

John Savage	*Certificate of levy.*
adv.	*Recorded May 26, 1881.*
William R. Smith.	*Book 500, page 210.*

O. L. Mann, Sheriff of Cook County, Ill. (by Deputy), certifies, that by virtue of a writ of attachment numbered 78,928, to him directed from the Superior Court of Cook County, Ill., in favor of William R. Smith, plaintiff, and against John Savage, defendant, dated May 23, 1881, he did on "this" 23d day of May, 1881, levy on the right, title and interest of said defendant in and to the following described real estate, to wit: [Here follows the description.]

Where the action is duly prosecuted and is followed by judgment, execution and sale, the attachment may be indicated only by references to the issue, levy and return of the writ, and filing of certificate, the validity of the sale depending upon the judgment and execution; but where, as in the above example, no personal service has been had, and the notice is constructive merely, the notice, proof of publication, and other acts necessary to confer jurisdiction must appear. The only object of the entries as above is to show the fact of a lien. Where the attachment has been dissolved or the action discontinued, a continuation of the abstract should disclose those facts so as to show the removal of the lien.

CHAPTER XXVI.

JUDGMENTS AND DECREES.

§ 446. Defined and distinguished.
447. Operation and effect of judgments.
448. Lien of judgments.
449. Territorial extent of lien.
450. Duration of lien.
451. Priority.
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§ 446. **Judgments and Decrees — Defined and Distinguished.** Any distinction between judgments and decrees is rather fanciful than real, since all adjudications by a court of competent jurisdiction are essentially judgments, yet in practice the term "decree" is used to distinguish the determinations and orders of a court of equity, while the term judgment is generally employed to denote the adjudications of a law tribunal. Judgments are usually for damages, and provide for a definite recovery in money; decrees contemplate some method of affirmative relief or operate in some specific way in answer to the prayer of the complaint.

In examinations of title, judgments *in personam* are important only as they serve to incumber the land of the judgment debtor with a statutory lien, and when the lien has been extinguished, either by lapse of time or satisfaction of the

judgment, they become of no importance whatever and are wholly disregarded. Decrees, on the other hand, operating directly upon the land, are of controlling and continuing efficacy. They become a part of the general course of title, and through whatever mutations it may afterwards pass they always remain essential links of the chain.[1]

§ 447. **Operation and Effect of Judgments.** It is a general rule, that a judgment by a court having jurisdiction over the parties and the subject-matter, rendered directly upon the point in question, is conclusive as between such parties and in relation to such point,[2] and there is no essential difference between the effect of a decree in equity, and that of a judgment at law to bar a subsequent suit.[3] But such adjudication is conclusive only for the purposes for which it was made, and does not conclude matters collaterally introduced or recited.[4]

It is, however, in regard to their effect on the lands of the judgment debtor, by reason of the lien given by the statute, that they become at all important in examinations of title; and in pursuing such examinations whatever other operation or effect they may have is comparatively of no significance. This, of course, has reference only to judgments *in personam*, and not to judgments in legal actions which operate *in rem*.[5]

§ 448. **Lien of Judgments.** Judgment liens on real es-

1 The Codes of Procedure, adopted in many of the States, do not recognize the distinction made in the above paragraph. Under these codes all final determinations of the rights of the parties in the action are classed as judgments, without reference to the subject-matter, or the character of the relief granted. In these codes the word "decree" is not used, but the term "judgment" is substituted in its place, as regards actions both of an equitable and a legal nature. In practice, however, both by the bench and bar, the term is used and in the sense above indicated.

2 Geary *v.* Simmons, 39 Cal. 224; Spencer *v.* Dearth, 43 Vt. 98; Gates *v.* Preston, 41 N. Y. 113; Finney *v.* Boyd, 26 Wis. 366; Russell *v.* Place, 94 U. S. 606.

3 Foster *v.* The Richard Busteed, 100 Mass. 409.

4 Fish *v.* Lightner, 44 Mo. 268; Land *v.* Keirn, 52 Miss. 341; Eastman *v.* Porter, 14 Wis. 39.

5 As judgments in ejectment, which, while they may purport to confer only the right of possession are yet conclusive as to title.

tate are wholly statutory. The lien attaches and becomes effective only by force of the statute, and only in the mode, at the time, and upon the conditions and limitations imposed by it. It receives no vigor or even aid from the common law, to which it was unknown. At common law, the judgment creditor could have satisfaction only out of the goods and chattels and present profits of the lands of the debtor, but under the statute it is the policy of the law to make all of a man's property, real as well as personal, liable for the payment of his debts, both during his life and after his death, except in cases of specified statutory exemptions; and a conveyance of land by a judgment debtor, for a valuable consideration, after a judgment has become a lien thereon, and pending an appeal, will not defeat the lien of the judgment. In such case the grantee takes title subject to the lien, and a sale and deed made on execution under such judgment will pass title, unaffected by the conveyance.[6]

Where the abstract shows a judgment duly rendered against any of the parties in interest from which an appeal has been taken, notwithstanding that a bond has been given, such judgment should be noted as a defect of title. The appeal does not vacate the judgment nor destroy its lien. Its only effect is to operate as a stay of proceedings for enforcement during the pendency of the appeal,[7] and in case the judgment is affirmed it has practically the same force and effect as though no appeal had been taken.[8]

In general, personal property must first be taken upon legal process, and it is a universal rule that this is the primary fund for payment of debts, after the death of the debtor.[9]

A judgment lien on land constitutes no property in the land itself,[10] for the lien is but an incident, not the object of the judgment, and the judgment creditor is not entitled to any advantage which his debtor had not.[11] Such lien is subject

6 Dobbins *v* Wilson, 107 Ill. 17.
7 Oakes *v.* Williams, 107 Ill. 154.
8 Walker *v.* Doane, 108 Ill. 236.
9 Mitchell *v.* Wood, 47 Miss. 231; Whitney *v.* Whitney, 14 Mass. 88.
10 School Dist. *v.* Werner, 43 Iowa, 643; Conrad *v.* Ins. Co., 1 Pet. 378.
11 Reed's Appeal, 13 Penn. St. 475.

to all equities which existed against the land, in favor of third persons, at the time of the recovery of the judgment, and with a failure or extinguishment of the debtor's title the lien entirely ceases and is lost.[12]

The statute usually provides that the judgment shall be a lien on the "real estate" or "lands and tenements" of the debtor for a specified period, but is sometimes coupled with conditions relative to the issuance of execution, etc., the observance of which is necessary to perfect the lien. The terms "real estate" or "lands and tenements," as used in this connection, are of very broad signification, and have been held to include remainders and reversions vested under legal titles, as well as legal estates in possession,[13] but do not embrace mere equities[14] or inchoate rights; nor does a judgment against a firm create a lien upon the individual property of the partners,[15] although if they are all made defendants they will all be severally liable, and all the incidents of a judgment will attach to their several estates.[16]

§ 449. **Territorial Extent of Lien.** The lien of a judgment rendered by a State court attaches only to the land of the debtor situate within the county for which the court is held, or in which a transcript has been regularly docketed, and a certificate covering only the county courts of record is all that is necessary to fully apprise intending purchasers of the condition of the title so far as same may be affected by the adjudications of the State courts.[17]

12 Hydraulic Co *v.* Loughry, 72 Ind. 562; McBane *v.* Wilson, 12 Reporter, 325; Frazer *v.* Thatcher, 49 Tex. 26. A judgment recovered against a person after he is adjudged bankrupt, will not be lien upon the lands of the bankrupt: Burgett *v.* Paxton, 99 Ill. 288.

13 Lawrence *v.* Belger, 31 Ohio St. 175; Ducker *v.* Burnham, 146 Ill. 9.

14 Dixon *v.* Dixon, 81 N. C. 323; Powell *v.* Knox, 16 Ala. 364. This doctrine, however, is not universal, and though the prevailing one yet in several of the States it is denied: see Lathrop *v.* Brown, 23 Iowa, 40; Jackson *v.* Williams, 10 Ohio, 69; Wallace *v.* Monroe, 22 Ill. App. 602.

15 Stadler *v.* Allen, 44 Iowa, 198.

16 Starry *v.* Johnson, 32 Ind. 438.

17 Baker *v.* Chandler, 51 Ind. 85. The lien of a judgment of the Su-

It was long held that judgments rendered in the Federal courts have the same lien on the lands of the debtor within the district that is given to the judgments of the State courts within the limits of their respective territorial jurisdictions,[18] and therefore, in the compilation of abstracts it was quite as essential that the Federal courts of the district should be covered by the search, as the county courts. But this rule has been greatly modified of late years. In the year 1888 by an act of Congress it was provided that judgments of Federal courts shall be liens "to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State," and this act, it is contended, places judgments of the Federal courts on the same basis as judgments of the State courts with respect to their effect as liens. Accordingly it has been held that where a State statute restricts the territorial lien of a judgment to the county in which it was rendered, and to counties in which a transcript is filed, such statute, since the passage of the law of 1888, prevents the lien of a Federal judgment from becoming operative throughout the entire district and subjects it to the restrictions of the State law.[19]

A judgment, whether of State or Federal courts, is not a specific lien upon any particular land of the judgment debtor, but extends generally upon all his proprietary holdings, subject to prior liens, legal or equitable.[20]

preme Court is co-extensive with the territorial limits of the State: Durham *v.* Heaton, 28 Ill. 264.

18 Sellers *v.* Corwin, 5 Ohio, 398; Shrew *v.* Jones, 2 McLean, 78; Massingill *v.* Downs, 7 How. 760; Brown *v.* Pierce, 7 Wall, 205; Branch *v.* Lowrey, 31 Tex. 96.

19 See, Blair *v.* Ostrander, 109 Iowa, 204; 47 L. R. A. 469. The constitutional power of Congress to make a judgment of a Federal court a lien on the debtor's property, and fix the duration and territorial extent of the lien, is declared in Dartmouth Sav. Bank *v.* Bates, 44 Fed. Rep. 546, and other cases sustain the doctrine. But it has always been the policy of Congress to conform such liens, as well as the processes of the Federal courts, to those of the State courts.

20 Rodgers *v.* Bonner, 45 N. Y. 379. Judgment liens being purely legal, should they fail at law, can not be extended in equity: Douglass *v.* Houston, 6 Hammond (Ohio), 162.

§ 450. **Duration of Lien.** The lien of judgments upon real estate is regulated by statute, and the general rule is, that the lien continues for ten years[21] from the rendition of the judgment, and no longer, except that in a few enumerated cases where a party is restrained from enforcing his judgment by appeal, injunction, etc., the time so consumed is excluded from the computation. A purchaser from a judgment defendant, after the expiration of ten years from the rendition of the judgment, or such other period of limitation as the statute may prescribe, takes the land discharged from the lien of same, unless it has been preserved by some of the exceptions contained in the statute.[22] Ordinarily a search for judgments covering a period of ten years is sufficient, and it is not customary for the examiner to certify judgments for a longer time. Unless specially excepted, neither injunction, appeal, nor other cause will have the effect to prolong the lien beyond the statutory period, as against a purchaser from the judgment debtor.[23]

There is some uncertainty with respect to the territorial extent of judgments rendered in the United States courts. Prior to the act of 1888 it was the invariable rule that a judgment rendered in the Federal courts has the same lien on the lands of the debtor within the district that is given to a judgment

21 In some States for a shorter period. Thus, in Illinois for only seven years.

22 Applegate *v.* Edwards, 45 Ind. 329; Gridley *v.* Watson, 53 Ill. 186. The limitation period in some States is less than ten years; thus, in Illinois, the time is seven years. In most instances, however, the period is fixed at ten years, as stated in the text.

23 Tucker *v.* Shade, 25 Ohio St. 355. The lien of a judgment is a qualified right, given by law, and may be taken away by law: Houston *v.* Houston, 67 Ind. 276, and when the law is repealed upon which the lien depends, the lien is destroyed by the repeal: Ray *v.* Thompson, 43 Ala. 434. A familiar form of statutory expression is, that the judgment shall cease to be a lien or incumbrance on any real estate, as against purchasers in good faith, subsequent incumbrancers, etc., but within the meaning of such an act, all purchasers are to be considered as purchasers in good faith, except those who purchase with an actual fraudulent intent, and mere notice of the prior judgment, either actual or constructive, will not render the purchase *mala fide:* Little *v.* Harvey, 9 Wend. 157.

of a State court within the limits of its territorial jurisdiction;[24] but, however this may be, there is no uncertainty with respect to its termination for it is provided that "judgments and decrees rendered in a United States circuit or district court, within any State, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such State cease, by law, to be liens thereon."[25]

§ 451. **Priority.** It has been held, that neither judgment creditors nor purchasers at sheriff's sale, deriving rights by operation of law, are regarded as purchasers for a valuable consideration, but as mere volunteers in contemplation of a court of equity,[26] and that the general lien of a judgment creditor upon the lands of his debtor is subject to all equities which existed against such lands, in favor of third persons, at the time of the recovery of the judgment.[27] Generally this is true, yet, under the statute, as it exists in a majority of the States, the lien of a docketed judgment, lawfully obtained at the suit of any party against the person in whose name the title to such land appears of record, will have priority over an unrecorded mortgage, or deed.[28] These statutes protect judgment creditors as *bona fide* purchasers for a valuable consideration whose liens arise while the record title appears in the judgment debtor, although in fact he may have conveyed the property.

As between judgment creditors there is no general rule respecting priority, the matter being usually regulated by statute. Judgments rendered at the same term of court, or on the same day in vacation, ordinarily have no priority over each other, but this is by no means a uniform observance, and it has been

24 Sellers *v.* Corwin, 5 Ohio, 398; Shrew *v.* Jones, 2 McLean, 78; Massingill *v.* Downs, 7 How. 760.

25 U. S. Rev. Stat., § 967; see Meyers *v.* Tyson, 13 Blatchf. 242.

26 Davis *v.* Hamilton, 50 Miss. 312.

27 Hydraulic Co. *v.* Loughry, 72 Ind. 562; Apperson *v.* Burgett, 33 Ark. 328.

28 Lash *v.* Hardick, 5 Dillon, 505; Wood *v.* Young, 38 Iowa, 102; Miss. Valley Co. *v.* R. R. Co., 58 Miss. 846; Guiteau *v.* Wisely, 47 Ill. 433.

held, that when several judgments are rendered at the same term of court, but on different days, such judgments do not relate to the first day of the term and become effective as of that date, but are liens on the real estate of the judgment debtor only from the dates at which they are respectively entered or docketed, and take priority accordingly.[29] As a rule the law does not regard fractions of a day and all acts done upon the same day are to be taken as done at the same time. Yet, where it is necessary to justice, and can be done, this rule will be made to yield to the exigencies of the particular case. Thus, where the hour itself may become material; as where a lien attaches upon the doing of an act, or in behalf of the party who asserts it or seeks to fasten same on property, the fraction of a day may be considered in determining a question of priority. In the matter of apparently concurrent judgments this latter doctrine has frequently been applied and the preference given to the one first entered.[30] As before remarked, however, the application of this doctrine is largely a matter of statutory direction and construction.

When lands are incumbered simultaneous with their acquisition, the incumbrance being to secure the unpaid purchase money, the authorities are uniform in declaring that such incumbrance will take priority over the lien of a judgment already docketed.[31] "The reason for this is readily found," observes Freeman, "when we remember that it is a universally recognized principle of law that no judgment lien can be a charge upon any greater interest than the defendant owns. A purchaser who has paid only a portion of the sum contracted to be paid, has no title which is not liable to be subjected to the lien of the vendor for unpaid purchase money. A judgment against such a vendee must, therefore, be subordinate as a lien to that held by the vendor; and for this purpose, it is perfectly immaterial whether the claim is put in the shape

29 Anderson *v.* Tuck, 33 Md. 225.

30 Mitchell *v.* Schoonover, 16 Oreg. 211; Coal Co. *v.* Barber, 47 Kan. 29; Lang *v.* Phillips, 27 Ala. 311; Murfree *v.* Carmack, 4 Yerg. (Tenn.) 270.

31 Curtis *v.* Root, 20 Ill. 53; Roane *v.* Baker, 120 Ill. 308.

of a vendor's lien, or of a mortgage to secure the payment of purchase money." [32]

§ 452. **After-acquired Property.** It is a well established doctrine, that the lien of a judgment attaches to and binds land, the title to which is subsequently acquired by the judgment debtor, and, where the statute is silent on the subject, this rule has been generally received and acted upon throughout the United States.[33] The lien does not take effect by relation as of the date of the judgment, but attaches to such after-acquired property only from the time it is acquired by the judgment debtor, and the liens of all judgments in existence when the debtor obtains the property attach alike.[34]

§ 453. **Docketing.** The general rule seems to be, that before a judgment can become a lien it must be regularly docketed. That is, be entered of record in such books as the statute requires to be kept. This, it is said, is the only proof of a judgment and hence essential to its validity.[35] In some instances it has even been held that the record is not complete until an entry has been made in the index,[36] and that an omission in this particular is fatal to the lien. On the other hand, some of the cases hold that docketing is not an essential of the efficacy of a judgment nor a condition precedent to issuing execution thereon, but is a necessary condition for the purposes of a lien.[37] Others have gone so far as to declare that the lien of a judgment is not lost by the failure of a clerk to enter the rendition in the docket, although the land affected by such judgment lien may have passed into the hands of a *bona fide* holder without notice.[38]

32 See *contra*, Ryner *v.* Frank, 105 Ill. 326.

33 Thulemeyer *v.* Jones, 37 Tex. 560.

34 Coyce *v.* Stovall, 50 Miss. 396; Babcock *v.* Jones, 15 Kan. 296; Wales *v.* Bogue, 31 Ill. 464.

35 Callanan *v.* Votruba, 104 Iowa, 672; Davis *v.* Steeps, 97 Wis. 472; Rockwood *v.* Davenport, 37 Minn. 533. But see, Durant *v.* Comegys, 2 Idaho, 809.

36 Ætna Ins. Co. *v.* Hesser, 77 Iowa, 381; Crouse *v.* Murphy, 140 Pa. St. 335.

37 Bernhardt *v.* Brown, 122 N. C. 587.

38 Johnson *v.* Schloesser, 146 Ind. 509.

It will be seen, therefore, that the authorities are not in accord upon this subject, and that local law and usage is the only safe guide.

§ 454. **Formal Requisites of Judgments.** No set form of words is necessary to be employed in rendering judgments,[39] provided they are certain and find the sum for which they are rendered, but failing in this, they are fatally defective.[40] The certainty required has reference both to the parties and the recovery, for the judgment is regarded as a unit and must comprehend all the parties then before the court, while the recovery must be certain and specific in the amount with nothing left to implication; thus a judgment for "four hundred and sixty-one and 53-100 damages" is not for a certain definite sum of money, and is therefore a nullity,[41] and where only numerals are used without some mark or word indicating for what they stand, the judgment is insufficient.[42] Otherwise, to constitute a judgment record valid upon its face so that it may be enforced by action, nothing more need appear by it than that the court had jurisdiction of the subject-matter of the action and of the parties, and that a judgment was in fact rendered.[43] It is customary, as well as proper, in making the entry, to set out the names of the parties against whom the judgment is rendered, but it seems that a judgment against "said defendants," the title of the cause being stated, is suffi-

39 Guild *v.* Hall, 91 Ill. 223; Church *v.* Crossman, 41 Iowa, 373.

40 Ry. Co. *v.* Chicago, 53 Ill. 80; Carpenter *v.* Sherfy, 71 Ill. 427; Lirette *v.* Carrane, 27 La. Ann. 298; Randolph *v.* Metcalf, 6 Coldw. (Tenn.) 400.

41 Carpenter *v.* Sherfy, 71 Ill. 427.

42 Lawrence *v.* Fast, 20 Ill. 338; Avery *v.* Babcock, 35 Ill. 175.

43 Maxwell *v.* Stewart, 22 Wall. 77. It has been held that a judgment is not rendered, so as to be a lien from the time of its "rendition," until it has been entered upon the record, notwithstanding an entry or direction for entry has been signed by the judge and endorsed by the clerk as "filed." Callanan *v.* Vatruba, 104 Iowa, 672; Rockwood *v.* Davenport, 37 Minn. 533. But see, Durant *v.* Comegys, 2 Idaho, 809; Johnson *v.* Schloesser, 146 Ind. 509.

cient.[44] And, generally, an obscure judgment entry may be construed with reference to the pleadings and record.[45]

In the abstract it is the general practice to give the name of the forum, together with the case number or some other index for the purpose of reference; the full title of the case, and a statement of the fact of judgment, together with the amount for which it was rendered. A synopsis of the judgment is rarely given, nor is it at all necessary, yet the examiner should always carefully read the judgment roll for errors of form or substance; as the omission of parties, imperfect recitals of recovery, etc. Where the judgment becomes dormant unless followed by execution it becomes necessary to show the issuance and return of the execution, provided such facts appear of record. A minute of judgments *in personam* may be made in this manner:

Judgments.

In the Superior Court of Cook County, Ill.

Henry W. Newman
vs.
William Jasper.

Case No. 53,166.
Assumpsit.
Fee Book 35, page 585.
Judgment rendered against defendant, Dec. 9, 1874, for $634.92.

Execution No. 22,993 issued, dated Dec. 9, 1874, returned no part satisfied.

Any additional matter that may seem material, as, the issuance of alias or pluries executions; remission or satisfaction of any part of the judgment, etc., may be shown after this point, with such detail as may be necessary, thus:

44 Bank of Athens *v.* Garland, 109 Mich. 515.

45 See, Fowler *v.* Doyle, 16 Iowa, 534; McCartrey *v.* Kittrell, 55 Miss. 253; Smith *v.* Chenault, 48 Tex. 455.

Dec. 18, 1874, Plaintiff remits $103.61.

Dec. 20, 1874, Execution (alias) issued and returned satisfied for $100.00.

Where the lien of the judgment is independent of execution the note of the issuance of same is immaterial, except as it may tend to show a reduction or partial satisfaction; but, in many of the States, when execution is not issued on a judgment within one year from the time of its rendition, the lien thereafter ceases and is lost.[46] Executions may also become operative as liens from the time they are delivered to the sheriff, or other proper officer, to be executed, when issued during the statutory period, even though the general lien of the judgment has been lost by laches.[47] Wherever the rule last stated prevails the issuance of execution becomes almost as important as the rendition of the judgment, and in abstracting the judgment, careful search must also be made for executions, and should none appear of record it would seem that such fact should be affirmatively stated rather than left to inference. There can be no doubt that this course would frequently save inquiries by counsel and greatly expedite his labors. In continuations, where the former examination shows a judgment upon which no execution appears to have issued prior to the date of such examination, the subsequent steps, if any, should appear in the continuation, either by re-exhibiting the judgment and resulting proceedings, or by setting forth the substance of such proceedings in a note.[48]

§ 455. **Antecedent Proceedings.** It is not customary, in abstracting a judgment, to show anything more than the mere fact of rendition in the manner heretofore indicated. But in making the search the entire judgment roll should be perused by the examiner for possible defects. While the law implies a presumption of regularity, and of all jurisdictional

[46] See, Kirby *v.* Runals, 140 Ill. 289.

[47] These provisions, however, have reference more to personalty than to realty.

[48] See also, "Satisfaction and Discharge," *infra.*

facts in cases where the record is silent,[49] yet where the record states what was done this presumption does not apply.[50] Thus, it will be presumed, in the absence of anything to the contrary, that a personal service of process was had upon the defendant. But if the record shows something different, as that the service was by publication, the legal presumption cannot be permitted to aid the record. A familiar example is furnished in the case of a deficiency judgment on foreclosure. If the record affirmatively discloses that the service was by publication, particularly if the defendant was a non-resident of the State, such a judgment would be void and no lien would be created.[51]

Again, a personal judgment must as a rule, be preceded by a personal service of summons to appear and answer the plaintiff's demand. It will often happen, however, that the defendant was not served with process, but voluntarily appeared in the case by attorney. It is always presumed in favor of a judgment based on the appearance of an attorney, that the attorney was duly authorized for such purpose, even where there is an appearance without service,[52] and in a collateral proceeding this presumption is conclusive.[53] If the attorney was without authority the judgment will be set aside on motion or may be enjoined in equity, but, until some move of this kind is made, the courts, from reasons of public policy, will hold the appearance good and the proceedings valid. Still, it would seem to be the better plan, where a judgment is rendered without service and on appearance of attorney only, to show these facts in the abstract.

§ 456. **Judgment Against a Deceased Person.** It is a rule of the common law, and one generally observed in all

49 Galpin *v.* Page, 18 Wall. (U. S.) 350.

50 Hahn *v.* Kelly, 34 Cal. 391.

51 Latta *v.* Tutton, 122 Cal. 279; and see, Griffith *v.* Harvester Co., 92 Iowa, 634; Willamette, etc. Co. *v.* Hendrix, 28 Oreg. 485.

52 Arnold *v.* Nye, 23 Mich. 286; Fergusen *v.* Crawford, 70 N. Y. 253.

53 Williams *v.* Johnson, 112 N. C. 424.

the States, that a judgment against a deceased person is void, and the fact that service may have been obtained, or the suit commenced before the death of the party, in the absence of any statutory provision on the subject, does not affect the operation of the rule.[54]

It has been held in a large number of cases, however, that where a court has once acquired jurisdiction of the parties and the subject-matter of an action, a judgment rendered against a party after his death is not void, if the death has not been suggested upon the record, but only voidable, and this doctrine seems to have been adopted in a number of States. It is conceded that the rendition of such judgment is erroneous, and hence subject to be set aside or vacated on motion timely made.[55]

The subject possesses a further interest for the examiner of titles in cases where a joint judgment has been rendered against several persons, one of whom, at the time of such rendition, is dead. The authorities are not in full accord as to the effect of such judgment, but the better rule would seem to be that it should be regarded as a unit with respect to all of the defendants and hence void as to all, or, at least, subject to collateral attack.[56]

§ 457. **Judgments Against Infants.** The general status of infants has heretofore been referred to and the dangers attendant upon the state pointed out. It may be said, however, that while the statute usually provides that infant parties must be represented by guardian, either general or *ad litem*,

54 Burke *v.* Stokely, 65 N. C. 569; Life Assoc. of America *v.* Fassett, 102 Ill. 315; Weis *v.* Aaron, 75 Miss. 138. Where the judgment was recovered prior to defendant's death it may be revived and enforced against his estate by *sci fa:* Brown *v.* Parker, 15 Ill. 307. While if execution had been issued and levied during the lifetime of such defendant, a sale after his death will be valid without any notice to his legal representatives on revivor by *scire facias*.

55 See, Hayes *v.* Shaw, 20 Minn. 405; Yaple *v.* Titus, 41 Pa. St. 203; Jennings *v.* Simpson, 12 Neb. 565; Coleman *v.* McAnulty, 16 Mo. 177; Ried *v.* Holmes, 127 Mass. 326.

56 Claflin *v.* Dunne, 129 Ill. 241; Weis *v.* Aaron, 75 Miss. 128.

yet a judgment rendered against an infant for whom no guardian has been appointed is not, for that reason, void. If he in fact appeared in the action, and an appearance by attorney will be presumed to have been authorized, the judgment will be merely voidable at his instance seasonably expressed.[57] If he desires to vacate such judgment he must move for same promptly on coming of age. An unexcused delay will bar his right.[58]

§ 458. **Exemptions.** The homestead acts of the different States have created an exception to the general rule which subjects the lands of the debtor to the lien of judgments recovered against him, and an exemption from levy and forced sale is made of certain lands which shall be occupied by the debtor as a homestead. This exemption consists either of a specific allotment of land determined by fixed boundaries, or of an estate of limited duration, measured by a definite money value and without reference to the quantity of land occupied. The lien of the judgment does not affect such homestead, either in the possession of the judgment debtor or his grantee.[59] The only exception to this rule, where any exception is permitted, is where the debt, for which the judgment was rendered, is a liability incurred for the purchase or improvement of the land.[60]

§ 459. **Satisfaction and Discharge.** Judgments may be discharged by an entry upon the record; by a formal release or satisfaction filed in the case;[61] or by a return of the execution fully satisfied. The particular method employed is of little moment to the examiner and only noticed by him in case of a continuation, where the former examination shows a subsisting unsatisfied judgment. Even in this instance it is not absolutely necessary that it be noticed in the abstract, as his

57 Childs *v.* Lanterman, 103 Cal. 387; Kemp *v.* Cook, 18 Md. 130; Cohn *v.* Baer, 134 Ind. 375.

58 Eisenmenger *v.* Murphy, 42 Minn. 84.

59 Green *v.* Marks, 25 Ill. 221.

60 Bush *v.* Scott, 76 Ill. 524.

61 The satisfaction piece, though filed, is not a record, but a mere warrant to the clerk to enter satisfaction on the roll: Lowns *v.* Remsen, 7 Wend. (N. Y.) 35.

certificate to the effect that there are no judgments unsatisfied of record would be sufficient to show the discontinuance of the lien, yet it is recommended as the better practice, that, where the former examination shows unsatisfied judgments, but which subsequent to the date of such examination and prior to that of the continuation have been discharged or satisfied, and which if unsatisfied would still be a lien, such satisfaction or discharge should affirmatively appear. A simple note will in most cases be all that is required, thus:

NOTE.— *In case No. 40,075 in the Superior Court of Cook County (Smith v. Jones), judgment was rendered against the defendant, on October 10, 1872, for $250.00 and costs, which was satisfied of record December 1, 1872, by plaintiff's attorney.*

To this simple statement may be added the mention of any other matter which may seem material, as:

Execution No. 18,139 issued thereon dated October 11, 1872, is not returned.

§ 460. **Decrees Classified and Distinguished.** Decrees are classified as interlocutory and final, the former being one which only partially disposes of the subject-matter, or of a particular portion thereof, leaving something still to be done; the latter, disposing of the whole subject, deciding all questions in controversy, ascertaining the rights of all the parties, and awarding the costs.[62] The fact that something remains to be done to carry out or enforce the decree does not render it any the less final,[63] but the true test seems to be, that no further necessity exists for bringing the cause again before the court.[64]

[62] Taylor *v.* Reed, 4 Paige, 561; Mills *v.* Hoag, 7 Paige, 18; Kane *v.* Whittick, 8 Wend. 224.

[63] To avoid the confusion incident to the use of the word judgment, in two senses, one as interlocutory, and the other as final, the codes designate the former as orders, and do not recognize such a thing as an interlocutory judgment.

[64] Mills *v.* Hoag, 7 Paige, 18;

§ 461. **Operation and Effect of Decrees.** A formal decree operates differently from a judgment, but its effect is the same, and the same general rules apply with equal force to either. As *res adjudicata* it is conclusive upon the question actually presented or directly involved,[65] though not upon collateral issues,[66] and embraces not only the questions actually contested and determined, but also all those which might have been if they had been reasonably presented.[67] It is binding on parties and privies and imports such absolute verity that it can not be attacked collaterally on account of mere irregularities in the proceedings by one not a party in interest,[68] nor can defects therein be set up by a stranger to the record, for the purpose of defeating a claim of right to land based thereon.[69] It is evidence of itself to sustain a conveyance made under it,[70] but where it does not in terms divest the title

Butler *v.* Lee, 33 How. 251. An interlocutory decree is properly a decree pronounced for the purpose of ascertaining matter of law or fact preparatory to a final decree. Therefore, when it happens that some material circumstance or fact necessary to be made known to the court is either not stated in the pleadings, or is so imperfectly ascertained by them that a court is unable to determine finally between the parties; and therefore, a reference to, or an inquiry before a master, or a trial of facts before a jury becomes necessary, the decree entered for that purpose is an interlocutory decree. The court, in the meantime, suspends its final decree, until by the master's report, or verdict of the jury, it is enabled to decide finally: 1 Barb. Ch. Prac. * 326; Seaton on Decrees, 2; 1 Harr. Ch. Prac. 420.

65 Geary *v.* Simmons, 39 Cal. 224; Cannon *v.* Brame, 45 Ala. 262; Foster *v.* The Richard Busteed, 100 Mass. 409; People *v.* Brislin, 80 Ill. 423; State *v.* Ramsburg, 43 Md. 325. When a judgment or decree is rendered by consent, or as the result of a compromise, it can not be admitted as *res adjudicata:* Wadhams *v.* Gay, 73 Ill. 415. And such decree would only bind the parties consenting, and would not affect the rights of others not made parties to the suit, but who should have been: Dibrell *v.* Carlisle, 51 Miss. 785.

66 Land *v.* Keirn, 52 Miss. 341; Eastman *v.* Porter, 14 Wis. 39; Fish *v.* Lightner, 44 Mo. 268.

67 Petersine *v.* Thomas, 28 Ohio St. 596; Bates *v.* Spooner, 45 Ind. 489; Hungerford's Appeal, 41 Conn. 322; Talbot *v.* Todd, 5 Dana, 193.

68 Myler *v.* Hughes, 60 Mo. 105.

69 Lathrop *v.* American Emig. Co., 41 Iowa, 547; Pettit *v.* Cooper, 9 Lea (Tenn.), 21.

70 Grebbin *v.* Davis, 2 A. K. Marsh. (Ky.) 17; Dunklin *v.* Wilson, 64 Ala. 162.

of the defendant, but merely directs the execution of a deed, until such execution, the legal title remains in the defendant.[71] A reversal of the decree does not divest the title of a purchaser thereunder in good faith,[72] who is a stranger to the record, but all rights acquired by parties to the suit as purchasers of the land under the decree, fall with the reversal.[73] A decree upon a matter not involved by the cause, nor in issue by the pleadings, is *coram non judice* and void,[74] and will be treated as a nullity, even in a collateral proceeding.[75]

§ 462. **Decrees Rendered on Constructive Notice.** The remarks of the last section must be understood to apply more particularly to decrees which have been rendered upon a full hearing of the case and with all the parties properly before the court. Where, however, there has been no personal service upon the defendants, and such persons are before the court only constructively by a substituted service, somewhat different rules prevail. The law will not hastily preclude a person's rights when he has had no opportunity to be heard; hence, a decree entered in such a case does not become final and conclusive until some time has elapsed during which the defendants may come forward and urge any matter they may have in extenuation or defense. The time allowed for this purpose as well as the method by which such defendants are let in, are matters of local statutory regulation, but the principle is of general observance, that all persons acquiring rights under such decree, before it becomes final and conclusive, are equally affected with notice of its conditional character; and all interests so acquired, whether for a valuable consideration or otherwise, are entirely dependent upon the confirmation of the decree, which, if vacated, renders all proceedings under it

71 Peak *v.* Ligon, 10 Yerg. (Tenn.) 469.

72 Taylor *v.* Boyd, 3 Hammond (Ohio), 353; Lambert *v.* Livingston, 131 Ill. 161.

73 Fishback *v.* Weaver, 34 Ark. 569; Powell *v.* Rogers, 105 Ill. 318.

74 Meredith *v.* Little, 6 Lea (Tenn.), 517.

75 Monday *v.* Vail, 34 N. J. L. 418.

a mere nullity, and of this all persons dealing with the land must take notice.[76]

In this connection the attention of the examiner is directed to the antecedent proceedings and the character of the process by which the defendant is brought within the jurisdiction of the court. Where a decree is based on a constructive service everything essential to jurisdiction must appear. The defendant must be properly named or identified. In other words, he must have notice, and if the fact of no notice affirmatively appears upon the face of the proceedings the judgment is void and open to collateral attack. Thus, a notice to —— Smith, without other description or identification will not suffice to bring John Smith into court, nor will a judgment rendered against him have any binding effect.[77]

§ 463. **Lien of Decrees.** Decrees, equally with judgments, create liens upon the lands of the losing party. This follows as an incident where there is a money decree *in personam,*[78] while, by statute, where a decree is pronounced requiring a party to perform some act other than the payment of money, it may be made a lien upon the property of such party until he shall perform the acts mentioned in the decree.[79] In the first instance the lien has the same force and effect, and is subject to the same limitations and restrictions as judgments at law.[80]

§ 464. **Formal Requisites of Decrees.** Unlike judgments *in personam,* which are ordinarily shown only by a brief reference, decrees and judgments *in rem,* or which affect or implicate title, are copied almost verbatim, or at least set forth with little condensation. The formal parts of de-

76 Southern Bank *v.* Humphreys, 47 Ill. 227.

77 Clark *v.* Hillis, 134 Ind. 421; Thompson *v.* McCorkle, 136 Ind. 484.

78 Karnes *v.* Harper, 48 Ill. 527; Yackle *v.* Wightman, 103 Ill. 169. No personal decree can be rendered in equity against defendants not personally before the court; as to such defendants the bill must be dismissed without prejudice; Virden *v.* Needles, 98 Ill. 366.

79 Kirby *v.* Runals, 140 Ill. 289.

80 Karnes *v.* Harper, 48 Ill. 527; Eames *v.* Germania Turnverein, 74 Ill. 56.

crees are, the caption and title of the cause; the recitals; and the ordering or mandatory clause. A fourth part, called the declaratory clause, is sometimes added.[81] The strictly formal parts which relate to the caption, etc., may in some cases be abbreviated, particularly when the decree is shown in regular order as a part of the synopsis of the proceedings of the court which pronounced it, but when the abstract is made from a certified copy recorded with the recorder of deeds, it is advisable to show these parts also. The caption shows the court; term, day, etc., on which the decree was rendered; the name of the presiding judge or chancellor; and the title of the cause. The recitals are now very meager and refer briefly and generally to the hearing, pleadings and proofs, and to the fact of their having been duly considered by the court. Formerly it was customary to set out at great length the pleadings, evidence, etc., but this practice, by reason of its expense and inconvenience, has been discontinued, and the inducement of the recitals reduced to a bare mention,[82] although in some States the evidence still is, or may be, preserved in some instances in this manner.[83] The recitals being brief, should be shown in full.[84] The ordering or mandatory clause is the vital part of the decree, and must always, with the exception of the part referring to the costs, be copied verbatim. This part contains the specific directions of the court with reference to the subject-matter before it, and provides for the final disposition of the rights of the litigants. All decrees must be

81 When this is used it immediately precedes the ordering part, and consists of a declaration of the rights of the parties. It is not necessary, however, and its omission will not invalidate the decree.

82 Dousman *v.* Hooe, 3 Wis. 466.

83 Cooley *v.* Scarlett, 38 Ill. 316; Walker *v.* Cary, 53 Ill. 470.

84 Though formerly a stricter rule prevailed, every reasonable presumption is now indulged in favor of the jurisdiction of a court of general jurisdiction, and its findings in decrees are held to be *prima facie* evidence of the existence of jurisdictional facts, while the recitals frequently have the further effect to cure defects of service, etc. For this reason the recitals should be fully stated. See Turner *v.* Jenkins, 79 Ill. 228; Rivard *v.* Gardner, 39 Ill. 125; Prettyman *v.* Barnard, 37 Ill. 105; Haworth *v.* Huling, 87 Ill. 23; Belden *v.* Meeker, 2 Lans. (N. Y.) 470.

founded on, and in conformity with, the allegations and proofs; and can not be based upon a fact not put in issue by the pleadings.[85] When not supported by the pleadings they are as fatally defective as though not sustained by the verdict of findings.[86]

Where a decree directly affects land, as in case of foreclosure or other action *in rem,* it is of vital importance that the description be accurate and certain. The rules of conveyancing, which permit reference to extrinsic facts to aid the intention of the parties, have no application to descriptions found in judicial decrees, or deeds of conveyance founded upon them, nor can the assistance of equity be invoked to reform such descriptions.[87] Hence, if the decree and resulting deed are so defective that it can not be ascertained by inspection, or from data which they furnish, what property was in fact sold, or, if in order to ascertain the intention of the officer selling it becomes necessary to institute an extraneous inquiry, the proceeding will be void for uncertainty.[88]

§ 465. **Abstract of Decrees.** From what has been said it will be perceived that an abstract of a decree, unless it preserves the evidence, can consist of little else than a copy of such decree. The recitals may permit of some condensation, and the mandatory parts that refer to the costs are also susceptible of the same treatment. The verbiage of the caption may also be condensed and parts thereof omitted, thus:

Alexander Stewart
vs.
Charles Dalton.

Circuit Court Cook County.
June Term, 1883.
In Chancery.

Recites, that this cause having come on to be heard upon the pleadings herein and the proofs taken in said cause, and having been

85 1 Barb. Ch. Prac. * 339; Carneal *v.* Banks, 10 Wheat. 181; Maunday *v.* Vail, 34 N. J. L. 418.

86 Bachman *v.* Sepulveda, 39 Cal. 688; Marshman *v.* Conklin, 21 N. J. Eq. 546; Parsley *v.* Nicholson, 65 N. C. 207.

87 Lewis *v.* Owen, 64 Ind. 446.

88 Evans *v.* Ashley, 8 Me. 177; Bowen *v.* Wickersham, 124 Ind. 404.

argued by counsel, and the court having duly considered the same, and being fully advised in the premises;[89]

Doth order, adjudge and decree, that the said deed of conveyance from William Jones and wife to the defendant, Charles Dalton, bearing date January 4, 1882, of the lands described as follows, to wit: [set out description] *and recorded in the recorder's office of Cook County, Ill., as Doc. 129,242, be, and the same is hereby set aside and declared null and void, as against the complainant, his heirs and assigns, as a cloud upon the title of the complainant; and that the defendant, Charles Dalton, do deliver up the said deed to be canceled by the clerk of this court.*[90]

Further ordered, that defendant pay costs of this suit, to be taxed, and that execution issue therefor.[91]

§ 466. **Errors and Defects.** Errors and defects in judgments or decrees require, when apparent, appropriate mention. But the defects that are noticeable are mainly confined to matters of practice, form, etc., and vital defects, from their very nature, are frequently undiscernible. Thus, a judgment against an individual as a defendant, by a name which is not his in contemplation of law, can not ordinarily be enforced against him,[92] and certainly is not constructive notice of a lien upon his land.[93] It has in some instances been held,

89 Recitals in a decree of a court of inferior jurisdiction of the facts necessary to give jurisdiction are *prima facie* evidence of such facts, subject to be contradicted, but sufficient *per se* to uphold the proceeding if uncontradicted: Belden *v.* Meeker, 2 Lans. (N. Y.) 470.

90 Equity will generally compel an instrument to be delivered up for cancellation, where it has been declared inoperative, and may possibly do harm if allowed to remain in defendant's hands: Keemle *v.* Conrad, 12 Phila (Pa.) 524. A decree canceling a deed may direct the clerk to enter the fact on the margin of the record of such canceled deed: Jones *v.* Porter, 59 Miss. 628.

91 This is equivalent to a money judgment and creates a statutory lien on the defendant's lands.

92 Farnham *v.* Hildreth, 32 Barb. 277; Thomas *v.* Desney, 57 Iowa, 58.

93 Thomas *v.* Desney, 57 Iowa, 58; Grundies *v.* Reid, 107 Ill. 304. Thus, a judgment against Mrs. J. B. Smith, is not constructive notice that it is a lien on land owned by

that a judgment in an action in which the defendant is named in all the proceedings therein by a different name from that of a particular existing individual, will be of no avail against the latter, even if entered up against him by his real name, although process was in fact served upon him, when the name of the defendant in such process was not his;[94] because, unless he actually appeared in the action, no jurisdiction over him was obtained therein by the service of such process.[95] But the weight of authority would seem to indicate that if the process is served on the party intended to be served, though by a wrong name, and he fails to appear and plead the misnomer in abatement and suffers judgment to be obtained against him, he is concluded, and in all future litigation may be connected with the suit or judgment by proper averments.[96]

In compiling an abstract, however, the two matters just noted would not be treated alike. In the former case, the name of the judgment debtor not being the same as the party whose title is under consideration, the judgment might with safety and propriety be disregarded; as where the name of the land owner is "Freeman" Jones, and that of the judgment debtor "Herman" Jones.[97] But in the latter, though the judgment debtor was sued by a wrong name, yet inasmuch as judgment was entered against him by his true name, such judgment must substantially appear, together with so much of the proceedings, including the process and return, as will show the repugnancy or invalidity, and the opinion of title should specifically pass upon the facts thus exhibited.

Mary Smith, notwithstanding that she is the wife of J. B. Smith; Bankers, etc. Co. *v.* Blair, 99 Va. 606.

94 Bates *v.* State Bank, 7 Ark. 394. In this case service was returned as had upon Asher B. Bates and judgment was rendered against Ashley B. Bates.

95 Moulton *v.* De Macarty, 6 Rob. (N. Y.) 470; Ford *v.* Doyle, 37 Cal. 346.

96 See Bloomfield R. R. Co. *v.* Burgess, 82 Ind. 83; National Bank *v.* Jaggers, 31 Md. 38; Walsh *v.* Kirkpatrick, 30 Cal. 202; Foshier *v*, Narver, 24 Oreg. 441.

97 Farnham *v.* Hildreth, 32 Barb. 277; Thomas *v.* Desney, 57 Iowa, 58; Kennedy *v.* Merriam, 70 Ill. 228.

§ 467. **Continued — Middle Names.** A more perplexing question arises in case of correct Christian and surnames, but wrong middle names or initials. The authorities are all agreed that the law requires and recognizes but one Christian name, and that the omission or insertion of middle names or initials is immaterial,[98] yet in many instances the middle name is the only clue by which judgment debtors can be identified. In populous localities it is not always expedient to show all the judgments appearing against a particular name. Say the person whose title is under consideration is named John R. Smith, and the record discloses judgments against "John Smith," and John Smith with middle initials other than "R," now what course must be pursued in view of the propositions last presented? To insure absolute certainty, every judgment that comes within the rule must be shown, and this in many cases would be impracticable, for to exhaust the possibilities as to John Smith might require hundreds of searches. In the absence of positive instructions, therefore, when questions of doubt arise, the examiner usually looks only for judgments against the particular name under consideration, and in his certificate expressly states that no search has been made for the other names.[99]

While this practice is sometimes condemned it is yet in consonance with the general tendency of the courts in construing docket entries and enforcing judgments. It is now a common statutory requirement that the judgment docket shall set forth the name at length of each judgment debtor. Hence, if the true name of the judgment debtor is "John R. Smith" but judgment is docketed against him as "John Smith," while the judgment might be effective as between the parties it would be of no effect as against a purchaser.[1] In the cases

98 Thompson *v.* Lee, 21 Ill. 242; Bletch *v.* Johnson, 40 Ill. 116; Allison *v.* Thomas, 72 Cal. 562; Choen *v.* State, 52 Ind. 347, in this case it is said the middle name is mere surplusage.

99 This matter is further considered in the chapter devoted to "Opinions of Title."

1 Terry *v.* Sisson, 125 Mass. 560; Dutton *v.* Simmons, 65 Me. 583; Hutchinson's Appeal, 92 Pa. St.

which support this doctrine it is held that the middle name or initial is an essential part of the name and that the omission of such middle name or initial, or the substitution of others than the true one, is a misdescription of the person, the tendency of which is to deceive intending purchasers. The object of the statute is that the docket shall, of itself, furnish reasonably satisfactory evidence as to whether a judgment exists against the person shown by the records to own the land which prospective purchasers seek to acquire. In order to make the judgment lien effective as constructive notice to subsequent purchasers the true name should be shown and if the index fails to make this disclosure, and the purchaser has no actual knowledge of the identity of the judgment debtor, he should take the land freed from the lien.[2]

§ 468. **Continued — Initials — Idem sonans.** The same perplexity arises where only initials are employed, an incorrect yet nevertheless common practice. A judgment docketed against "A. Jones" has been held sufficient notice of a judgment against "Abel Jones," where the defendant uniformly wrote his name by his initials and there was no other "A. Jones" in the county.[3]

Again, the examiner, and counsel as well, must deal with the discordant doctrine of *idem sonans*. Thus, a judgment against John "Bobb" was in one instance permitted to operate as a lien on land owned by John "Bubb,"[4] and one against Henry "Hackman" was in another case allowed to participate against the property of Henry "Heckman."[5] It is said in

186; Ridgeway's Appeal, 15 Pa. St. 177.

2 Crouse *v.* Murphy, 140 Pa. St. 335. The docket entry of a judgment against Edward Davis was held not to constitute constructive notice of a lien on the land of either E. A. Davis or Edward A. Davis. See, Davis *v.* Steeps, 87 Wis. 472; and see, Johnson *v.* Hess, 126 Ind. 298.

3 Jones Estate, 27 Pa. St. 336; Hart *v.* Lindsey, 17 N. H. 235.

4 Meyer *v.* Fegaly, 39 Pa. St. 429.

5 Bergman's Appeal, 88 Pa. St. 123. The names "Welch" and "Welsh" are *idem sonans*. Donohoe-Kelly Banking Co. *v.* South. Pac. Co., 138 Cal. 183; so are the names Watkins and Wadkins, because, it is said, in casual pronunciation there is scarcely any difference

support of these precedents that identity of sound is a surer designation of the names of persons than identity of orthography, and that in ascertaining identity of sound the prevailing usage in pronunciation in the locality will prevail. It is also contended that persons searching the judgment docket for liens ought to know the different forms in which the same name may be spelled, and to make their searches accordingly; unless indeed where a spelling is so entirely unusual that persons can not be expected to think of it.[6]

It is, however, the duty of a judgment creditor to see that his judgment is properly entered, and in such a manner as to furnish to the eye of purchasers and subsequent incumbrancers, that record notice which the law contemplates,[7] therefore, while slight variations not materially changing the sound may be permitted to stand under the rule of *idem sonans,* total departures in initial letters, misleading the searcher and failing to furnish him with proper clues, can not be allowed. As where the judgment debtor is named "Yoest," but the judgment is docketed "Joest," notwithstanding that the foreign pronunciation of the name is the same using either initial, yet the eye is misled, and the law does not impose upon any one who searches, the duty of inquiring whether some other letters may not spell the name of the debtor in another language.[8] So, too, a material change in the spelling, although preserving to a large extent the original sound of a name, is fatal to the lien as against one having no notice. Thus, the names "Hesser" and "Hesse" are so dissimilar that one searching for incumbrances against the former would not be

in the sounds. Bennett *v.* State, 62 Ark. 516. See Lyon *v.* Kain, 36 Ill. 368, where Emonds, Emmens, and Emmons, were all held to have practically the same sound and hence to be within the rule. On the other hand, it has been held, that Hyde and Hite, do not come within the rule, State *v.* Williams, 68 Ark. 241. And that purchasers from W. H. Furman are not charged notice of incumbrances by W. H. Freeman, Howe *v.* Thayer, 49 Iowa, 154.

6 See Meyer *v.* Fegaly, 39 Pa. St. 429.

7 Hutchinson's Appeal, 92 Pa. St. 186.

8 Heil's Appeal, 40 Pa. St. 453. But see Kirtz *v.* Behrensmeyer, 125 Ill. 141.

charged with notice of a judgment against the latter, nor put upon inquiry.[9]

But while it is undoubtedly true, that the law of notice by record is addressed to the eye and not to the ear, and that record notice is principally a matter of sight and not of sound, yet, it is held, it is above all a matter for the consideration of the mind, and if the record of a name spelled in one way should directly suggest to the ordinary mind that it is also commonly spelled another way, the searcher should be charged with whatever the record may show in some other spelling, particularly under the same initial letter. Hence, a judgment against "Seibert" was held to be notice to purchasers of property owned by "Sibert."[10] It will be seen, therefore, that the subject is one of doubt and uncertainty, and because of this an additional burden of care and diligence is cast upon both examiner and counsel.

§ 469. **Operation and Effect of Probate Decrees.** A decree of a probate court acting within the sphere of its jurisdiction, is conclusive upon all those to whom the right of appeal is given,[11] when such right is unexercised, and as to all matters which appear from the record to have been adjudicated upon;[12] and all such decrees, where the court has jurisdiction of the subject-matter, will be presumed to have been made upon proper notice and formal proceedings, even though such proceedings do not appear of record.[13]

Orders of sale made by probate courts are a class of decrees to which the attention of the examiner is particularly directed. These orders are essential parts of the title and call for severe scrutiny. It has been held that an order of court for the sale of land must in itself be sufficient without refer-

9 Ætna Ins. Co. *v.* Hesser, 77 Iowa, 381; and see Bates *v.* Bank, 7 Ark. 394; Anthony *v.* Taylor, 68 Tex. 403.

10 Green *v.* Myers, 98 Mo. App. 438.

11 Lawrence *v.* Englesby, 24 Vt. 42.

12 Rix *v.* Smith, 8 Vt. 356.

13 Sparhawk *v.* Buell, 9 Vt. 41; Pollock *v.* Buie, 43 Miss. 140. But see Martin *v.* Williams, 42 Miss. 210.

ence to extraneous matters,[14] and where the description is insufficient the sale will be invalid.[15]

§ 470. **Foreign Judgments and Decrees.** The courts of a country have no extraterritorial jurisdiction, hence, they can not, by judgment or decree, affect title to land situated in a foreign country. It is true, that courts of equity may, and do, entertain bills for the specific performance of contracts respecting lands situate in a foreign country, if the parties are resident within the territorial jurisdiction of the court, but, in such cases, the court can not bind the land itself by any decree it may make; it can only bind the conscience of the party in regard to the land, and enforce him, by process against his person, to perform his agreement.

[14] A decree need not set out the evidence on which it is founded but should find the allegations of the petition to be proved, and, generally, it will be presumed that the evidence warranted the decree, Bree *v.* Bree, 51 Ill. 367.

[15] Crosby *v.* Dowd, 61 Cal. 557; Hill *v.* Wall, 66 Cal. 130.

CHAPTER XXVII.

JUDICIAL AND EXECUTION SALES.

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§ 471. **Judicial and Execution Sales — Defined and Distinguished.** No inconsiderable portion of the real property of the country changes hands every year through the media of execution and judicial sales, meaning by such terms, all sales and transfers of property made in pursuance of the orders, judgments or decrees of courts, or sales made to obtain satisfaction of such orders, judgments or decrees. The term "judicial sale" is properly applied only to sales made in conformity to an order or decree directing same, and requiring a subsequent confirmation or approval by the court.[1] "Execution sales," though based upon a judgment, are made under

1 Mr. Freeman classes judicial sales as: (1) those made in chancery; (2) those made by executors, administrators and guardians, when acting by virtue of authority derived from orders of sale obtained in judicial proceedings; and (3) all other cases where property is sold under an order or decree of court designating such property, and authorizing its sale: Freeman Void. Jud. Sales, 15

the statute, for the recovery of a specific sum of money in satisfaction of the judgment. "The chief differences between execution and judicial sales," says Freeman, "are these: the former are based on a general judgment for so much money, the latter on an order to sell specific property; the former are conducted by an officer of the law in pursuance of the directions of a statute; the latter are made by the agent of a court in pursuance of the directions of the court; in the former the sheriff is the vendor, in the latter, the court; in the former the sale is usually complete when the property is struck off to the highest bidder; in the latter it must be reported to and approved by the court." [2]

Sales made under an execution must conform, in all respects, with the rules which the law lays down for the protection of the debtor. If not so made, they may be held irregular and void. But sales made under the decree of a court are, to a considerable extent, under the discretionary control of the court, which often sets them aside, although no error or irregularity has been committed, merely for the sake of an advance in the price; or which may, if satisfied that no injustice has been done, disregard irregularities in the conduct of the sale, and confirm the action of the master or other officer making same.[3] An erroneous or voidable judgment or decree stands good until reversed; and a stranger who purchases property sold under such judgment or decree will generally be protected in his purchase.[4]

§ 472. **Execution Sales — Validity and Effect.** It is a familiar principle that statutory proceedings to divest title to land must be strictly pursued; and that a substantial departure from the requirements of the statute renders the proceedings void.[5] As a rule, the sheriff is presumed to have done his

[2] Freeman on Void Jud. Sales, 14.

[3] Lasell *v.* Powell, 7 Coldw. (Tenn.) 277.

[4] South Fork Canal Co. *v.* Gordon, 2 Abb. (U. S.) 479; McAusland *v.* Pundt, 1 Neb. 211; Storm *v.* Smith, 43 Miss. 497; Garrett *v.* Lynch, 45 Ala. 204; Sinnett *v.* Cralle, 4 W. Va. 600.

[5] Stillwell *v.* Swarthaut, 81 N. Y. 109; Havens *v.* Sherman, 42 Barb.

duty in making a sale, and to have complied with all the requirements of law.[6] But this rule does not apply where the fact that the sale was in violation of the statute, is apparent on the face of the record through which the title is claimed,[7] although the validity of a purchaser's title will not be affected by the failure of the officer to make a seizure in the mode, or by the steps, prescribed by the statute, when such failure consists of mere irregularities.[8] His power to sell comes from the judgment and execution, and is not to be measured by his proceedings under the writ.[9] Greater strictness is required in conducting the sale, the details of which are regulated by express statutory provisions in all the States, and non-compliance in this particular, as by offering land in gross instead of in parcels, etc., will be sufficient to vitiate the proceeding, and the sale may be set aside, even as against a stranger who has bought the property and paid the price.[10]

One who buys at execution sale is not an innocent purchaser in the full meaning of the term, but takes the estate subject to all equities existing against it at the time of the purchase, and is chargeable with notice of all defects in the execution debtor's title, together with the value of the property and of its situation, and of the legal rules bearing upon the transaction.[11] Where, however, a purchaser looks to the record and finds there a subsisting judgment, and buys in good faith, pays the price and receives a deed, he takes a title which is valid until the sale is set aside and the purchase money refunded.[12]

The doctrine of *caveat emptor* applies to every purchaser at

636; Surgi *v.* Colmer, 22 La. Ann. 20.

6 Leonard *v.* Sparks, 117 Mo. 103; Hogue *v.* Corbit, 156 Ill. 540.

7 Piel *v.* Brayer, 30 Ind. 332.

8 Wood *v.* Morehouse, 1 Lans. (N. Y.) 405; Stewart *v.* Pettigrew, 28 Ark. 372; Curd *v.* Lackland, 49 Mo. 451.

9 Blood *v.* Light, 38 Cal. 649.

10 Vass *v.* Johnson, 41 Ind. 19; Browne *v.* Ferrea, 51 Cal. 552; Morris *v.* Robey, 73 Ill. 462. Compare Eaton *v.* Ryan, 5 Neb. 47.

11 Richardson *v.* Wicker, 74 N. C. 278; Allen *v.* McGaughey, 31 Ark. 252; Morris *v.* Robey, 73 Ill. 432.

12 Owen *v.* Navasota, 44 Tex. 517; Wing *v.* Dodge, 80 Ill. 564.

a sheriff's sale. He buys at his peril, and succeeds only to the right and title which the defendant in execution had at the time the judgment was rendered against him.[13] The selling officer has no power to warrant the title and the purchaser is presumed to have made all proper examinations and to know what he is acquiring.[14] The judgment is, of course, the foundation for the title, and the purchaser must see to it that at the time of the sale such judgment is subsisting and unsatisfied, for, however innocent he may be, he can acquire no title when the power which confers the same has ceased to exist.[15]

§ 473. **Title under Execution Sale.** A purchaser at an execution sale succeeds to all the rights which the judgment debtor had,[16] and takes the same title possessed by him with all its imperfections and infirmities.[17] It is the policy of the law, however, to uphold and protect such titles, and though the deed purports to convey only "the right, title and interest" which the judgment debtor possessed or had in the land at date of the judgment, yet the purchaser under such a deed will take the entire estate as against prior unrecorded deeds or equities of which he had no notice.[18] The title so acquired may be sold and conveyed, even pending an appeal,[19] and the reversal of the judgment for error, where the court had

13 Miller *v.* Wilson, 32 Md. 297; Walke *v.* Moody, 65 N. C. 599; Frost *v.* Bank, 70 N. Y. 553; Barron *v.* Mullin, 21 Minn. 374; Holmes *v.* Shaver, 78 Ill. 578; McCartney *v.* King, 25 Ala. 681.

14 Atwood *v.* Wright, 29 Ala. 346; Bassett *v.* Lockard, 60 Ill. 164; Hensley *v.* Baker, 10 Mo. 157.

15 Wood *v.* Calvin, 2 Hill (N. Y.) 566; Jackson *v.* Anderson, 4 Wend. (N. Y.) 474; King *v.* Goodwin, 16 Mass. 63.

16 Morgan *v.* Bouse, 53 Mo. 219; Williams *v.* Amory, 16 Mass. 186.

17 Hicks *v.* Skinner, 71 N. C. 539; Cameron *v.* Logan, 8 Iowa, 434; Bassett *v.* Lockard, 60 Ill. 164.

18 Harpham *v.* Little, 59 Ill. 509.

19 The issue of an execution on a judgment, pending an appeal, is irregular, but not void, and a sale of land under such an execution is subject to be set aside, on motion made in proper time by the defendant, whose land has been sold; but no one except the defendant in the execution can question the sale for irregularity, however gross, and if not so set aside, the sale will pass the defendant's interest in the land: Shirk *v.* Gravel Road Co., 110 Ill. 661.

jurisdiction of the subject-matter and the parties,[20] will not materially affect the purchaser's rights, for it is a settled principle of the common law, coeval with its existence, that the defendant shall have restitution of the purchase money, and the purchaser shall hold the property sold, except where the plaintiff in the judgment becomes purchaser, and still holds the title.[21] In this latter event the title acquired under such judgment is divested by the reversal.[22]

§ 474. **When Title Vests.** In all cases where a redemption is permitted, the legal estate of the judgment debtor is not divested by the sale until after the period allowed for redemption, nor even then, unless the sale has been consummated by a deed from the sheriff. Until the execution of such deed the title of the purchaser is inchoate, for by the simple act of purchase he acquires no legal estate in the land, but only a right to an estate which may be perfected by conveyance.[23] Prior to the sheriff's deed, the debtor is entitled to the possession and profits of the land, while the equity held by the purchaser is a lien upon the land for the amount of his bid and interest.[24]

§ 475. **The Writ.** It is a cardinal rule that the execution must conform substantially to the judgment, or the sale will be void;[25] yet it is not customary to more than allude to this instrument in the abstract of an execution sale, unless special instructions are given otherwise. Its date, number and import are usually noticed, and in case of a *venditioni exponas* a brief allusion to the lands specifically described. Nor will a more extended notice, in most cases, be necessary, as the

20 Feaster *v.* Fleming, 56 Ill. 457; Hobson *v.* Ewan, 62 Ill. 146.

21 Fergus *v.* Woodworth, 44 Ill. 374; Mansfield *v.* Hoagland, 46 Ill. 359. In this event the sale is usually void under special statutes: see Hutchens *v.* Doe, 3 Ind. 528; but compare Gossom *v.* Donaldson, 18 B. Mon. (Ky.) 230.

22 Powell *v.* Rogers, 105 Ill. 318.

23 Smith *v.* Colvin, 17 Barb. 157; Evertson *v.* Sawyer, 2 Wend. 507; Bowman *v.* The People, 82 Ill. 246; and see Rucker *v.* Decker, 49 Ill. 377.

24 Vaughn *v.* Ely, 4 Barb. 159.

25 Crittenden *v.* Leitensdorfer, 35 Mo. 239; Hightower *v.* Handlin, 27 Ark. 20; Hastings *v.* Johnson, 1 Nev. 612.

purport and effect of the writ are generally recited in other of the proceedings under it. Where an execution is not signed by the officer authorized to issue it,[26] or where there is an insufficient *teste,* as where the seal of the court is omitted,[27] or where there is a want of correspondence with the judgment, such defects should be shown, as a valid execution is one of the integral links in the chain of title, but mere clerical variance will not invalidate,[28] nor afford ground for collateral impeachment.[29] An execution issued and levied in the name of deceased plaintiffs, or against deceased defendants, will be void in some States, but may be effectual in others, provided certain statutory provisions are complied with.[30]

§ 476. **The Levy.** A levy of lands is made by an indorsement thereof upon the writ, there being no such thing as seizure of the property. The sheriff, when levying on real estate, does not disturb the possession of the debtor nor even his right of possession, and this constitutes the chief distinction between a levy on real estate and on personal property.[31] The decisions as to what constitutes a valid levy are generally harmonious in declaring that the land must be described with sufficient certainty to enable it to be identified without other evidence,[32] but if defective in this respect it will be cured by a correct deed.[33] In an abstract of the sale it is regarded as a minor detail, which may be briefly noticed in the return of the execution, but the certificate and deed supply in better

26 Rawles *v.* Jackson, 104 Ga. 593; Wooters *v.* Joseph, 137 Ill. 113.

27 This has been held a fatal defect which will invalidate the deed: Ins. Co. *v.* Hallock, 6 Wall. 556; Davis *v.* Ransom, 26 Ill. 100; Weaver *v.* Peasley, 163 Ill. 251; Gordon *v.* Bodwell, 59 Kan. 51; but see, *contra,* Corwith *v.* Bank, 18 Wis. 560.

28 Wheaton *v.* Sexton, 4 Wheat. 503; Jackson *v.* Spink, 59 Ill. 404; Riddle *v.* Bush, 27 Tex. 675; Woodley *v.* Gilliam, 67 N. C. 237.

29 Butler *v.* Haynes, 3 N. H. 21.

30 Hildreth *v.* Thompson, 16 Mass. 191; Meek *v.* Bunker, 33 Iowa, 169; Bowen *v.* Bonner, 45 Miss. 10.

31 Dement *v.* Thompson, 80 Ky. 255.

32 Chadbourne v. Mason, 48 Me. 389; Gault *v.* Woodbridge, 4 McLean, 329.

33 Hopping *v.* Burnam, 2 Greene (Ia.), 39.

shape the necessary information concerning it. "And," observes Mr. Rorer,[34] "though the purchaser relies on the judgment, execution, the levy and the deed, yet when the purchaser at sheriff's sale shows an authorized execution and deed, a correct levy and notice is presumed. A judgment, execution and deed from the sheriff are sufficient to support the title of a purchaser without proof of a levy, though the return be incorrect, or there be no return."[35]

§ 477. **Notice of Sale.** It is a general statutory provision that land shall not be sold by virtue of any execution except at public sale, nor unless the time and place of holding such sale shall have been previously given by prescribed methods. These methods generally consist in putting up written or printed notices of sale and by advertisement thereof in some newspaper, which notices must describe the parties, property, terms, etc., and this applies as well to judicial as to execution sales.[36] This notice it is well to briefly abstract, showing only the legal requirements in a connected narrative form, and when proof of publication is appended, show this as well. The proof of publication is afforded by the publisher's affidavit or certificate of same. The statutes requiring notice of sale are said to be directory merely, and failure to give such notice will not avoid the sale so as to defeat the title of an innocent purchaser not himself in fault;[37] hence, a passing allusion sufficient to show its purport, seems all that is necessary in regard to the notice.[38] In the general synopsis of sale it may be mentioned in this manner:

[34] Rorer Jud. and Ex. Sales, 292, citing Brooks *v.* Rooney, 11 Ga. 423; Hopping *v.* Burnam, 2 Greene, 39; Evans *v.* Davis, 3 B. Mon. 344; McEntire *v.* Durham, 7 Ired. L. 151; Jackson *v.* Young, 5 Cow. 269; Phillips *v.* Coffee, 17 Ill. 154.

[35] Levy on attachment is governed by different principles, and a return or certificate filed is of vital importance in preserving the lien: See Lis Pendens and Attachments.

[36] Olcott *v.* Robinson, 20 Barb. 148.

[37] Freem. Ex. § 284. With regard to probate sales a more strict rule seems to prevail and notice is held essential: Blodgett *v.* Hitt, 29 Wis. 169; Mountour *v.* Purdy, 11 Minn. 384.

[38] Defective notice does not ren-

Printed copy of notice of sale, gives title of court and cause, describes the said premises,[39] *and fixes on Sept. 7, 1881,*[40] *at 11 o'clock a. m.,*[41] *at the east door of the Court House,*[42] *Chicago, Ill., and for cash, as the time, place and terms of said sale.*

§ 478. **Proof of Publication.** Appended to the notice of sale will usually be found an affidavit or certificate by the publisher of a newspaper, to the effect that the notice was duly published according to law, and this affidavit or certificate it is well to show in brief terms. Its material points may be noted as follows:

Appended to the foregoing is,

Affidavit by Myra Bradwell, President of the Chicago Legal News Co. } *Subscribed and sworn to, June 1, 1883.*

Recites, that a notice "of which the annexed printed slip is a true copy," was duly published in the Chicago Legal News, a weekly newspaper of general circulation, printed and published in Cook County, Ill., for the period of three successive

der the sale void, or even voidable unless the purchaser has notice of the irregularity. Purchasers in good faith can not be affected by such non-compliance with the statute: Osgood *v.* Blackmore, 59 Ill. 261; Watt *v.* McGalliard, 67 Ill. 513.

39 A minute description is not necessary provided what is given is correct and sufficiently identifies the property to enable the public to understand, by the exercise of ordinary intelligence, what is to be sold: Stevens *v.* Bond, 44 Md. 506; Collier *v.* Vason, 12 Ga. 440; Allen *v.* Cole, 9 N. J. Eq. 286.

40 The date of sale is material and destroys the validity of the notice if of such a character as to mislead the public: Fenner *v.* Tucker, 6 R. I. 551.

41 If the notice does not name the exact hour at which the sale is to be held, it should name the hours between which it will take place, which will be sufficient if the hours named belong to the business hours of the day: Cox *v.* Halsted, 2 N. J. Eq. 311; Burr *v.* Borden, 61 Ill. 388. A failure to state some time renders the notice insufficient: Trustees *v.* Snell, 19 Ill. 156.

42 The designation of a place of sale is an essential requisite of the notice, without which it is in law

weeks;[43] *that the date of the first publication was Jan. 6, 1883;*[44] *that the date of the last publication was Jan. 20, 1883.*[45]

A certificate of publication under the statute is sufficient if it shows a substantial compliance therewith, but the essential requisites must appear; such affidavit or certificate may properly be likened to the return of an officer, and like such return should show all jurisdictional facts.

A defect in the certificate of publication, in not stating the first and last days of the publication, has been held to be cured by a recital in the decree that "it appearing to the court that notice according to law was given," etc., the presumption being that the court received other evidence than the certificate, of the date of the publication.[46] It must be observed further, that the certificate or affidavit of publication can only be made by the publisher or his authorized agent,[47] and a certificate signed "John Wentworth, publisher, by Reed," has been held insufficient.[48] In this instance the certificate did not purport to be given by the publisher, but by another person who used

no notice whatever: Bottineau *v.* Ins. Co., 31 Minn. 125; Blodgett *v.* Hitt, 29 Wis. 169.

43 The number of times, or period of time, the notice was published, and the date of the first and last issues containing same, are indispensable to its validity: Beygeh *v.* Chicago, 65 Ill. 189.

44 It may be well to observe that the date of publication does not fall on Sunday as this would invalidate the notice: Smith *v.* Wilcox, 24 N. Y. 353; Scammon *v.* Chicago, 40 Ill. 146; Shaw *v.* Williams, 87 Ind. 158.

45 It would seem that the statute is satisfied if there are three different insertions in as many weekly issues before sale, although twenty-one days do not elapse from first insertion to day of sale, Pearson *v.* Bradley, 48 Ill. 250. Where this fact appears, however, counsel should notice it in his opinion, if the statute requires twenty days' notice.

46 Moore *v.* Neil, 39 Ill. 256. The foregoing example, though inserted in connection with execution sales, is that also employed in all decretal sales as well, either in chancery or in probate, and must be shown in the same manner in expositions of such sales.

47 This matter is statutory; usually the proof of publication must be made by the "printer or publisher."

48 Fox *v.* Turtle, 55 Ill. 377.

the publisher's name but failed to show his own authority. Where a newspaper is published by a firm or by a corporation, a certificate by one of the partners, or by an officer of the corporation, when such certificate shows the official connection of the person making it with the newspaper, will usually be sufficient.[49]

§ 479. **Execution Sale as Affected by Death.** The death of a plaintiff after judgment and before execution issued is of comparatively little moment in respect to title, as his personal representatives may sue out execution in the name of such deceased plaintiff, or in their official capacity, as the statute may direct.[50] If the defendant dies after judgment, the plaintiff may sue out execution in the mode prescribed by statute, or, if permissible, proceed by the common law *scire facias.* But, in the event of the death of either party prior to execution, to render valid a sale under the judgment it should be revived by *scire facias,* or an execution must be sued out in the mode prescribed by statute, which usually provides for the filing or recording, in the court in which the judgment exists, of the letters testamentary or of administration, after which execution may issue and proceedings be had thereon, in the name of the executor or administrator.[51]

49 Fox *v.* Turtle, 55 Ill. 377. It would seem to be the rule in some States, that when the affidavit of publication is defective, an amended affidavit may be filed according to the truth of the case: Bunce *v.* Reed, 16 Barb. 347.

50 It is a familiar provision of the statute that liens created by law do not abate by reason of the death of any plaintiff or plaintiffs, but that same shall survive in favor of the executor or administrator, whose duty it shall be to have the judgment enforced: Durham *v.* Heaton, 28 Ill. 264.

51 Scammon *v.* Swartout, 35 Ill. 326; Brown *v.* Parker, 15 Ill. 307. In this case a sheriff's deed was relied on for title. The execution under which the sale was made was not issued until several years after the death of the judgment creditor, without first reviving the judgment in favor of the personal representative, or recording in court his letters of administration, and was also issued in the name of the deceased plaintiff, and not in the name of his personal representative. *Held,* that the execution, and all proceedings under it, were absolutely void.

§ 480. **Exemptions.** Though all the real estate of a judgment debtor may be primarily liable to seizure and sale on execution, a statutory right has been given to him in every State, to relieve a portion of same from this burden, but the exercise of this right is largely dependent on intention. When, therefore, title is claimed, or sought to be adduced through the medium of an execution sale, and the abstract furnishes no information, it would seem that an inquiry should be made concerning the status of the land with reference to the statutory right of exemption. The debtor is not always obliged to assert his right at the time of the levy, neither will a subsequent sale impair same, and the question, when such a state of facts may exist under the statute, becomes of controlling importance. A sale of the homestead under execution being inoperative, the purchaser thereat takes no title.[52]

§ 481. **Dower rights.** It must always be borne in mind, while making searches of the character now under consideration, that a sale made in pursuance of a judgment affects only the title of the parties to the suit. To the great majority of judgments at law the wives of the defendants are not made parties, and it necessarily follows, in such a case, that an execution sale of the husband's land does not extinguish the wife's right of dower.[53] Therefore, whenever title is derived through a sale of this kind, and the records fail to disclose anything respecting the domestic condition of the judgment debtor, an inquiry is raised and a requisition for further information should be made.

§ 482. **Judicial Sales — Validity and Effect.** A sale of land under a decree, must be made in the manner and on the terms prescribed in such decree;[54] and a confirmation by the court of the report of the officer, can not, it seems, cure the invalidity of a sale not so made.[55] But a sale will not be disturbed unless the party suing can show an injury re-

[52] Conklin *v.* Foster, 57 Ill. 104.

[53] Butler *v.* Fitzgerald, 43 Neb. 192; Dayton *v.* Corser, 51 Minn. 406; Ficklin *v.* Rixey, 89 Va. 832.

[54] Langsdale *v.* Mills, 32 Ind. 380; Augustine *v.* Doud, 1 Ill. App. 588.

[55] Bethel *v.* Bethel, 6 Bush (Ky.), 65; but this will only apply

sulting to him therefrom,[56] as well as an interest in the subject-matter,[57] while it is always the policy of the law to uphold judicial sales, and to protect the rights of purchasers under them;[58] and although the judgment or decree may be reversed, yet all rights acquired at a judicial sale while the decree or judgment was in force, and which it authorized, will be protected. It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order on the faith of which he purchased was made, and authorized the sale,[59] for where the court has jurisdiction of the parties, and of the subject-matter of the litigation, no matter how erroneously it may thereafter proceed, within the bounds of its jurisdiction, its decree will be conclusive until reversed or annulled in some direct proceeding,[60] and the title to property acquired at a sale under such decree, by a stranger to the record, will be upheld, although the decree itself may afterward be reversed for manifest error.[61]

On the other hand it must be remembered that the rule of *caveat emptor* applies to all judicial sales,[62] and one who purchases thereat must, for his own protection, always exercise that reasonable caution and vigilance which the rule exacts. It is of the utmost importance, therefore, that in the examination of a title depending on a judicial sale every essential step of

to gross departures; mere irregularity is generally cured by confirmation: Williamson *v.* Berry, 8 How. 546; Koehler *v.* Ball, 2 Kan. 160. Void sales, whether execution or judicial, are classed by Mr. Freeman, as (1) those which are void because the court had no authority to enter the judgment or order of sale; (2) those which, though based on a valid judgment or order of sale, are invalid from some vice in the subsequent proceedings: Freeman Void Jud. Sales, 15.

56 Matter of Gilmer, 21 La. Ann 589.

57 Nixon *v.* Cobleigh, 52 Ill. 387.

58 Dorsey *v.* Kendall, 8 Bush (Ky.), 294; Allman *v.* Taylor, 101 Ill. 185; Norton *v.* Reardon, 67 Kas. 302.

59 Gray *v.* Brignardello, 1 Wall. 627; Fergus *v.* Woodworth, 44 Ill. 374.

60 Norton *v.* Reardon, 67 Kas. 302; Noland *v.* Barrett, 122 Mo. 181; Bland *v.* Muncaster, 24 Miss. 62.

61 Allman *v.* Taylor, 101 Ill. 185.

62 Holmes *v.* Shaver, 78 Ill. 578.

the transaction should be carefully scrutinized and the facts of jurisdiction established.

§ 483. **Title under Judicial Sale.** The title acquired under a sale by order of the court differs in no material respect from that obtained where the sheriff is the vendor. The purchaser is entitled to the interest of all the parties to the suit, and to the interest of those who have purchased *pendente lite* from any of the parties.[63] But he acquires no new rights, nor does the fact that the court is regarded as the vendor[64] confer upon him any superior equities. A court does not insure the title to real property sold under its decrees,[65] and the purchaser buys, presumably, with full knowledge of all defects and pre-existent liens.[66] He is charged with notice of all facts disclosed by the record which affect the rights of others in the property sold,[67] and he is bound to examine the title or purchase at his peril. If he buys without an examination and obtains no title, he must, as a general rule, suffer the loss arising from his neglect, unless fraud or mistake has entered into the transaction.[68] Prior to confirmation he has no independent rights, but is regarded as a mere proposer;[69] after confirmation his rights become vested, and the sale will not be set aside except for fraud, mistake, surprise, or other cause for which equity would give relief if the sale had been made by the parties in interest instead of by the court.[70] Neither will the title of an innocent purchaser, a stranger to the record, be affected by the subsequent

63 Harryman *v.* Starr, 56 Md. 63.

64 In all sales made under the authority of a decree in equity, the court is the vendor, and the commissioner making the sale is the mere agent of the court. The decree is the warrant of authority to sell: Parrat *v.* Neligh, 7 Neb. 546; Thompson *v.* Craighead, 32 Ark. 291.

65 Gunton *v.* Zantzinger, 3 MacArthur (D. C.), 262.

66 Housley *v.* Lindsay, 10 Heisk. (Tenn.) 651; Guynn *v.* McCauley, 32 Ark. 97; Capehart *v.* Dowery, 10 W. Va. 130; Watson *v.* Hoy, 28 Gratt. (Va.) 698.

67 Williamson *v.* Jones, 43 W. Va. 562; Meacham *v.* Steele, 93 Ill. 135.

68 Tilley *v.* Bridges, 105 Ill. 336.

69 State *v.* Roanoke Nav. Co., 86 N. C. 408.

70 Berlin *v.* Melhorn, 75 Va. 639.

reversal of the decree for irregularity;[71] but where the purchaser was an original plaintiff in the suit, or an assignee of the judgment or decree, he acquires only a defeasible title, which may be defeated by a subsequent reversal, and the same rule obtains whether the reversal is based on an amendable defect or one that is incurable.[72]

§ 484. **Rights of Purchaser.** A purchaser at a judicial sale has a right to presume that it is conducted according to the provisions of law,[73] and proceedings in court, in a matter in which it has jurisdiction, will be presumed to be regular. Hence, a purchaser, at a sale made by order of such court, is not bound to look further back than the judgment or decree, and the legal effect it may have on the title which is the subject of inquiry.[74] Such judgment is a complete protection to a purchaser under it,[75] except as to matters which reach the jurisdiction of the court. Neither is he bound, in any case, to see to the application of the purchase money, for this is under the control of the court; and however unwise the disposition may be, his title will not be affected by it.[76]

§ 485. **Compelling Purchaser to take Title.** A sale made by order of a court of equity is, until final ratification, an executory contract, open to objection, and not to be enforced if the enforcement would be inequitable and against good conscience.[77] A purchaser can not be compelled to accept a doubtful title. A title is doubtful when its condition invites litigation. When doubts are raised by extrinsic circumstances, which neither the purchaser nor the court can satisfactorily investigate, for want of means to do so, the court will refuse to

71 Sutton *v.* Schonwald, 86 N. C. 198; Barlow *v.* Stanford, 82 Ill. 298.

72 McDonald *v.* Life Ins. Co., 65 Ala. 358; Fishback *v.* Weaver, 34 Ark. 569; McLagan *v.* Brown, 11 Ill. 519.

73 Browning *v.* Howard, 19 Mich. 323.

74 Fleming *v.* Johnson, 26 Ark. 421; Dugan *v.* Follett, 100 Ill. 581; Allman *v.* Taylor, 101 Ill. 185.

75 Hening *v.* Punnett, 4 Daly (N. Y.), 543.

76 Knotts *v.* Stearns, 91 U. S. 638.

77 Hunting *v.* Walter, 33 Md. 60; Ormsby *v.* Terry, 6 Bush (Ky.), 553; Mullins *v.* Aiken, 2 Heisk. (Tenn.) 535.

impose such title on the purchaser. When the means of inquiry are offered, and the result is satisfactory, performance will be enforced.[78] But all objections must be made before the sale is confirmed,[79] for after confirmation no relief will be granted to the purchaser upon the ground of defect of title;[80] he can not have a rebate of price on discovering liens unknown to him before confirmation,[81] and even though the title he may procure from the court may be worthless, he can not be relieved from payment of the price.[82] A purchaser can not, after confirmation, set up, as a ground of relief against his purchase, facts known to him before it was completed;[83] and one who buys without inquiry or examination will not be relieved because of a misapprehension as to the legal effect of the decree for sale and the character and extent of the title he will acquire; such mistake being a mistake of law, and due to the carelessness of the purchaser himself.[84]

§ 486. **Order of Confirmation.** After the sale, and before the execution of a conveyance, in all cases of judicial sales, and sometimes of execution sales as well,[85] a return or report of sale must first be made to the court which ordered the same, which upon examination approves and confirms the action of

78 Kostenboder *v.* Spotts, 80 Pa. St. 430; Monaghan *v.* Small, 6 Rich. (S. C.) 177; Graham *v.* Bleakie, 2 Daly (N. Y.), 55.

79 Long *v.* Weller, 29 Gratt. (Va.) 347.

80 Farmers' Bank *v.* Peter, 13 Bush (Ky.), 591. But the general rule, that objections, by purchasers, to judicial sales, for defects of title, must be made before the sale is confirmed by the court, and that objections afterward come too late, does not apply to the equity of a purchaser arising from after discovered mistakes, fraud, or other like matter: Watson *v.* Hoy, 28 Gratt. (Va.) 698. But if mistake is relied on it must be the mistake of both parties: Long *v.* Weller, 29 Gratt. (Va.) 347. And see Berlin *v.* Melhorn, 75 Va. 639.

81 Farmers' Bank *v.* Peter, 13 Bush (Ky.), 591; Curtis *v.* Root, 28 Ill. 367.

82 Capehart *v.* Dowery, 10 W. Va. 130, and see Dills *v.* Jasper, 33 Ill. 263.

83 Spence *v.* Armour, 9 Heisk. (Tenn.) 167.

84 Hayes *v.* Stiger, 29 N. J. Eq. 196; Morris *v.* Hogle, 37 Ill. 150; Johnson *v.* Baker, 38 Ill. 98.

85 Confirmation of execution sales is not necessary at common law, but is sometimes rendered so by statute.

the officer who made the sale.[86] Until this has been done the sale is incomplete, and confers no rights on the purchaser.[87] In judicial sales a confirmation is rendered necessary from the fact that the court, and not the officer making the sale, is the vendor, and confirmation is regarded as the final consent; but even where there has been no confirmation, if a deed has been made and delivered, and there has been a possession and holding thereunder, time may, if sufficiently long, operate to confirm and ratify the sale, and perfect the title of the purchaser.[88]

Where an abstract of judicial proceedings culminating in a sale and conveyance, is shown, the order of confirmation is material, and if wanting, the apparent defect should be noted by counsel and proper inquiries made regarding same.

§ 487. **Effect of Confirmation.** An order confirming a sale of land, made by a court having jurisdiction of the parties and the subject-matter, is a final and conclusive determination of all matters passed upon or which might have been passed upon had they been presented by way of objection. It binds all of the parties and their privies and forever precludes any attack upon the sale except for fraud, mistake, surprise, or some other circumstance for which equity would give relief if the sale had been made by the parties in interest instead of by the court.[89] So, too, as the order of confirmation is practically

86 A sale of land under a decree will not be approved by a court if fraud or misconduct on the part of any of the parties to the sale is shown. Barling *v.* Peters, 134 Ill. 609.

87 Busey *v.* Hardin, 2 B. Mon. (Ky.) 407; Bank *v.* Humphreys, 47 Ill. 227; Williamson *v.* Berry, 8 How. 547; Thorn *v.* Ingram, 25 Ark. 52; Valle *v.* Fleming, 19 Mo. 454; Hunting *v.* Walter, 33 Md. 60. Approving the sale makes the officer's act that of the court, and where, upon such approval, he is ordered to make a deed, no order confirming the deed is necessary: McHany *v.* Schenk, 88 Ill. 357.

88 Gowan *v.* Jones, 18 Miss. 164; Rorer on Jud. and Ex. Sales, 57. In such an event, however, the deed would be regarded only as color of title in connection with adverse possession.

89 Kincaid *v.* Tutt, 88 Ky. 392; Berlin *v.* Melhorn, 75 Va. 639; Brown *v.* Gilmor, 8 Md. 322; Speck *v.* Pullman Co., 121 Ill. 33; Willis *v.* Nicholson, 24 La. Ann. 545.

a final judgment it has the effect of curing all irregularities in the proceedings leading up to the sale.[90]

But, while the order of confirmation cures all irregularities in the mode of making the sale it adds nothing to the authority of the officer who made it. If the sale was without authority, the ratification of it by the court must be considered as having been given inadvertently,[91] or, if given deliberately and on a full examination of the facts, must still be regarded as an unauthorized proceeding.[92] So, too, where the court has exceeded its jurisdiction in ordering the sale, a confirmation would have no effect, for the sale being void, there was no subject-matter upon which the order of confirmation could act. If the court had no jurisdiction to order the sale, it had none to confirm it, for where there is no power to render a judgment or to make an order, there can be none to confirm or execute it.[93] But where these questions do not arise it is presumptive evidence that the sale was regularly and properly made, and questions arising under it can not be presented collaterally.[94]

§ 488. **Certificate of Sale.** Where a contract for the sale of land is executory on both sides, it is necessary that it should be evidenced by a memorandum in writing, signed by the vendor, and sheriff's sales form no exception to the general rule.[95] The usual method is to execute a certificate of sale. If no certificate or deed is given to the purchaser, and no memorandum of the sale is made on striking off the property, it has been held that the sale can not be enforced, even though the purchase money is paid, and the sheriff afterward makes due return of

90 Thorn *v.* Ingram, 25 Ark. 53; O'Brien *v.* Gaslin, 20 Neb. 347; Koehler *v.* Ball, 2 Kan. 172; Hotchkiss *v.* Cutting, 14 Minn. 537; Conover *v.* Musgrove, 68 Ill. 58.

91 Wills *v.* Chandler, 1 McCrary (C. Ct.), 276. Hickenbotham *v.* Blackledge, 54 Ill. 316.

92 Shriver's Lessee *v.* Lynn, 2 How. 60, and see Jacobus *v.* Smith, 14 Ill. 359.

93 Townsend *v.* Tallant, 33 Cal. 54; Hawkins *v.* Hawkins, 28 Ind. 70; Bethel *v.* Bethel, 6 Bush (Ky.), 65.

94 Crowell *v.* Johnson, 2 Neb. 146; Matthews *v.* Eddy, 4 Oreg. 225; Eaton *v.* White, 18 Wis. 517. Speck *v.* Pullman Co., 121 Ill. 33.

95 Ruckle *v.* Barbour, 48 Ind. 274; Evans *v.* Ashley, 8 Mo. 177.

the sale.[96] But this is an extreme view. The sheriff, in making sales, acts as the legal agent and representative of the plaintiff and defendant in the judgment, and of the accepted bidder at the execution sale, and he has the right to bind all the parties by his memorandum. This, it seems, he may do by his return on the execution;[97] his return of the facts attending the purchase, made at the time of the sale, taking the case out of the statute of frauds,[98] and binding all parties by an enforceable executory contract. It is no part of the office of a sheriff's return, however, to show what land is sold on execution, the province of a return being to show the satisfaction or part satisfaction of the judgment, or failure to make satisfaction thereof, and the particulars of the sale, subject-matter, consideration, purchase, etc., are best shown by the certificate of purchase or by the recitals in the sheriff's deed.[99]

Deeds do not issue immediately upon execution sales, and, in many cases, judicial sales as well, but a reasonable time is allowed during which the judgment debtor may redeem the property upon payment of the judgment, costs, charges, etc., and a certificate stating the facts is issued to the purchaser at the time of the sale.[1] A duplicate of this certificate is recorded by the officer in the registry of deeds, and the certificate, duplicate, or record of same, is, by law, made evidence of the facts therein stated. In case of redemption, as provided by law, a certificate

96 Gossard *v.* Ferguson, 54 Ind. 519; but see Sanborn *v.* Chamberlin, 101 Mass. 409.

97 Warehouse Co. *v.* Terrill, 13 Bush (Ky.), 463; Sanborn *v.* Chamberlin, 101 Mass. 409; Remington *v.* Linthicum, 14 Pet. 92.

98 It is a prevailing rule, however, that after confirmation judicial sales are not within the statute of frauds; Bozza *v.* Rowe, 30 Ill. 198; Fire Ins. Co. *v.* Loomis, 11 Paige, 431; Steward *v.* Garvin, 31 Mo. 36; Hutton *v.* Williams, 35 Ala. 503. And in some States they are held to be not within the statute at all: Fulton *v.* Moore, 25 Pa. St. 468; Halleck *v.* Guy, 9 Cal. 181.

99 Gardner *v.* Eberhart, 82 Ill. 316.

1 The legal effect of the certificate is to evidence the lien of the purchaser upon the lands, for the amount of his bid and interest, during the period allowed for redemption: Vaughn *v.* Ely, 4 Barb. 156, and see Evertson *v.* Sawyer, 2 Wend. 507.

of redemption is issued and recorded in like manner. The certificate of sale made by the sheriff is sufficiently shown as follows.

Seth Hanchett, Sheriff of Cook Co., Ills., to Hiram Smith. } *Certificate of sale. Dated March 1, 1882. Recorded March 2, 1882. Book 200, page 210. Said Sheriff (by deputy)* [2] *certifies that by virtue of a certain (alias, pluries, etc.) writ of execution to him directed from the Superior Court of Cook County, issued on a judgment rendered at the November Term, 1881, of said court, in favor of William Thompson, plaintiff, against Thomas Jones, defendant, for $1,000.00 and costs, dated February 1, 1882, he did on March 1, 1882, at 10 o'clock A. M., at the front door of the court house in the city of Chicago (the time and place aforesaid having been duly advertised according to law), sell at public vendue all right, title and interest of said defendant in and to* [here set out the description as found in the certificate] *to Hiram Smith for $1,035.00, said sum being the highest and best bid offered for said tract or lot of land, the same having been first offered in separate tracts or lots without receiving any bid or bids therefor or for any part thereof, and the purchaser will be entitled to a deed of the premises so sold on March 1, 1883, unless the same shall be redeemed as provided by law.*

As has been seen, where lands are sold by order of court, although the sheriff is a proper person to make the sale, the court has discretionary power to appoint a commissioner, master in chancery, or other officer of the court, or any fit and proper person to make it. Sales made by a commissioner or master, under the direction of a court of chancery, do not stand in all respects on a footing with sales made by the sheriff under an execution. The latter are made under the naked authority of the writ,

[2] When such is the case.

the former under the direct supervision of the court.[3] Judicial sales are usually intrusted to a master, who also executes the deed, and on such sale a certificate issues to the purchaser in like manner as in sales on execution. The following abstract presents the salient features of a master's certificate:

Edward A. Dicker, Master in Chancery of the Circuit Court of Cook County, Ill., to William Jackson. Doc. 10,028.

Certificate of Sale.
Dated May 3, 1880.
Recorded May 3, 1880.
Book 210, page 500.

Said master certifies that in pursuance of a decree entered June 15, 1879, by said court in the cause in chancery entitled [here set out the title of the cause] *he duly advertised according to law the lands hereinafter described to be sold at public auction to the highest and best bidder for cash at 10 o'clock A. M., on May 3, 1880, at the front door of the court house, in the city of Chicago, Ill.*

That at the time and place, so aforesaid, appointed for said sale, he attended to make the same and offered and exposed said lands for sale at public auction to the highest and best bidder for cash. Whereupon William Jackson offered and bid therefor $1,000.00, and that being the highest and best bid therefor, he accordingly struck off and sold to said bidder for said sum the said lands which are situated in Cook County, Illinois, and described as follows, to wit: [here describe the property]. *He further certifies that said William Jackson, his legal representatives or assigns, will be entitled to a deed of said premises on May 3, 1881, unless the same shall be redeemed according to law.*

The certificate of sale confers on the holder no title or interest in the land, especially where the time for redemption has

[3] Meetze v. Padgett, 1 S. C. 127; Lasell v. Powell, 7 Coldw. (Tenn.) 277.

not expired,[4] and the possession of the defendant in execution can not be disturbed until his title has been transferred by the officer's deed.[5] After the execution of a deed the certificate of sale ceases to be an essential muniment of title.[6]

§ 489. **Assignment of Certificate.** A certificate given at a judicial or execution sale is usually assignable by indorsement, and the assignee is entitled to the benefits, in every respect, to which the original purchaser was entitled therefrom. On the other hand, it is subject in his hands to all defenses that could have been made against it in the hands of the assignor, such assignee standing in the shoes of the original purchaser. But such purchaser does not take the land itself by his bid; he has only an incipient interest that may or may not ripen into an absolute estate; and as a party can not assign that which he hath not, so such purchaser, not having the legal title to the property, of course can not assign it. It would seem, therefore, that the assignee can not be regarded as an innocent purchaser, nor entitled to protection as such, until he is clothed with a legal title by a sheriff's deed.[7]

Where the original purchaser dies before the issuance of a deed, in the absence of an express devise, his executors will succeed to no rights in the land, and have no right to demand a deed, but the sheriff's deed should be made to the deceased purchaser's heirs at law.[8]

§ 490. **Proof of Title Under Judicial and Execution Sales.** Where a person attempts to avail himself of a decree, as an adjudication upon the subject-matter, or as a link in his chain of title, founded on a judicial sale under the decree, he is required to produce the judgment roll, so that, among other things, the court may determine, on an inspection of the entire roll, whether the court which rendered the decree had jurisdic-

4 Huftalin *v.* Misner, 70 Ill. 55.
5 Hays *v.* Russell, 70 Ill. 669.
6 Gardner *v.* Eberhart, 82 Ill. 316.
7 Roberts *v.* Clelland, 82 Ill. 538; Reynolds *v.* Harris, 14 Cal. 667, and see Messerschmidt *v.* Baker, 22 Minn. 81.
8 Potts *v.* Davenport, 79 Ill. 455; Swink *v.* Thompson, 31 Mo. 336.

tion of the subject-matter.[9] It is true, the purchaser may rest, in support of his title, upon the judgment or decree, and the deed thereunder, but he must produce a valid judgment or decree, and the well established rule is, that the method of proving such judgment or decree to be valid is by the production of the roll, on an inspection of which it may be determined whether the court had the necessary jurisdiction of the parties and of the subject-matter.[10] In analogy, therefore, to the presentation of the judgment roll, a synopsis of the papers and proceedings in the cause should always form a preliminary statement to the abstract of the officer's deed, and this should be sufficiently full and explicit to enable counsel to pass with judicial discrimination upon the merits of the title as affected by the proceedings. In all proceedings in equity, where the suits are wholly or partially *in rem,* this is always done, but in legal actions, or where the proceeding is *in personam,* a different rule is generally observed. The reason for this is apparent, in that personal actions affect the land only collaterally and by reason of the statutory lien of the judgment, hence, examiners have not deemed it necessary to show the various steps which led up to the judgment, but have contented themselves with a simple showing of the fact that judgment was rendered. Yet if the court failed to obtain jurisdiction of the person of the judgment debtor, and has erroneously proceeded to hear the proofs and render judgment when no sufficient steps had been first taken to bring the parties properly before it, any sale made in satisfaction of such judgment would be void and confer no title on the purchaser.[11] These are extreme cases, yet they have occurred, and similar cases may again occur, and it would seem, therefore, that in actions *in personam,* followed by judgment,

9 See "Actions and Proceedings," *infra.*

10 Harper *v.* Rowe, 53 Cal. 233; 1 Greenl. Ev. § 511; 2 Phil. Ev. 138; Vail *v.* Iglehart, 69 Ill. 332.

11 Albee *v.* Ward, 8 Mass. 79; Miller *v.* Handy, 40 Ill. 448. In this case, there was a sale under execution; the judgment was afterward declared void for want of proof of service, and the sale declared a nullity; and see Johnson *v.* Baker, 38 Ill. 98; but compare Fitch *v.* Boyer, 51 Tex. 336.

execution and deed, sufficient should be shown to enable counsel to see that the parties were properly before the court. In any event, the examiner should inspect the judgment roll as well as the docket, and if, from such inspection, palpable errors are manifest they should be properly noted.

§ 491. **Continued — Presumptions.** It is true, however, as a general proposition, that a domestic judgment of a court of general jurisdiction, upon a subject-matter within the ordinary scope of its powers and proceedings, is entitled to such absolute verity, that, in a collateral action, even where the record is silent as to notice, the presumption, when not contradicted by the record itself, that the court had jurisdiction of the person also, is so conclusive that evidence *aliunde* will not be admitted to contradict it.[12] It is probably on the strength of this doctrine that examiners have been accustomed to show only the fact of judgment, and not the preliminary steps attending it, assuming the judgment to be valid; and attorneys have passed upon the facts so presented in view of the oft-repeated principle, that all that a purchaser must show to sustain his title, is a valid judgment, execution, and a sheriff's deed.[13] If the court had jurisdiction of the subject-matter, and the proper parties were before it, and its proceedings were regular, and the sale was properly conducted, then the title of an innocent purchaser will not be disturbed, and he may rest secure upon the assurances of his deed. These are the great essentials to a perfect title, and all that a purchaser must show to satisfactorily prove it.

A purchaser is not bound to go through all the proceedings,

12 Fitch *v.* Boyer, 51 Tex. 336; Guilford *v.* Love, 49 Tex. 715; Griffin *v.* Page, 18 Wall. 350; Hahn *v.* Kelly, 34 Cal. 391; Freeman on Judg'ts, § 124; 2 Am. Lead. Cas. 736.

13 Coffee *v.* Silvan, 15 Tex. 362; Hughes *v.* Watt, 26 Ark. 228; Lennox *v.* Clarke, 52 Mo. 115; Splahn *v.* Gillespie, 48 Ind. 397; Mayo *v.* Foley, 40 Cal. 281. The common law presumption in favor of the jurisdiction and regularity of the proceedings of courts of record or general jurisdiction, had its origin in the fact that, at common law, no judgment could be given against a defendant until he had appeared in the action: Neff *v.* Pennoyer, 3 Sawyer, 274.

and to look into all the circumstances, and see that the judgment or decree is right in all its parts. He has the right to presume that the court has taken the necessary steps to investigate the rights of the parties, and upon such investigation has properly rendered a judgment or decreed a sale. He will not be affected by any imperfection in the frame of the bill if it contain sufficient matter to show the propriety of the decree, and the propriety of the decree must be attested, and its validity determined by the then existing circumstances.[14]

§ 492. **Probate Sales.** "Probate sales," says Mr. Freeman, "we are sorry to say, are generally viewed with extreme suspicion. Though absolutely essential to the administration of justice, and forming a portion of almost every chain of title, they are too often subjected to tests far more trying than those applied to other judicial sales. Mere irregularities of proceeding have, even after the proceedings had been formally approved by the court, often resulted in the overthrow of the purchaser's title. In fact, in some courts, the spirit manifested toward probate sales has been scarcely less hostile than that which has made tax sales the most precarious of all the methods of acquiring title."[15] Possibly the learned author has taken a too extreme view of the matter, though it must be conceded that by reason of the many jurisdictional facts and circumstances which environ sales of this character, titles derived thereunder are not always as stable as those derived under sales in equity, or even by execution.[16] The jurisdiction of probate

14 Zirkle *v.* McCue, 26 Gratt. (Va.) 517.

15 Freeman Void Jud. Sales, 44.

16 While the decrees of a probate court, upon matters within its jurisdiction are as final and conclusive as the judgments of any other court (Barker *v.* Barker, 14 Wis. 131; Cummings *v.* Cummings, 123 Mass. 271; Dayton *v.* Mintzer, 22 Minn. 393), and its records import absolute verity (Wood *v.* Myrick, 16 Minn. 494; Tibbitts *v.* Tilton, 24 N. H. 124), yet, owing to the peculiarly connected character of its proceedings, and the interdependence of all its acts, as well as the further fact that its practice is neither in accordance with established common law nor chancery precedents, and hence not reviewable in the light afforded by such precedents, they are not merely voidable if want of jurisdiction appears, but absolutely void (Sumner *v.* Parker, 7 Mass. 79; Smith *v.* Rice, 11 Mass.

courts to order the sale of lands of a decedent is statutory and limited, and must appear from the record, but, while no intendments will be made in its favor, the tendency is to disregard mere irregularities, errors of form and other matters not directly affecting jurisdiction, and all presumptions in this respect are in favor of the sale and of the validity of the title based on such proceedings.[17]

Probate courts are invested by law with a general jurisdiction in cases where real estate is to be sold for the payment of the debts of decedents, and where a court ordering a sale has jurisdiction of the subject-matter and of the proper parties, even if the proceedings are irregular and erroneous, the decree and sale under it can not be assailed in a collateral proceeding,[18] nor can the purchaser for that reason avoid the sale.[19] Until reversed, the decree confers power to sell and pass the title, however erroneous it may be.[20] No class of public sales are better entitled to a just degree of protection than those of administrators.[21]

But while this represents the prevailing sentiment it must yet be remembered that the administrator, as such, has no interest in or power over the land belonging to his intestate at his death; nor has the probate court any jurisdiction over it for any purpose whatever, but only a simple power to order its sale. This power is derived wholly from special legislative grant and its exercise is restricted to the happening of particular contingencies. These contingencies are jurisdictional

507), and an unwarranted step at the outset will suffice to vitiate all subsequent proceedings. Thus, if the original appointment of the administrator is void, all the subsequent proceedings are void: Gary's Prob. Prac. 12; Frederick *v.* Pacquette, 19 Wis. 541.

17 Reynolds *v.* Schmidt, 20 Wis. 374; Mohr *v.* Tulip, 40 Wis. 66; Woods *v.* Monroe, 17 Mich. 238; Morrow *v.* Weed, 4 Iowa, 77; King *v.* Kent's Heirs, 29 Ala. 542; Moffitt *v.* Moffitt, 69 Ill. 641; Maurr *v.* Parrish, 26 Ohio St. 636; Bowen *v.* Bond, 80 Ill. 351.

18 Nichols *v.* Mitchel, 70 Ill. 258; Wing *v.* Dodge, 80 Ill. 564; Dayton *v.* Mintzer, 22 Minn. 393; Farrington *v.* Wilson, 29 Wis. 383; Falkner *v.* Guild, 10 Wis. 563.

19 Wing *v.* Dodge, 80 Ill. 564.

20 Wing *v.* Dodge, 80 Ill. 564; Montgomery *v.* Johnson, 31 Ark. 74.

21 Goudy *v.* Hall, 36 Ill. 313; McCowan *v.* Foster, 33 Tex. 241.

and should all appear affirmatively. They consist, mainly, of the fact of insolvency of personal estate,[22] as shown by the administrator's report; notice to persons interested, and a finding of the fact of insufficiency of personal assets. The record must show on its face these jurisdictional facts.[23]

It must further be borne in mind, that the foundation of all title derived through an administrator is the fact of the death of the intestate. This must always affirmatively appear — directly and positively. Administrations are sometimes granted on presumptions, but every one acts at his peril in dealing with an administrator who has been appointed upon a mere presumption that his supposed intestate is dead; and all persons are conclusively presumed to know, if the supposed intestate should subsequently turn up alive, that the grant of administration, and all acts done under it, would be absolutely void.[24]

§ 493. **Nature and Requisites of Probate Sales.** Sales in probate, though made in connection with, and as a part of the regular administration and settlement of the decedent's estate, are yet to be regarded as special and independent proceedings. Such proceedings are regularly inaugurated by the filing of a petition, stating the necessary jurisdictional facts, and praying for license to sell, and it is this petition, and the recital of the statutory requisites, which gives to the court its

22 The lien of a creditor in probate is different from all other liens upon land in this, that it can never be enforced until the personal estate of the decedent has been exhausted. Garvin *v.* Stewart, 59 Ill. 232.

23 Root *v.* McFerrin, 37 Minn. 17.

24 Springer *v.* Shavender, 118 N. C. 33; Melia *v.* Simmons, 45 Wis. 334; Thomas *v.* People, 107 Ill. 517. Tne text states the old and well established rule and the one which obtains generally throughout the United States. But of late years we may find some departures therefrom in a few States where it is held that where the fact of death has been presented to and decided by a court of competent jurisdiction the adjudication becomes conclusive of the fact, however erroneous such adjudication may be, until set aside in a direct proceeding (Porter *v.* Purdy, 29 N. Y. 106) and that titles acquired under such adjudication will remain intact, notwithstanding the supposed decedent returns alive. See Scott *v.* McNeal, 5 Wash. 309. The leading case on this point is Roderigas *v.* East River Savings Institution, 63 N. Y. 460, but compare the same case in 76 N. Y. 316.

jurisdiction to take cognizance of the matter and make subsequent orders in relation to same.[25] The proceeding is in the nature of an action, of which the petition is the commencement, and the order of sale the judgment, the whole forming a new, separate and independent proceeding, depending for its validity upon the sufficiency of the facts stated in the petition.[26] All the necessary features common to equitable actions, both as respects the subject-matter and the parties, must be present and affirmatively appear, and as the action is adversary in its character, and in derogation of the rights of the devisees and heirs, all the parties having an interest in the property, defendant as well as plaintiff, must be regularly brought before the court.[27] The filing of the petition will give the court jurisdiction of the subject-matter,[28] but jurisdiction must also be obtained over the persons of the heirs and devisees in the manner prescribed by law, as well as of the subject-matter, or its order will be void.[29] Hence, the proceedings must show issuance and service of citations, or appearance in the action, and a due observance of the rights of minors and others under disability, for whom special guardians must be appointed, should they

25 Pryor *v.* Downey, 50 Cal. 389; Hall *v.* Chapman, 35 Ala. 553; Jackson *v.* Robinson, 4 Wend. 436; Ethell *v.* Nichols, 1 Idaho (N. S.), 741. Moffitt *v.* Moffitt, 69 Ill. 641.

26 The necessity for a sale is not a matter for the administrator or executor to determine, but is a conclusion which the court must draw from facts stated, and the petition must furnish materials for the judgment: Pryor *v.* Downey, 50 Cal. 398; Ethell *v.* Nichols, 1 Idaho (N. S.), 741.

27 Morris *v.* Hogle, 37 Ill. 150; Hoard *v.* Hoard, 41 Ala. 590; Guy *v.* Pierson, 21 Ind. 18; Fiske *v.* Kellogg, 3 Oreg. 503. This is contrary to the doctrine stated in Grignon's Lessee *v.* Astor, 2 How. (U. S.) 319, which for many years was accepted in this country, and is founded on better reason and more correct principles. In that case it was held, that the proceeding is *in rem* and not adversary, and that the administrator represents the land.

28 Grayson *v.* Weddle, 63 Mo. 523; Botsford *v.* O'Connor, 57 Ill. 79. The text states the rule as usually understood, of course, jurisdiction in the court pronouncing a decree of sale does not rest upon the petition nor the averments of pleadings but upon the existence of substantive facts.

29 Fiske *v.* Kellogg, 3 Oreg. 503; Clark *v.* Thompson, 47 Ill. 25; Israel *v.* Arthur, 7 Col. 8.

have no guardians, or if having guardians they fail to appear.[30] The method of citation is statutory, but, as a rule, contemplates a general notice by publication and a personal service on all persons interested, if within the jurisdiction of the court, and if the proofs show an insufficient service or publication, the subsequent proceedings are fatally defective.[31]

§ 494. **Abstract of Probate Sales.** Sales by an executor or administrator may be shown in connection with the settlement of the decedent's estate, or as independent exhibits. Where a former abstract shows the death of the decedent, probate of his estate, etc., and a sale of all or a portion of the land of such decedent occurs during a subsequent examination or continuation, no necessity exists for re-exhibiting the probate proceedings, and the abstract of the sale commences with the filing of the petition. Where the examination is original, sufficient of the action of the probate court must be given to show the facts of death, application for probate, appointment of administrator, and proof of heirship, in case of intestate estates; and of probate of will, letters testamentary and devisees, in case of testate estates. Examples of probate of wills will be found in the chapter on wills, and of the probate of intestate estates in the chapter on descents; a probate sale in either case would be shown somewhat as follows, making due allowance for the minor differences which must appear between testacy and intestacy:

[30] Fiske *v.* Kellogg, 3 Oreg. 503. The omission to make the guardian of the minor heirs or devisees a party, can not be taken advantage of in a collateral proceeding: Harris *v.* Lester, 80 Ill. 307.

[31] Blodget *v.* Hitt, 29 Wis. 169; Mohr *v.* Tulip, 40 Wis. 66; Sibley *v.* Waffle, 16 N. Y. 180; Botsford *v.* O'Connor, 57 Ill. 72.

Probate Court of Cook County, Ill.

Probate Sale.

Samuel M. Henderson, administrator of the Estate of Nathan Adams, deceased,

vs.

Charles W. Adams, Henry S. Adams, Mary E. Adams, widow of Nathan Adams, and Thomas R. Smith.

Petition of Samuel M. Henderson, administrator aforesaid, filed July 6, 1881.

Represents (among other things) that the personal estate of deceased is insufficient to pay claims against said estate in the sum of $1,000.00, besides the cost of administration.[32] *That deceased died having a claim and title to the following described real estate:* [describing the same.] *That said deceased left surviving Mary E. Adams, his widow, having a dower interest in his real estate; and Charles W. Adams, and Henry S. Adams, his children, his only heirs at law. That Henry S. Adams is a minor and has no guardian. That Lot 22, Block 14,* [etc.,] *is now occupied by and in the possession of Thomas R. Smith.*

Prays that a guardian ad litem may be appointed for said minor heir, and that the Court will order and direct said petitioner to sell the said real estate or so much as may be necessary to pay said deficiency.

Sworn to July 6, 1881.

Summons issued, dated July 6, 1881, to all of said defendants, returnable on the 3d Monday of July, 1881.

Summons returned indorsed as follows:[33] [In a necessary case set out the return.]

[32] This is the vital part of the petition, for a sale of land to pay debts is never allowed until the personal property has been exhausted; this statement is therefore a jurisdictional fact: Foley *v.* McDonald, 46 Miss. 238; Diversy *v.* Johnson, 93 Ill. 547.

[33] The return of process in every action furnishes the proof of jurisdiction over the person, and in all cases of default or non-appearance of any of the parties the method of service is invariably to be shown by a transcript of the officer's return. Unless parties are brought before the court in the manner provided by statute, the court acquires no jurisdiction over them. Donlin *v.* Hettinger, 57 Ill. 348. Where all

Order entered July 25, 1881, appointing Charles Anderson guardian ad litem for said minor defendant.

Answer by said defendants and said minor defendant by his guardian ad litem, and reply thereto, filed July 25, 1881.[34] [Note default, if any].

Decree entered July 25, 1881. (Record 2 of decrees, page 49.) [Set out the decree or the substance of same].

Administrator's report of sale filed Sept. 22, 1881.[35]

Represents, that in pursuance of a decree, etc., [set out the substance of the report]. *Sworn to, Sept. 19, 1881.*

Attached to the report of sale and filed therewith, is proof of publication and posting notices of sale.

Printed copy of notice of sale gives title, etc.[36]

Administrator's report of sale approved and sale confirmed, Sept. 22, 1881.

parties have appeared this becomes of minor importance, and a brief statement of the fact of service without disclosing the method is sufficient.

34 If the court has acquired jurisdiction of the subject-matter by the filing of a petition, and of the persons of infant defendants by the publication of notice, a failure to appoint a guardian *ad litem*, or his failure to answer, will not defeat the jurisdiction: Gage *v.* Schroeder, 73 Ill. 44.

35 It is not usual to abstract the report of sale, but where the record is silent on vital points or no evidence appears of statutory essentials, as, of posting notices of sale, or other necessary incidents, statements under oath in a report of sale have been held sufficient in collateral proceedings: Woods *v.* Monroe, 17 Mich. 238. In such cases the recitals of the report become necessary to show validity, and should find appropriate mention.

36 See § 477 for abstract of notice of sale.

CHAPTER XXVIII.

ACTIONS AND PROCEEDINGS.

§ 495. Chancery proceedings.
496. Authority and jurisdiction of chancery courts.
497. Authority and jurisdiction of probate courts.
498. Actions and proceedings to be noticed.
499. Jurisdiction the great essential.
500. Notice afforded by chancery records.
501. Process.
502. Formalities of a summons.
503. Service.
504. Proof of service.
505. Affidavit and order of publication.
506. Appearance without process.
§ 507. Master's and referee's reports.
508. Verdicts.
509. Abstract of chancery proceedings.
510. Injunctions.
511. Ejectment.
512. Quia timet.
513. Partition.
514. Specific performance.
515. Redemption.
516. Foreclosure.
517. Dower.
518. Divorce.
519. Right of eminent domain.
520. Proceedings for condemnation.
531. Construction of wills.

§ 495. **Chancery Proceedings.** In the compilation of abstracts the general name of " Chancery Proceedings " has been given by examiners to all classes of actions that operate directly upon the land and culminate in judgments *in rem*. And while it is undoubtedly true that the proper tribunals for the trial of land titles are the common law courts, and that equitable jurisdiction is only invoked when the law is inadequate to give relief, yet the common law actions respecting land have to a great extent been abolished, or superseded by statutory remedies of the same nature but based upon equitable principles.[1]

[1] The State of New York, in 1848, passed an act " to simplify and abridge the practice, pleadings and proceedings " of the courts of that State, whereby the then existing forms of actions and pleadings in common law cases were abolished; the distinction between legal and

In many States no separate chancery jurisdiction exists and the law courts are authorized to exercise chancery powers and administer equitable relief in all cases brought before them, and to adjust the claims of the parties litigant according as the right may appear without reference to the technical rules applying to either jurisdiction.[2] The common law actions respecting title, in such courts, are regarded rather as equitable than legal proceedings, and equitable defenses are permitted, while the judgment of the court adapts itself to equitable methods in disposing of the rights of the parties.[3] This chapter will be devoted to a general review of all legal actions respecting land which partake of an equitable nature and to such actions as are strictly within the equity jurisdiction.

§ 496. **Authority and Jurisdiction of Chancery Courts.** The primary object of courts of equity, is, to supply defects in the administration of justice in the ordinary courts, assuming the power of enforcing the principles upon which the ordinary courts decide, when the powers of those courts or

equitable remedies abrogated; and a uniform course of proceeding, in all cases, was established. The State of Ohio some years later followed the example of New York, and the codes thus formulated by these two States, have been made the basis of the procedure of a number of other States. In some States the ancient practice is still retained, but in a greatly modified form, and the distinction between legal and equitable remedies preserved, though both remedies are administered in the same court.

2 Troost *v.* Davis, 31 Ind. 34. When the legal title alone is in question it needs no support from equities, but stands impregnable in its own strength and is presumed to embrace all equites. Proof of equities becomes important when the legal title is defective, or when it is proposed to assail it: Shaw *v.* Chambers, 48 Mich. 355.

3 The codes of procedure which abolish all distinction between legal and equitable remedies, endeavor to blend them into one system, combining, or professing to combine, the principles peculiar to each, but though the only form of a suit recognized by them is that known as the "civil action," the established principles pertaining to each branch of the law are still intact and of binding force and efficacy. The only true difference between the new and old systems is in the practical application of those principles: Rubens *v.* Joel, 3 Kern. 488; Scovill *v.* Griffith, 2 Kern, 515; Rozierz *v.* Van Dam, 16 Iowa, 175. See Meyers *v.* Rasback, 4 How. (N. Y.) 83; Giles *v.* Lyon, 4 Com. (N. Y.) 600.

their modes of proceeding are insufficient for the purpose; to prevent these principles, when enforced by the ordinary courts, from becoming, contrary to the purpose of their original establishment, instruments of injustice; and to decide on principles of universal justice, when the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent.[4] Courts of equity also administer to the ends of justice by removing impediments to the fair decision of a question in other courts, by providing for the safety of property in dispute pending a litigation,[5] by restraining the assertion of doubtful rights in a manner productive of irreparable damage,[6] by preventing injury to a third person from the doubtful title of others,[7] and by putting a bound to vexatious and oppressive litigation, and preventing unnecessary multiplicity of suits;[8] and without pronouncing any judgment on the subject, by compelling a discovery which may enable other courts to give their judgment; and by preserving testimony, when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation.[9] In one way and another the exercise of this jurisdiction often affects the title to land.

§ 497. **Authority and Jurisdiction of Probate Courts.** The probate courts of the United States are courts of special and limited jurisdiction, deriving all their authority from the statute.[10] But while the scope of their jurisdiction is restricted they can in no proper sense be regarded as inferior tribunals, as is sometimes asserted, and their judgments, within the sphere of their authority, are not distinguishable from the determinations of other courts. They possess original and frequently exclusive jurisdiction in all matters pertaining to the settlement

4 Whitney *v.* Roberts, 22 Ill. 381; Long *v.* Barker, 85 Ill. 431; Bennett *v.* Nichols, 12 Mich. 22; Mears *v.* Howarth, 34 Mich. 19.

5 McIntyre *v.* Storey, 80 Ill. 127.

6 Bennett *v.* McFadden, 61 Ill. 334; Prim *v.* Raboteau, 56 Mo. 407.

7 Scott *v.* Moore, 3 Scam. (Ill.) 306.

8 Scott *v.* Moore, 3 Scam. (Ill.) 306; Imp. Fire Ins. Co. *v.* Gunning, 81 Ill. 236; Beatty *v.* Dixon, 56 Cal. 619; Third Ave. R. R. Co. *v.* Mayor, etc., 54 N. Y. 159.

9 Mit. Pl. 3; 1 Smith's Chan. Prac. 2.

10 Hendrick *v.* Cleveland, 2 Vt. 392; Propst *v.* Meadows, 13 Ill. 157.

of estates of deceased persons,[11] which jurisdiction continues so long as there is any occasion for its exercise, and until there has been a full and complete settlement and distribution.[12] They also possess, so far as may be necessary, a portion of the equitable powers exercised by a court of chancery,[13] and are not confined to the technical rules of common law in opposition to established chancery principles.[14] They are ordinarily courts of record upon the administration of estates, or other matters over which they possess a general jurisdiction, and as liberal intendments are, or should be, made in their favor, as are extended to the proceedings of the circuit court.[15] Their jurisdiction in no State extends to controversies respecting the title to land, but the peculiar nature of the matters entrusted to their charge makes their judgments and decrees of controlling efficacy in the decision of questions relative to title, which may arise in other courts.

§ 498. **Actions and Proceedings to be Noticed.** The actions and proceedings that call for special notice on the part of the examiner, are such as relate to the recovery of specific real property, or the possession thereof, called ejectment;[16]

11 A court of chancery may, in the exercise of its general jurisdiction take upon itself the administration of estates, and thus, in a particular case, supersede the jurisdiction of the probate court: Freeland *v.* Dazey, 25 Ill. 294; but the interference of a court of chancery in the settlement of estates is usually confined within the narrowest limits, and has gone upon the ground merely of aiding the jurisdiction of the probate court in those points only wherein its functions and powers are inadequate to the purposes of perfect justice, retaining its ancillary jurisdiction to the same extent over matters in the probate court, which it has over those in the common law courts: Adams *v.* Adams, 22 Vt. 50; Heustis *v.* Johnson, 84 Ill. 61.

12 Keeler *v.* Keeler, 39 Vt. 550.

13 Bennett *v.* Whitman, 22 Ill. 448; Appeal of Schaeffner, 41 Wis. 260; Brooks *v.* Chappel, 34 Wis. 405.

14 Robinson *v.* Swift, 3 Vt. 283.

15 Grignon *v.* Astor, 2 How. (U. S.) 319; Propst *v.* Meadows, 13 Ill. 157; Moreland *v.* Lawrence, 23 Minn. 84; Barker *v.* Barker, 14 Wis. 131; Ostrom *v.* Curtis, 1 Cush. 460.

16 Ejectment is a common law remedy, but the statutory action substituted in many States is equitable in its nature, and in at least one State the action is a substitute for a bill in equity.

actions and proceedings for partition;[17] foreclosure of liens[18] and mortgages; bills to quiet title; actions brought to enforce the specific performance of land contracts; proceedings under the right of eminent domain; suits for dower; and incidentally such bills, actions, or proceedings as from their nature may operate as *lis pendens*. All the proceedings specially enumerated, whether pending or closed by decree, should be carefully scrutinized and stated in the abstract with a reasonable degree of detail. The decree entered in these matters, when followed by deed, is the foundation for such deed, and of equal dignity with it, while the anterior proceedings go to establish the validity of the decree. In addition to those matters of exclusive cognizance in the circuit court, the examiner will also show all proceedings in the county (probate) courts that incidentally affect title, by reason of the relation of the parties to the subject-matter. In this way matters relating to adoption, guardianship, etc., will frequently appear, as well as assignments of dower, homesteads, etc.

§ 499. **Jurisdiction the Great Essential.** The validity of all decrees, as well as sales and conveyances which may result from them, depends on the jurisdiction of the court,[19] and this has reference both to the parties and the subject-matter. Both of these particulars must satisfactorily appear in the abstract, and are shown in the one case by a statement of the return of the summons, the method of service being also given where greater certainty is desired, and in the other by a synopsis of the bill, answer, and other pleadings. The decree in all instances must conform to the process and allegations, i. e., to the parties in the action and the matter recited in the pleadings.[20] It will therefore be seen that a correct rendering of

17 Partition is also a common law action: Hopkins *v.* Medley, 97 Ill. 402; but partakes of many equitable qualities, and equity has jurisdiction as well as law courts: Hess *v.* Voss, 52 Ill. 472.

18 A suit to enforce a mechanic's lien, although statutory, is substantially a chancery proceeding, and is governed by the chancery practice: McGraw *v.* Bayard, 96 Ill. 146.

19 Weidersum *v.* Naumann, 62 How. (N. Y.) Pr. 369; Campbell *v.* McCahan, 41 Ill. 45.

20 Slocum *v.* Slocum, 9 Ill. App. 418. Thus, one case can not be

the commencement of the action; statement of facts constituting the subject-matter; and a full presentation of the adjudication made thereon, are the only matters of prime consideration on the part of the examiner, and when these several matters show apparent regularity and a just correspondence in all their parts, correct and satisfactory opinions may be predicated upon them, even though minor details may have been neglected, and positive error is shown by the record.

Where it appears from the whole record that the court had no jurisdiction over the person or subject-matter the judgment is void. By jurisdiction is meant the right to adjudicate concerning the subject-matter,[21] and by subject-matter is meant "the nature of the cause of action and of the relief sought."[22] A court may be said to have jurisdiction of the subject-matter of a suit when it has the right to determine the issue between the parties or grant the relief prayed. The issue is determined from the pleadings. When the court has cognizance of the matter as it appears from the pleadings, and has the parties before it, then the judgment or decree which is authorized by the pleadings, however erroneous, irregular or informal it may be, is valid until set aside or reversed on appeal.[23]

§ 500. **Notice Afforded by Chancery Records.** It is a fundamental rule in equity that purchasers are directly affected by every matter or circumstance concerning the title to the property they take, which affirmatively appears from the pleadings or decrees of courts of competent jurisdiction, in actions relating to such property, whether such purchasers have actual notice or not.[24] It is the application of this rule which

alleged and another proved: Meredith *v.* Little, 6 Lea (Tenn.), 521; Parkhurst *v.* Race, 100 Ill. 207.

21 Munday *v.* Vail, 34 N. J. L. 422.

22 Cooper *v.* Reynolds, 10 Wall (U. S.) 316.

23 Hope *v.* Blair, 105 Mo. 85; Lancaster *v.* Wilson, 27 Gratt. (Va.) 624.

24 Leitch *v.* Wells, 48 N. Y. 585; Jackson *v.* Warren, 32 Ill. 331; Hersey *v.* Turbett, 27 Pa. St. 418; Blanchard *v.* Ware, 37 Iowa, 305; Hunt *v.* Haven, 52 N. H. 162. The same rule has been frequently applied in actions at law: See, Jackson *v.* Tuttle, 9 Cow. (N. Y.) 233; Howard *v.* Kennedy, 4 Ala. 592; Bennett *v.* Williams, 5 Ohio, 461.

renders necessary a searching investigation of the court rolls whenever real property is sold, for every man is presumed to be cognizant of what transpires in the courts of justice, and the law will charge him with actual notice of whatever there occurs, which affects the merits of the title he would take.[25] This rule, which has always been considered a hard one,[26] is not a favorite with the courts, who are ever inclined to limit its application, and it will not be extended to embrace collateral matters, or matters not specifically mentioned in the bill or decree.[27] "In the investigation of titles," says Mulkey, J., "purchasers look for decrees and judgments against those who appear of record to have been owners, and when it is ascertained that a particular decree or judgment does not affect the title which is the object of inquiry, it is believed not to be customary to look further; and to hold that purchasers are affected with constructive notice of every fact relating to the purchased estate that may happen to appear in some of the files of a case, and not elsewhere, would, in our judgment, be carrying the doctrine of constructive notice to a dangerous extent. The establishment of such a rule would have a direct tendency to unsettle titles, for no one could know of a certainty when he was getting a good title, without examining the files in every case in the county where the land lay, and this would be wholly impracticable. We hold, therefore, purchasers are not bound to look beyond the judgment or decree, and the legal effect it may have on the title which is the subject of inquiry."[28]

§ 501. **Process.** Equity suits are commenced by the filing of a bill or petition in the office of the clerk of the court in

25 Leitch *v.* Wells, 48 N. Y. 585; Fissler's Appeal, 75 Pa. St. 483; Loomis *v.* Riley, 24 Ill. 307.

26 Hayden *v.* Bucklin, 9 Paige, 572.

27 Dugan *v.* Follett, 100 Ill. 581.

28 Dugan *v.* Follett, 100 Ill. 581. This rule is in consonance with the general doctrine that one buying land, of which the record title is in the grantor, is not bound by equities stated in deeds unconnected with the chain of title, and of which he is not informed. See Odle *v.* Odle, 73 Mo. 289.

which the action is brought, which bill contains a statement of the facts constituting the complainant's claim, and a prayer for such relief as he may deem himself entitled to. Upon the filing of this bill or petition process issues to compel the appearance of the defendants. This is the ancient chancery procedure, and process issued before the filing of a bill, or service made prior thereto, is a nullity.[29] The codes substitute a new procedure, by which the issuance of summons is made, in ordinary cases, the commencement of the action,[30] but the law governing the service of process is substantially the same, and the court in either case derives its jurisdiction only from a full and technical compliance with the statute. A discussion of practice is foreign to the purposes of this work, and in speaking of these matters reference can only be made to the commonly accepted principles which are recognized by all courts and are applicable to all systems of practice, trusting that the points given will suggest others depending upon local rules and decisions. The process of a court has vitality, and may be enforced, anywhere within its jurisdiction, but beyond that it is of no effect. Hence, a service outside of its jurisdiction confers no rights over the person of the defendant.[31]

§ 502. **Formalities of a Summons.** It is not necessary in the abstract of court records to set out minutely all the papers and files, and as a rule the practical purposes of the abstract can be accomplished by references and partial statements. The summons, however, is vital, and unless there has been an appearance, the formal requisites are jurisdictional.[32] When the summons, as under the old chancery practice, issues out of the court where the bill has been filed, it must be with proper

29 Story's Eq. Pl. § 7; Barton's Suit in Eq., 39; Hodgen *v.* Guttery, 58 Ill. 431.

30 This is the procedure of the New York code and all systems based thereon. This is also the procedure in legal actions at common law.

31 Isett *v.* Stuart, 80 Ill. 404. In some of the States the statute provides for actual personal service without the State, and permits the notice thereby given to supersede the necessity of publication.

32 Orendorff *v.* Stanberry, 20 Ill. 89; Miller *v.* Handy, 40 Ill. 448; Garland *v.* Britton, 12 Ill. 232; Besemer *v.* The People, 15 Ill. 439.

venue,[33] for a defendant has a right to know when and where he is required to appear, and when the writ fails to furnish such information, it is void.[34] It must run in the name of the "People" or the "State," [35] or it is void,[36] and must be addressed to the sheriff of the county in which the defendant resides if he be a resident of the State.[37] It must correctly describe the parties to the suit,[38] and, when required by statute, the cause for which it is brought,[39] and must be made returnable to a particular term.[40] When issuing from a court it must be tested in the name of the clerk [41] or presiding judge,[42] and must bear *teste* of the day on which it is issued.[43]

By some of the codes, the summons may be issued by an attorney of the court, and need not be signed by the clerk or judge, but must be subscribed by the attorney who causes same to issue.[44] When regarded as the direct mandate of the court,

33 Orendorff *v.* Stanberry, 20 Ill. 89. And this rule has not been changed by the codes: Blanchard *v.* Strait, 8 How. (N. Y.) 84. The force and effect of a venue in a judicial writing is to indicate the county wherein the court is acting: Van Dusen *v.* People, 78 Ill. 645.

34 Orendorff *v.* Stanberry, 20 Ill. 89. A code summons requiring the defendant to serve a copy of his answer upon "the subscriber," the plaintiff's attorney, at a place designated, is sufficiently certain under the code, and confers jurisdiction: Hotchkiss *v.* Cutting, 14 Minn. 537.

35 Curry *v.* Hinman, 11 Ill. 420. The style is generally constitutional.

36 Ferris *v.* Crow, 5 Gilm. (Ill.) 96.

37 A summons issued by the clerk of one county, addressed to the sheriff of another county, commanding him to summon a defendant in his county to appear at Lincoln, in said county, is void: Gill *v.* Hoblit, 23 Ill. 473, and see Kennedy *v.* People, 15 Ill. 418. The N. Y. code summons is addressed simply to the defendant.

38 Richardson *v.* Thompson, 41 Ill. 202; Rogers *v.* Green, 33 Tex. 661.

39 McDermid *v.* Russell, 41 Ill. 489; King *v.* Blood, 41 Cal. 314.

40 A summons returnable to the wrong term confers no jurisdiction on the court to render a judgment in the action: Culver *v.* Phelps, 130 Ill. 217.

41 Norton *v.* Dow, 5 Gilm. 459; Costly *v.* Driver, 45 Ala. 230; Wilson *v.* Owen, 45 Ala. 451.

42 Brown *v.* Parker, 15 Ill. 307; Howerter *v.* Kelly, 23 Mich. 337.

43 Brown *v.* Parker, 15 Ill. 307.

44 See Howard's N. Y. Code (1859), 162. This is the method in most of the States which employ the N. Y. code.

45 Besemer *v.* People, 15 Ill. 439; Morrison *v.* Silverburgh, 13 Ill. 551.

a seal is indispensable to its validity,[45] but under the code system this is unnecessary.[46]

§ 503. **Service.** To bind a person by a judicial sentence he must be a party to the proceeding, and must have either actual or constructive notice thereof,[47] or enter his appearance.[48] These matters are jurisdictional, and where the service of the summons is insufficient to confer jurisdiction, the judgment or decree as to the defendants is a nullity,[49] and open to attack in all collateral proceedings.[50] The return of the officer serving the process must show strict compliance with the statute, before the court can obtain jurisdiction of the person,[51] and this has reference both to the time, the manner, and the person on whom the service was made.[52]

When personal service can not be made, by reason of the absence of the defendant, or because he can not be found, a substituted service is prescribed by statute, but in making this service, as well as in case of constructive service by publication, the requirements of the statute must all be strictly complied with, and this must affirmatively appear on the record.[53] Service, or constructive notice, by publication, was only obtainable formerly on the return of process *non est inventus,* and such is still the rule in some States, but ordinarily, where an affidavit of non-residence has been filed a constructive service by advertisement may be obtained.[54]

46 For a brief period a U. S. Rev. stamp was required on all process, but this law was repealed March 2, 1867; see 14 U. S. Stat. at Large, 475.

47 Borders *v.* Murphy, 78 Ill. 81; Easterly *v.* Goodwin, 35 Conn. 273.

48 Barker *v.* Ins. Co., 24 Wis. 630.

49 Botsford *v.* O'Conner, 57 Ill. 72.

50 Haywood *v.* Collins, 60 Ill. 328.

51 Cost *v.* Rose, 17 Ill. 276; Pardon *v.* Dwire, 23 Ill. 572; People *v.* Bernal, 43 Cal. 385.

52 Botsford *v.* O'Conner, 57 Ill. 72; Hochlander *v.* Hochlander, 73 Ill. 618; Mack *v.* Brown, 73 Ill. 295; Rankin *v.* Dulaney, 43 Miss. 197; York *v.* Crawford, 42 Miss. 508; Hendley *v.* Baccus, 32 Tex. 328; Vandiver *v.* Roberts, 4 W. Va. 493; Melvin *v.* Clark, 45 Ala. 285.

53 Boyland *v.* Boyland, 18 Ill. 551; Miller *v.* Mills, 29 Ill. 431; Wells *v.* Stumph, 88 Ill. 56; Williams *v.* Downes, 30 Tex. 51; Brownfield *v.* Dyer, 7 Bush (Ky.), 505; Mullins *v.* Sparks, 43 Miss. 129.

54 Millett *v.* Pease, 31 Ill. 377;

In all cases of constructive service the statute must be strictly pursued, and as the affidavit of non-residence constitutes the basis of an order of publication, whenever such order is required, it is essential that such affidavit should appear of record,[55] and, as a matter of course, be properly exhibited in the abstract in connection with the order of publication,[56] notice, and publisher's proof of publication.

It is now generally conceded that the State possesses the power to provide for the adjudication of land titles within its limits, as against non-residents who are brought into court only by publication, and decrees based on such constructive service are as valid and effectual as if rendered with the parties actually appearing.[57]

§ 504. **Proof of Service.** The service of a summons is ordinarily proved by the return of the sheriff or other person serving it,[58] or by the admission of the person so served,[59] but in all cases where the record shows an appearance of the defendant, this becomes a matter of minor importance, for a general appearance is an admission on the part of the defendant that he has been regularly brought into court, and subjects him to

Tibbs *v.* Allen, 27 Ill. 119; Coons *v.* Throckmorton, 25 Ark. 60.

55 Bardsley *v.* Hines, 33 Iowa, 157; Merrill *v.* Montgomery, 25 Mich. 73; Byrne *v.* Roberts, 31 Iowa, 319; Coons *v.* Throckmorton, 25 Ark. 60; Millett *v.* Pease, 31 Ill. 377. In this case, while holding the affidavit to be the basis of the order, it is yet held, that where the record shows a notice by publication, which recites the fact that an affidavit was duly filed, but does not appear of record, the court will presume that the affidavit was duly filed; and see Tompkins *v.* Wiltberger, 55 Ill. 385.

56 A rule of court providing for publication on filing an affidavit of non-residence may take the place of a formal order in each case. It will not be necessary to show the rule in the abstract.

57 Perkins *v.* Wakeham, 86 Cal. 580; McLaughlin *v.* McCrory, 55 Ark. 442; Adams *v.* Cowles, 95 Mo. 501.

58 No person can execute a process in his own favor: Snydacker *v.* Brown, 51 Ill. 357. The return of a process server, if other than an officer, must be under oath.

59 An admission of service is not very satisfactory as evidence. The court takes judicial notice of the signatures of its officers but is not presumed to know the signature of a party defendant, who has not appeared: Litchfield *v.* Burwell, 5 How. (N. Y.) 341.

the jurisdiction thereof.[60] In such cases it would seem that a passing reference to the issuance and service of summons would be sufficient, though many attorneys require a synopsis or full transcription of the officer's return, particularly in the case of infants, lunatics, and persons under disability, when the appearance is by guardian. But where a plaintiff undertakes to obtain a judgment or decree against a defendant, without any appearance by the latter, either in person or by attorney, he is required at his peril to bring such defendant within the jurisdiction of the tribunal in which he is suing, or his proceedings will be set aside as irregular, and totally defective and void.[61] In the case of joint defendants this matter is particularly important, for, although the plaintiff may generally proceed against the defendants served, no valid judgment can be rendered against those not served, except that service upon one member of a firm has, in some instances, been held to give the court jurisdiction over all the members in an action brought against the firm.[62]

Whenever, therefore, the record shows no appearance it is advisable that all matters relating to service be set out minutely and in detail. In case of personal service, show the return briefly, but always display enough to show the jurisdictional essentials; who were served, when, where, etc. In case of sub-

60 Dix *v.* Palmer, 5 How. (N. Y.) 233; Webb *v.* Mott, 6 How. (N. Y.) 439; Barker *v.* Ins Co., 24 Wis. 630; Bustamete *v.* Bescher, 43 Miss. 172; Bowin *v.* Sutherlin, 44 Ala. 278; Liles *v.* Woods, 58 Tex. 416; Abbott *v.* Semple, 25 Ill. 107.

61 Williams *v.* Valkenburg, 16 How. (N. Y.) 144; Roberts *v.* Stowers, 7 Bush (Ky.), 295; Grantern *v.* Rosecierrance, 27 Wis. 488. A distinction is sometimes made between a total want of service of process, and a defective service, as to their effect in judicial proceedings. In the one case a judgment or decree is held to be *coram non judice* and void. In the other, the defective service gives the defendant actual notice of the proceedings against him, and the judgment or decree, although erroneous, is valid until reversed by a direct proceeding in an appellate jurisdiction; and its validity can not be collaterally called in question: Harrington *v.* Wofford, 46 Miss. 31.

62 Anderson *v.* Arnette, 27 La. Ann. 237. Yet service upon an alleged partner, the fact of partnership not being established, does not confer jurisdiction upon another alleged partner: Nixon *v.* Downey, 42 Iowa, 78.

stituted service show the return entire; that is, a literal transcription. If the service is effected by notice and publication, show a synopsis of the notice and proof of publication.[63] The advertisement in the latter case performs the same office as process,[64] and it is not enough that the decree recites that the defendant has been duly served, or that he has been regularly notified; the record should show process or notice duly served or published and a decree *pro confesso* is rendered erroneous and invalid when these particulars are wanting.[65]

A decree rendered upon the constructive notice afforded by publication is not regarded in many States as final or conclusive upon the subject presented for considerable time after its rendition, and is liable to be vacated, in the interests of justice, where application is made in apt time, and of these facts purchasers or others dealing with the title to land are bound to take notice.[66]

§ 505. **Affidavit and Order of Publication.** The statute authorizing constructive service by publication, in case of non-resident or absent parties, requires certain facts to be presented by affidavit to the court in which the action is pending, whereupon, if such presentation is satisfactory to the court, an order is made for the publication of the summons or notice to appear, which not only prescribes the period but designates the paper in which the publication is to be made, while if the residence of the defendant be known such order further provides for an additional notice through the mail. The service is deemed

63 Proof of the publication of the summons for "six successive weeks" has been held insufficient to show a publication "once each week" for the period named: See Godfrey *v.* Valentine, 39 Minn. 336.

64 Randall *v.* Songer, 16 Ill. 27; Church *v.* Furniss, 64 N. C. 659.

65 Reddick *v.* State Bank, 27 Ill. 145. This doctrine has been somewhat modified by later decisions, and every reasonable presumption will be indulged in favor of the jurisdiction of a court whose decrees recite due process and service and such recitals are generally held to be *prima facie* evidence of the jurisdictional facts: Turner *v.* Jenkins, 79 Ill. 228; Tompkins *v.* Wiltberger, 56 Ill. 385. Mere clerical omissions, provided sufficient is shown to confer jurisdiction, are usually of little consequence: Carter *v.* Rodewold, 108 Ill. 351.

66 Southern Bank *v.* Humphreys, 47 Ill. 227.

complete at the expiration of the time prescribed by the order of publication, and the proof is afforded by the affidavit or certificate of the printer, and an affidavit of deposit in the post-office, if such deposit has been made.[67]

These preliminaries, though often overlooked when compiling an abstract, are as important as any step in the action and upon their due performance the validity of the subsequent proceedings rests. It is not sufficient to show merely the affidavit of publication, for, although that fact is an important ingredient of the service, it is comparatively of no force or effect unless connected with the preliminary steps which occasioned it. Publication of a summons in a newspaper is not service of the summons, nor is an affidavit of such publication proof of service. To be of any avail the publication must have been made in a paper designated by the order of the court or judge and for the period prescribed by such order.[68] The terms of such order must, therefore, be connected with the affidavit, or the proof will amount to nothing.[69] As the printer is not supposed to know anything of the order, and is not called upon even to refer to it in his affidavit, it becomes necessary in making up the abstract to include the substance of the affidavit of non-residence and the order of the court made upon it, otherwise it will disclose no proof of service. Where publication is made pursuant to a general rule of court, while the service must comply with the requirements of the rule, it is not necessary to set out the rule itself.

§ 506. **Appearance Without Process.** A party may enter his appearance in a pending action without service of summons, and such appearance, voluntarily made, either in person or by attorney, binds him with respect to any judgment or decree that may be rendered in the case.

67 This matter is statutory and varies with locality.

68 This is often provided for by a general rule of court which stands for a special order in the particular case. Of course, the publication must comply with the rule; usually, however, the publication may be made in any "secular newspaper of general circulation."

69 Galpin *v.* Page, 3 Sawyer (C. Ct.), 93.

Where, however, the appearance is by attorney and without service of process, this is a fact that should be noted, for while all of the presumptions are in favor of a judgment based on such an appearance,[70] yet, if the appearance was in fact unauthorized the judgment may be vacated on motion or its enforcement enjoined.[71]

§ 507. **Master's and Referee's Reports.** Frequently during the progress of a cause a reference is made to a master or referee to ascertain some particular fact, or for a trial of the whole issue, and the manner in which the master or referee presents his opinion and the result of his inquiries to the court, is either by a certificate or report. A certificate is a simple notification of a fact, or of an opinion, or a conclusion; reports are the results of his inquiries with his findings or conclusions, and opinions thereon.[72] References are more frequently made to state an account, or for other matters arising out of commercial transactions, but occasionally references of title are made, and these will sometimes require notice in making up a synopsis of chancery proceedings. All reports, upon which are founded decrees or decretal orders, require confirmation. Judicial sales are frequently conducted by a master or commissioner, and a circumstantial report of such sale must be rendered to and confirmed by the court ordering same, and though it is not usual to abstract this report, where the decree and deeds are shown, some allusion must be made to it.

§ 508. **Verdicts.** The original chancery practice did not contemplate the intervention of a jury, but all facts were found by the court.[73] Issues were sometimes made up and submitted to a jury, and such is still the general practice, though under the codes all questions of fact in litigated cases, whether the action is legal or equitable, may be, and usually

70 Corbitt *v.* Timmerman, 95 Mich. 581; Williams *v.* Johnson, 112 N. C. 424.

71 Winters *v.* Mears, 25 Neb. 241.

72 Smith's Ch. Prac. * 161; 2 Barb. Ch. Prac. * 544; 2 Dan. Ch. Prac. 934.

73 Oral examinations were not formerly permitted

are, the subject of jury trials. The verdict of a jury on an issue which a court of equity has directed them to try is advisory merely,[74] and is not conclusive on the court,[75] who may reverse the verdict and render a decree opposed to the findings of the jury.[76] As a material fact, however, when acted upon by the court, the verdict should be appropriately noticed, which can ordinarily be accomplished by a statement of the issue presented and the finding made thereon. In legal actions for the trial of title to land the verdict or finding of the jury is always important and must be shown.

§ 509. **Abstract of Chancery Proceedings.** In preparing minutes of equitable actions involving title much nice discrimination is necessary in order that the abstract may show a perfect *resume* of the proceedings and all the material points presented, and yet not become unwieldy or burdensome. The name of the court in which the action is prosecuted; the title of the cause; case number, and date of commencement of the action come first, and in the order indicated. Then follows a brief statement of the material parts of the bill, avoiding all repetition and surplusage. The subsequent steps next follow in chronological sequence down to the final determination or decree which is usually shown in full. The examples given in this section and other parts of this chapter will fully serve to illustrate the matter. Where the case is still undetermined

74 Quinby *v.* Conlan, 104 U. S. 420; Rusling *v.* Rusling, 35 N. J. Eq. 120; McGan *v.* O'Neil, 5 Col. 58. It would seem that this principle has not been materially changed by the code, although the forms of action have been, and that the verdict is only in aid of the court, and does not have the same effect as a verdict at law. See Stanley *v.* Risse, 49 Wis. 219. In some forms of equitable actions the verdict, when issues are sent to a jury, has the same binding effect as a verdict at law. This, however, is always the result of special legislation and is in derogation of the common-law powers of a chancery court.

75 Rusling *v.* Rusling, 35 N. J. Eq. 120; Marshall *v.* Marshall, 18 W. Va. 395; Stanley *v.* Risse, 49 Wis. 219; Contra, Marvin *v.* Dutcher, 26 Minn. 391.

76 Ivy *v.* Clawson, 14 S. C. 267; Wakefield *v.* Bonton, 55 Cal. 109; Smith *v.* Richardson, 5 Utah, 424; Swegle *v.* Wells, 7 Or. 222; Gladsen *v.* Whaley, 9 S. C. 147; Austin *v.* Bainter, 50 Ill. 308.

at the time of the search, or has not yet come on to be heard, the examiner sets out only so much as appears of record, and indicates the condition of the cause by adding the word "pending," thus:

In the Circuit Court of Cook County, Illinois.

William Schafer
vs.
Henry Brown.

Case No. 12,2,510.
In Chancery.
Bill filed July 16, 1874, sets forth that on or about June 12, 1874, complainant entered into a contract with said defendant to convey to him all his right, title and interest in and to certain property in McHenry Co., Ills., and that said defendant agreed to convey to him all his right, title and interest in and to Lot 30, in Block 3, in Bowman's Subdivision of part of the East half, of South East quarter, of North East quarter of Sec. 6, Town 39 North, Range 14, East of 3d P. M., Cook County, Ills.

Prays, that said defendant be adjudged to specifically perform the said contract, and to convey to complainant the said premises, and to furnish an Abstract of Title to said property showing clear and perfect title to same, and that defendant be compelled to pay to complainant the damage he has sustained by his refusal to perform said contract, etc.

(*Pending.*)

A continuation should take up this case at this point, and show all subsequent proceedings, thus:

In the Circuit Court of Cook County, Illinois.

Henry Brown.
vs.
William Shafer

Case No. 12,510.
In Chancery.
The following proceedings have been had in this cause since July 18, 1874. (Chancery record 42, page 17.)

Aug. 18, 1874, suit dismissed at complainant's costs for want of prosecution.[77] *(Costs paid.)*

Where more direct reference to a former examination is deemed desirable the following form may be used in a continuation:

In Circuit Court of Cook County, Ills.
Case 12,510.

William Shafer
vs.
Henry Brown.

Continuing No. 8 of an examination made by us [or by any other person] *dated July 18, 1874, (and hereto attached.)*

Aug. 18, 1874, dismissed at complainant's costs and judgment. Execution No. 2,415 issued, dated Dec. 1, 1874.

The further examples given in this chapter of special proceedings in the different chancery actions, will, it is believed, furnish sufficient data for any exigency that may arise, while the examiner will have no difficulty in adapting them to details or differences of practice in his own State.[78]

§ 510. **Injunctions.** An injunction is a writ, commanding or restraining the commission of some act, to serve the purposes of equity and good conscience. In the endless variety of cases where a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or continuance of some act of the defendant's, a court of equity will administer it by means of the writ of injunction.

Injunctions are rarely shown in abstracts of title, and when shown have reference usually to transitory matters which affect the title only incidentally, being connected rather with the use

77 An order or decree dismissing a suit for want of prosecution, is like a non-suit at law, and is not a bar to a subsequent suit for the same matter: Porter *v.* Vaughan, 26 Vt. 624.

78 In connection with this chapter the reader is referred to the chapter of this work entitled "Execution and Judicial Sales."

and occupation of the land, than with any matter which goes to the title. Temporary injunctions restraining the sale of land pending litigation [79] will sometimes be found, as well as writs restraining the action of public officers, who, under a claim of right, are proceeding illegally to impair the rights or injure the property of individuals or corporations,[80] as also, to prevent a multiplicity of suits. Injunctions are granted upon motion in pursuance of the statute and are usually auxiliary to some legal proceeding then commenced or pending, and may be shown, when material to the title, either in connection with such pending suits, or as independent exhibits. An injunction which has been dissolved does not call for notice. Perpetual injunctions, when relating to matters which directly concern title, become permanent muniments, and, of course, must be regularly shown in connection with the enjoined matter. This will be the case in respect to rights of way appurtenant to land; [81] or of deeds declared to be void, when attempted to be used as evidence of title; [82] and of judgments which have become invalidated for any reason.[83] A perpetual injunction to quiet title will sometimes lie when there has been no trial at law; as when the party having possession is disturbed, but not so dispossessed as to make it the subject of an action at law.[84]

79 Camp *v.* Bates, 11 Conn. 51; Sidener *v.* White, 46 Ind. 588; Fehrle *v.* Turner, 77 Ind. 530 (reversing, 34 Ind. 300). An injunction is a preventive remedy and can not be invoked to command a party to undo what he has done or restrain him from doing an act which he is alleged to have already done: Wangelin *v.* Goe, 50 Ill. 459.

80 Smith *v.* Bangs, 15 Ill. 399; McIntyre *v.* McIntyre, 80 Ill. 127; Keam *v.* Ash, 27 N. J. Eq. 57. The writ is often employed in disputes between the civic authorities and individuals relative to rights of way, occupation of streets, etc.: Pettibone *v.* Hamilton, 40 Wis. 402; Knox *v.* Police Jury of Baton Rouge, 27 La. An. 204.

81 Truehart *v.* Price, 2 Munf. (Va.) 488.

82 Bushnell *v.* Harford, 4 Johns. Ch. 302.

83 Kruson *v.* Kruson, 1 Bibb (Ky.), 184; Brinkerhoff *v.* Lansing, 4 Johns. Ch. 69; Gairity *v.* Russell, 40 Conn. 450; Dalton *v.* Lamburth, 9 Nev. 192.

84 Trustees of Louisville *v.* Gray, 1 Litt. (Ky.) 148. The *writ* of injunction, as a provisional remedy, has been abolished by the codes,

§ 511. **Ejectment.** The action of ejectment is said to have originated at some period uncertain between the years 1327 and 1377, and was at first a mere action of trespass to recover damages from an intruder who had usurped possession.[85] A new feature, not contemplated by the original writ, was soon introduced,[86] for the purpose of enabling the plaintiff to recover the term as well. It was originally brought only by a lessee, to recover possession of the lands from which he had been ousted, and in its strictly technical sense is still an action for the recovery of the possession of real estate, but in practice it is more generally used, both in England and the United States, to determine the title to lands,[87] to which possession attaches itself as an essential attribute. Under the statute it possesses little of its original features,[88] while its general scope has been so extended that it is competent to determine almost every question that can arise in conflicting titles. It is now regarded as a legal remedy,[89] to be prosecuted only by the real parties in interest,[90] having the legal title to the land,[91] and can be brought only against the person in possession of the premises, if they are occupied,[92] or against a person claiming title, etc., when the premises are vacant and unoccupied. It is used, not only to determine the title of parties claiming from the same source, as well as to settle conflicting adverse titles derived from independent sources, but also by purchasers

which substitute a statutory remedy by order; but the nature of the remedy has not been changed.

85 Warvelle on Ejectment 4. *Et seq.*

86 Supposed to be about the year 1455.

87 Guyer *v.* Wookey, 18 Ill. 536.

88 As originally administered it depended upon a series of legal fictions and feigned issues: 3 Black. Com. 200.

89 Gillett *v.* Neganza, 13 Wis. 472; Guyer *v.* Wookey, 18 Ill. 536; Joy *v.* Berdell, 25 Ill. 537.

90 Hanson *v.* Armstrong, 22 Ill. 442; Thompson *v.* Schuyler, 2 Gilm. (Ill.) 271.

91 Allen *v.* Smith, 6 Blackf. (Ind.) 527; Morton *v.* Greene, 2 Neb. 441.

92 Persons in possession merely, as servants or employes of the party claiming adversely, are not occupants within the meaning of the law: Chiniquy *v.* Catholic Bishop, 41 Ill. 148.

under execution and judicial sales to obtain possession of the property purchased and extinguish the occupying claimant's rights.

At common law a judgment or decree in ejectment is not regarded as conclusive in respect to the question of title, but as a recovery of the possession without prejudice to the right, as it may afterward appear, even between the same parties,[93] but wherever the common law form of the action is abolished, and same is prosecuted by the real parties in interest, in their own names, the judgment is an estoppel and a valid bar to any subsequent action, unless such privilege is expressly given by statute.[94] Where a recovery is had against the occupant, the judgment binds not only him, but all persons in privity of estate or possession with him,[95] and concludes them from again litigating the same title,[96] but is not necessarily a bar to a subsequent suit, or to defenses set up in a subsequent suit, unless the titles and defenses are precisely the same as in the first suit.[97]

Nor does a judgment in ejectment transfer to the successful party the title of the adverse party, but, if presented in the proper manner, whenever such adverse title is drawn in issue, it shuts out all proof of same, and its effect bears a closer resemblance to an extinguishment, than a transfer of the adverse title. The judgment awards the possession to the prevailing party, because he had the title at the commencement of the action, and because the losing party had no title, or not such a title as would authorize him to withhold the possession; but it neither directly nor indirectly transfers the title.[98] Inasmuch as the judgment is conclusive on the rights of the parties to the subject-matter of the action and all persons claiming by,

93 Mitchell *v.* Robertson, 15 Ala. 412; Holmes *v.* Carondolet, 38 Mo. 551; Smith *v.* Sherwood, 4 Conn. 276; Atkins *v.* Horde, 1 Burr. 114.

94 Freem. on Judgts. § 299; Campbell *v.* Hall, 16 N. Y. 575; and see Clarkson *v.* Stanchfield, 57 Mo. 573. In most of the States a defeated party may have a second trial as of right.

95 Hanson *v.* Armstrong, 22 Ill. 442; Rodgers *v.* Bell, 53 Ga. 94; State *v.* Orwig, 34 Iowa, 112.

96 Amesti *v.* Castro, 49 Cal. 325.

97 Foster *v.* Evans, 51 Mo. 39.

98 Mahoney *v.* Middleton, 41 Cal.

through or under them by title accruing after the commencement of the action,[99] the abstract should fully show the points presented, their relation to the land, and the final disposition made, which may all be easily accomplished by a full synopsis of the pleadings, the verdict,[1] and the judgment or decree.

§ 512. **Quia Timet.** This is an anticipatory remedy to quiet the title to lands,[2] and, unlike ejectment, is brought only by the person in possession of the land, or one claiming to be the owner when the lands are unimproved or unoccupied.[3] It is an ancient chancery remedy, but in most of the States is now a statutory action, resorted to for the purpose of quieting the title or the removal of a cloud,[4] and equity is invoked to reach persons out of possession, who can not be compelled to defend their right at law.[5]

The decree, unless otherwise provided by statute, is not properly a judgment *in rem*, establishing title to the land, but operates *in personam* only, by restraining the defendant from asserting his claim, or by directing him to perform some duty, as to deliver up his deed to be canceled, or to execute a release, etc.[6]

The possession which confers jurisdiction in such cases must have been acquired in a lawful way,[7] though the complainant is not bound to show a perfect title as against all the world,[8]

99 Sheridan *v.* Andrews, 3 Lans. (N. Y.) 129; Amesti *v.* Castro, 49 Cal. 325.

1 Where the verdict fails to specify any estate, judgment can not be rendered on it: Long *v.* Linn, 71 Ill. 152; but a finding that the plaintiff is the owner of the land is sufficiently explicit as to the plaintiff's title: Haddock v. Haddock, 22 Ill. 384; when tried by the court the finding and judgment must be for the premises described in the pleadings and the character of the estate recovered must be stated: Harding *v.* Strong, 42 Ill. 148.

2 Frequently denominated a bill of peace.

3 Gould *v.* Sternberg, 105 Ill. 488; Hardin *v.* Jones, 86 Ill. 313.

4 Hardin *v.* Jones, 86 Ill. 313; Collins *v.* Collins, 19 Ohio. St. 468.

5 Barron *v.* Robbins, 23 Mich. 42; Alton Ins. Co. *v.* Buckmaster, 13 Ill. 201.

6 Massie *v.* Watts, 6 Cranch (U. S.) 148; Vandever *v.* Freeman, 20 Tex. 334. Such decrees are conclusive on parties and privies: Buckmaster *v.* Ryder, 12 Ill. 207.

7 Hardin *v.* Jones, 86 Ill. 313.

8 Rucker *v.* Dooley, 49 Ill. 377;

as is the case of one seeking to recover possession, and the title asserted must be the legal title,[9] or at least the complainant must be the real owner.[10] An equitable claimant, who is not in possession, can not invoke the aid of a court to quiet his title and remove the cloud cast upon it by other claimants.[11]

Where clouds or obscurations of any kind are found upon examination, and no other or more convenient method can be employed to remove them, it is the duty of counsel to recommend a bill to quiet title, and for nearly every species of colorable interference with the legal title this furnishes a most efficient remedy. There is in some States a special statutory action to establish and confirm title where records have been destroyed. The general features of these actions resemble the action to quiet title above described but the scope and legal effect is broader.[12]

§ 513. **Partition.** Originally, partition could only be enforced between co-parceners, but by statute in England at an early day compulsory partition was allowed between joint tenants and tenants in common. The right, as exercised there and in this country as well, is given only to one having an actual or constructive possession of the lands sought to be partitioned. Hence, unless the statute expressly provides otherwise, the right is peculiar to those having a present estate, which carries with it the right of possession, and necessarily excludes remainder-men and reversioners, who have simply an estate to vest in possession *in futuro*.[13] It would seem, however, that remainder-men or reversioners in fee may have

Schroeder *v.* Gurney, 17 N. Y. Sup. Ct. 413.

9 San Diego *v.* Allison, 46 Cal. 162; O'Brien *v.* Creig, 10 Kan. 202; Fonda *v.* Sage, 48 N. Y. 173.

10 Carlisle *v.* Tindall, 49 Miss. 229; Lee *v.* Ruggles, 62 Ill. 427; Eiden *v.* Eiden, 41 Wis. 460.

11 Herrington *v.* Williams, 31 Tex. 448.

12 Of this class is the so-called "Burnt Record Act" of Illinois, which enables parties to establish title against all persons, even though unknown, who may have or claim interests in the land.

13 Sullivan *v.* Sullivan, 66 N. Y. 37; Spight *v.* Waldron, 51 Miss. 356; Scarborough *v.* Smith, 18 Kan. 399.

partition among themselves subject to the unexpired precedent particular estate.[14]

Partitions occur in many titles of long standing, particularly in agricultural lands and large tracts, and as the interests of minor heirs and others under disability are frequently involved, the proceedings should show affirmatively a full statutory compliance. The procedure is substantially the same in all the States,[15] making due allowances for minor differences of practice, and involves a presentation of the case to a court of competent jurisdiction; a decree defining the interests of the parties; the appointment of a master or commissioners to execute the decree and make partition, or to inquire into the expediency of same or susceptibility of the property to partition; the report of the commissioners; and confirmation or final decree. All of the foregoing steps are essential, and form regular links in the chain of title.

It is customary under the old chancery practice to decree a mutual interchange of deeds, but statutory power is now generally given to confirm title in the parties in cases of partition, without this formality.[16] The decree is *prima facie* evidence of title in favor of each of the parties to the particular tract adjudged to him,[17] and conclusive against all the parties before the court, and their privies.[18] The decree under the statute may be final and conclusive as evidence between the parties without the interchange of deeds, either by the parties or commissioners, as it ascertains all the rights involved, and leaves nothing to be done but to carry it into effect. It does not, however, vest in either of the co-tenants any new or additional title in respect of the respective parcels set off to each, but

14 Scoville *v.* Hilliard, 48 Ill. 453.

15 Under the statute the action for partition of lands in a suit at law in some of the States, and not in equity, and is a substitute for the old common law action of partition: Hopkins *v.* Medley, 97 Ill. 402.

16 Smith *v.* Crawford, 81 Ill. 296.

17 Word *v.* Douthett, 44 Tex. 365.

18 Wright *v.* Marsh, 2 G. Greene, 94; Allie *v.* Schmitz, 17 Wis. 169; Smith *v.* Crawford, 81 Ill. 296.

simply severs the unity of possession theretofore existing.[19] The title by which each holds his divided share after partition, is the same as that by which his undivided interest was held prior thereto.[20]

Where title is deduced through a decree of partition in a suit between the heirs of a deceased owner, the adjudication, where the court has jurisdiction, finding who are the heirs at law of the deceased owner, is *prima facie* evidence of who were the heirs and owners of the land whose interests were allotted or decreed to be sold; and in an action of ejectment brought by a grantee of one of the parties, or a purchaser at the sale against a stranger to the partition suit, the plaintiff is not bound to produce evidence of heirship outside of such decree, in the absence of proof to the contrary. The doctrine that judgments and decrees are evidence only in suits between parties and privies has no application, it would seem, in such a case.[21] The synopsis which follows will serve to fairly indicate the method of showing a partition, and will also serve as a precedent for other chancery actions:

In Circuit Court of Cook County, Illinois.

Robert E. Jones,
vs.
Edward C. Walker, Thomas Cannon, Sarah C. Newhouse, a minor, and James W. Newhouse, her guardian and next friend.

Case No. 39,379.
In Chancery.
Bill filed Oct. 24, 1881.

Represents that complainant and defendant Edward C. Walker, are the owners each of an undivided one half as tenants in common of Lot 80, School Trustees' Subdivision of the North part of Section 16, Town 39 North, Range 13, east of 3d P. M., being now subdivided into sixteen lots and known as Secrist's Subdivision of said Lot 80.[22]

19 Wade *v.* Deray, 50 Cal. 376.
20 Carter *v.* Day, 59 Ohio St. 96.
21 Whitman *v.* Heneberry, 73 Ill. 109.
22 A bill in equity for partition

That defendants, Sarah C. Newhouse, a minor, and Thomas Cannon, have or claim to have, some interest in or lien upon said premises.[23]

Prays for a partition and division of said premises according to the rights and interests of the parties in severalty, if same can be done without manifest prejudice to the owners thereof, or if the partition can not be made without such manifest prejudice, that a sale thereof be made according to law, and that the proceeds of such sale be distributed among the parties respectively entitled thereto.[24]

Chancery summons, (to Cook county) issued, dated Oct. 24, 1881, to all said defendants, returnable 3d Monday of Nov., 1881, and duly served upon all said parties.[25]

Answer of defendant Edward C. Walker (and replication thereto) filed Dec. 8, 1881.

Default of defendants, Thomas Cannon, James W. Newhouse, guardian and next friend, taken and entered Dec. 8,

need not make any formal deraignment of title but must state the complainant's own title and the title of the defendants so that it may appear that they hold the land as cotenants. It should also show the undivided proportion belonging to each, and that they are entitled to a partition.

23 To entitle a party to partition it is not enough for him to show *prima facie* title in himself; he must also make persons holding adverse titles parties to the action or show that they are not under disability and that their title is completely barred: Ross *v.* Cobb, 48 Ill. 111.

24 The law contemplates two modes of proceeding in order to procure a division of real estate held in joint tenancy or in common: (1) By a partition of the premises without sale; and (2) where a partition can not be conveniently made, by a sale of the property.

25 Very frequently counsel desires to know the manner of service, particularly where persons under disability are interested, and in such case the abstract at this point should disclose such method by a copy or summary of the returns of the officers. Where *all* the parties enter an appearance the method above given is sufficient, but when there has been default, it is essential to a correct opinion that the method of service upon the non-appearing parties be shown, and this can only be done by a copy of the return. Stating that defendant was "personally served" is not sufficient, as a very slight omission will frequently vitiate the return and prevent jurisdiction from attaching.

1881, (chancery record 42, pg. 198) for want of plea, answer or demurrer to bill, and Louis Hunt appointed guardian ad litem for said minor defendant, Sarah A. Newhouse.

Cause referred to W. Fenimore Cooper, Master in Chancery, Dec. 8, 1881, to take proofs, etc.

Answer of said minor defendant by her guardian ad litem, filed Dec. 8, 1881.

Master's report, submitting proofs and exhibits, filed Feb. 20, 1882.

Said master reports that the material facts averred in the bill have been fully proved, and said complainant is entitled to the relief prayed for in said bill.

Decree entered, Feb. 20, 1882 (Chancery Record 42, page 406.)

[Here should follow the decree or every material part thereof.[26]]

Where the decree is interlocutory only, the subsequent proceedings, as the appointment and report of commissioners, offers and acceptances of parties, together with the final decree and confirmation should follow in regular order. What has been given will serve to fully illustrate the method in which subsequent steps may be shown.

Where a partition occurs in the history of a title counsel should carefully note that all persons shown to have any interest are properly joined in the suit as parties. For this purpose reference should always be made to the proof of heirship, made in the probate of the ancestor's estate, where the title is derived through descent, and the names of the heirs compared with those in the partition suit. If minors are interested the proceedings will be void as to them unless they are made parties and personally served with process.[27]

§ 514. **Specific Performance.** Equity will enforce spe-

26 See "Judgments and Decrees" for a precedent of a decree.

27 Terrell v. Weymouth, 33 Fla. 255.

cific performance of agreements relating to lands;[28] compel conveyance of land purchased,[29] either by the vendor or his heirs;[30] or where specific performance can not be enforced, will give other adequate relief.[31] The essential conditions of such contracts are: That they be made by competent parties, willingly entered into;[32] that the terms are certain and well defined;[33] be founded upon sufficient consideration;[34] and the party seeking its performance must fulfill his obligations under it.[35] The contract must further be lawful in its character,[36] and such as a court can enforce.[37] As this matter occurs most frequently, in connection with title, in actions growing out of agreements to deed, it is advisable, that, in case performance has been decreed and consummated, a rather full synopsis be given of all the material parts of the pleadings; master's report, if there has been a reference; and of the final decree. If performance has been denied, and the contract or agreement is of record, the same, together with a brief notice of the action, may be shown as a special appendix.

In addition to actions in the Circuit Court, it is provided in some States that when any deceased person was bound by a contract in writing to convey any real estate a specific performance by the personal representatives of such deceased person may be decreed in the probate court, in all cases where the deceased, if living, might be compelled to execute such conveyance. The jurisdiction in this event is obtained by petition setting forth the jurisdictional facts, and of notice duly given in accordance with the statute. The petition,

28 Kerfoot *v.* Breckenridge, 87 Ill. 205.

29 Marling *v.* Marling, 94 W. Va. 79.

30 Bennett *v.* Waller, 23 Ill. 97.

31 Woodward *v.* Harris, 2 Barb. 439; Oliver *v.* Croswell, 42 Ill. 41.

32 Johnson *v.* Dodge, 17 Ill. 433; Taylor *v.* Merrill, 55 Ill. 52.

33 Schmeling *v.* Kriesel, 45 Wis. 357; Colson *v.* Thompson, 2 Wheat. 336; Gigos *v.* Cochran, 54 Ind. 593.

34 Cheney *v.* Cook, 7 Wis. 413; Smith *v.* Wood, 12 Wis. 382.

35 N. W. Iron Co. *v.* Mead, 21 Wis. 474; Ishmeal *v.* Parker, 13 Ill. 324.

36 McClurken *v.* Detrich, 33 Ill. 349; Hooker *v.* De Palos, 28 Ohio St. 251.

37 McClellan *v.* Darrah, 50 Ill. 249.

notice, proof of service and decree, should precede or supplement the administrator's or executor's deed whenever it is shown in the abstract.[38]

§ 515. **Redemption.** Bills to redeem, though formerly of common occurrence, are now rarely employed, from the fact that the fundamental law concerning mortgages has been radically changed, and the necessity of equitable interference to restore the mortgagor's rights no longer exists save in a few instances. After the law day has passed the status of the mortgagor's title is substantially the same as it was before, and until foreclosed by legal methods the right to redeem by simple payment is unimpaired. Such, at least, is the recognized law in a majority of the American States. But when a deed, though in fact given as security only, is absolute on its face, and purports to convey an absolute estate in fee, the mortgagor, to assert his right of redemption and become reinvested with his former title, must still make application to a court of equity by a bill to redeem, or such other similar remedy as the statute has provided. In like manner, if a mortgagee, having entered for condition broken,[39] refuses to relinquish possession of the mortgaged lands after payment, or tender of payment, of the money due on the mortgage, the only remedy of the mortgagor, in States where the ancient doctrine still obtains, in order to regain the estate, is by a bill to redeem.[40] Ordinarily, however, this latter end is attained by a direct proceeding to have the mortgage canceled. The bill, in some form, together with its attendant decree, will occasionally

[38] By statutory provision in many States a certified copy of the order or decree directing the execution of the conveyance, is required to be recorded in the registry of deeds of the county in which the land is situate, and such certified copy is made evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make the conveyance, while the conveyance itself is made effectual to pass the estate contracted, as fully as if the contracting party himself were still living and then executed same: R. S. Wis. Ch. 167; Minn. Gen. Stat. Ch. 58.

[39] This is still permitted in a few States, see Chap. XXII.

[40] Parsons *v.* Wells, 17 Mass. 419; Sherman *v.* Abbott, 18 Pick. 448.

occur, particularly in case of equitable mortgages, and as its effect upon title is very marked, it must be fully set forth.

§ 516. **Foreclosure.** Probably no class of legal proceedings so often figures in examinations of title as actions brought to foreclose and enforce liens, and particularly is this true in the matter of the foreclosure of mortgages. A foreclosure in equity, according to ancient legal theory, is a proceeding by which the mortgagor's right of redemption in the mortgaged premises is barred or closed forever, and occurs when the mortgagor has forfeited his estate by non-payment of the money due on the mortgage at the time appointed, but still retains the equity of redemption.[41] In such case the mortgagee may call upon the mortgagor, in a court of equity, to redeem his estate presently, or, in default thereof, be forever closed or barred from any right of redemption.

Two general methods of foreclosure are recognized in equity,[42] one, called strict foreclosure, whereby the mortgagee is adjudged the absolute owner of the property; and the other, by a sale of the property under the direction of and by an officer of the court, in which case the proceeds are applied to the discharge of incumbrances, according to their priority, and the balance, if any, paid over to the mortgagor. Strict foreclosure has always been regarded as a harsh remedy, and is not permitted in most of the States, nor is the title thus acquired as safe as when made by the ordinary foreclosure by sale.

The title derived under a foreclosed mortgage is evidenced by the mortgage itself; the proceedings and decree in foreclosure; the certificate of sale, report, and confirmation; and finally by the selling officer's deed, all together composing one transaction. Much care should be exercised in preparing a synopsis of the proceedings, especially in regard to parties,

41 1 Bou. Law. Dict. 599. A court of equity will never decree a foreclosure until the period limited for payment has expired: Harshaw *v.* McKesson, 66 N. C. 266.

42 There is also a method of foreclosure at law, by means of a proceeding by *scire facias*, but which, from its inadequate nature, is seldom resorted to.

and counsel, in passing title, should see that all persons who might legally assert any rights in relation to the mortgaged premises have been regularly brought in and properly barred or their rights adjusted. This will include not only the mortgagors, but subsequent mortgagees, judgment creditors, lien holders, and all other persons possessing legal rights or equities accruing subsequent to the lien asserted by the mortgage.[43] Where the foreclosure is recent, and particularly when the title under investigation is that offered at the foreclosure sale, the decree and antecedent proceedings should be set out very fully.

§ 517. **Dower.** The interest which a widow possesses in the lands of her deceased husband in right of dower may, at common law, be assigned to her in severalty by the heir, without the order of a court and without a deed, for the assignment in such case is not regarded as a conveyance of title, but only the ascertainment of an interest which is a continuation of the estate of the husband, and which is held of him by appointment of law;[44] the only effect of the assignment being to distinguish the land to which it attaches from the rest of the husband's estate. But should the heir neglect or refuse, within a reasonable time after the death of a husband, to lay off and assign to the widow such portion of the land as she may be entitled to use and occupy, or when the particular part can not be agreed upon, or when the right is disputed, recourse may be had to equity to determine the rights and apportion the interests of the parties. In some States an ejectment suit at law may be resorted to by the widow.

Where the right is undisputed, dower may be assigned by the probate court, as an incident to the settlement of the husband's estate, and the award in such case should substantially appear in the synopsis of probate proceedings, or as an independent exhibit.

Where the right is disputed the probate court, as a rule, has

43 Hinson *v.* Adrian, 86 N. C. 61; Mabury *v.* Ruiz, 58 Cal. 11.

44 Farnsworth *v.* Cole, 42 Wis. 405; 4 Kent. Com. 62.

no jurisdiction, while in many States if the heir or other person shall not, within some specified period after the death of the husband,[45] satisfactorily set over and assign to the surviving wife dower in and to all lands whereof by law she is or may be dowable, such surviving wife may, in the first instance, sue for and recover the same by petition in equity, against the heir or any other person claiming right or possession of said estate. In either case the interposition of commissioners is contemplated, and the report of the commissioners, together with the approval of the court, are necessary parts of the abstract of the proceedings. Where an allowance is made in lieu of dower a statement must be made of that fact, particularly when by decree the assessment of such allowance is made a lien upon the heir's land.

§ 518. **Divorce.** The dissolution of the marriage contract, though formerly a power exercised by the legislature, is now very generally relegated to courts of equity, and as a rule, such courts have exclusive original jurisdiction. Until decree has actually been entered, the legal relations of the parties continue to subsist, even where the marriage is utterly void for pre-existent causes, and such decree, to be effective, must further be made during the lifetime of both parties.[46]

At common law, a divorce was only granted for pre-existent cause, and had the effect of bastardizing the issue. Under the statute divorces are granted for causes arising subsequent, as well as prior, to the marriage, and do not affect the legitimacy of the children of the marriage, except, perhaps, when the divorce is granted on the grounds of a prior marriage.[47]

Pending the determination of the cause the husband may be enjoined from disposing of his property in order to defeat any allowance of alimony,[48] but such injunction is never made per-

45 Where husband and wife are equally dowable in the lands of the other, these remarks will apply to both sexes.

46 Reeves' Dom. Rel. 204; 1 Black. Com. 440.

47 Consult local statutes for the effect of divorce.

48 Vanzant *v.* Vanzant, 23 Ill. 536; Gray *v.* Gray, 65 Ga. 193.

petual on granting the decree.[49] The allowance of alimony may, however, be enforced by a sale of the husband's real estate, and by the decree the payment of same is frequently made a specific lien upon his property. When alimony or maintenance is made to become due by installments, and a sale is made to meet such installments, the title will pass subject to the lien of installments not then due unless the court shall, at the time, direct otherwise.[50] When property is held by one party which equitably belongs to the other, the court may compel conveyance thereof to be made, and sometimes, in case of a community of interest, a partition is necessary.[51] Lands in fee may be decreed in satisfaction of alimony,[52] or the court may assign as such the use for life of part of the husband's estate.[53] It is not customary, however, to disturb the husband's real estate, but a definite money allowance is made instead; "indeed," says Dickey, J., "the cases are very rare where the fee in lands held by the husband should ever be required to be transferred to the wife, unless she has some special equity in that particular land, arising from the purchase having been made with her money, or from some other cause substantially placing the husband in the position as to that property equivalent to that of a trustee holding in his name for the wife, or in a position in its nature equitably equivalent thereto. In such cases, though the form of the decree may be that of adjusting the question of alimony, the substance is more in the nature of the enforcement of a trust." [54]

With respect to the effect upon lands of a decree for alimony payable in gross, the rule does not seem to be well settled. The

49 Errissmann *v.* Errissmann, 25 Ill. 136; Keating *v.* Keating, 48 Ill. 242. Instead of the injunction, the decree makes the alimony a lien upon his land, and he may be compelled to secure the lien further by mortgage.

50 All these matters are the subject of express statutory regulation. Consult local statutes.

51 Stewartson *v.* Stewartson, 15 Ill. 145.

52 Wheeler *v.* Wheeler, 18 Ill. 39.

53 Keating *v.* Keating, 48 Ill. 241; Jolliff *v.* Jolliff, 32 Ill. 527.

54 Wilson *v.* Wilson, 102 Ill. 297.

volume of authority, however, holds that such a decree will operate as a lien upon the lands of the husband located in the county where the decree is rendered or docketed, and may be enforced by execution levied upon such lands either in the hands of the divorced husband or his grantee, where they have been conveyed after the rendition of the decree.[55]

[55] In Chase *v.* Chase, 105 Mass. 385, it was held that a judgment for alimony in the case of a divorce *a vinculo*, or from bed and board, creates a debt of record in favor of the wife, and that she is entitled, as a creditor, to impeach a conveyance made by him with intent to defraud her. It is said by the Supreme Court of the United States in Barber *v.* Barber, 21 How. 582, that when the court, having jurisdiction of her suit, allows the wife, from her husband's means, by way of alimony, a suitable maintenance and support, "it becomes a judicial debt of record against the husband, and is as much a debt of record, until the decree has been recalled, as any other judgment for money is." And see, to the same effect, Wetmore *v.* Wetmore, 149 N. Y. 520. In Frakes *v.* Brown, 2 Blackf. (Ind.) 295, the wife obtained a divorce, and a judgment for the sum of $550 as alimony. By virtue of a *fieri facias* issued upon this judgment, the land in question was sold, and the complainant was the purchaser. In a bill in chancery the complainant prayed that a conveyance of the land made by the husband to the defendant might be set aside as fraudulent and void. In the opinion, Blackford, J., says: "It is said that real estate is not liable on a decree for a divorce and alimony. The answer to this is that here is a judgment against the husband for a certain sum of money, rendered by a court having jurisdiction of the cause, and that every judgment of this kind, is by statute, a lien on real estate. It is not for this court to look beyond the judgment in the case before us. It must be considered as having the same effect as all other judgments for the payment of money, whilst it stands unreversed and remains unsatisfied." The statute by which judgments became liens on real estate was the general enactment: "Judgments in the Circuit Courts are hereby made liens on the real estate of the defendant or defendants, from the day of the rendition thereof, in the county where such judgment may be rendered." Rev. Laws Ind. 1824, 192. In Keyes *v.* Scanlan, 63 Wis. 345, the complaint set out that the plaintiff recovered a judgment for divorce against her husband, and that the sum of $300 alimony, and cost of suit, were adjudged in her favor. Section 2367 of the Annotated Statutes of Wisconsin provides that, upon the failure to pay the alimony adjudged to the wife, "the court may enforce the payment thereof by execution or otherwise, as in other cases." In construing this language, the court say: "There are very satisfactory reasons for saying that the divorce judgment stood upon the same footing as ordinary money

With the exceptions hereafter noted, divorce proceedings are seldom shown in abstracts of title, save as they may incumber land by the lien for alimony, and then only in brief and general terms. A divorce has another important effect on titles, however, considered in respect to dower. It is a doctrine, both of the common law and of the statute, that the dissolution of the marriage relation, *ipso facto* restores the parties, legally as well as socially, to the same relative position they occupied prior to entering into same. One of the incidents, therefore, is loss of the dower right of the wife,[57] and to show a full and complete exposition of title an appropriate mention of a divorce seems necessary in all cases where the question of dower would properly arise. This may be accomplished by a brief reference to the case as follows:

Albert Gallaway,
vs.
Mary A. Gallaway.

Circuit Court, Cook County.
Case No. 10,057.
Bill for divorce.
January 20, 1881. Decree of divorce rendered, which orders, inter alia, that defendant be, and she is, forever barred of and from all right and claim of dower in and to the lands and tenements of said complainant.
Costs paid.

A decree of divorce, however, has no retroactive effect except as specially provided for by statute, and therefore a wife's right of dower which had vested prior to a decree is not thereby divested unless the statute so specifically declares.[58]

There is another effect produced by divorce which properly

judgments, and became a lien upon the real estate of the debtor, liable to execution, as soon as docketed."

57 Burdick *v.* Briggs, 11 Wis. 126; Rice *v.* Lumley, 10 Ohio St. 596; Given *v.* Marr, 27 Me. 212; Miltmore *v.* Miltmore, 40 Pa. St. 151. In some States dower is preserved where the decree is rendered in favor of the wife for the misconduct of the husband. Consult local statutes.

58 Van Cleaf *v.* Burns, 118 N. Y. 549; and see, Alt *v.* Banholzer, 39 Minn. 511.

finds mention in a work of this character. As has been shown a conveyance to husband and wife, in most of the States, produces what is known as an estate by entirety, that is, an estate similar to a joint tenancy.[59] It is held that this estate is destroyed by divorce, the legal unity of the parties being broken, and that the former spouses become tenants in common.[60]

In many cases where a divorce is pending, prudence would suggest that a brief allusion be made to it, yet the commencement and pendency of such action, where the bill merely sets forth the defendant's lands as affecting the amount of alimony to be allowed, and neither asserts nor seeks any right in respect to them, affords no notice *lis pendens* sufficient to affect the rights of purchasers from such defendant. Where, however, the bill sets up some specific claim of right in the lands, or where any part of them are asked to be assigned for alimony, or any other right is asserted in respect to them or any other relief asked in regard to them, it would seem that the doctrine of *lis pendens* will apply; and any one who purchases such property during the pendency of the action will be bound by the judgment subsequently rendered therein.[61]

§ 519. **The Right of Eminent Domain.** The general subject of eminent domain has been alluded to in a former part of this book, but may be advantageously referred to at this place in connection with its practical application to the alienation of land. The right of eminent domain is defined to be the ultimate right of the sovereign power to appropriate not only the public property, but the private property of all persons within the territorial sovereignty, to public purposes,[62] and though the exercise of the right usually affects only the use and enjoyment of the land and not the fee,[63] it is, in effect, a per-

59 Consult, § 241 *supra*.

60 Steltz *v.* Shreck, 128 N. Y. 263; and see, Harrer *v.* Wallner 80 Ill. 197; Lash *v.* Lash, 58 Ind. 526.

61 Sapp *v.* Wightman, 103 Ill. 150; Wilkinson *v.* Elliott, 43 Kan. 590.

62 Vattel's Law of Nations, b. 1, ch. 20; Charles River Bridge *v.* Warren Bridge, 11 Pet. 641.

63 R. R. *v.* Burkett, 42 Ala. 83;

petual right of user almost equal in dignity to the fee, and in some States it contemplates a transfer of the fee itself.[64] This right is variously exercised by the State, both in its own behalf, as for the acquisition of land for State institutions or improvements, roads, canals and other works of a strictly public character, and in behalf of corporations for works and improvements of a *quasi* public character, but it is a fundamental principle that any lands of the subject, for whatever purpose required, shall not be taken or damaged for public use, without just compensation. When land is taken under this right and in fee, it is freed from all contingent interests, liens and equities, including inchoate rights of dower, judgment liens, etc.[65]

In the examination of titles questions growing out of the exercise of this right are often presented where there has been an abandonment of the lands appropriated, or a diversion from the original purpose. Condemnations are also shown incidentally, as where rights of way are acquired over tracts which form the subject of an examination.

§ 520. **Proceedings for Condemnation.** Provision is made in every State for the condemnation of land, and the compensation to be paid for or in respect of the property sought to be appropriated or damaged, when no agreement can be effected by the parties interested; or in case the owner of the property is incapable of consenting; or his name or residence is unknown; or he is a non-resident of the State.

The general procedure is very uniform, though the instrumentalities used are not alike in all the States. The proceedings generally contemplate an investigation by a jury, and an assessment and award, which, when regularly accomplished and confirmed, has the effect of divesting the title of the former owner and clothing the corporation with such title as the law

Hatch *v.* R. R., 18 Ohio, 92; Morris *v.* Schallsville, 6 Bush (Ky.), 671.

64 Nicoll *v.* R. R. Co., 2 Kern. 121; People *v.* Mauran, 5 Den. 389; Heyward *v.* Mayor of N. Y., 3 Seld. 214; Troy *v.* R. R. Co., 42 Vt. 265; Challis *v.* R. R. Co., 16 Kan. 117.

65 Moore *v.* Aldermen, etc., 4 Sand. 456; affirmed, 4 Sel. 110; Watson *v.* R. R., 47 N. Y. 157.

imports. This is effected by a petition addressed to a court of competent jurisdiction, or to a judge thereof, either in term time or vacation, setting forth, by reference, the authority in the premises of the party seeking to take or damage the property so required; the purpose for which said property is sought to be taken or damaged; a description of the property; the names of all persons interested therein as appearing of record, if known, or if not known stating the fact, and if the proceedings seek to affect the property of persons under guardianship the guardians, or conservators of persons having conservators, must also be made parties defendant, and if married women their husbands must be made parties. Persons interested whose names are unknown may be made parties by the description of the unknown owners; the latter fact being presented by affidavit. Notice is given to the parties interested by personal or substituted service, and a hearing is had either before the judge to whom the petition was addressed, or commissioners appointed by him, and when heard by the judge a jury may be impaneled to ascertain the damages. The record in the matter should substantially appear in the abstract, and must be sufficiently full to disclose all jurisdictional facts and that the power has been exercised according to the direction of law. When the proceedings are conducted by commissioners a report is made to the court granting the authority, and this report substantially embodies all that is necessary to show complete divesture, while the court roll, when such proceedings are conducted primarily before a court, or on appeal, will also serve the same end.

If the proceedings are regular in form the synopsis may be considerably condensed, and when such proceedings are displayed only incidentally, for the purpose of explaining the situation of the land and not to show the title of the condemned tracts, this course is recommended. In such case brief references to the petition, the appearance of parties, the verdict and the judgment of the court, are all that will be necessary. Thus:

In the County Court of Cook County.

Central Railway Company vs. James Thompson. } *Case, 1,509.*

Petition, filed July 1, 1903, for the condemnation of the South 100 feet of the North West quarter of Section 10, Town 39 North, Range 13 East of the 3d Principal Meridian, for the purposes of a railroad.

Appearance of defendant entered Aug. 4, 1903.

Case heard Oct. 15, 1903 (Law Rec. 12, pg. 25). Verdict rendered wherein the jury finds that the petitioner do take from the owner the following property, to-wit: a strip of land 100 feet in width over and across the South side, etc. [set out the finding].

Ordered, by the court, that petitioner have judgment of condemnation herein, and that upon the payment by it to the County Treasurer of said county, of the sum aforesaid, that said Central Railway Company do enter into possession of the said land and hold the same for the purposes provided by law.

It will frequently be advisable to show condemnation proceedings where land is taken for the opening or widening of streets, and the result is a change in the shape or dimensions of platted lands. Where provision is also made for an assessment of benefits as well as compensation for damage, it will become necessary to show the essential features of the proceeding and the extent of the lien thereby occasioned. Brief general recitals will, however, be sufficient. As per example:

In Superior Court of Cook Co.

City of Chicago vs. Unknown Owners. } *Case, No. 79,050.*

Petition filed June 2, 1906, represents that on March 28. 1906, the City Council of said City passed an ordinance providing that Fairmount Avenue be opened and widened from West 28th Street to Wilson Avenue, by con-

demning therefor the East 16½ feet of Lots 10, 11, 12 and 13, in Block 4 of White & Black's subdivision of the W. ½ of N. E. ¼ of Sec. 16, T. 24, N. R. 12, and other property.

Attached to petition is a copy of said ordinance, duly verified, wherein it is provided that said improvement be made by special assessment to be levied upon the property benefited.

Prays that the just compensation to be made for property taken or damaged be ascertained by a jury.

Feb. 14, 1907, (Law Rec. 45, pg. 276) Verdict, wherein the jury find the just compensation to be paid to the owners of the East 16½ feet of said Lots to be $75.00 for each lot.

Judgment on the verdict for said respective sums.

Assessment roll filed June 10, 1907, wherein Lots 10, 11, 12 and 13 are each assessed the sum of $125.00.

July 1, 1907, (Law Rec. 45, pg. 488) Assessment confirmed.

§ 521. **Construction of Wills.** The validity of a will may be contested in equity as well as before the probate court,[66] yet this is seldom done, except on appeal, and the aid of a court of equity is usually invoked only to pass upon and construe indefinite and uncertain passages, or to direct the executor in the execution of indeterminate or insufficiently expressed trusts. Where any doubt arises as to the proper construction of a will, or as to the rights of parties thereunder, resort is usually had to a court of equity for a construction and decree for distribution, and the decree so made, so far as it relates to land, either directly or by just implication, becomes an essential muniment of title, equal in importance to the will itself, and of which, as an expression of the testator's intention, it forms an integral part.

66 Duncan v. Duncan, 23 Ill. 264; Flinn v. Owen, 68 Ill. 111.

CHAPTER XXIX.

TAXES AND TAX TITLES.

§ 522. Definition — Nature of taxing power.
523. Subjects of taxation.
524. Lien of taxes.
525. Tax titles.
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§ 531. Tax sales — Tax payer as purchaser.
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§ 522. **Definition — Nature and Scope of the Taxing Power.** By the concurrent opinion of lawyers, judges, lexicographers, and political economists, as well as by the general and popular understanding, taxes are burdens or charges imposed by the legislative power, upon persons or property, to raise money for public purposes or to accomplish some governmental end.[1] This power is vested wholly in the legislature, though municipalities may exercise it by a special delegation of authority, and is unrestricted except when it is opposed to some provision of the Federal or State constitution.[2] It extends to every trade or occupation, to every object of industry, use, or enjoyment, and to every species of possession.[3] The right of taxation has for its foundation the principle that the

1 Hanson *v.* Vernon, 27 Iowa, 28; Mitchell *v.* Williams, 27 Ind. 62; Blackw. Tax Tit. 1.

2 People *v.* Marshall, 1 Gilm. (Ill.) 672; Wider *v.* East St. Louis, 55 Ill. 133.

3 Curry *v.* Spencer, 14 Reporter, 527; DePauw *v.* New Albany, 22 Ind. 204; Anderson *v.* Kerns Draining Co., 14 Ind. 199.

citizen shall contribute to the support of the government which protects his person and property, in just proportion to the value of the property protected;[4] and equality, so far as is practicable, is its distinguishing characteristic.[5] While it is scarcely possible to attain absolute equality in all cases, or benefits commensurate with the burden of taxes imposed, yet the principle upon which the approximation to equality is to be maintained must be preserved inviolate in this, that all property subject to taxation shall be uniformly assessed, according to value; a rule applicable to all taxation, whether for general, local or special purposes.[6]

The legislature, as we have seen, is the sole source and repository of the taxing power; on the other hand, the counties and other municipal divisions are mere auxiliaries of the government, established simply for the more effective administration of justice, and the power of taxation, as confided to them, is a delegated trust, and is to be strictly construed. They act, not by virtue of inherent power, but as mere agencies of the State,[7] the whole theory of our system of taxation being based upon the idea that it is prepared by the representatives of the people, upon due deliberation and reflection, and when thus prepared for State purposes, it may be safely applied by the counties and other local agencies of the commonwealth.

§ 523. **Subjects of Taxation.** Primarily all property is subject to a just proportion of the burdens of taxation in return for the protection which the State affords, but the legislature may grant an exemption to certain classes, and such grant may

4 Dunleith v. Reynolds, 53 Ill. 45; *In re* Van Antwerp, 56 N. Y. 265.

5 Sherlock v. Village of Winnetka, 60 Ill. 530; Holbrook v. Dickinson, 46 Ill. 285; Weeks v. Milwaukee, 10 Wis. 242; Attorney-General v. Plankroad Co., 11 Wis. 35.

6 Peay v. Little Rock, 32 Ark. 31; Chicago v. Larned, 34 Ill. 253; McCormack v. Patchin, 53 Mo. 33; Weeks v. Milwaukee, 10 Wis. 242; People v. Bradley, 39 Ill. 130; Ottawa v. Spencer, 40 Ill. 211; Attorney-General v. Plankroad Co., 11 Wis. 35; Sears v. Racine, 10 Wis. 271.

7 R. R. Co. v. Washington County, 30 Gratt. (Va.) 471; U. S. v. New Orleans, 98 U. S. (8 Otto) 381.

be in the nature of a contract and therefore inviolable. But such grant must be expressed in clear and unmistakable language, and can not be aided by presumption or inference,[8] while all language creating an exemption is to be strictly construed.[9]

§ 524. **Lien of Taxes.** The lien for taxes attaches to all land subject to taxation, annually, upon some day stated, the time being different in nearly every State, and continues until the tax is paid.[10] Where, for instance, the lien attaches on the first day of May, and the property is conveyed subsequent to that date, it is incumbered by the lien, and unless a special exception is made in the deed the vendor is liable upon his covenants for the payment of the tax. It is also a statutory provision in many States, that taxes assessed on personal property of the same owner become a lien on his real estate.[11]

Many examiners make no search for information concerning current taxes, yet this is one of the things of which intending purchasers should be apprised. Taxes are due and payable at a stated time each year and when the date of the search is after this time, and before that fixed for the sale of lands for taxes, an examination should be made to ascertain the fact of payment or non-payment. The result may be embodied in a brief note among the appendices, as follows:

NOTE.— *It does not appear from the collector's warrant that the taxes for the year 1903, levied on the property described in the caption* [or whatever piece may be delinquent] *have been paid.*

A general statement that the examiner finds no unpaid taxes may be embodied in the final certificate but, if desired, the fact

8 Minot *v.* R. R. Co., 18 Wall. 206; Butler's Appeal, 73 Pa. St. 448; R. R. Co. *v.* Maguire, 49 Mo. 490.

9 Commissioners *v* Brackenridge, 12 Kan. 114; Manf. Co. *v.* East Saginaw, 19 Mich. 259; Methodist Church *v.* Chicago, 26 Ill. 482.

10 Binkert *v.* Wabash Ry. Co., 98 Ill. 205.

11 Union Trust Co., *v.* Weber, 96 Ill. 346.

of payment may be shown affirmatively by a note similar to the foregoing, and whenever the title is complicated by adverse claims or interests it is always well to show who paid the tax. Thus:

NOTE.— *On the collector's books for the year 1903 the general taxes levied on the land described in the caption hereto, are marked as having been paid May 14, 1904, by Thomas Brown.*

§ 525. **Tax Titles.** A tax title is a purely technical, as contradistinguished from a meritorious title, and depends for its validity upon a strict compliance with all the requirements of law.[12] No presumption can be raised to cure radical defects in the proceedings, and the proof of regularity devolves on the person asserting the title.[13] If the land claimed under such a title was subject to taxation, and the proceedings under the law have been regular, and the owner has failed to redeem within the time limited by law, then the whole legal and equitable estate is vested in the purchaser, and a new and perfect title is established.[14] This results from the paramount authority of the State to levy the tax and coerce its payment by subjecting the property to sale, yet owing to the complexity of the pro-

12 Altes *v.* Hinckler, 36 Ill. 265; Whitmore *v.* Larned, 70 Me. 276; Charles *v.* Waugh, 35 Ill. 315; Hewes *v.* Reis, 40 Cal. 225; Rivers *v.* Thompson, 43 Ala. 633.

13 Oliver *v.* Robinson, 58 Ala. 46.

14 Atkins *v.* Hinman, 2 Gilm. (Ill.) 437; Smith *v.* Messer, 17 N. H. 420; Dunlap *v.* Gallatin Co., 15 Ill. 7; Jarvis *v.* Peck, 19 Wis. 74; Cram *v.* Cotting, 22 Iowa, 411. The following principles, or rules, for testing the validity of tax titles, appear to be fairly deducible from the reported cases: (1) Where the statute under which the sale is made directs a thing to be done, or prescribes the form, time, and manner of doing anything, such thing must be done, and in the form, time and manner prescribed, or the title is invalid; and in this respect the statute must be strictly, if not literally, complied with; (2) but in determining what is required to be done, the statute must receive a reasonable construction; and where no particular form or manner of doing a thing is pointed out, any mode which effects the object with reasonable certainty is sufficient: Hall, J., in Chandler *v.* Spear, 22 Vt. 388.

cedure employed, and the careless, bungling or ignorant manner in which it is often used, as well as the many grave questions which may arise even on perfect service, a tax title is regarded as among the poorest evidences of the ownership of land, and is always taken with suspicion and viewed with jealousy.

Though the end to be attained by the sale of the land, to wit, the satisfaction of the levy, is the same in every State, yet no two States seem to pursue exactly the same methods in arriving at this end, but whatever be the methods employed, there must at least be a valid judgment or corresponding feature; a valid precept authorizing the sheriff, auditor, or other officer to make the sale;[15] and a proper conveyance of the land from such officer or other authorized person. These are essential to the *prima facie* validity of the title, and none of them can be dispensed with.[16] The basis of the title is, of course, a legal tax, and no title passes by a deed when the whole or any part of the tax on which it is founded was illegal.[17] A sale of land for taxes frees it in the hands of the purchaser from all liens or liabilities for taxes of previous years;[18] divests all prior liens and incumbrances;[19] bars the inchoate right of dower;[20] and vests in such purchaser a new, original, and unimpeachable title in fee simple.[21] Such, at least, is the accepted doctrine in a majority of the States, though there are some in which it may not prevail.[22]

15 The precept, though not technically process within the constitutional provision requiring all process to run in the name of the people, performs the office of an execution, and is the authority under which the officer sells: Eagan *v.* Connelly, 107 Ill. 458.

16 Holbrook *v.* Dickinson, 46 Ill. 285.

17 Dogan *v.* Griffin, 51 Miss. 782; McLaughlin *v.* Thompson, 55 Ill. 219.

18 Bowman *v.* Thompson, 36 Iowa, 505; Preston *v.* Van Gordor, 31 Iowa, 250; Knox *v.* Leidgen, 23 Wis. 292.

19 Dunlap *v.* Gallatin Co., 15 Ill. 7; Cram *v.* Cotting, 22 Iowa, 411.

20 Jones *v.* Devore, 8 Ohio. St. 430. Local statutes may modify or change the doctrines stated in the text.

21 Turner *v.* Smith, 14 Wall. 553; Osterberg *v.* Union Trust Co., 9 Chi. Leg. News, 156; Schaeffer *v.* People, 60 Ill. 179.

22 The statute usually provides for a fee simple. It is held in several States, however, that the

§ 526. **Nature of Tax Titles — Dependent or Independent.** A tax title, though bearing some resemblance to titles derived under judicial and execution sales, differs in this, that the latter are strictly derivative titles, and dependent not only on the legality of the procedure of transfer, but upon the acts of former owners. A tax title, on the contrary, from its very nature, has nothing to do with the previous chain of title, nor does it, in any way, connect itself with it. The person asserting it need go no further than his tax deed, and the former title can neither assist nor prejudice him. The sale operates upon the land and not upon the title by which it had theretofore been held. It matters not how many different interests may have been connected with such title, for if the sale has been regularly made, the land, accompanied by a new and exclusive legal title, goes to the purchaser. No covenant running with the land, nor warranty, or other incident to the title as it formerly stood, passes to the purchaser, but he takes it by a new, independent and paramount grant, which extinguishes the old title and all the equities deepndent upon it.[23]

The statute usually pronounces the new title thus acquired a fee, but this would legally follow, even though the statute were silent, where no other estate is reserved in the deed. It must be understood, however, that the clause of the statute which provides that a conveyance resulting from a sale shall vest in the grantee an "absolute estate in fee simple" does not mean that such estate shall vest in the grantee, notwithstanding the fact that the law has not been complied with in making the sale, but refers merely to the quantity of the estate conveyed as distinguished from a lesser estate.[24]

grantee of a tax deed takes only the title and estate of the former owner. See Sheaf *v.* Wait, 30 Vt. 735.

23 Neiswanger *v.* Gwynne, 13 Ohio, 74; do. 15 Ohio, 367; Ross *v.* Barland, 1 Pet. 664; Blackwood *v.* Van Vliet, 30 Mich. 120. See Blackw. on Tax Titles for a very elaborate discussion, p. *535 *et seq.*

24 Steeple *v.* Downing, 60 Ind. 478. As the statute provides the title to be passed, it also, as a rule, states how that title shall be given in regard to prior liens and incumbrances, and sometimes makes the sale subject thereto. Consult local

§ 527. **Proceedings Incident to Taxation.** Where a statute requires a series of acts to be performed before the owners of property are properly chargeable with the tax, such acts are conditions precedent to the exercise of the power, and all the requirements of the statute must be complied with or the tax will be invalid.[25] These proceedings relate to the valuation, assessment, listing, returns, etc., and do not, as a rule, properly come within the scope of the examiner's duties. They are not usually shown in the abstract, unless there has been a special direction, and when required are usually made the subject of a separate and special examination. When a tax deed is relied upon as the foundation of title, all the antecedent steps become material, and should be shown, but this is the only instance in which it is done. Mere irregularities, not going to the groundwork of the tax, do not vitiate such proceedings,[26] and are cured by special statutes of limitation which exist in all the States.[27] The subject is too vast to open, even in a general way, and the reader must be referred to technical works on the subject.

§ 528. **Description of Land—Assessors' Plats.** Where lands are listed or assessed for taxation they must ordinarily be described by reference to the government surveys, or, if divided into lots, then by reference to authenticated plats. The subject of private subdivision has already been considered in other parts of the work, but there also exists in many, perhaps all, of the States, a method of official subdivision for the more convenient and accurate purposes of taxation. The power to make these subdivisions is usually delegated to the assessor but is exercised, as a rule, only when land can not be otherwise described than by noting the metes and bounds. The statute is usually very explicit in regard to assessors' plats and subdi-

statutes for the effect of tax deeds and the quantity and quality of the estate conveyed.

25 Hewes *v.* Reis, 40 Cal. 225; Rivers *v.* Thompson, 43 Ala. 633; Abbott *v.* Doling, 49 Mo. 302.

26 R. R. Co. *v.* Morris, 7 Kan. 210; Greene *v.* Lunt, 58 Me. 518; Parker *v.* Sexton, 29 Iowa, 421; Thatcher *v.* People, 79 Ill. 597.

27 See Thomas *v.* Stickle, 32 Iowa, 71.

visions, and every material requirement must be complied with to give validity to the plat or any assessment of any of the divisions thereof. The attention of the examiner is therefore called to these plats whenever they appear in the abstract, and the facts of conformity and sufficiency of description should be satisfactorily shown. Both the exact location and quantity must be manifest, and the plat will usually be fatally insufficient so far as the subdivision of the tract for the purpose of description of its parcels for taxation is concerned, if wanting in these particulars.[28]

§ 529. **Sale for Non-payment.** Taxation is regulated by statute, but the right is inherent in the government, and while summary remedies are given by law, yet taxes when assessed become a personal debt, to be collected by any of the legal methods incident thereto, should the government choose to resort to such a remedy.[29] Usually, however, the payment of a tax is enforced by a sale of the land upon which it has been imposed. The methods employed are too various to attempt special mention, every State providing a special procedure for this purpose, and the subject can only be treated generally. A tax is not an ordinary debt, however; it takes precedence of all other demands, and is a charge upon the property, without reference to the matter of ownership. It grows out of the perpetual lien which the State, by virtue of its sovereignty, has upon all taxable lands within its limits, and the property may be seized and sold, although there may be prior liens or incumbrances upon it, and payment enforced to the exclusion of all other creditors.[30] Whatever be the methods employed, the proceedings are summary in their nature and the requirements of law must be strictly pursued or the whole transaction will be void.[31] When special proceedings are authorized by statute,

28 See People *v.* Reat, 107 Ill. 581.

29 Mayor of Jonesboro *v.* McKee, 2 Yerg. (Tenn.) 167; Dunlap *v.* Gallatin Co., 15 Ill. 7; Binkert *v.* Ry. Co., 98 Ill. 205.

30 Reinhart *v.* Schuyler, 2 Gilm. (Ill.) 473; Dunlap *v.* Gallatin Co., 15 Ill. 7.

31 Charles *v.* Waugh, 35 Ill. 315; Cahoon *v.* Coe, 57 N. H. 556; Clarke *v.* Rowan, 53 Ala. 401; People *v.*

by which the estate of one man may be divested and transferred to another, the owner has a right to insist upon a strict performance of all the material requirements of the statute, especially those designed for his security, and the non-observance of which may operate to his prejudice.[32] It is not the policy of the law to deprive the citizen of his property by sales made on account of the government through its officers, who have no interest in the matter, without putting him wholly in fault in not complying with his obligations.[33]

A synopsis of the special proceedings culminating in the sale is of the highest importance whenever the sale is relied upon as the foundation of title, but in ordinary examinations tax sales are shown rather in the nature of incumbrances on the title or charges upon the land, and it is customary to show only the fact, leaving the question of validity to be decided by other and special searches. For this purpose tax sales, when still subject to redemption or not consummated by deed, are shown after the chain and under a classified head, the abstract consisting only of a brief mention of the date of sale and tax for which the sale is made, with reference to the official record; a brief description of the premises sold; and the name of the person to whom the certificate issued. Forfeitures to the State are treated the same as tax sales. The following will indicate the method:

Tax Sales.

Sale commencing Sept 13, 1880, for special assessments of the City of Chicago.

Record 37, page 58.

Lot 5, in East half of Block 24, Canal Trustees' Subdivision of West half, and West half of North East quarter

Biggins, 96 Ill. 481; Abbott *v.* Doling, 49 Mo. 302.

32 Marsh *v.* Chestnut, 14 Ill. 223; Holbrook *v.* Dickinson, 46 Ill. 285.

33 Rivers *v.* Thompson, 43 Ala. 633. The lien of taxes is purely legal in its character, the creature of the statute, not arising upon contract, and can be enforced in the mode provided by the law of its creation, and in no other manner: People v. Biggins, 96 Ill. 481.

of Section 17, Town 39 North, Range 14, East. Sold Oct. 15, 1880, (Warrant No. 4,382, for macadamizing, etc., W. Jackson Street) to Asahel Gage for $8.40.

Sale commencing Aug. 2, 1875, for State and County taxes of 1874.

Record 22, page 201.

Lots 13 and 14 in Block 10, of Rockwell's Addition to Brockton. Sold Sept. 25, 1875, for State and County taxes, 1874, to Asahel Gage, for $51.95.

Where there are forfeitures as well as sales these are shown in much the same manner.

§ 530. **Forfeitures.** The class of forfeitures to which this section alludes, is based upon the principle, "that every owner of lands hold his estate upon the implied condition that he will furnish a list of his taxable estate, and promptly pay his share of the common burdens assessed against the entire community; and if he omits to comply with the condition, and his estate is offered at public vendue, and no purchaser can be found for it, the title is transferred from the owner to the State, the latter being always ready to bid for the land, when no other bidder appears."[34] The term "forfeit" is not always used, but the effect in every State, where the property passes to the State in default of purchasers, is a forfeiture. A forfeiture operates to divest the title of the original owner, though ample time is always allowed for redemption, and purchasers of forfeited lands, where the law has been strictly complied with, will acquire a valid title from the State.

A note of forfeiture is sufficiently expressed as follows:

Forfeiture.

Sale commencing Sept. 13, 1880, for State and County taxes of 1879.

Record 23, page 205.

Lot 5, of Block 10, in Williams' Subdivision of the North East quarter of Section 16, Town 23 North, Range

[34] Blackw. Tax. Tit. *460; See Clery v. Hinman, 11 Ill. 430.

14 East, of the 3d P. M., was forfeited to the State of Illinois, Oct 15, 1880, for the non-payment of State and County taxes of 1879. Amount, $55.00.

§ 531. **Tax Sales — Tax Payer as Purchaser.** A very erroneous opinion has gained currency in many localities that a purchase by one owning, or interested in, the land sold for taxes strengthens a title previously acquired, and hence it is not uncommon to find tax deeds to persons already possessing legal interests in the property. Such deeds, however, are mere nullities, for it is a proposition beyond dispute that one whose duty it is to pay a tax can not be a purchaser of property offered for sale for the purpose of collecting it.[35] The payment of the money, in such case, will be regarded only as a payment of the tax, and not as a purchase of the property;[36] and the deed, at best, would evidence nothing more than that the tax on which it was founded was satisfied, the lien of the State discharged, and the estate restored from the sale, but no new title would be created or transferred by it.[37]

Nor does this principle apply only where there is a direct legal obligation. The party against whom a tax is assessed is directly liable for the tax, as is also a purchaser,[38] or lessee,[39] who has contracted to pay same, and in these cases, where there is a direct legal obligation, there can be no question about the duty. But other parties may acquire an interest in real estate who are not directly responsible for the taxes, and who enter

35 Douglas *v.* Dangerfield, 10 Ohio, 152; Busch *v.* Huston, 755 Ill. 343; Barton *v.* Moss, 33 Ill. 50; Dunn *v.* Snell, 74 Me. 22; Christy *v.* Fisher, 58 Cal. 256; Williamson *v.* Russell, 18 W. Va., 612; Cooley on Taxation, 346; Blackw. on Tax Tit. 400.

36 Baily *v.* Doolittle, 24 Ill. 577; Ballame *v.* Forsythe, 13 How. (U. S.) 18; Glancy *v.* Elliott, 14 Ill. 456; Middleton Bank *v.* Bacharach, 46 Conn. 513; Johnston *v.* Smith, 70 Ala. 108.

37 Gould *v.* Day, 4 Otto (U. S.) 405. A tax deed, however, is always color of title and where possession is taken under it and such possession is continued for the statutory period of limitation a title may be predicated upon it.

38 Fitzgerald *v.* Spain, 30 Ark. 334.

39 Waggoner *v.* McLoughlin, 33 Ark. 201.

into no contract in respect to them, yet may be so situated that it is their duty to pay them. For instance, a purchaser of the property or of the equity of redemption subject to a tax lien may be compelled to pay the taxes in order to protect his own title. Such a party can not ordinarily be a purchaser of a tax title. So, too, a mortgagee is under no legal obligation to pay the taxes, and yet he may be compelled to pay them in order to protect his mortgage. Although there may be cases which hold that under certain circumstances he may purchase a tax title, yet the general rule is that he can not;[40] for the reason that it is not necessary for him to do so. He may pay the tax and the amount paid will be added to his debt, and he will hold the whole property as security therefor. In such a case it is unnecessary to complicate the legal title with a tax deed, and the law will not allow it to be done. Nor does it vary the case in principle if the person paying the tax owns less than the whole equity. Whether his interest be worth much or little, whether he owns the whole or a part, can make no difference. In either case if his interest is worth protecting he will pay the tax, and in neither case can he purchase a tax title. All such persons are incapable of purchasing at a tax sale, and deeds to them convey no title.[41]

§ 532. **Rights of Purchasers.** A purchaser at tax sale is not affected by any matter pertaining to title not connected with the tax proceedings, nor is he charged with notice of any facts extraneous thereto. A sale for taxes is not subject to the rule that one who purchases during the pendency of a suit is held bound by the decree that may be made therein,[42] for the *lis pendens* only relates to and affects voluntary alienations by the defendant pending the action. It has nothing to do with

40 Williams *v.* Townsend, 31 N. Y. 411; Sturdevant *v.* Mather, 20 Wis. 576.

41 Middleton Sav. Bank *v.* Bacharach, 46 Conn. 513; Jacks *v.* Dyer, 31 Ark. 344. Possession under a deed which conveys no interest will not disqualify the grantee to purchase the property when sold for taxes. So one who holds a quit-claim deed to property previously conveyed may purchase same at tax sale: Curtis *v.* Smith, 42 Iowa, 665.

42 Wright *v.* Walker, 30 Ark. 44.

parties asserting rights independent of and adverse to that of the defendant, and where one acquires title under a sale for taxes he is not bound by the foreclosure of a mortgage given by a former owner of the land, and his title will prevail against that of the purchaser at the foreclosure sale.[43] It is a cardinal rule, however, that a purchaser at a tax sale comes strictly and rigidly within the rule of *caveat emptor*,[44] but this has reference to the methods by which he acquires title, and not to antecedent matters.

§ 533. **Redemption.** The subject of redemption from tax sales bears a strong analogy to the satisfaction and discharge of judgments, and raises many of the same questions in regard to the method of treatment in the abstract. It is not the usual custom of examiners to make special mention of a redemption, as the certificate of the abstract is presumed to be a sufficient statement of the condition of the title at its date. But in view of the current of authority, which ever inclines to limit the examiner's liability to the actual occurrences during the period covered by his search, irrespective of subsisting but previously contracted liens, it would seem a far more satisfactory practice, and one tending to greater certainty in arriving at conclusions or passing opinions, to show the extinguishment of any and every lien which former examinations may have disclosed, except, perhaps, where this has been effected by the statute of limitations.

From two to three years is the period ordinarily allowed in which the owner or interested party may discharge the obligation imposed by the levy of the tax and relieve the land from its burden. During this period the purchaser has a contingent interest, which, after the day for redemption has passed, may ripen into an absolute title. This contingency may be defeated by payment, and when such is the case, it will often become as proper a matter for special mention as a release or discharge

43 Becker *v.* Howard, 6 Thomp. & C. (N. Y.) 603; 4 Hun (N. Y.), 359. This is sometimes denied. See Smith *v.* Lewis, 2 West Va. 39.

44 Hamilton *v.* Valiant, 30 Md. 139.

of a mortgage. Where the sale and redemption both occur during the period included and covered by the dates of the examination the whole transaction may with propriety be wholly disregarded, since it only amounts to a payment of the tax; but where a former examination discloses a sale, and a continuation is made during the redemption period, the lien in the meantime having been extinguished, such fact should affirmatively appear, and should the abstract be silent in this particular, a requisition for further information should be made by counsel before passing the title. Many examiners show redemptions by a marginal note on the original abstract of the tax sale, and most attorneys prefer this method as it effectually disposes of the question the moment it is raised.

§ 534. **Certificate of Sale.** Certificates of sale are rarely recorded, though they undoubtedly vest in the purchaser an equitable interest in the land which entitles him to be clothed with the legal title at any time after the period of redemption has expired, and before his right has been barred by the statute of limitation.[45] The right to record such certificates, and assignments thereof[46] when such assignments are duly sealed, attested by witnesses, and acknowledged in conformity to law, is often given by statute, and when recorded in the proper county they have the same effect as other records therein. When found upon the records they are shown, if prior to deed, as a lien or charge upon the land and after the course of title has been exhibited; when followed by deed they are briefly noted in connection with that instrument. A synopsis of a certificate of sale simply recites the facts stated therein. The form will vary as the certificate may be made in pursuance of a judgment, as in Illinois; or by the county treasurer under the law, without judgment, as in Wisconsin. An example of the latter form is given. The reader is referred to illustrations of sheriff's certificates in other parts of the work.

45 Blackw. on Tax Titles, * 372.

46 The assignee of a tax certificate holds it subject to all the infirmities by which it would have been affected in the hands of the tax purchaser: Light *v.* West, 42 Iowa, 138; Besore *v.* Dosh, 43 Iowa, 211.

Hugh McDermott, County Treasurer of Kenosha County, Wis., to William Goffe.

Tax Certificate. Dated, etc.

* * * *

* * * *

Said Treasurer certifies that he did, at public auction, pursuant to notice given as by law required, on May 1, 1883, sell to William Goffe, (or the county of Kenosha,) the following described real estate [describing same] *for $5.50, being the amount due for taxes, interest and charges on said lands for the year 1882, and that said William Goffe (or assigns) will be entitled to a deed of same in three years from date, unless sooner redeemed according to law.*

§ 535. **Tax Deeds.** Neither the legal nor the equitable title to lands sold for non-payment of taxes vests in the purchaser until the execution and delivery of a tax deed.[47] This deed does not operate *ipso facto* to transfer the title of the owner as in ordinary deeds between individuals, but is the last act of a series of proceedings upon the regularity of which it depends for its character and effect. It is not title in itself, nor, unless aided by statute, even evidence of it. Its recitals bind no one, and it creates no estoppel upon the former owner.[48] The mere production of the deed, in the absence of statutory aid, creates no presumption in its favor until all the anterior proceedings prescribed by law have been affirmatively shown to have been complied with, when it becomes conclusive evidence of title according to its extent and purport. The foregoing doctrine, which long obtained in this country, is based upon the policy that it is better that the purchaser should lose the small amount of his bid rather than the owner should forfeit a valuable estate, where the proceedings show irregularity or illegal-

47 Stephens *v.* Holmes, 26 Ark. 48; Ins. Co. *v.* Scales, 27 Wis. 640; Bracket *v.* Gilmore, 15 Minn. 245; Lake *v.* Gray, 35 Iowa, 44.

48 Blackw. on Tax Titles, * 364; Jackson *v.* Esty, 7 Wend. 148.

ity,[49] and the burden of proving title under tax deeds has been thrown upon him who asserts such title.[50]

§ 536. **Continued — Statutory Modifications.** Though the rule of the common law, that he who affirms the existence of a material fact must prove it, was for many years applied to sales for taxes in all its unbending rigidity, until the astuteness of judicial refinement had rendered almost inoperative all legislation providing for such sales, a marked change is now apparent in many States. Stringent legislation has endeavored to counteract the tendency of judicial refinement, by declaring the operation and effect of tax deeds, and such conveyances in a majority of the States, when formal and duly executed, are now taken as *prima facie* or presumptive evidence of the regularity of all proceedings, from the listing or valuation of the land up to the issuance of the deeds. A few States have gone so far as to declare such deeds conclusive evidence of every matter or fact required by law to make a valid sale and vest title in the purchaser, except the facts of exemption, payment, and redemption, and as to the non-existence of those facts it is made *prima facie* evidence.[51] This doctrine, however, has been expressly repudiated by the courts as an unconstitutional confiscation of property, and the rule has been announced that the legislature can make a tax deed conclusive evidence of the regularity of prior proceedings only as to non-essentials or matters of routine which rest in mere expediency.[52] But the owner of property can not be precluded from showing the invalidity of a tax deed thereto by proving the omission of any act essential to the due assessment of the same, the levy of a tax thereon, and the sale thereof on that account. As to the performance of these

49 Blackw. on Tax Titles, * 68; Denning *v.* Smith, 3 Johns. Ch. 344; Jackson *v.* Morse, 18 Johns. 442.

50 Lyon *v.* Hunt, 11 Ala. 295; Keane *v.* Cannonoran, 21 Cal. 291.

51 See Gwynne *v.* Neiswanger, 18 Ohio, 400; Allen *v.* Armstrong, 16 Iowa, 508.

52 Acts which need not have been required in the first place — as the affidavit of the sheriff to the delinquent list — and which the legislature may by a curative act excuse when omitted: Marx *v.* Hawthorn, 12 Saw. (C. Ct.) 374.

acts, and the facts necessary to constitute them, the deed can only be made *prima facie* evidence.[53]

It would seem to be well settled, however, that the legislature has the power to make a tax deed *prima facie* evidence of material facts upon which the right to sell and convey depends, and when this has been done it has the effect to entirely change the burden of proof, relieving the purchaser therefrom and imposing it upon the person who attempts to controvert the deed;[54] but to have this effect the deed must be regular on its face[55] and display an apparent conformity to law. Whenever it is shown that any essential particular in the anterior proceedings has been irregular, the authorities are quite harmonious in declaring its *prima facie* character to be lost,[56] and when the *prima facie* character, as established by statute, is overthrown, the common law principles stated in the preceding section, at once attach, and the person asserting the title must prove by satisfactory evidence the regularity of the proceedings.[57] The law declaring a tax deed *prima facie* evidence of title, does not dispense with the statutory requirements which precede the sale, but only shifts the burden of proof from the party claiming under the deed to the party impeaching it.[58]

§ 537. **Formal Parts.** The form and substance of tax deeds are usually prescribed by statute, in which case a strict conformity is required or the deed will be void,[59] though if de-

53 Allen *v.* Armstrong, 16 Iowa, 508; MacCready *v.* Sexton, 29 Iowa, 356; Raley *v.* Guinn, 76 Mo. 263; Callanan *v.* Hurley, 93 U. S. 387; Steeple *v.* Dowing, 65 Ind. 501.

54 Biscoe *v.* Coulter, 18 Ark. 423; O'Grady *v.* Barnishel, 23 Cal. 287; Watson *v.* Atwood, 25 Conn. 313; Millikan *v.* Patterson, 91 Ind. 515; Clark *v.* Conner, 28 Iowa, 311; Hart *v.* Smith, 44 Wis. 213; Lacey *v.* Davis, 4 Mich. 140; Washington *v.* Hasp, 43 Kan. 324; Taylor *v.* Wright, 121 Ill. 455.

55 Taylor *v.* R. R. Co., 45 Minn. 67; Merriam *v.* Dovey, 25 Neb. 618.

56 Sibley *v.* Smith, 2 Mich. 486; Graves *v.* Bruen, 11 Ill. 431; Turney *v.* Yeoman, 16 Ohio, 24; Rayburn *v.* Kuhl, 10 Iowa, 92; Thompson *v.* Ware, 43 Iowa, 455.

57 Hurd *v.* Brisner, 3 Wash. 1.

58 Williams *v.* Kirtland, 13 Wall. 306.

59 Chandler *v.* Spear, 22 Vt. 388; Boardman *v.* Bourne, 20 Iowa, 134; Kruger *v.* Knob, 22 Wis. 429. The form in such case becomes substance, and must be strictly pur-

fective a new deed will usually issue to the person entitled,[60] and the deed will not be avoided for slight irregularities or variances from the statutory form.[61] The ordinary incidents of deeds attach to conveyances of land sold for taxes and in most respects they stand upon the same footing as deeds between individuals.[62] To attempt an enumeration of the special distinctive features, however, would be to refer to the statutes of every State in the Union, and not alone to one but to many, as few subjects have been so harassed by legislative tinkering, both as to the methods of procedure and its evidence, as the sale of land for taxes. But inasmuch as the deed does not derive its validity from its capacity as an independent conveyance to transfer the estate described in it, but from the existence of a power and compliance with prescribed conditions, it should show upon its face a proper exercise of the power in pursuance of which it purports to have been executed.[63] This rule is of uniform operation everywhere. All the recitals provided by law, which go to show full compliance, are necessary and integral parts, and the failure to recite any one of the prerequisites to a valid sale will raise a presumption that the omitted requirement was not complied with.[64] The execution and authentication are purely matters of local statutory regulation.

sued; Atkins *v.* Kinman, 20 Wend. 249.

60 Finley *v.* Brown, 22 Iowa, 538; Woodman *v.* Clapp, 21 Wis. 350.

61 Bowman *v.* Cockerill, 6 Kan. 311.

62 Blakely *v.* Bestor, 13 Ill. 708. The construction of a tax deed in respect to the description of the land conveyed must be the same as if such description were used in a deed between private individuals. The doctrine of strict construction, as applied to the execution of naked statutory powers, has no application in such case: Blakely *v.* Bestor, 13 Ill. 708.

63 Blackw. Tax Tit. * 368; Jackson *v.* Roberts, 11 Wend. 425; Tolman *v.* Emerson, 4 Pick. 160.

64 Long *v.* Burnett, 13 Iowa, 29; Lain *v.* Cook, 15 Wis. 446; Large *v.* Fisher, 49 Mo. 307. A ministerial officer, in making a return or recital as to how he executed a power, must set out the facts and the manner in which he performed the acts, and let the court determine whether they comply with or are in accordance with the law. The sale of property for taxes is an *ex parte* proceeding. The officer acts at his own peril, and must perform every prerequisite required by statute before the title of a citizen to his property

The later forms of tax deeds prescribed by statute are very short and concise, and the recitals confined to a few material points, while their legal effect and operation is expressly defined as in case of deeds between individuals after statutory forms. The execution of the deed is confided to the county clerk, or other officer having the custody of the tax records. A statutory deed as prescribed in Illinois and many of the Western States may be shown in the abstract, as follows:

E. F. C. Klokke,[65] *County Clerk of Cook Co., Ill., to Hiram Johnson. Doc. 203,073.*

Tax Deed.
Dated, etc.

* * * *
* * * *
* * * *
* * * *

Recites, that at a public sale of real estate for non-payment of taxes, made in the county aforesaid on Oct. 12, 1876, the following described real estate was sold, to-wit: [describing same] *and same not having been redeemed from said sale, and it appearing that the holder of the certificate of purchase has complied with the law necessary to entitle him to a deed of said real estate:*

Therefore, said county clerk, in consideration of the premises and by virtue of the statute, grants and conveys to said second party the real estate hereinbefore described, subject to any redemption provided by law.

Signed by said clerk, and the seal of the County Court affixed.

Acknowledgment.

can be taken from him. The deed must show affirmatively that the law has been complied with in all particulars: Spurlock *v.* Allen, 49 Mo. 178; Abbott *v.* Doling, 49 Mo. 302; Annan *v.* Baker, 49 N. H. 161.

[65] Where the county is the grantor, it must be named as such, while the procurement of the county clerk may be shown in the execution.

Inasmuch as the deed is statutory and can only be in one form, a shorter method is sometimes adopted, which, after the caption and formal parts relating to dates and record, would read somewhat in this manner:

Conveys (with other property) Lot 56, in Block 2, in Canal Trustees' Subdivision of the south east quarter of Section 87, T. 39, N. R. 14 E. of 3d P. M., Cook Co., Ills., sold Oct. 12, 1876, reciting sale of same for non-payment of taxes.

§ 538. **Effect of Deed as Evidence.** The form last considered, and which will not vary materially from that now in general use where a statutory form is prescribed, is very meager in recitals. Its effect as evidence is dependent on the statute, which has made it *prima facie* evidence, in all controversies and suits in relation to the right of the purchaser, or those claiming under him, to the property thereby conveyed, of the following facts: That the property conveyed was subject to taxation at the time the same was assessed, and had been listed and assessed in the time and manner required by law; that the taxes or assessments were not paid at any time before the sale; that the property had not been redeemed from the sale at the date of the deed; that it was advertised for sale in the manner and for the length of time required by law; that it was sold for taxes or special assessments, as stated in the deed; that the grantee in the deed was the purchaser or assignee of the purchaser; that the sale was conducted in the manner required by law.[66]

In addition, any judgment[67] for the sale of real estate for delinquent taxes estops all parties from raising any objections thereto or to a tax title based thereon, which existed at or before the rendition of such judgment, and could have been presented

[66] R. S. Ill. 1874, Chap. 120; R. S. Wis. 1878, Chap, 50, and see R. S. Ind. 1876, chap. 123.

[67] No application for judgment is required in many States, but the county treasurer, or some other designated officer, is given power to sell lands returned as delinquent after notice has been given

as a defense to the application for such judgment in the court wherein the same was rendered, and as to all such questions the judgment itself is declared to be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or assessment has been paid, or the property was not liable to the tax or assessment.

The effect of statutes similar to the foregoing and of such statutes as have been enacted to quiet tax titles and secure the property conveyed by tax deeds, has been to give stability to such deeds and remove the chances of reinvesture in the original owner. Yet even in the face of such statutes the courts still cling to the former doctrines in this respect and critically inspect tax deeds when offered in support of title,[68] and where a deed is void upon its face, as when there is a want of power on the part of the officer, or where there is included in the amount of the sale that for which the land could not be sold, and which is entirely unauthorized, it has been held not to divest the owner of his title to the land, even though the special limitation of the statute has run in favor of such deed.[69] In respect to the description of the land conveyed, a tax deed is governed by the same rules of construction as other deeds.[70]

In this connection the attention of counsel is directed to a practice often observable where spirited biddings attend tax sales. In some States it is provided that the officer conducting the sale shall sell so much of the land as a purchaser is willing to bid the amount of the tax upon. This has resulted in sales of infinitesimal portions and it is not uncommon to meet with tax deeds of the east vigintillionth of a tract. These deeds are practically nullities, and do not even cast a cloud upon the title. The portion of the lot which such a deed purports to

[68] A statute which makes a tax deed conclusive evidence, is in derogation of the common law and must be strictly construed: Gavin *v.* Shuman, 23 Ind. 32; and see Beekman *v.* Bigham, 1 Seld. (N. Y.) 366; McCready *v.* Sexton, 39 Iowa, 356; Cooley on Taxation, 356; Blackw. on Tax Tit. 79.

[69] Annan *v.* Baker, 49 N. H. 161; Knox *v.* Cleveland, 13 Wis. 245. But see Dalton *v.* Lucas, 63 Ill. 337.

[70] Blakely *v.* Bestor, 13 Ill. 708.

convey can neither be found nor identified and is not susceptible of a possession of any kind. Hence, as the land described has no practical existence the deed which purports to convey it really conveys nothing. Such a deed has been held void on its face.[71]

In a majority of the States application for a tax deed must be made within a stated time, usually one year after the expiration of the redemption period. In the event that the deed shall not be taken out and recorded within the time allowed therefor both the certificate and the sale upon which it is based becomes void.[72] It would seem, therefore, that where a deed is found upon record after the time so allowed, it may safely be disregarded in making an opinion of title, the invalidity being apparent on its face. But if the holder of the certificate has been prevented from obtaining a deed within the prescribed period, either by injunction or refusal of the proper officers to issue same, and these facts are recited in a deed afterward issued, then the time during which he has been so prevented may be excluded from the computation.[73]

§ 539. **Tax Deed — Possession — Limitation.** Radical defects in tax sales and resulting conveyances may be remedied in many of the States, by compliance with curative statutes which provide, that where purchasers unite possession and payment of taxes for a definite period to the tax deed an unimpeachable title inures to such purchaser; and this, even though on its face the deed shows that the sale was irregular, if there is nothing to charge the purchaser with actual bad faith.[74] Good faith is always presumed until the contrary is made to appear, and is imported by the deed itself.[75] Where the holder of the tax title has become entitled to the protection of the statute, all questions as to the regularity of the

71 Petty *v.* Beers, 224 Ill. 129.

72 Gage *v.* Reid, 118 Ill. 35; Fuller *v.* Shedd, 161 Ill. 496.

73 These matters are statutory. Consult local statutes.

74 Dalton *v.* Lucas, 63 Ill. 337. Compare Bowman *v.* Wettig, 39 Ill. 416; and see Geekie *v.* Kirby Carpenter Co., 9 Reporter, 37.

75 Dickenson *v.* Breeden, 30 Ill. 279.

tax proceedings are set at rest, except, perhaps, those which concern the power and jurisdiction of the taxing officers or the liability of the land to taxation. The tax deed then becomes conclusive evidence that the taxes were properly levied, and that all the requirements of law were complied with.[76] But where a deed discloses on its face that it is illegal, and has been executed in violation of law, a statute of limitation can not be brought in to aid its validity.[77] The constitutionality of special statutes providing for a shorter period than that provided in the general statute of limitations has been the subject of much debate, and is not yet a settled question; but there can be no doubt that a defective deed, though invalid as a conveyance, will yet be admissible as color of title, and when followed by actual adverse possession will set the statute in operation.[78]

§ 540. **Tax Abstracts.** Whenever a tax deed is relied on as a foundation of title which is independent of and adverse to all other titles, particularly that of the person who was last seized of the fee, a full exposition of the method by which the right was acquired is an essential preliminary to demonstrate the validity of all succeeding conveyances. The tax deed, unaided by statute, is not sufficient to demonstrate title, though it may be *prima facie* evidence of such, but the prior steps must be shown and all the requisites necessary to a complete and perfect title under the statute must be fully and succinctly stated.[79] An abstract of a tax title may consist of a synopsis of the proceedings from the listing or assessment to the sale and issuance of deed, with all the material matters copied in full; or if so directed, a narrative statement of what was done, the times, manner, place, etc.; but all sufficiently explicit to enable coun-

[76] Knox *v.* Cleveland, 13 Wis. 245.

[77] Shoat *v.* Walker, 6 Kan. 65. In this case the law under which the deed was issued had been repealed prior to such issue: Compare Dalton *v.* Lucas, 63 Ill. 337.

[78] Dillingham *v.* Brown, 38 Ala. 313; Chapman *v.* Templeton, 53 Mo. 463; Washburn *v.* Cutler, 17 Minn. 361; Wing *v.* Hall, 44 Vt. 118.

[79] Mr. Blackwell in his work on Tax Titles gives some very valuable forms for an abstract of this character. See Blackw. on Tax Tit. Appendix.

sel to see that every material step has been taken, and that in a proper and legal manner.

§ 541. **Special Assessments.** In addition to the ordinary charges annually imposed by the State, and which are usually designated as taxes, the examiner must also search for what are generally termed "assessments." An assessment, as distinguished from other forms of taxation, means a special or local imposition upon property in the immediate vicinity of municipal improvements which is necessary to pay for such improvements, and is laid with reference to the special benefit which the property is supposed to have derived therefrom.[80] A properly prepared abstract should show all confirmed special assessments against the property under investigation which remain unpaid at the date of the certificate. The statement may be brief but should comprise such data as will fully acquaint counsel with all necessary particulars and readily enable any person interested to refer to the original sources of information. Assessments are shown as appendices in connection with statements of unpaid taxes and tax sales. The following will be a sufficient mention:

Special Assessments.

Assessment, Doc. 24,276, warrant 24,712, for a plank sidewalk on Ridge Avenue, confirmed Feb. 15, 1900, was laid on Lot 17, Block 5, aforesaid.
Amount of assessment, $15.00.

Sometimes the entire sum of an assessment is divided into fractional parts and the payment extended over a series of years. When such is the case the fact should be noticed and the installments paid and unpaid should find appropriate mention.

80 Hale *v.* Kenosha, 29 Wis. 599. In many respects the system is vicious and unjust, being an attempt to compel individuals to pay for public improvements, but it seems to be too firmly established to be questioned at this time.

CHAPTER XXX.

DESCENTS.

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§ 542. **Title by Descent.** The best known but least understood title to land is that which the law raises for the heir upon the death of the ancestor.[1] It is called title by descent, and though for practical purposes it is regarded as a new title springing from the death of the ancestor, and when asserted must be so proved, yet in reality it is but a continuation of the ancestor's title, which the law casts upon the heir at the moment of the ancestor's death.[2] The heir is regarded in law

1 The term "ancestor," when used with reference to the descent of real property, embraces all persons, collaterals as well as lineals, through whom an inheritance is derived: Wheeler *v.* Clutterbuck, 52 N. Y. 67.

2 Hopkins *v.* McCann, 19 Ill. 113; Marshall *v.* Rose, 86 Ill. 374.

as a legal appointee to receive the title,[3] and this appointment he can neither disclaim nor avoid.[4] Whenever the death of any person is shown, until rebutted, the presumption is that he died intestate,[5] and that his heirs take his estate under the laws of descent.[6] Posthumous children take in all respects as though they had been born in the life-time of the intestate.[7]

§ 543. **Nature, Operation and Incidents of the Title.** The title of an heir is not so much an acquisition as a succession. The death of the ancestor does not create a title, but rather confirms in the heir that which was previously inchoate, uncertain and defeasible. "An estate of inheritance under the feudal law," says Mr. Bingham,[8] "existed only in the contract between the lord, for himself and his heirs on the one side, and the vassal, for himself and his heirs on the other. The one contracted that the other might have the possession and occupation of certain lands, usually upon the condition of rendering in return therefor certain rents and services, which the latter agreed to pay and perform. The heirs of each party were expressly named, and regarded, in the eyes of the law, as parties to the contract; and, when the original parties died, the heirs became the real and acting parties to the contract; and so parties continued to succeed each other from one generation to another, so long as there were heirs capable of becoming parties. This contract right of possession of the lands constituted what is known in the law as an estate of inheritance, or an estate in fee; and the succession of one person on the death of another, is what, in more recent times, is said to be the acquisition of title by descent."

3 Coke Lit. 191.

4 Wms. Real Prop. 75; 2 Black. Com. 201; 3 Wash. Real Prop. 6; Moore *v.* Chandler, 59 Ill. 466.

5 The word "intestate" properly signifies a person who died without leaving a will; but where it is used with respect to particular property, it signifies a person who died without effectually disposing of that property by will, whether he left will or not.

6 Lyon *v.* Kain, 36 Ill. 362. In all cases of intestacy the *lex rei sitæ* governs the descent: Lingen *v.* Lingen, 45 Ala. 410.

7 Smith *v.* McConnell, 17 Ill. 135; Sansberry *v.* McElroy, 6 Bush (Ky.) 440.

8 Bing. on Descents, 2; and see Watk. on Descents, 65.

The rules governing the method of descent and the classes of heirs who shall take, as well as the order in which they shall take, have been many times changed; the nature of the estate has been enlarged; the right of alienation during life and disherison after death has been given to the ancestor; the estate may also be diverted from the heir to satisfy the ancestor's debts; yet the fundamental principle of inheritance has remained practically unchanged. The contract on the part of the State as evidenced by the original grant still is, that the grantee and his heirs may hold, possess and enjoy the land, and on the death of the ancestor the heir succeeds to his rights in virtue of the original agreement, as strictly as though the right or power of alienation did not exist. The estate held by this title possesses none of the attributes of the ancient feudal estate, however, but is entire in the ancestor and his heirs, with no reversion or other feudal incident.[9] While the State may still exercise the right of escheat yet this, under modern statutes, is in no proper sense a reversion.

§ 544. **Inheritance as Dependent upon Seizin.** It was a primal rule of the common law that no person could inherit real estate, unless he was heir to the person last seized. Under the application of this rule it was not sufficient to be heir to the person who last had the right to the land, but not the actual seizin. This rule grew out of the feudal doctrine, which required the heir to be of the blood of the first purchaser, and the seizin of the last possessor was regarded as presumptive evidence of this fact.[10] The rule was subject to some exceptions in England. In this country it has never been adopted in a majority of the States, while in the others it has been expressly abrogated, and every possible right or title which the ancestor may have had in land, whether accompanied by actual seizin or possession, or not, is rendered transmissible by inheritance, with the exception of estates for years, which are regarded as chattels, and estates for his own life.[11] The word "seizin"

9 Haynes *v.* Bourn, 42 Vt. 686; Wallace *v.* Harmstad, 44 Pa. St. 429.

10 Co. Lit. 14; Watk. on Desc. 65.

11 Kent Com. 388; Jackson *v.*

is now equivalent to "ownership," and though the term is still retained both in the statutes and the language of the courts, its legal significance does not extend further than above stated, and is in no way dependent upon possession. Every right or interest, legal or equitable, to which the intestate was in any manner entitled at his decease, except estates which come within the definition of chattels real, are valid subjects of descent.

§ 545. **Heirship — Its Rights and Privileges.** The title of an heir is held in his own right,[12] subject only to the payment of the debts of the ancestor,[13] or the fulfillment of his covenants,[14] and though he may afterward be divested by the decree of the probate court and sale by the administrator, yet until such contingency he is the owner, and entitled to all rents, profits or other beneficial incidents flowing from the land.[15] Subject to the lien of the creditors, he may make any disposition of the land he may choose, and after due probate and administration, together with an extinguishment of the ancestor's debts, the title becomes perfect in him or his assigns.[16] He is favored by the law, and his inheritance is never defeated except by the clearest proof of intention on the part of the ancestor, and although he is expressly excluded by the terms of a will, yet unless some valid and effectual disposition of the land is made to some other person, it descends to him by operation of law, and in case of an invalid or insufficient devise, he takes in preference to the residuary devisee.[17]

§ 546. **The Line of Succession.** The law invests the heir with the title of the ancestor, but it also designates who is to be that heir, and in this respect is rigid, arbitrary and

Hendricks, 3 John. Cas. 214; Bates *v.* Schraeder, 13 John, 260; 3 Watk. (Ohio) 333; Williams *v.* Amory, 14 Mass. 20.

12 Wallbridge *v.* Day, 31 Ill. 379.

13 Foltz *v.* Prouse, 17 Ill. 487; Cockerel *v.* Coleman, 55 Ala. 583.

14 Miller *v.* Bledsoe, 61 Mo. 96.

15 Foltz *v.* Prouse, 17 Ill. 487. This old rule has been infringed in some States by permitting the administrator to take the rents and profits pending the final settlement of the ancestor's estate.

16 Vansyckle *v.* Richardson, 13 Ill. 171; Austin *v.* Bailey, 37 Vt. 219.

17 Haxton *v.* Corse, 2 Barb. Ch. 506; Rosevelt *v.* Fulton, 7 Cow. 71.

unyielding.[18] The common law canons of descent[19] have no application in the United States, but rules have been established in every State that regulate the line of succession and declare who, under certain conditions, shall be the heir. Succession in the United States, as in England, follows the line of consanguinity,[20] except where the surviving husband or wife is allowed a participation as a successor, and a person, to successfully establish his claim of title, must bring himself within one of the classes prescribed by the statute, as well as show that no nearer degrees of kindred exist which by statute would defeat the claim which he asserts.

§ 547. **General Rules of Descent.** While there is a sad lack of harmony in the statutes of descent of the different States, which not only prevents the formulation of a positive rule but also any intelligent method of general treatment, it may yet be said that five well defined principles relative to the succession are discernible. The descent in accordance with these principles is as follows: Real estate of an intestate descends (1) to his lineal descendants, except where a surviving consort is allowed to participate; (2) to his father, varied in some cases by a participation of brothers and sisters; (3) to his mother, varied as before by collateral participation; (4) to his collateral relatives; and (5) to the State by escheat. These five elementary principles are covered by a network of condi-

18 Tyler *v.* Reynolds, 53 Iowa, 146.

19 There were seven common law canons of descent to the effect: 1, that inheritance should always descend lineally, and never ascend lineally; 2, that males are always preferred to females; 3, of two or more males in equal degree, the eldest only should inherit, but females all together; 4, that lineal descendants *in infinitum*, of any person deceased, should represent their ancestor; 5, on failure of lineal descendants, the inheritance should descend to the collateral relations, being of the blood of the first purchaser, subject to the three preceding rules; 6, the collateral heir of the person last seized must be his next collateral kinsman of the whole blood; 7, in collateral inheritances, the male stock should be preferred to the female, unless where the lands had, in fact, descended from a female: 2 Black. Com. 208, 234.

20 See Table of Consanguinity, § 31 of this work.

tions and provisos, differing more or less in every State, and the application of these conditions governs the descent, and directs it into some one of the channels above enumerated. In all cases not provided for by the statute, the inheritance descends according to the course of the common law.

§ 548. **The Right of Representation.** This is the right of the lineal descendants to take the portion which their ancestor would have taken, and is called inheritance *per stirpes*. It is a statutory right, and by reason of the diversity of the statutes of the different States, no positive rule can be stated. Generally, if one of several children shall have died before the ancestor, the heirs of such child will take the portion which would have descended to it if it had survived the ancestor,[21] and the same rules apply for determining who are the heirs of such child, as in any other case of descent. In a few States, where an intestate leaves grandchildren only, they all take *per capita*, or in their own right,[22] but as a rule of more general observance, the lineal descendants represent only their ancestor.[23]

§ 549. **Preferences.** By the common law canons of descent, males were preferred before females, the eldest male taking in preference to others of equal degree, and females equally, while in collateral inheritance the male stocks were always preferred to the female, except where, in fact, the lands had descended from a female. This has all been abolished by the statutes of descent which provided in all cases for equal participation among the members of a class, and the right of primogeniture, if it ever existed in this country, is now unknown.

§ 550. **Who May Take By Descent — Aliens.** There is a mass of curious and obsolete learning in the books, relative to persons capable of succeeding to an inheritance, for the law

21 Dodge *v.* Beeler, 12 Kan. 524; Crump *v.* Faucett, 70 N. C. 345.

22 Cox *v.* Cox, 44 Ind. 368; Eshleman's Appeal, 74 Pa. St. 42. Compare Harris' Estate, 74 Pa. St. 452.

23 This is somewhat in accordance with the fourth canon of inheritance at common law, only by the application of that rule, descendants of a person deceased *in infinitum* represented their ancestor, and only when the representation failed were the lineal descendants of the intestate's next of kin permitted to come in.

formerly guarded the landed estates of the country with jealous care, and ruthlessly excluded from a succession thereto all persons who owed fealty to another sovereign. Inheritance was long confined to citizens of the United States, and aliens were expressly declared incapable of taking lands by descent, or other mere operation of law, and because an alien could have no inheritable blood through which title could be deduced, a citizen was precluded from asserting a title so derived. In case of the death of an alien owning lands, or of a citizen without other than alien heirs, the lands of such persons escheated to the State.[24] Private laws were often passed to enable individuals to receive and transmit title, and the effect of such laws was to invest the person mentioned with inheritable blood and to enable him to alien or devise his property and to transmit by descent in all respects the same as a citizen of native birth,[25] but not to remove the barrier against alien heirs. All of this grew out of the timidity of the islander, and was a part of our inheritance of the English common law.

At present a few relics of the narrow, insular ideas of the common law may still be found, but in many States where the doctrine formerly prevailed, it has been swept away by the liberal policy of later years and in other States it never had a recognition. In a few States, while the right of inheritance is not denied to an alien, it is yet restricted by limitations of time, value and quantity, but, generally, for all practical purposes, so far as respects the acquisition and descent of land, the alien and the citizen stand upon an equal footing.[26]

In the examination of titles an inquiry into the questions just noted is sometimes material and necessary, and if, from a view of the facts shown, or of answers to inquiries *in pais*, it appears that title is deduced through an alien, at a time when

[24] Craig *v.* Radford, 3 Wheat. 363; Doe *v.* Governeur, 11 Wheat. 352; Jackson *v.* Green, 7 Wend. 333; Levy *v.* Levy, 6 Pet. 102. This extended as well to the estates of dower and curtesy: Mick *v.* Mick, 10 Wend. 379.

[25] Parish *v.* Ward, 28 Barb. 328.

[26] See McConville *v.* Howell, 17 Fed. Rep. 104.

aliens were incapable of transmitting by descent,[27] evidence of other matters, sufficient in law to support the title of the present claimant, should be required before accepting same. The laws of the States removing the disabilities of alienage and granting or withholding the privileges of citizenship, are not usually retroactive, nor do they possess any extraterritorial effect, and the domicile of the ancestor at the time of his death does not affect the application of the *lex rei sitæ*, for no State can prescribe qualifications of citizenship, to be exercised in another State, in opposition to its local laws and policy, and even the clause of the Federal constitution declaring that the citizens of each State are entitled to all the privileges and immunities of citizens in the several States, is not sufficient to overcome the rule.[28]

§ 551. **Continued — Adoptive Heirs.** The rights growing out of adoption present a series of somewhat similar views. This act, being in derogation of the common law and of natural right, confers upon the heir by adoption rights which can only by asserted strictly within the law, and particularly is this the case when title is claimed in States other than that under whose laws the heirship was effected. The rights of inheritance acquired by an adopted heir in one State can be recognized and upheld in another State only so far as they are not inconsistent with the law of descent of such latter State, and his inheritable capacity must be measured by the laws of the State where the land is situate, and not by that of his late ancestor's domicile, or the State conferring inheritable blood.[29]

§ 552. **Ancestral Estates — Half Blood.** A marked provision may be observed in the statutes of descent of many States in relation to ancestral estates and the exclusion of all persons

[27] Sporadic attempts to revive the bar against alien heirs and to restrict alien ownership will be found in the legislation of many States. The effect of such legislation must be determined by local laws and statutory construction.

[28] Gerard's Titles, 89; Corfield *v.* Corgell, 4 Wash. (C. Ct.) 371; Keegan *v.* Geraghty, 101 Ill. 26.

[29] Consult Ross *v.* Ross, 129 Mass. 243; Sewal *v.* Roberts, 115 Mass. 262; Keegan *v.* Geraghty, 101 Ill. 26.

who do not partake of the blood of such ancestor. The clause in question provides in substance that in case an inheritance comes to an intestate by descent, devise or gift of one of his ancestors, all those not of the blood of such ancestor shall be excluded from such inheritance, and the rule observed by the courts is general, that only persons of ancestral blood can inherit ancestral estates.[30] The current of later decisions, however, is uniform in declaring that the rule has reference to the immediate ancestor from whom the intestate received the inheritance, and not from a remote ancestor who was the original source of title.[31]

§ 553. **Surviving Consorts.** Husbands and wives are in no sense of the word next of kin to the other,[32] but inasmuch as heirship is peculiarly a creation of the legislature, it has the power to make a surviving husband or wife, as well as a child, an heir, and this has been directly or indirectly accomplished in a number of the States.[33] But further, the right of dower has been radically changed in a few States, so that instead of the use, during life, of a portion of the husband's estate, the fee to a specific quantity vests absolutely in the widow upon his death, and though it will require no small amount of astute reasoning to discover wherein such procedure does not constitute a descent, yet the courts of such States, in view of the fact that the statute declares that she shall be "entitled," etc., have decided that the widow does not take by descent, as an heir, but by virtue of her marriage relation, as a widow.[34] Further provision for a surviving consort is made in some States where

30 Campbell *v.* Ware, 27 Ark. 65; Wheeler *v.* Clutterbuck, 52 N. Y. 67; Perkins *v.* Simmonds, 28 Wis. 90.

31 Buckingham *v.* Jacques, 37 Con. 402; Curren *v.* Taylor, 19 Ohio, 36; Cramer's Appeal, 43 Wis. 167; Ryan *v.* Andrews, 21 Mich. 229; Wheeler *v.* Clutterbuck, 52 N. Y. 67.

32 Townsend *v.* Radcliffe, 44 Ill. 446; Tillman *v.* Davis, 95 N. Y. 17. The term "next of kin" refers only to relatives by blood. See Slosson *v.* Lynch, 43 Barb. (N. Y.) 147; Haraden *v.* Larrabee, 113 Mass. 430; Dodge's appeal, 106 Pa. St. 216.

33 May *v.* Fletcher, 40 Ind. 577; Dodge *v.* Beeler, 12 Kan. 524; Ringhouse *v.* Keever, 49 Ill. 470.

34 Brannon *v.* May, 43 Ind. 92; May *v.* Fletcher, 40 Ind. 577.

the deceased spouse leaves no children, or no kindred of any kind, and in such event the survivor takes strictly as an heir.[35]

§ 554. **Corparceners.** Persons to whom estate of inheritance descends jointly, and by whom it is held as an entire estate, are called coparceners.[36] Formerly in England the term included all persons, and such is its legal signification in America, but its present use in England is confined to females.[37] The distinction between coparcenary and tenancy in common, is virtually abolished in the United States, and the general rules relative to tenants in common have the same application whether the common property be derived by descent or by purchase.

§ 555. **What Descends.** Everything comprised in the term "lands," or "lands, tenements and hereditaments," descends according to law to the heirs, and these terms include every estate, interest and right, legal and equitable, whether in possession or expectancy, vested or contingent, except such matters as may be determined or extinguished by the death of the intestate, leases for years, and estates for the life of another.[38]

§ 556. **How Affected by Ancestral Covenants.** Heirs are not bound by the covenants of their ancestors, further than the real estate descended to them and the amount of their distributive shares of their ancestor's personal estate,[39] but where the ancestor conveyed with warranty, land to which he had no title, or in which he had only an inferior or limited estate, his heirs must make the warranty good if they have assets by descent equal to the value of the land.[40]

§ 557. **Liability for Ancestral Debts.** An heir is under no legal liability to discharge the debts of his ancestor from whom he takes real estate, except where the personal estate of

35 See, York *v.* York, 38 Ill. 522.

36 1 Bou. Law Dict. 363; 2 Black. Com. 187.

37 4 Kent Com. 462; 2 Bou. Inst. n. 1781.

38 The statute usually defines the subject of inheritance, but the above is the substance of the statute as generally enacted.

39 Holder *v.* Mount, 2 Marsh. (Ky.) 189.

40 Miller *v.* Bledsoe, 61 Mo. 96.

such ancestor is insufficient to pay same,[41] and creditors, in the first instance, must resort to the personal representatives before seeking satisfaction of the heirs.[42] After having accepted the succession, they become personally liable for the debts of the ancestor,[43] but only to the extent of what descends to them from such ancestor.[44]

§ 558. **Creditors' Liens.** Even though a title by descent may be perfect in the person asserting same, it is yet liable to be defeated by a sale made in satisfaction of the ancestor's debts, and no security can be predicated for it until the bar of the statute has intervened. In case of unprobated estates the full period of limitation must have expired before a purchaser can feel reasonably certain as to the stability of his title, and where there is no statute — as is generally the case — interposing any limitation of time within which the lien of creditors on the lands of a decedent must be enforced, difficult and embarrassing questions are presented, for which no absolute rule of solution can be given. The questions that naturally arise are; will the delay and laches of the creditor destroy his lien and right to pursue the land in the hands of the grantee of the heir, holding under a conveyance duly recorded, and if so, what period of time must elapse? Certainly the lien can not be perpetual, and it would seem, by analogy to the liens of judgments and the limitation for entry upon land, that the statutory period provided in those cases should bar such lien, and this has been the view taken by the courts in several instances when such ques-

41 McLean *v.* McBean, 74 Ill. 134; Woodfin *v.* Anderson, 2 Tenn. Ch. 331. Though customary, it is not accurate to say that lands descending to heirs are charged with the debts of the ancestor. The lands are liable only to be charged with the payment of debts upon a deficiency of personal assets; and this right may be lost by delay: Bishop *v.* O'Conner, 69 Ill. 431.

42 Mix *v.* French, 10 Heisk. (Tenn.) 377.

43 Succession of Bougere, 28 La. Ann. 743. The debts chargeable upon lands descended are those contracted by the decedent owner, not those incurred by his representatives in the course of administration: Allen *v.* Poole, 54 Miss. 323; Porterfield *v.* Taliaferro, 9 Lea (Tenn.), 242.

44 Payson *v.* Hadduck, 8 Biss. (C. Ct.) 293; Williams *v.* Ewing, 31 Ark. 229; Branger *v.* Lucy, 82 Ill. 91; Cutright *v.* Stanford, 81 Ill. 240.

tions have been presented.[45] The question, however, is still one of great doubt and uncertainty. The conclusion above stated seems in every way just and equitable and in consonance with established legal rules, yet it appears to have been adopted in but few States. The preponderance of authority leaves the matter open and indefinite. It is agreed that an order to sell lands should be procured within a reasonable time, but what is a reasonable time is generally left to the discretion of the courts to be determined upon consideration of all the circumstances of each particular case.[46]

In case of probated estates, a shorter period is required. The limit of the time when application can be made by creditors to sell the lands of the decedent, is variously fixed at from one to four years from the granting of letters of administration. During this period the land remains subject to sale, in case of a deficiency of personal assets, not only in the hands of the heirs, but of every subsequent purchaser,[47] and the title made at such sale will be paramount to all titles made by or through the heirs.[48] There is no prohibition to the alienation of the land before the expiration of the prescribed period, for the heir may sell and convey at any time after the death of the ancestor, but if he should convey before the expiration of that period, the lands pass subject to the power of the probate

[45] McCoy *v.* Morrow, 18 Ill. 519; Fitzgerald *v.* Glancy, 49 Ill. 465; Furlong *v.* Riley, 103 Ill. 638. The policy of the law is, repose and security of titles and estates against dormant claims, and further, to afford notice of liens against lands through the public records, and to disfavor those liens of which it has provided no public notice.

[46] Hatch *v.* Kelly, 63 N. H. 29; Gunby *v.* Brown, 86 Mo. 253; Mays *v.* Rogers, 37 Ark. 155; Liddel *v.* McVickar, 11 N. J. L. 44; Fergusen *v.* Scott, 49 Miss. 500.

[47] Hyde *v.* Tanner, 1 Barb. 79; Hill *v.* Treat, 67 Me. 501; McCoy *v.* Morrow, 18 Ill. 519.

[48] Meyer *v.* McDougal, 47 Ill. 278. The same is equally true of devisees: Hyde *v.* Tanner, 1 Barb. 79. But where the creditor proceeds directly against the heir, if the real estate has been sold by such heir in good faith, it would seem that it can not be sold under a judgment against him; but the creditor must satisfy his judgment out of other property of the heir to the extent of the value of the land so aliened: Vansyckle *v.* Richardson, 13 Ill. 171.

court to order a sale for the payment of debts, which is a kind of statutory lien running with the land. After the expiration of the statutory period, the power of the probate court ceases; the land is discharged from the lien; and the heir may sell, and *bona fide* purchasers will take the estate, freed and discharged from the debts.[49]

The foregoing is based upon decisions made in pursuance of local statutes, but will probably serve as a general exposition of the law in all States so far as respects creditors who fail to present or prove their claims.

§ 559. **Equitable Conversion.** The succession of the heir may also be defeated by what is known as equitable conversion, as where the ancestor had made a valid contract of sale but died before its consummation by deed. In such a case equity will intervene, on the familiar principles heretofore shown.[50] In the event just noted, the purchase money accrues to the executor or administrator, and not to the heirs,[51] while on the contrary, if the ancestor had purchased land but received no conveyance, the title subsequently acquired would inure to the heirs, even though the administrator paid the purchase money.

§ 560. **Proof of Heirship.** Title by inheritance or succession accrues only to the issue of lawful wedlock,[52] and can be asserted only by the person or persons who can bring them-

49 Collamore *v.* Wilder, 19 Kan. 67; Sevier *v.* Gordon, 29 La. Ann. 440; Hyde *v.* Tanner, 1 Barb. 79; Nowell *v.* Bragdon, 14 Me. 320; Aiken *v.* Morse, 104 Mass. 277. This is a matter of statutory regulation; consult local statutes.

50 See Chap. XVIII, Agreements for Conveyances.

51 The heirs in such a case would take the legal title by descent, but only as trustees: Johnson *v.* Corbett, 11 Paige, 265; Moore *v.* Burrows, 34 Barb. 173; Smith *v.* Smith, 55 Ill. 204; Eaton *v.* Bryan, 18 Ill. 525.

52 It is a rule of construction that, *prima facie* the term "children" means lawful children, and the statute of descents, by which the property of an intestate is made to descend to and among the children and their descendants, has reference to lawful children only, and does not do away with the common law rule, which prevents illegitimate children from inheriting anything: Blacklaws *v.* Milne, 82 Ill. 505.

selves within the line of succession provided by the statute. To successfully assert the title, therefore, it is necessary for the heir to prove: (1) the death of the ancestor, and lawful seizin in him of the subject-matter of the title at the time of such decease; (2) the marriage of his parents; and (3) proof of his legitimacy or a lawful adoption. These three points satisfactorily established, the law will invest him with title to such portion of the ancestor's estates as, under the statute, he is entitled to take. To prove heirship in a collateral line, a party must show the descent of himself and the person last seized, from some common ancestor, and the extinction of all those lines of descent which would claim before him.[53]

In contests concerning the succession, these matters are proved in a variety of ways, but mainly upon the established precedents of the common law, which will be discussed in succeeding paragraphs. The difficulties which may attend the judicial determination of questions of heirship, including the ascertaining who are entitled to succeed to an intestate's real estate, do not seem to be provided for by statute in a majority of the States, though an attempt has been made in some to provide means, by a proceeding in probate, for obtaining presumptive evidence of the facts as to the persons who constitute the heirs at law of a deceased person.[54] Ordinarily the meager proof offered by the administrator, upon the application for letters of administration, is the only record proof of heirship available in the compilation of an abstract, and though the decree or adjudication may find the persons mentioned in his petition the only heirs at law of the decedent, it is not conclusive on that point, and is done rather for the purpose of fixing the right of the person appointed to administer, and for his guidance in the distribution

[53] Emmerson *v.* White, 29 N. H. 482.

[54] See, N. Y. Civ. Co. Proc. § 2654. This is done by petition describing the real estate; setting forth the facts upon which the jurisdiction of the court depends; the interest of the petitioners and other heirs; and praying for a decree establishing the rights of inheritance; but this proceeding does not affect the right or interest of a person not a party thereto.

of the personalty, than to establish the claims of the heirs to the realty through descent.

§ 561. **Proof of Adoption.** Where the heir is such by adoption and not by blood, it may be well, in proper cases, to require further proof of heirship than is afforded by the finding of the probate court. This would be accomplished by showing the decree of adoption. The right of adoption is not of common law origin but is borrowed from the civil law, and, in every instance, is purely statutory. It is necessary, therefore, that the facts essential to the exercise of this special jurisdiction should be shown by the record, and to give a decree of adoption any force or effect the court pronouncing same must, as a rule, have acquired jurisdiction (1) over the person seeking to adopt the child; (2) over the child; and (3) over the parents of such child.[55] In other words, the statute must in all cases be complied with;[56] its terms and conditions must be fulfilled; and if the specified requisites[57] are not performed, then the act is incomplete and the child can not inherit from the parent by adoption.[58] Where the statute provides specifically the means whereby one sustaining no blood relation to an intestate may inherit his property, the rights of inheritance must be acquired in that manner, and can be acquired in no other way.[59]

§ 562. **Proof of Death.** To establish the claim of the heir it is necessary to prove the death of the ancestor, and, in the absence of proof, all the presumptions are that an individual is still living.[60] For certain purposes an absence of

55 Ferguson *v.* Jones, 17 Oreg. 204.

56 Tyler *v.* Reynolds, 53 Iowa, 146; Keegan *v.* Geraghty, 101 Ill. 26.

57 Usually the consent of the parents or surviving parent of the child is required, and if the child is over the age of consent, its own consent as well. Where these requisites are specified they are vital.

58 Luppie *v.* Winans, 37 N. J. Eq. 245; Foster *v.* Waterman, 124 Mass. 592.

59 Shearer *v.* Weaver, 56 Iowa, 578.

60 Martinez *v.* Vives Succession, 32 La. Ann. 305; Mosheimer *v.* Ussleman, 36 Ill. 232; Whiting *v.* Nicoll, 46 Ill. 230. Great lapse of time will, of course, rebut the presumption, and in the interval of,

seven years without tidings has been held to create a presumption of death,[61] but this presumption is repelled by very slight facts and circumstances[62] and courts have refused to entertain the presumption after an interval of absence and silence of twenty years, where the circumstances rendered it improbable that a party, if alive, would have communicated with her friends.[63] "Scarcely any length of time," observes a Canadian writer,[64] "will be sufficient to compel an unwilling purchaser to take a title depending on such a presumption of death, unless made with reference to the age of the party said to be deceased; and if the party whose death is asserted was, when last heard of, very young, the period must be that beyond which human life does not commonly extend." Instances similar to that cited by the writer just quoted must, however, be of very rare occurrence in the United States as other agencies, arising from taxation, adverse possession, statute of limitations, etc., might,

say one hundred years, a party must be presumed to have died in the ordinary course of nature. The civil law, however, presumes a person living at one hundred years of age, and the common law does not stop much short of this. See Watson *v.* Tindal, 24 Ga. 494.

61 Whiting *v.* Nicoll, 46 Ill. 230; Dart. on Vend. 315; Hubback on Suc. (Eng.) 179; Newman *v.* Jenkins, 10 Pick. 155; Wambough *v.* Schenk, 1 Pa. 229; Davie *v.* Briggs, 97 U. S. 628; Adams *v.* Jones, 39 Ga. 479.

62 Smith *v.* Smith, 49 Ala. 158; Brown *v.* Jewett, 18 N. H. 230. A failure to hear from an absent person for seven years, who was known to have had a fixed place of residence abroad, would not be sufficient to raise a presumption of his death, unless due inquiry had been made at such place without getting tidings from him. Wentworth *v.* Wentworth, 71 Me. 72.

63 Taylor on Titles, 65; Bowden *v.* Henderson, 2 Sm. & G. (Eng.) 560. On the other hand one may be presumed to be dead before the expiration of the lapse of time requisite to establish the presumption in the case of absence without being heard from, if there is sufficient evidence, though circumstantial only, to fairly induce a belief in the fact that death has occurred: Boyd *v.* Ins. Co., 34 La. Ann. 848. The presumption varies somewhat according to the subject to which it is applied; this is strikingly illustrated in the case of second marriages, where more liberal intendments are permitted, than in case of succession and descent. See, Cooper *v.* Cooper, 86 Ind. 75; Williams Estate, 13 Phil. (Pa.) 325.

64 Taylor on Titles, 65; citing Lee on Abstracts, 467. And see, O'Gara *v.* Eisenlohr, 38 N. Y. 296; Watson *v.* Tindal, 24 Ga. 274; Sprig *v.* Moale, 28 Md. 497.

under proper circumstances, validate and make good a title derived by succession even though defective in itself and founded upon insufficient evidence of ancestral death.

The ordinary evidence of death in England consists of entries in parochial registers, or certified copies of same, and declarations as to the identity of the parties; these registers, however, do not seem to be evidence of the time of death, and disclose the fact only inferentially, as by showing that it must have occurred before the date of burial, of which fact they seem to be evidence.[65] Such evidence has, however, been received in the United States,[66] particularly in proving pedigrees, but is of doubtful character, unless aided by statute. To remedy the defects, inaccuracies, omissions, etc., of parish registers, as well as to provide some tangible evidence of births, marriages and deaths, for the large class who would not be affected by such registers in a country where a complete disassociation of church and State is observed, many of the States have provided a special registration of such facts in the permanent archives of the counties.

Where the question arises in the examination of title, and no other or better evidence can be adduced, it is customary to procure the affidavits of eye witnesses who are conversant with the fact. Thus, the affidavit of the attending physician, or the undertaker, or a person who knew deceased in life and saw his remains in the coffin, are often resorted to in cases of difficulty and to sustain conveyances by alleged heirs.

Granting of letters of administration is *prima facie* evidence of the death of the party upon whose estate they are issued, but the presumption thus raised is of the lowest class;

65 Dart on V. & P. * 176.

66 Hyam *v.* Edwards, 1 Dall. (U. S.) 2; Duplessis *v.* Kennedy, 6 La. 231; Jackson *v.* Boneham, 15 Johns. (N. Y.) 226. The question was decided in favor of such entries in an early case in the Supreme Court of the United States, where entries of burial in a church in Philadelphia were held to be admissible in a land controversy in Kentucky, tried in one of the courts of the United States. It was there held, expressly, that they were competent testimony. Lewis *v.* Marshall, 5 Pet. (U. S.) 470.

is weak and inconclusive, and may be rebutted by slight evidence.[67]

Death, like any other fact, may be proved by circumstantial evidence; hence a sudden disappearance, particularly if coupled with an unsound mental or physical condition,[68] or proof of a wreck of a vessel in which the ancestor was known to have taken passage, or any other circumstances from which the death of the person may be reasonably inferred, are all competent to show the fact in connection with long and unexplained absence. Where several lives are lost in the same disaster, there is no presumption from age or sex that either survived the other, nor is it presumed that all died at the same moment; but the fact of survivorship, like every other fact, must be proved by the party asserting it.[69] In the absence of evidence from which the contrary may be inferred, all may be considered to have perished at the same moment; not because that fact is presumed, but, because from a failure of those asserting it to prove to the contrary, property rights must necessarily be settled on that theory.[70] All cases involving the question of survivorship must be determined upon their own peculiar facts and circumstances

67 Tisdale *v.* Ins. Co., 26 Iowa, 170.

68 John Hancock, etc., Co. *v.* Moore, 34 Mich. 41.

69 Newell *v.* Nichols, 75 N. Y. 78; Coye *v.* Leach, 8 Met. (Mass.) 371.

70 This is the generally accepted doctrine in all the States which derive their systems of jurisprudence from the common law; under the civil law, however, there is no room for dispute on the subject, it being the invariable rule of the civilians that when a parent and his grown child perish together, the manner thereof being unknown, the child shall be supposed to survive the parent. According to the Roman law the presumptions were never in favor of contemporaneous death. If a father and his son perished in the same battle or shipwreck, the son above the age of puberty was presumed to have survived his father; under that age to have predeceased him. This was upon the idea that in the former case the son was usually stronger, in the latter case weaker, than his father. So if persons perishing in the same disaster were all under fifteen, the presumption of survivorship was with the elder; if all were over sixty, with the younger. Similarly the wife (being of the weaker sex) was presumed to have yielded first to the common peril.

whenever the evidence is sufficient to support a finding of survivorship; in the absence of such evidence the question of survivorship must necessarily be regarded as unascertainable.

§ 563. **Continued — Official Registration.** In States where a system of official registration prevails, all persons or societies solemnizing marriages; all physicians, or other professional persons, under whose care a birth shall occur, or in case of no professional attendance, then the mother; and all persons who shall be in attendance professionally at the time of the death of any person, are required to transmit to the recording officer of the county a statement under their hands of the facts attending such marriage, birth or death, and a register of the facts so returned is kept by such officer. A transcript of such registry is further required to be transmitted semi-annually to the Secretary of State to be by him preserved at the seat of government.[71] This record, when made and kept pursuant to law, is received as presumptive evidence of the marriage, birth or death so recorded.[72] When no probate proceedings have been had, this method of proof, if available, should be resorted to for the purpose of showing the death of the ancestor, as well as the birth and legitimacy of the heir claimant. The facts of a death certificate may be stated in this manner:

Proof of Death of George Williams. Doc. 200,110. | *Certificate by Wm. M. Farr, M. D. Dated March 10, 1883. Recorded March 11, 1883. Death Register "A," page 20.88.*

Certifies that George Williams, white, male, aged fifty-five

71 This matter is local and statutory. The statement above made is compiled from the code of the State of Wisconsin. As affecting real estate by descent, it is a most wise and salutary measure and one that should find immediate adoption in all States in which it does not now prevail. In some States the municipal authorities are required to keep a register of "vital statistics," which, in some measure, will serve as an aid in securing missing links in a chain of pedigree.

72 State *v.* Wallace, 9 N. H. 515; Milford *v.* Worcester, 7 Mass. 48; State *v.* Potter, 52 Vt. 33; Niles *v.* Sprague, 13 Iowa, 198.

years, by occupation a carpenter, died Mar. 8, 1883, at the town of Pleasant Prairie, Kenosha County, Wisconsin, of Bright's disease of the kidneys, and was buried in the "German Roman Catholic Cemetery."

That said deceased was born Mar. 8, 1828.

That the name of the father of said deceased was Henry Williams, and of his mother Jane (Flynn) Williams, and that the name of said deceased's wife is Mary (Jones) Williams.[73]

§ 564. **Continued — Probate of Death.** Before administration is granted upon the estate of any person alleged to have died intestate, satisfactory proof is always required to be made before the probate court to whom application for that purpose is made, that the person in whose estate letters of administration are requested, is dead, and died intestate. This is accomplished by an affidavit or verified petition, made by the person applying for such letters, or by some other credible person, and forms the basis of all subsequent proceedings in such court. Oral testimony of the fact of death is also received on proof of will or heirship and in such cases a judicial finding of death is entered of record.

§ 565. **Proof of Birth and Legitimacy.** Certificates of the marriage of the parents and the baptism of the person proposed within a reasonable time after the marriage, are admitted in England, and it would seem in Canada, as full and ample evidence of legitimacy, without any proof of the identity of the parties,[74] and such evidence in a contest regarding the succession would also be received in the United States, while for many purposes, in the absence of better evidence, general

73 This serves to identify the deceased with reasonable certainty, and precludes the necessity of affidavits or declarations of identity.

74 Taylor on Titles, 63; Hubback on Suc. 65. A certificate of baptism is no evidence of the exact age of a party; it is good evidence of his legitimacy, but not of his age: Cov. Con. Ev. 281. And an entry in a baptismal register is competent to prove only the fact and date of baptism: Blackburn *v.* Crawford's Lessee, 3 Wall. (U. S.) 175.

reputation,[75] proof of cohabitation,[76] admissions and declarations,[77] would be competent. Entries in a family bible are also admissible to prove birth when primary evidence can not be obtained.[78] An abstract, as it is compiled in this country, does not contain evidence of this character, and where it is desirable to obtain information relative to heirship, and no decree has been made in any matter respecting same, and no system of official registration of births and marriages exists, an inquiry *in pais* must be made. Where official returns are made and kept pursuant to law, such returns, or the record thereof, would furnish *prima facie* evidence of the desired facts,[79] while the probate of the estate, including distribution, assignment of dower, etc., would also be evidence of the same character.

Except in cases of contested succession the question of marriage does not become very material in the examination of a title. All intendments are in its favor and very slight evidence will usually be sufficient to sustain the claim of an heir where nothing appears to oppose it. If the estate has been probated nothing more than the proof of heirship taken therein will be required; if there has been no probate an affidavit of pedigree should be furnished. Absolute facts are not essential to such an affidavit nor is it necessary that the affiant should make a

75 Fenton *v.* Reed, 4 Johns, 52; Brice's Estate, 11 Phila. (Pa.) 98; Harland *v.* Eastman, 107 Ill. 535. An affidavit by some person who was present and witnessed the marriage would be competent (Brewer *v.* State, 59 Ala. 101; State *v.* Williams, 20 Iowa, 98), or by the celebrant (State *v.* Goodrich, 14 W. Va. 834), or by some member of the family that a marriage was reputed to have taken place: Waldron *v.* Tuttle, 4 N. H. 371; Kelly *v.* McGuire, 15 Ark. 555; Jackson *v.* Browner, 18 Johns. (N. Y.) 37.

76 Clayton *v.* Wardell, 4 N. Y. 230; State *v.* Armington, 25 Minn. 29. Proof of both reputation and cohabitation are sufficient evidence upon which to presume marriage, but proof of either alone is not sufficient: Commonwealth *v.* Stump, 53 Pa. St. 132. Reputation is generally held to consist of the expressed opinions of persons who knew the parties.

77 Betsinger *v.* Chapman, 88 N. Y. 487; Proctor *v.* Bigelow, 38 Mich. 282; Ill. Land & Loan Co., *v.* Bonner, 75 Ill. 315.

78 Campbell *v.* Wilson, 33 Tex. 252; Hunt *v.* Chosen Friends, 64 Mich. 67.

79 State *v.* Potter, 52 Vt. 33; Niles *v.* Sprague, 13 Iowa, 198.

statement from his own knowledge. Common reputation, living together of the parents, and other corroborating circumstances will all tend to prove marriage. At common law no special form or solemnity is necessary to constitute a valid marriage and where parties enter into the relation by mutual consent the legal results of marriage will follow. Such marriages have repeatedly been recognized in the United States [80] and the assent may and will be presumed from the actions of the parties. Continuous matrimonial intercourse for a number of years will furnish grounds for the presumption of a valid marriage,[81] and evidence of a legitimate descent.[82]

§ 566. **Presumption of Legitimacy.** It was formerly the rule in England, as also in this country, that when a child was born in wedlock the presumption of legitamacy was conclusive. But recent years have greatly modified the old rule and now, while the presumption is not to be rebutted by circumstances which only create doubt and suspicion, it may yet be wholly removed by proper and sufficient evidence showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the

80 Port *v.* Port, 70 Ill. 486; Meister *v.* Moore, 96 U. S. 76; Hutchins *v.* Kimmell, 31 Mich. 126...

81 The rule may be succinctly stated as follows: Where it appears that the intercourse between the parties was originally illicit, there being no impediment to marriage, it will be presumed that the intercourse continued to be illicit; and where their subsequent relations appear to be clandestine, and are kept concealed from others who will necessarily discover that the relation is illicit, unless made to believe that the parties are married, the evidence is insufficient to prove marriage. But where such subsequent relations have all the appearance of the marriage relation, and there is nothing apparently clandestine, and no divided reputation, and the parties acknowledge each other on all occasions and under all circumstances as man and wife to the extent that married persons ordinarily do, a legal presumption of marriage is raised. Cross *v.* Cross, 55 Mich. 287; Williams *v.* Williams, 46 Wis. 464; Harbeck *v.* Harbeck, 102 N. Y. 714; Arnold *v.* Cheesbrough, 46 Fed. Red. 700.

82 K. P. R. R. Co. *v.* Miller, 2 Cal. 442; Askew *v.* Dupree, 30 Ga. 173; Duncan *v.* Duncan, 10 Ohio St. 181; Dyer *v.* Brennock, 66 Mo. 391. But see, Robertson *v.* State, 42 Ala. 509; Mangue *v.* Mangue, 1 Mass. 240; *In re* Thaley, 93 Pa. St. 36.

mother; (3) entirely absent at the period during which the child must in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse.

§ 567. **Validity of Descents.** Titles depending upon descent are viewed by our English brethren with disfavor and ranked amongst the poorest that can be offered, or the weakest that can be asserted. Such titles are always to be viewed with jealousy, observe their leading writers, and if dependent upon several successive descents are scarcely marketable.[83] In a limited sense this may also be true of title by descent in the United States, and purchasers would be justified in refusing to take many titles that might be offered by parties claiming in this manner. This almost invariably follows in cases of unprobated estates, for no title can be more uncertain and insecure, and scarcely any length of time in the absence of other evidence, would be sufficient to furnish a reasonable presumption of death and the exclusion of the rights of other heirs who might possess valid claims upon the property.[84] Proof that certain persons are the only children who survive their father does not establish the fact that they are the only heirs, as he may have grandchildren by deceased children,[85] and hence it is necessary, in some instances, that additional information to that furnished by the proceedings in probate, be also procured to fully establish an asserted right. A properly taken proof of heirship in probate should, however, show the fact of decease of children prior to the death of the intestate and whether or not such children died without issue, but frequently this fact is not found.[86] The statute of limitations will furnish a strong re-

83 Atkinson on Titles, 374; Hubback on Suc. (Eng.) 71; Taylor on Titles (Canada), 61.

84 A deceased person is always presumed to have left heirs: Pile *v.* McBratney, 15 Ill. 314.

85 Skinner *v.* Fulton, 39 Ill. 484.

86 From personal inquiries made by author it appears that in a majority of the probate courts of the State of Illinois no proof of heirship is required other than that furnished by the statements of the petition for letters of administration, and that in such courts it is not customary to make any judicial findings of heirship. Probably the same conditions prevail in other States.

enforcement to a doubtful title by descent, and serve to effectually settle many of the questions that otherwise would render the title undesirable.

§ 568. **Abstract of Descents.** Under the English system of abstracting, a descent is shown by a pedigree, supported by certificates of marriage, births and deaths, inserted in the order of their date. If the certificates can not be procured, which, from the loss or imperfect state of registers or other circumstances is sometimes the case, substitution is made of entries in the Royal College of Arms, in family bibles or books, inscriptions on tomb stones, and the solemn declarations of family solicitors, tenants, workmen, and parties acquainted with circumstances and facts, as well as such evidence of the seizin of the different parties, shown by the pedigree to be entitled, as can be adduced; for which evidence old leases of the property, land tax, and parochial assessments, are referred to.[87] Pedigrees, or family histories, may be used to a very limited extent in the eastern States and are sometimes alluded to by writers on conveyancing, but in the west they are practically unknown, while authentic information of the facts to which a pedigree relates is usually extremely difficult of ascertainment, and the sources as mentioned above would hardly be considered sufficiently certain by the average attorney.[88]

Family records, when shown to have been regularly compiled, are not without weight in the United States, and are frequently resorted to for proof of heirship in the administration of estates and trial of disputed land titles, but while they, with other evidence, will be received by courts to prove pedigree and establish rights of succession, they do not constitute such evidence, save

87 Moore on Abst. 44.

88 As a matter of curiosity, rather than for any real utility, the following abstract of an English pedigree is inserted. The object is to show title by descent in Thomas Noakes:

RALPH NOAKES was the grandfather of Thomas Noakes, Esq., of Cliff Hall (the mortgagor), as will be seen by the subjoined pedigree (*ex parte paterna*) copied from one in his possession, and kept by his family. It is also shown by different entries found in the family registers, now likewise in his possession. The fact of his being the direct lineal heir of

as they appear in court proceedings by way of recital, as is required in compiling an abstract, and examiners as a rule do not, and as a matter of fact, should not, attempt to introduce them or any other matter strictly *in pais*. A judicial determination in an action brought by adverse claimants, or in a proceeding *in rem* to determine the rights and apportion the interests of the parties before the court, would be proper record evidence of descent and right of succession, while the proceedings in probate are evidence of the same nature. These matters therefore, must always be noted and appropriately exhibited, and with a very few exceptions will furnish sufficient data, and be sufficiently conclusive of the facts of death and heirship, to warrant the belief that the persons so found to be the heirs of the decedent are such heirs and the only ones entitled to participate in the distribution or share in the succession.

§ 569. **Continued — Probate Proceedings.** The usual and ordinary method of showing a descent in the United States is by an abstract of the settlement of decedent's estate. This should disclose the jurisdiction of the court, appointment of administrator, proof of heirship, and adjudication. This is sufficient to show the descent, but in order that the title of the heirs may not be obscured by latent defects or creditors' liens,

said Ralph Noakes is also confirmed by entries at the Royal College of Arms.

And the following is a pedigree and entries referred to:

Ralph Nokes = Ann Freke.

Richard = Sarah Hart. Ann = John Brown. ob. ob.

Thomas = Oliva Jones. Susan = James Old. Jane. ob. æt. 18.

Thomas = Charlotte Smart. Samuel, Eliza, Thomas.

Thomas, and six other children.

"Feb. 10, 1740] Richard, only son of Ralph Noakes, was born at Cliff Hall, at 3 in the morning."

"April 3, 1762] Thomas, only son of Richard, born at Cliff Hall on Tuesday the 3d of April, 1762, at 12 o'clock at night."

"June 19, 1784] Thomas, son of Thos. Noakes and Charlotte Smart, born at Cliff Hall, at 9 in the morning."— Moore on Abst. 58.

the inventory, payment of claims, and final report and discharge of the administrator should also be shown. The degree of detail is optional with the examiner, provided the jurisdiction be made to appear and an apparent regularity is shown in all of the subsequent steps. The following is offered as a specimen of a very simple settlement:

In Probate Court, Cook County, Ills.

In the matter of the estate of Julia A. Mason. } *Descent. Case No. 2,000 in box 135. Petition of Anna Haskell for letters of administration, filed May 10, 1883. Record 14, pg. 12.*

Represents that Julia A. Mason died intestate, Aug 2, 1882, leaving property and effects in Cook County, Ills., as follows, to wit: [describe the real estate] *and leaving her surviving,*[89] *Anna Haskell (wife of Charles Haskell) and Walter A Mason, her only heirs at law.*

Sworn to May 10, 1883.

Letters of administration issued to Anna Haskell, dated May 10, 1883.

Bond in sum of $6,400.00 with sureties, filed and approved May 10, 1883.

Warrant to appraisers issued, dated May 10, 1883.

Proof of heirship entered May 10, 1883.

The court finds from the evidence produced in open court, that Julia A. Mason died Aug. 2, 1882,[90] *leaving her surviving*

[89] This fact, if properly proved, will be sufficient to establish the heirship of the persons named (Russell *v.* Jackson, 22 Wend. (N. Y.) 277), but is not conclusive, nor does it prove that the persons named are the only heirs entitled to share in the succession, as the intestate may have had children who did not survive him, but who in turn may have left children entitled to a representation: Skinner *v.* Fulton, 39 Ill. 484.

[90] The proof of death is the foundation of title by descent or through the administrator; this must be conclusive, and, while the evidence need not be shown, the fact should be made to appear as strongly as possible. See Thomas *v.* People, 107 Ill. 517, for a learned and instructive opinion on grants

Walter A. Mason, her son, and Anna Haskell (wife of Charles Haskell) her daughter, her only next of kin and heirs at law.

Proof of publication and posting of notices for adjudication filed June 1, 1883, and approved July 16, 1883.

Adjudication ordered July 16, 1883.

Proceed in this order showing succeeding steps in much the same manner as an abstract of a devise. This would include the proof and payment of claims, and the final order of distribution and discharge of the administrator.

§ 570. **Settlement without Administration.** It is competent for all the heirs to an estate, if of age, to settle and pay the debts of the estate, and to make partition of the property among themselves, without any administration; and neither creditors nor debtors of the estate have a right to complain.[91] If, in pursuing this course, they sell portions of the property and make proper application of the proceeds to the payment of the debts, their acts are entitled to full faith and credit, as though they acted in the capacity of administrators or executors.[92]

Where deeds are found upon the records which purport to have been executed by the heirs at law of a party in whom title is shown to have been vested, and no administration appears to have been had upon the estate of such alleged ancestor, it is well to call attention to such latter fact by a brief note immediately following the heir's deed. Thus:

NOTE.—*We find no evidence of administration in Cook County, Illinois, on the estate of William Black, nor probate of his will, if any.*

It will frequently happen that the ancestor was a non-resident and that administration was had upon his estate at the place

of administration, made on presumptions and insufficient proof.

91 Taylor *v.* Phillips, 30 Vt. 238; Babbitt *v.* Bowen, 33 Vt. 437; and see Brashear *v.* Connor, 29 La, Ann. 374.

92 Morris *v.* Halbert, 36 Tex. 19.

of his late domicile. When such is the fact an exemplification of such proceedings should be procured and filed in the registry of deeds of the county where the land in question is situate. This will be sufficient to show descent, provided a finding of heirship appears, but in order to make an indefeasible title an ancillary administration should be had. The chief object of such ancillary administration is to bar the claims of creditors, and if the property is valuable this step should always be taken.

§ 571. **Escheat.** The latest taker, under the statute of descents, is the State. But the State is not to be deemed an heir within the ordinary meaning of the term, and takes, not as an heir, but rather because there are no heirs.[93] The right of the State is established by a formal proceeding generally called "inquest of office," and where title is deduced through escheat this proceeding must be shown. Instances of title derived in this manner are, however, very rare.

93 State v. Ames, 23 La. Ann. 69.

CHAPTER XXXI.

ADVERSE TITLE.

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§ 572. **Adverse Titles, Generally Considered.** In examinations of title it is not uncommon to find two, or even three, conflicting claims of title evidenced by deeds or other matter of record, while inquiries *in pais* may further disclose claims of title and ownership founded upon actual occupation and possession, under claims of right resting upon unrecorded deeds, undisclosed descents, or prescriptive user. In some cases the adverse titles have a common origin and all flow from the same source; in others they originate through tax sales, or by reason of independent conveyances from individuals. Sometimes the adverse titles are only seeming, being the results of mistakes in the draughting of instruments of conveyance. The questions raised by these conflicting claims are numerous and sometimes difficult of solution, and are among the most perplexing incidents upon which counsel are obliged to pass.

§ 573. **Adverse Conveyances.** Under this head are grouped all conveyances emanating from independent sources and not connected with original grantor or forming a part of

the regular course of title. These conveyances may consist of tax deeds and resulting conveyances which have not been merged into the common ownership; an assertion of title by one having no record evidence; and deeds which by erroneous descriptions do not convey the property intended, but cover other and entirely different parcels. It is the practice of examiners to arrange these deeds as an appendix to the chain, setting them out under the classified head, "adverse conveyances," and prefixing to them the statement, "we also find."

Where an adverse title appears of record, followed by mesne conveyances, and eventually merging into the original title, they constitute part of the chain and are shown in the regular course. In cases of this kind the better way is to trace the title from the original grantor to the person in whom a perfect and unembarrassed title is found; here stop and separate what follows by a broad dash, or, if desired, a prefatory note; then show the tax deed or other initial adverse conveyance and the conveyances resulting therefrom, until title is again found in the person proposed. Now separate the succeeding matter as before, and the next deed will commence, a reunited and perfect chain. Isolated adverse conveyances, as has been stated, are frequently the result of error, and are often followed by curative deeds which demonstrate same. When the examiner can supply the necessary information an explanatory note should follow the adverse deed, thus:

NOTE.— *We find recorded in Book 500, page 260, a deed between the same parties, and bearing same date as the foregoing, conveying property in the northeast quarter of Sec. 10, T. 2 N., R. 23 E., and wherein it is recited that said deed is given to correct an error in the description of land conveyed by deed recorded in Book 490, page 359 (shown as No. 25 of this examination;* or, *shown above).*

The foregoing suggestion is considered the better way to treat adverse conveyances, particularly when it can not be demon-

strated that the adverse conveyance is the result of error and not the assertion of an independent title; yet examiners of undoubted standing and ability have frequently deemed an explanatory note, without any exhibition of the adverse deed, sufficient for the purposes of the abstract. Should the later method be considered desirable, a statement similar to the following may be made:

Adverse Conveyances.

In Book 185, page 537, is recorded a deed from John H. Fellows and wife to Lorenzo Dow, purporting to convey land described as: Beginning at the southeast corner south of the Indian Boundary Line of southeast quarter of Section 35, Town 40, Range 13; thence north on east line of said quarter section 40 rods; thence west 160 rods; thence south 40 rods; thence east 160 rods, containing 40 acres; and in Book 49 of Mortgages, page 519, is recorded a mortgage from said Lorenzo Dow to James Parton, covering same premises; said mortgage is released on margin of record (as appears by our indices). Fellows owned land in Section 35, Town 41, Range 13, and we assume that said deeds by Fellows and Dow were intended to convey land there and not in Section 35, Town 40, Range 13, where he had no interest whatever.

The foregoing example is given to show the methods that can be and sometimes are employed, rather than as a precedent to be followed, for, although the conveyances are sufficiently identified to furnish actual notice of their character and import to all persons perusing the abstract, and possibly sufficient explanation is given to warrant the assumption of the examiner, and, in the instance under consideration, the examiner has sufficiently discharged his duty to relieve himself of liability, yet the practice of showing positive transactions by notes, and of making assumptions without expressed authority, is dangerous

and often misleading, and calculated to involve the examiner in serious complications. Any and every conveyance, incumbrance, lien or charge which directly or by just implication affects, impairs or clouds the title, if a matter of record, and within the dates comprising the period of the search, should be shown affirmatively and without expression of opinion as regards the legal effect of the instruments, or the real or supposed intention of the parties, and if the examiner is also the counsel, let the abstract and the opinion be separate and distinct papers.

§ 574. **Adverse Possession.** An adverse title need not depend on documentary evidence, but may rest wholly on occupation, or on occupation coupled with other circumstances. This, of course, the abstract will not show and the facts which constitute such title are ascertained by inquiries *in pais*.

It is a well established rule that a possession, to be adverse, must be so open, notorious and important as to give notice to parties interested that a claim of right is intended thereby; that the right of the true owner is invaded intentionally, and with a purpose to assert a claim of title adversely to his; and to furnish the basis of a substantial title, must extend in unbroken continuity over the period prescribed by the statute of limitations.[1] This element of peaceful continuity is perhaps more distinctly material in conferring title by adverse possession than any other,[2] and is a consideration of primary importance in all examinations.

A statutory distinction is made in some States between a claim of title founded upon some written instrument or judgment, and an actual, continued occupation under claim of title,

1 Carrol *v.* Gillien, 33 Ga. 539; Beatty *v.* Mason, 30 Md. 409; Dixon *v.* Cook, 47 Miss. 220; Laramore *v.* Minish, 43 Ga. 282; Bowman *v.* Lee, 48 Mo. 335; Calhoun *v.* Cook, 9 Pa. St. 226; Cahill *v.* Palmer, 45 N. Y. 484; Booth *v.* Small, 23 Iowa, 177.

2 Tyler Adv. Enj. 907; Groft *v.* Weckland, 34 Pa. 308; Williams *v.* Wallace, 78 N. C. 354; Shields *v.* Roberts, 64 Ga. 370. Possession of land once established by material acts of visible, notorious ownership must be presumed to continue until open, notorious, adverse possession be proved to have been taken by another: Clements *v.* Lamkin, 34 Ark. 598.

exclusive of any other right, but not founded upon any written instrument, judgment or decree; and the period of occupancy in the latter case must be continued much longer than in the former. Thus, in the first instance, the title may become perfect and indefeasible at the end of ten years,[3] while in the latter the period of legal memory must have run to warrant the presumption of an original valid entry, and the loss or destruction of the muniments that establish the occupant's right to the soil. The character of the possession, too, may be vastly different under the two claims; as, in the first instance, a partial occupancy only is required, such partial occupancy drawing to it constructively the possession of all of the land mentioned in the instrument under which the claim is made, while in the latter the adverse holding extends only to so much of the land as may have been actually occupied.[4] But in either event, to constitute a bar to the assertion of the legal title, the possesion must be hostile,[5] and not a mere trespass,[6] and must also be visible,[7] continuous,[8] notorious,[9] definite,[10] and inconsistent with the claim of others,[11] while the claim of right accompanying such possession must not have originated in fraud.[12] These are the

3 Limitation periods are wholly statutory. The text states the general rule but in some States a shorter period is prescribed. Thus, in Illinois possession under color of title with payment of taxes for seven years will create an estoppel available against all persons not under disability.

4 What acts are sufficient to constitute possession are matters of local statutory regulation, but, as a rule, there must be either cultivation or improvement; protection by a substantial enclosure; and a use of the premises, if not enclosed, for the supply of fuel, or husbandry, or the ordinary use thereof by the occupants in the same manner that lands similarly situated are used.

5 Turney *v.* Chamberlain, 15 Ill. 271; Thompson *v.* Felton, 54 Cal. 547.

6 Humbert *v.* Trinity Ch., 24 Wend. 587; Cahill *v.* Palmer, 45 N. Y. 479.

7 Irving *v.* Brownell, 11 Ill. 402.

8 Jackson *v.* Berner, 48 Ill. 203.

9 McClellan *v.* Kellogg, 17 Ill. 498; Dixon *v.* Cook, 47 Miss. 220.

10 Fugate *v.* Pierce, 49 Mo. 441; Grube *v.* Wells, 34 Iowa, 148.

11 Ambrose *v.* Raley, 58 Ill. 506; Sparrow *v.* Hovey, 44 Mich. 63.

12 Moody *v.* Moody, 16 Hun (N. Y.), 189; Laramore *v.* Minish, 43 Ga. 282. The question whether one who holds by color of title holds in good faith or bad, depends upon the purpose with which he

universally recognized elements that must enter into every adverse holding, and unless they are present the settled principles of law require us to consider the true owner as constructively in possession of the land to which he holds the title.[13]

A clandestine entry or possession will never serve to set the statute in motion, for in order to bar the true owner from asserting his title, he must have actual or constructive notice of the instrument under which the adverse claimant enters, or knowledge, or the means of knowledge of such occupation and claim of right,[14] and the entry must be made and the possession continued under such circumstances as to enable such true owner, by the use of reasonable diligence to ascertain the fact of entry and the right and claim of the party making it.[15]

Any substantial interruption of an adverse possesion, before the lapse of the period required to constitute the statutory bar, will have the effect of restoring the seizin of the rightful owner of the land, and in order to set the statute in motion a new entry and disseizin will be necessary. It seems also, that the running of the statute may be interrupted if the possession ceases to be adverse, notwithstanding a possession in fact may still continue.[16]

§ 575. **Color of Title.** It is a general rule that where one enters upon land under a recorded deed, his entry and claim must be referred to that deed and measured by it.[17]

acquired the title relied on, and the reliance placed upon it. If the holder received it, knowing it to be worthless, or in fraud of the owner's rights, it cannot be said to be held in good faith. Still, many things that may be sufficient to destroy the presumption of good faith may be insufficient to prevent the deed from being color of title. See Hardin *v.* Gouverneur, 69 Ill. 140; Hall *v.* Mooring, 27 La. Ann. 596.

13 Bliss *v.* Johnson, 94 N. Y. 235; Doe *v.* Thompson, 5 Cow. (N. Y.) 371.

14 Fugate *v.* Pierce, 49 Mo. 441; Crispen *v.* Hannavan, 50 Mo. 536; Thompson *v.* Pioche, 44 Cal. 508; Nowlin *v.* Reynolds, 25 Gratt. (Va.) 137.

15 Soule *v.* Barlow, 49 Vt. 329; Brown *v.* Cockerell, 33 Ala. 151.

16 Stewart *v.* Stewart, 83 Wis. 364.

17 Stevens *v.* Brooks, 24 Wis. 326; Crary *v.* Goodman, 22 N. W. 170.

Such deed, though void in fact, gives a "colorable title"[18] to the purchaser, and where it professes to convey the entire estate a claim and occupation under it creates an adverse possession as against all the world.[19] What amounts to a color of title, is still an open and unsettled question, though numerous decisions defining its character exist in all the States as well as in the federal courts, and notwithstanding that in a few instances it has been held that documentary evidence is not required to support a claim under color of title,[20] the weight of authority indicates that a written instrument is necessary, so far good in appearance as to be consistent with the idea of good faith, and purporting on its face to convey a title.[21] The definitions in the books, though widely divergent in many particulars, yet agree in the main on these points.

A claim of heirship has been held to come within the term, the supposed inheritance forming the "color," for says Gibson, J., "one entering by a title depending on a void deed, would certainly be in by color of title, and it would be strange if another, entering under an erroneous belief that he is the legitimate heir of the person last seized should be deemed otherwise."[22] A confusion, however, seems to exist, arising from the interchangeable use of the terms "color" and "claim" of title, which, as a matter of fact, may, and do, exist separate and independent of each other. To constitute the former, there must, as a rule, be a paper title, while the latter may exist wholly by parol.[23] Possession under a claim of title, without a deed or other written instrument, limits the person so asserting his claim, to his actual enclosure or occupancy,[24] but when

18 Edgerton *v.* Bird, 6 Wis. 527; Brooks *v.* Bruyn, 35 Ill. 394; Lindsay *v.* Fry, 25 Wis. 460; Beverly *v.* Brooke, 9 Ga. 440; Hamilton *v.* Boggess, 63 Mo. 233.

19 Hall *v.* Law, 102 U. S. 461; Bell *v.* Longworth, 6 Ind. 273.

20 Cooper *v.* Ord, 60 Mo. 431.

21 Baker *v.* Swan, 32 Md. 355; Kruse *v.* Wilson, 79 Ill. 240; Stark *v.* Starr, 1 Sawyer, 20; Gittens *v.* Lowry, 15 Ga. 338.

22 McCall *v.* Niely, 3 Watts (Pa.) 72; and see Cooper *v.* Ord, 60 Mo. 420; Teabout *v.* Daniels, 38 Iowa, 158.

23 Hamilton *v.* Wright, 30 Iowa, 486; Clagett *v.* Conlee, 16 Iowa, 487.

24 Dills *v.* Hubbard, 21 Ill. 328.

founded upon a claim and color of title, a constructive possession of the entire tract will follow the actual occupancy of any portion,[25] provided the deed or other matter be of record.[26]

§ 576. **Adverse Possession Under Color of Title.** A valid title is not required in order to enable a party to rely upon adverse possession under the statute of limitations,[27] nor is it necessary that he should trace title through a chain to any source.[28] A deed which purports to convey a complete title will be sufficient to give color of title, although the grantor may, in fact, have only the rights of a mortgagee,[29] or lessee;[30] or, if the deed was issued on an erroneous or void decree;[31] or, in pursuance of a sale under an imperfectly executed trust;[32] and generally, when followed by a continuous and uninterrupted possession for the entire statutory period, it will constitute an adverse holding, effective for all purposes, however groundless the supposed title may be.[33] It is essential, however, that the lands claimed be fully identified or described in the instrument,[34] for mere occupancy of land in virtue and under a claim of a grant which does not embrace it, is not adverse possession sufficient to constitute an estoppel or effect a transfer

25 Brooks *v.* Bruyn, 18 Ill. 539; Scott *v.* Elkins, 83 N. C. 424; Coleman *v.* Billings, 90 Ill. 577; Little *v.* Megquier, 2 Me. 176; Webb *v.* Richardson, 42 Vt. 465; but if the true owner be in actual possession of any part of the lands, his constructive seizin extends to all not in fact occupied by the intruder: Hunnicut *v.* Peyton, 102 U. S. 333.

26 Tritt *v.* Roberts, 64 Ga. 156.

27 Close *v.* Samm, 27 Iowa, 503; Jackson *v.* Woodruff, 1 Cow. 276; Elliott *v.* Pearle, 10 Pet. 412; Ford *v.* Wilson, 35 Miss. 504; Grant *v.* Fowler, 39 N. H. 104.

28 Rawson *v.* Fox, 55 Ill. 200. Compare Hedges *v.* Paulin, 5 Biss. 177.

29 Stevens *v.* Brooks, 24 Wis. 326.

30 Sands *v.* Hughes, 53 N. Y. 287.

31 Huls *v.* Bunten, 47 Ill. 396; Hinkley *v.* Green, 52 Ill. 223.

32 Gebhard *v.* Sattler, 40 Iowa, 153.

33 Ford *v.* Wilson, 35 Miss. 504; Grant *v.* Fowler, 39 N. H. 104; Tyler Adv. Enj., 907; Davis *v.* Easly, 13 Ill. 192.

34 Lane *v.* Gould, 10 Barb. 254; Jackson *v.* Woodruff, 1 Cow. 276; Fugate *v.* Pierce, 49 Mo. 441; Grube *v.* Wells, 34 Iowa, 148; Brown *v.* Coble, 72 N. C. 391.

of title,[35] and the claim must not be general, but specific.[36]

§ 577. **Constructive Possession.** Where title is asserted adversely under a claim of right, and by reason of occupancy and possession, it is a rule of universal application that the extent of the claim must be measured by the instrument under which the claim is made.[37] When such instrument purports to convey an estate in fee in specific lands, although actual occupancy is only had of a portion of the premises described, the claimant is yet constructively in possession of the entire tract,[38] his occupancy of a part being in contemplation of law the occupancy of every portion,[39] but there can be no constructive possession without the color of title[40] afforded by some deed, instrument or proceeding purporting to convey the whole and defining boundaries, as well as actual possession of a part.[41] Nor will constructive possession be sufficient to confer title to any portion of the tract in the adverse seizin of another.[42]

§ 578. **Adverse Possession From User.** An actual continued occupation of lands under a claim of title exclusive of any other right, although not founded on a written instrument, judgment or decree, is yet sufficient, if extending through the entire statutory period, to confer title to the portion so actually occupied.[43] It is immaterial to support title thus claimed whether there be a deed valid in form, or whether there be no deed,[44] and the party in possession may even knew that his title is groundless,[45] but there must be a claim of title;[46] an

35 Laverty *v.* Moore, 33 N. Y. 658; Farish *v.* Coon, 40 Cal. 33; Grube *v.* Wells, 34 Iowa, 148; Wood *v.* Banks, 14 N. H. 111.

36 Crary *v.* Goodman, 22 N. Y. 170; Hallas *v.* Bell, 53 Barb. 247; Pepper *v.* O'Dowd, 39 Wis. 538.

37 Washburn *v.* Cutter, 17 Minn. 361.

38 Constructive possession has been defined to be a possession in law, without possession in fact: Hodges *v.* Eddy, 38 Vt. 327; Welborn *v.* Anderson, 37 Miss. 155.

39 Brooks *v.* Bruyn, 18 Ill. 539; Crispen *v.* Hannavan, 50 Mo. 536.

40 Wells *v.* Jackson Manuf. Co., 48 N. H. 491.

41 Fugate *v.* Pierce, 49 Mo. 441.

42 Walsh *v.* Hill, 41 Cal. 571; Jackson *v.* Vermylyea, 6 Cow. (N. Y.) 677.

43 Dills *v.* Hubbard, 31 Ill. 328; Doe *v.* Eslava, 11 Ala. 102.

44 Rannels *v.* Rannels, 52 Mo. 108.

45 Bogardus *v.* Trinity Church, 4 Sand. Ch. (N. Y.) 633; Jackson *v.* Wheat, 18 Johns. 40.

46 Humbert *v.* Trinity Church, 24 Wend. 587; Rannels *v.* Rannels, 52 Mo. 108.

assertion of paramount right;[47] and there must be actual occupancy measured by a distinct, visible and marked possession.[48] Permissive user can never, by any lapse of time and even though continuous and exclusive, ripen into a title to the fee, nor when the original entry was by consent of the owner, and no adverse claim of ownership has been asserted.[49]

§ 579. **Naked Possession without claim.** "Squatters" or intruders upon lands acquire no rights by reason of their possession, as the gist of every adverse holding is, that it is accompanied by a claim of right, and a mere trespass can never ripen into a right, so as to set the statute in motion, no matter how long continued;[50] nor will occupation by mistake or ignorance suffice to constitute an adverse holding,[51] although upon this point there is much confusion in the authorities. But an entry by one without color of title, or claim of right, may subsequently become adverse by his acquiring and asserting a claim of title; and the statute will begin to run from the time of such assertion.[52]

§ 580. **Tacking.** When several adverse claimants unite their several possessions into one continuous term, this is called "tacking." Where there are several successive adverse claimants, the last one may tack the possession of his predecessors to his own, so as to make a continuous adverse holding for the

47 Howard *v.* Howard, 17 Barb. 285; Jackson *v.* Johnson, 5 Cow. 74; Bowman *v.* Lee, 48 Mo. 335.

48 Corning *v.* The Troy, etc., Factory, 44 N. Y. 577; Fugate *v.* Pierce, 49 Mo. 441.

49 Indianapolis, etc., R. R. Co. *v.* Ross, 47 Ind. 25; Cooper *v.* McBride, 4 Houst. (Del.) 461; Bedell *v.* Shaw, 59 N. Y. 46; Hudson *v.* Putney, 14 W. Va. 561. Compare Ford *v.* Holmes, 61 Ga. 419.

50 Thompson *v.* Pioche, 44 Cal. 508; Nowlin *v.* Reynolds, 25 Gratt. (Va.) 137. Nor can the successive possession of trespassers be connected to make the bar of the statute: Baker *v.* Hale, 6 Baxter (Tenn.), 46.

51 Thomas *v.* Babb, 45 Mo. 384; Farish *v.* Coon, 40 Cal. 33; Grube *v.* Wells, 34 Iowa, 148; Dow *v.* McKenney, 64 Me. 138. The text states the generally received doctrine but the cases, in many instances, make some fine distinctions, and the authorities are not in full accord with respect to the rights acquired by one who encloses and occupies land by mistake. See Warvelle on Ejectment, § 440, *et seq.* for a full discussion and collected cases.

52 Hamilton *v.* Wright, 30 Iowa, 480.

statutory period, provided there is a privity of possession between such occupants.[53] Such privity may arise from a parol bargain and sale of the possession of the land, followed by delivery thereof, as well as by a formal conveyance from one occupant to the other.[54] Actual possession by prior occupants claiming title, although having no color of title, will always avail a subsequent occupant under color of title, claiming under such prior occupants, in making out a possessory title in himself.[55] The element of continuity must appear, however, and several successive but unconnected disseizins or adverse possessions, though amounting in the aggregate to twenty years, or such other period as the statute may prescribe, can not be tacked together to make a continuous possession.[56]

§ 581. **Possession as Notice.** Possession, while it may not be "nine points of the law," always has been, and will doubtless ever continue to be, *prima facie* evidence of the highest estate in land, to wit, a seizin in fee,[57] and when open, notorious and visible, it has always been regarded as affording constructive notice to others of the occupant's title and equities.[58] For this reason, counsel, in framing an opinion of title, should always direct the attention of his client to the rights of the person in possession, if any, or suggest that an inquiry *in pais* be made as to present occupancy.

§ 582. **Who May Acquire Adverse Title.** One who enters into possession of land in subordination to the title of

53 Shuffleton *v.* Nelson, 2 Sawyer (C. Ct.), 540; Haynes *v.* Boardman, 119 Mass. 414; Alexander *v.* Stewart, 50 Vt. 87; McNeeley *v.* Langan, 22 Ohio St. 37.

54 Shuffleton *v.* Nelson, 2 Sawyer (C. Ct.), 540; Kruse *v.* Wilson, 79 Ill. 233; Weber *v.* Anderson, 73 Ill. 439.

55 Day *v.* Wilder, 47 Vt. 584. This has been held to be the case of one who held as heir of one who held adversely under mere claim of right: Teabout *v.* Daniels, 38 Iowa, 158.

56 Shuffleton *v.* Nelson, 2 Sawyer (C. Ct.), 540; Marsh *v.* Griffin, 53 Ga. 320; Pegues *v.* Warley, 14 S. C. 180.

57 Gulf R. R. Co. *v.* Owen, 8 Kan. 409.

58 Redden *v.* Miller, 95 Ill. 336; Pinney *v.* Fellows, 15 Vt. 525; Perkins *v.* Swank, 43 Miss. 349; Hoppin *v.* Doty, 25 Wis. 573; O'Rourke *v.* O'Connor, 39 Cal. 442.

another is estopped from denying that title, while he holds actually or presumptively under it; this is a fundamental rule of universal observance.[59] Yet a trustee may disavow and disclaim his trust;[60] a tenant the title of his landlord, after the expiration or surrender of his lease;[61] a purchaser the title of his vendor, after the breach of his contract by the latter; and a tenant in common, the title of his co-tenant; and drive the respective owners and claimants to their action of ejectment within the period of the statute of limitations. In like manner one who has possession of land under an agreement to purchase, which contemplates a continuing right of possession while the contract is being performed, and an absolute right of possession by virtue of its performance, may, on performance, deny the title of the vendor; and thereafter his possession will be adverse.[62]

A grantor remaining in possession would seem to be effectually estopped by the covenants of his deed, and such has been held to be the law,[63] yet in a number of instances a grantor who conveys by quit-claim deed only, by remaining in possession of the property and asserting a hostile claim, has been permitted to acquire a title against his grantee by virtue of the statute of limitations;[64] while some courts have even held that a grantor with warranty may, subsequent to the delivery of his grant, originate an adverse possession, and is not estopped from asserting the same by his covenant of warranty.[65] In any event the possession of the vendor cannot be ignored even though he

59 Wilson *v.* James, 79 N. C. 349; Clarke *v.* Clarke, 51 Ala. 498; Hatch *v.* Bullock, 57 N. H. 15.

60 Jamison *v.* Perry, 38 Iowa, 14.

61 Nellis *v.* Lathrop, 22 Wend. (N. Y.) 121; Mattis *v.* Robinson, 1 Neb. 5. Or by rescinding the lease and claiming a new title: Weichselbaum *v.* Curlett, 20 Kan. 709; as where the tenant purchased the property at tax sale.

62 Catlino *v.* Decker, 38 Conn. 262; Stark *v.* Starr, 1 Sawyer (C. Ct.), 15. The executed contract then becomes a sale and not merely an agreement to purchase: Ridgeway *v.* Holliday, 59 Mo. 444.

63 Van Keuren *v.* R. R. Co., 38 N. J. L. 165.

64 Dorland *v.* Magilton, 47 Cal. 485.

65 Sherman *v.* Kane, 86 N. Y. 57.

may have conveyed with warranty, and where he continues to occupy the premises all persons acquiring title from his grantee are chargeable with notice of the claims of the grantor and of his equitable rights.[66]

§ 583. **Remainder-men.** It is a well established principle that the statutes of limitation do not commence to run until the right of action or right of entry accrues. It therefore does not commence to run against a remainder-man until the termination of the precedent estate,[67] when the deed creating such prior estate is of record, or the party in possession has notice of its existence. But when a party has had the uninterrupted and undisputed possession of land for the statutory period, and during that time has paid all taxes legally assessed thereon, and has had neither actual nor constructive notice of a prior unrecorded conveyance creating a life estate with a remainder over to others, such possession and payment of taxes by him will be a bar to a recovery by such remainder-man, even though the full period of the statute has not elapsed since the termination of the life estate, and notwithstanding the fact, that the party so asserting title is, by the terms of such undisclosed deed, made a tenant in common with such remainder-man.[68]

§ 584. **Reversioners.** As against a reversioner there can be no adverse possession. It can only exist against one entitled to possession.[69]

§ 585. **Tenants in Common.** The general rule is, that the statute of limitations does not run as between tenants in common, for the reason, in part, that the possession of one, in contemplation of law, is the possession of all,[70] and this is

66 White *v.* White, 89 Ill. 460; Ford *v* Marshall, 107 Ill. 136.

67 Christie *v.* Gage, 71 N. Y. 189; Dugan *v.* Follett, 100 Ill. 581; Fogal *v.* Perro, 10 Bos. (N. Y.) 100; Carpenter *v.* Denoon, 29 Ohio St. 379; Gernet *v.* Lynn, 31 Pa. St. 94.

68 Dugan *v.* Follett, 100 Ill. 581.

69 Clark *v.* Huges, 13 Barb. 147; Gernet *v.* Lynn, 31 Pa. St. 94; Raymond *v.* Halder, 2 Cush. (Mass.) 269. The text states the general rule but exceptional cases may at times militate against it.

70 Dugan *v.* Follett, 100 Ill. 581; Ang. on Lim. § 422; Florence *v.*

especially so when all the parties derive title through the same deed or conveyance.[71] But if a tenant in common conveys the whole tract, by a deed which purports to include the entire estate, his grantee, if in possession, will hold adversely to the others,[72] while the possession of one of several tenants may become adverse, when his acts amount to an exclusion of his co-tenants.[73]

§ 586. **Persons under Disability.** A special exception has been made by the statute in case of infants, insane persons, and persons imprisoned on a criminal charge for any period less than life,[74] and their rights in land are not only protected during the period of disability, but for a certain period after the disability has ceased, or after the death of a person dying under disability. This period is usually fixed at ten years, but the statutes vary in this particular. It will be seen, therefore, that before any positive assurance can be entertained that a title has become perfect by adverse possession or prescriptive user, it must appear, not only that the property has been adversely held for the requisite time, but also that it has been held against some person against whom a prescriptive title can be acquired.[75]

But unless provided for in express terms this statutory exception does not have the effect of suspending the operation of the statute of limitations after it has legitimately commenced to run, and hence, if an adverse possession commence in the lifetime of an ancestor, it will continue to run against

Hopkins, 46 N. Y. 182; McQuiddy *v.* Ware, 67 Mo. 74; Aquirre *v.* Alexander, 58 Cal. 21.

71 Dungan *v.* Follett, 100 Ill. 581.

72 Clapp *v.* Bromagham, 9 Cow. 530; Florence *v.* Hopkins, 46 N. Y. 182; Rigg *v.* Fuller, 54 Ala. 141; Faulke *v.* Bond, 41 N. J. L. 527.

73 Florence *v.* Hopkins, 46 N. Y. 182. Though adverse possession and disseizin may not be in all particulars identical, their effect is the same for the purpose of terminating a tenancy in common: Millard *v.* McMullen, 68 N. Y. 345.

74 Married women are sometimes included in this exception.

75 Melvin *v.* Whiting, 13 Pick. (Mass.) 188; Arbuckle *v.* Ward, 29 Vt. 55.

the heir, notwithstanding any existing disability on the part of the latter when the right accrues to him or her.[76]

§ 587. **Married Women.** In the absence of evidence to the contrary the presumption of law is, that the possession of husband and wife in the joint occupancy of land as a home is the possession of the husband, but this presumption may be rebutted by a showing that the woman took and held possession in her own right and so continued to hold during the statutory period of limitation. If such is the case, her title, when once vested, canot be affected by any recovery in ejectment against the husband nor by any of his acts or declarations during the joint occupation.[77]

§ 588. **Adverse Rights as Against the State.** It is matter of common knowledge that statutes of limitation do not run against the State. That no laches can be imputed to the king, and that no time can bar his rights, was the maxim of the common law, and was founded on the principle of public policy, that, as he was occupied with the cares of government he ought not to suffer from the negligence of his officers and servants. The principle is applicable to all governments which must necessarily act through numerous agents, and it is essential to a preservation of the interest and property of the public.[79] It is upon this principle that in this country the statutes of a State prescribing periods within which rights must be prosecuted are not held to embrace the State itself,[80] unless it is expressly included, or the mischiefs to be remedied are of such a nature that it must necessarily be included. As legislation of a State can only apply to persons and things over which the State has jurisdiction, the United States are also necessarily excluded from the operation of such statutes.[81] But the State may submit itself to the operation of the statute, in which

76 Fleming *v.* Griswold, 3 Hill (N. Y.), 85; Jackson *v.* Moore, 13 Johns. (N. Y.) 513; Oates *v.* Beckworth, 112 Ala. 356; White *v.* Clawson, 79 Ind. 192.

77 Collins *v.* Lynch, 157 Pa. St. 246.

79 Gibson *v.* Chouteau, 13 Wall. 92.

80 Gardiner *v.* Miller, 47 Cal. 570.

81 United States *v.* Hoar, 2 Mason, 312; People *v.* Gilbert, 18 Johns. 228.

event the same rule as to ouster and possession will obtain where the State is the owner as would apply in the case of private parties.[82]

As adverse possession cannot run against the government, it logically follows that the claim can not be asserted against a grantee of the government, and mere possession of government lands, though open, exclusive and uninterrupted for twenty years, creates no impediment to its recovery by the government, or by one who within that period receives a conveyance from the government.[83]

§ 589. **Effect of Adverse Possession.** When title to land has been perfected by twenty years' adverse possession and enjoyment, it becomes equally as strong as one obtained by grant,[84] and creates in the person so asserting same, if otherwise unimpaired, a legal title to the fee which is effective for all purposes.[85] In many States, ten, seven or even five years' uninterrupted possession under color of title, coupled with acts of ownership, payment of taxes, etc., will, under the operation of the statute, cure defects in the instruments under which the entry was made, and bar all actions for the recovery of the land, thus securing to the occupier an indefeasible title

82 See, Schneider *v.* Hutchinson, 35 Oreg. 253; St. Paul *v.* Ry. Co., 45 Minn. 396; Green *v.* Irving, 54 Miss. 450. Consult local statutes.

83 Oaksmith *v.* Johnson, 92 U. S. 343. But while it is true that mere lapse of time and continuance of possession without pretense of title, or under pretense of a void title, can not be set up against the government, yet long possession is nevertheless a strong weapon of defense in the hands of one who can show reasonable proof that the title of the government has been parted with and has devolved on him; so held, where a patent had been issued to one, of lands then in possession of another, who claimed same by virtue of a selection by the State in lieu of section sixteen, but to prove which no primary evidence could be adduced. See Hedrick *v.* Hughes, 15 Wall. (U. S.) 123.

84 Sherman *v.* Kane, 86 N. Y. 57; Schneider *v.* Botsch, 90 Ill. 577; Bowen *v.* Preston, 48 Ind. 367. The presumption of a grant from adverse possession continued for the statutory term, is not founded on any probability of an actual grant, but is a positive rule established for quieting titles: Melvin *v.* Waddell, 75 N. C. 361.

85 Covington *v.* Stewart, 77 N. C. 148.

in law, no matter how defective the title of the grantor, or the instrument of conveyance, may have been.[86] This circumstance, in cases where no disability is shown to exist, is often of vital importance in passing titles otherwise defective and lays at rest a vast number of questions that frequently require long and laborious investigation to properly solve. The statutory requisites relative to possession and perfection of title must be fully ascertained, however, either by record evidence or otherwise before the bar of the statute can be relied on.

§ 590. **Proofs to Support Title by Adverse Possession.** When the title offered is adverse in its character, counsel should seek by inquiries *in pais* to demonstrate its validity before passing same. The highest and best record proof that could be adduced would be the judgment of some court of competent jurisdiction, either in an action of ejectment or a suit to quiet the title. A deed purporting to convey the title is next in order, while payment of taxes and the like still further tend to strengthen it.[87] Many of the facts which go to confirm an adverse title are not capable, however, of affirmative showing in an abstract, and evidence concerning them must, from the nature of the title, be disclosed *aliunde*.[88]

In an examination of title a much greater degree of strictness in the proof should be insisted upon than would be necessary to support a claim in a legal proceeding. In the latter case affirmative evidence is usually all that is required, but in the former, inasmuch as there is no one to present negative evi-

[86] Ryan *v.* Kilpatrick, 66 Ala. 332; Hunton *v.* Nichols, 55 Tex. 217; Stark *v.* Brown, 101 Ill. 395; Harris *v.* McGovern, 99 U. S. 161; Moingona Coal Co. *v.* Blair, 51 Iowa, 447; Jones *v.* Patterson, 62 Ga. 527.

[87] Paying taxes on land is not evidence of possession, but goes to show a claim of title: Paine *v.* Hutchins, 49 Vt. 314; Brown *v.* Rose, 48 Iowa, 231. But payment of taxes for a fixed period of years, coupled with possession and color of title, will by statute, in some States, confer a title commensurate with the deed under which entry was made.

[88] Consult Turner *v.* Hall, 60 Mo. 271; Howland *v.* Cemetery Assoc., 66 Barb. 366; Soule *v.* Barlow, 48 Vt. 132; Harnage *v.* Berry, 43 Tex. 567; Kerr *v.* Hitt, 75 Ill. 51.

dence, counsel should require the person asserting the title to satisfactorily show that no evidence of this kind exists; as, that the claim is not liable to be defeated by the infancy of heirs of the servient estate, or the lunacy or disability of parties who might, were it not for such disability, be able to establish a claim.

CHAPTER XXXII.

OPINIONS OF TITLE.

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§ 591. **Perusing the Abstract.** No specific rules can be laid down in regard to the perusal of an abstract by counsel, as this is something that depends largely on the habits and professional methods of the individual. "The perusal should, if the length of the abstract will permit of it," says Sugden,[1] "be finished at one sitting, although any difficult point of law, the whole bearing of which is not ascertained, may properly be reserved for further and separate consideration;" and this perhaps, will, to the majority of the profession, be found to be the method best calculated to produce satisfactory results. "It may sometimes be useful," says the same author,[2] to

1 Sugd. on Vendors, 10.
2 *Ibid.*

glance over the abstract in the first place, in order to obtain a general view of the title, and experience will rapidly point out when a subsequent part of the abstract may be looked into advantageously before its proper turn; but, speaking generally an abstract should be perused but once, and that once effectually. The party should never pass on until he thoroughly comprehends what he has already read; the advancing in a difficult title, in order to comprehend what you have passed and do not understand, often leads to insurmountable difficulties." The experience of the writer would indicate that the remarks just quoted are not without merit, but the difference in the plan of compilation, as well as the effect of the instruments with reference to registration, notice, and other incidentals not common to the English abstract, renders necessary a somewhat different course from that pointed out by Mr. Sugden.

The writer suggests, that whether the abstract be long or short, or whether the title be simple or complicated, a general perusal, in order to obtain a preliminary view should first be made. This perusal is only to establish the fact of an apparent chain of title from its source, the government, or from some person proposed in whom the title is assumed to have been vested. To assist in arriving at a correct estimate, an analysis of the abstract must always be made in intricate cases, and such a course will be found helpful in every case. Having established the fact of apparent title extending in unbroken sequence from the initial point to the person in whom it is last asserted, a critical review of every remove [3] must then be made to determine its effect and validity, in much the same manner, though not for the same purpose, as the English counsel examines the muniments. All defects, whether of form or substance, are noted upon the analysis just mentioned, together with notes of discrepancies, objections and requisitions for further information. It would be unwise, however, to lay down

3 For want of a better name, each link in the chain, whether by deed, will, mortgage, lease, etc., is called a "remove," and the removes are all numbered *seriatim* from the beginning, and referred to by number whenever occasion calls for reference.

any unvarying rule for a matter of this kind. Men's minds are not alike, and the methods that insure the best results in the case of one, may be entirely inadequate in the case of another. The counsel's personal professional habits will, after all, be the best guide, but should he have no decided habits of professional thought or study, it is believed the course indicated in this chapter will enable him to form better opinions, and arrive at more satisfactory conclusions, than can be attained by any haphazard or undefined methods.

§ 592. **Note Taking.** The real utility of note taking, as an aid to study or investigation in any pursuit, must ever remain an open question, yet it can not be denied that in the examination of complicated titles the use of notes is, in a majority of cases, of undoubted benefit, as well in unraveling a tangled chain as in framing subsequent opinions. In the judgment of some writers, counsel will find it the best and surest method of arriving at a just conclusion, to trust to his view of the title on the face of the abstract itself, without incumbering himself with or relying upon notes,[4] they being regarded as unnecessary details which often serve to distract the attention.[5] Properly and methodically used, however, notes will usually be found an important aid, while in complicated cases they appear almost indispensable. Particularly is this true in making an

[4] Sugd. on Vendors, 10 (Am. Ed.).

[5] The prejudice which exists among many distinguished members of the profession against the use of notes as an aid to study or investigation, refers more particularly to common-placing and abridging, and though this was recommended by the earlier writers, notably Fulbeck (1599), Sir Matthew Hale (1688), and others of later periods, as Mr. Hoffman, in our own time and country, yet modern writers like Mr. Warren, Mr. Bishop, etc., strongly condemn the practice. Mr. Bishop says that if he wishes "to *remember* a thing, the last method available is to commit it to paper. This is, with me, to put it out of the jurisdiction of the memory." This prejudice, however, is mostly in regard to note-books as a means of assisting the memory, and the author last quoted admits the utility of notes taken by a lawyer in looking up a question on which to advise a client, or references which will enable him, if litigation is afterward carried on, to go on with the case without a fresh search. See Bish. First Book of the Law, § 423.

analysis of title, where the interest of every person connected with the title, or possessing any rights in the land, must be ascertained at every remove, and notwithstanding the fact that so high an authority as Mr. Sugden condemns their use, the American counsel will find that in a majority of instances he must resort to them or run the risk of overlooking some important matter in making up his final estimate of title and framing his opinion.

§ 593. **Examination of the Muniments.** In addition to the general survey of title from all the instruments and proceedings, each particular step must be examined technically and critically, and its own sufficiency or insufficiency passed upon. Under the English system this would consist of a comparison of the original instruments with the abstract,[6] but this task under the American system, is supposed to have been satisfactorily performed by the abstract maker, and all that counsel is expected to do is to see that the instruments as they are presented are sufficient in form and substantially correct. This task is the most arduous part of the examination, for the sufficiency of every instrument and proceeding must not only be investigated with respect to itself but frequently with reference to numerous other instruments in the chain and sometimes in connection with matters not disclosed by the abstract.

Thus, a deed, by the donee of a power under a will to dispose of the property by last will and testament, he having also the use of the land for life, presents two distinct phases. In the first place the instrument itself must be considered with reference to its formal parts; its date; registration; estate conveyed — a most vital point; execution, etc. Viewed only in this

6 The duty of a solicitor in examining an abstract is thus summed up by Mr. Dart. He says: "The object of the examination is to ascertain, 1st, that what has been abstracted is correctly abstracted; 2ndly, that what is omitted is clearly immaterial; 3dly, that the documents are perfect as respects execution, attestation, indorsed receipts, registration, stamps, etc.; and 4thly, that there are no indorsed notices, nor any circumstances attending the mode of execution, attestation, etc., etc., calculated to excite suspicion." Dart on Vendors, 381.

light it may be insufficient as failing to disclose the intention of the donee to execute the power, and though purporting to convey the fee, conveys only the life estate of the grantor.[7] In the second place, the deed must be construed in connection with the will granting the power, and its legal sufficiency considered in relation to such will, presuming that in form it is unimpeachable and fully discloses the power and evinces the intention of the grantor to work under it. Now it is a vexed question as to whether it is possible for the donee of a power to make any disposition of the subject of the power save in the manner indicated in the instrument, granting same.[8] An important question is here presented, therefore, and upon its solution depends the validity of the proffered title. The donor of the power intended that it should be executed by the will of the donee; he has attempted to execute it by deed.[9] Here counsel must refer to the will and to the grant of the power therein, and the two must be carefully considered in relation to their effect upon the title. This is but an instance, but it is sufficient to illustrate the matter and to show the importance of this branch of the examination as well as the care and attention that must be bestowed upon it.

7 Dunning *v.* VanDusen, 47 Ind. 423; Jassey *v.* White, 28 Ga. 295; and see Funk *v.* Eggleston, 92 Ill. 515. In order to execute a power it is not absolutely essential that a deed should recite or even refer to the power, where it was manifestly the intention of the party to execute the power. But where the maker has an estate which will pass without executing the power, and the instrument is silent on that point, as in the case supposed, the law will presume that he intended to convey such estate and no more: See, Pease *v.* Pilot Knob Iron Co., 49 Mo. 124.

8 See § 392 for a discussion of this subject.

9 The courts in England, and very generally in this country, have determined that when a power is to be executed by will, the donor intended that it should remain under the contract of the donee "to the moment of his death." And the authorities are numerous, and uniform, in enunciating the principle that the donee can not enlarge and amplify the scope of the power, but must be strictly controlled in its execution by the declared intention of the donor; and that a power to be executed by will can not be executed by deed, and equity will not relieve if the attempt is made: Reid *v.* Shergold, 10 Ves. (Eng.) 370; Wilks *v.* Burns, 60 Md. 64.

§ 594. **Examination of Deeds.** It is not proposed, nor is it necessary, to recapitulate all that has preceded relative to the formalities or legal effect of instruments and proceedings offered in support of title, but it may be well, at this point, to briefly call the attention of counsel to the prominent features thereof as they are presented in the abstract. After a proper inception of title has been shown, or where same has been satisfactorily established in some person at some definite period, either by assumption or investigation, the first duty of counsel is to see that the course of title is uninterrupted from that person and period. For this purpose he should observe the names of parties and dates of instruments down through the entire chain, and note all places where the chronological sequence is broken or in inverse order. This, with a general view of each instrument, constitutes the preliminary survey. An analysis of the abstract, if it be long or the title complicated, must now be made, and the sufficiency and effect of every remove noted therein. Again returning to the first instrument he should read the same carefully, observing the following points, which, for greater certainty, it is well to put interrogatively.

The parties: are they properly named and do they include all who by the initial matters are shown to possess title or interests?[10] Have they all executed the deed, and is the execution correct in form? Observe in this connection any apparent differences in the orthography of names as shown in prior or subsequent conveyances, and in case such differences appear, make a requisition for further information disclosing identity. See that correct *descriptio personæ* accompanies the names as indicative of capacity, domestic relations, etc. Where one conveys alone, no clue being given as to his domestic status, an inquiry as to marriage can never be safely omitted. In

10 The legal effect of the matters mentioned in this section have all been discussed in other parts of the work and the authorities relating thereto given. The reader is referred to the various heads, and subdivisions under which they will severally be found for extended discussions.

case of corporate conveyances, require, if necessary, additional evidence relative to the power of the corporation to receive, hold and convey, as well as to show proper execution. If the deed is the act of a municipality the resolution of authority must appear; if it does not a requisition for same should be made.

The estate: what estate purports to be conveyed? If the entire estate, observe by reference to prior conveyances what estate is held by the grantor, for he can convey no more than he possesses, whatever be the form of words used. Is it incumbered by expressed or latent liens? Has the right of dower, in a proper case, been relinquished? Have the homestead rights been waived? and if attempt has been made in either case, has it been successfully accomplished? If the abstract fails to disclose these facts, make a requisition for further information.

The property: does the description correspond in essential parts to the caption of the abstract, or to the subject of the examination? Does it correspond with prior conveyances? Observe carefully for omissions and misdescription.

The covenants are not essential to title, and, being simply for the further assurance of the purchaser, may be disregarded except when they become necessary to show an estoppel.

The conditions are important; observe in what manner they may affect title by reason of non-performance or breach. Do they disclose a possibility of divesture of title at some future period, or confer upon the grantor contingent reversionary rights of re-entry or forfeiture? Do they create a conditional limitation? If the deed itself is the result of prior agreement, does it substantially conform to such prior agreement as shown? This inquiry is not always important, but may become so.

The dates: compare the dates respectively, of execution, acknowledgment, and registration. Do they show a proper correspondence? Compare these dates with those of prior and subsequent conveyances. In case of conflicting titles from the same source, this may become very important in the solution of questions depending on priority.

§ 595. **Examination of Legal Proceedings and Judgments.** So much has been said upon this subject in the preceding chapters that little remains without indulging in repetition, yet, as it has long been customary in nearly every part of the country to look solely to deeds as evidences of title, it is the desire of the writer to strongly impress upon the minds of examiner and counsel that all conveyances resulting from legal proceedings, aside from their *prima facie* quality, are valueless as evidence without proof of capacity in the grantor, and this can come only from the fact of jurisdiction in the court pronouncing the judgment or decree. Should evidence of this fact be wanting, a requisition must be made for further information concerning same, and in no case should a deed made in pursuance of a judicial sale be passed without full proof of its validity.

Where official deeds of any kind are, by statute, made presumptive evidence of their own validity and of the validity and regularity of the anterior proceedings upon which they rest, and counsel relying on the *prima facie* evidence thus presented dispenses with proof of prior regularity and jurisdiction, prudence, as well as fair dealing, would suggest that special reference to such facts be made in the opinion, that the client and his assigns may know that the title passed is a *prima facie* title only, and has not been demonstrated.

In the preliminary measures to all execution and judicial sales counsel will first observe that the proceeding is apparently regular and formal; this is not vital, but may in some instances suggest an inquiry that requires answer. Next, he should observe, the parties: do the names in process, pleadings and judgment correspond? Has there been a personal appearance, or was the judgment taken on default? If the latter, does the abstract show a due and legal service of process, either personal or substituted? The subject-matter: do the pleadings disclose a cause of action within the jurisdiction of the court? The judgment or decree: is it regular in form, *i. e.*, definite, certain, etc.? Does it correspond with the process and pleading, *i. e.*, parties and allegations? The sale: is it

warranted by the prior proceedings? Is the selling officer clothed with proper authority? Was it conducted according to law?

With respect to judgments *in personam:* observe the names of defendants or judgment debtors; are they identical with those of the persons who now own the land, or who at some former period have held title or possessed equities capable of being reached by execution? Resolve any doubts that may arise by a requisition. Affidavits of identity and disclaimer are about the best available means for determining this point. A certificate by plaintiff's attorney, when such can be procured, will also serve to remove doubts concerning the identity of persons bearing the same name. Is the judgment still a subsisting lien? Was execution issued within a year from rendition? If dormant, has there been a revivor? If against a party in interest has it been appealed from? An appeal does not destroy the lien but may act as a supersedeas. If it is a subsisting lien provision should be made for its satisfaction before accepting title.

§ 596. **Marginal Notes and Requisitions.** It will be remembered that in England the abstract is compiled almost entirely from original documents, and that devious courses as well as intervals of title are supplemented and filled up by matter which to the American examiner would be entirely extraneous. So the English counsel, as he proceeds in the perusal, frequently calls, in the margin,[11] for evidence of facts which he supposes may be material and will readily be produced, and further notes such objections to the vendor's title as he thinks proper; all of which must be satisfactorily met and answered by the vendor and his solicitor. In a less degree, the same procedure may be followed by the American counsel, though many of the "requisitions" necessary to the proper elucidation of an English title are unnecessary in the

[11] The English abstract is frequently written upon a sheet with four margins (so called), the outer left hand one being left clear for the observations of examining counsel. The calls and requisitions made on this margin thus become a part of the abstract.

United States by reason of our system of registration and its attendant doctrines of notice and estoppel. Where, however, an apparent descent occurs in the abstract, and a deed is shown purporting to be executed by the "heirs at law" of the person last seized, a call should be made for further inquiry or evidence touching the legitimacy of the claim of title thus asserted. So, too, of a partition among heirs, by the mutual interchange of deeds, in which minors' rights may be affected.

Frequently a death is suggested inferentially, as where a man and wife convey, and on subsequent revesture of title the man alone executes a deed. In the same way a marriage may be suggested, and in every case, where an individual conveys with no words descriptive of the person, inquiry should be made in regard to marriage.

American abstracts are not made with a "margin," however, and the little strip on the left hand side of the sheet was not left to write or scribble on, nor should the examining counsel use it for that purpose. If by chance, or sheer perversity, he should do so, his writing should all be erased before the abstract leaves his hands, that what he has written may not confuse others or be mistaken for the work of the abstract maker. Objections may be noted on his analysis, or preserved on separate sheets, and when required for use may be formally drafted and annexed to the abstract, or embodied in his opinion. Even in England, where the custom originated, it seems to be generally discouraged by modern conveyancers and solicitors, as will be seen by the next paragraph.

§ 597. **Continued.** The American system of title abstracts, or at least that expounded in this work, does not contemplate the marginal divisions used in the compilation of English abstracts, and hence, the only margin is the narrow strip on the left hand side of an ordinarily ruled page of legal cap, which is often used for lead pencil memoranda, all of which should be erased before the abstract is returned to the client. It would seem to be the present custom of English counsel to make their formal requisitions on a separate sheet of paper, which has been divided longitudinally by being folded down the middle. Upon the left half of this sheet, counsel,

from the notes taken in the course of perusing the abstract, draws his questions, inquiries, objections, etc., and delivers the same for answers. The vendor, or his solicitor, then peruses the requisitions, and proceeds to the reply to them on the right half of the sheet, the questions and answers being numbered in consecutive order, and the replies, so far as practicable, being written opposite to the requisitions. It is not thought that this is practiced to any considerable extent in this country, or at least, if practiced, it has never been brought to the attention of the writer. In a modified form it might be found useful.

The method may be of advantage to American practitioners; therefore a form, taken from Ball's "Popular Conveyancer" (London, 1877), is given herewith.

BROWN *to* JONES.
Requisitions on Title and Replies thereto.

Requisitions.	*Replies.*
1. The lease of the .... day of ...., 18.., does not appear to have been registered. This should be done; the reference should be supplied.	1. This lease was registered. We can not give the reference, but it can readily be ascertained by the usual search. See clause — of contract.
2. The license to underlet given by .... to ...., and dated the .... day of ...., 18.., must be delivered up on completion, and the vendor must obtain the requisite license for the present assignment.	2. This will be done.
3. The assignment dated the .... day of ...., 18...., and made between .... and .... purports to assign the term from 29th September, 1866, whereas the original term is from 29th September, 1863. How is this accounted for?	3. This is an error. The term is from 29th September, 1863, and the assignment referred to in the requisition is of the residue of the term.
4. Is the vendor, or are his solicitors, aware of any charge or incumbrance, or other matter affecting the premises sold which is not disclosed by the abstract?	4. No. It is presumed that the purchaser will make the usual searches.
ANDREW ABBE, Solicitor for Purchaser. (Dated)	CHARLES & DARWIN, Solicitors for the Vendor. (Dated)

It will be observed the example just given is of requisitions and replies upon a leasehold title.

§ 598. **Answers to Requisitions.** "A purchaser is entitled," observes an English writer,[12] "to be furnished with evidence of facts material to the title, whether such facts are to be used as positive or negative proofs, and the vendor is bound to answer, to the best of his knowledge, any relevant question upon the subject of the title, and to furnish such evidence as may be in his power; but the purchaser must confine his questions to some particular defect, and not call for a general explanation of matters which he may consider require to be explained."[13] The foregoing remarks, though made in relation to the English laws on the subject of sales of real property, are not without some force in the United States, but, as a rule, and unless the agreement for sale otherwise provides, the purchaser is entitled to a full disclosure of everything in any way material, and the evidence should, so far as practicable, enable the purchaser to deduce a marketable title of record. Where affidavits, or other instruments are furnished in answer to requisitions, such instruments should be recorded, if accepted, as they then constitute a part of the muniments of title.[14] Statements not under oath or not attested by any solemnities are too unsatisfactory, even though reduced to writing, though sometimes from necessity, or under a choice of difficulties, letters are admissible to supply information or furnish data for missing facts. Certificates, particularly when

12 Seaborne Vend. & P. 175.

13 Green *v.* Pulsford, 2 Beav. (Eng.) 70; Pearse *v.* Pearse, 1 DeG. & S. (Eng.) 12. These matters are usually arranged beforehand by what is called the "Conditions of Sale," an instrument resembling what is known in this country as a "Contract for Sale," (not "Agreement to Deed") but much more circumstantial and explicit.

14 As suggested, in another place, after all inquiries have been made and requisitions supplied, the matter thus obtained, or such portions as are susceptible, should be recorded, and a supplemental abstract of same made and appended to the original. This would make, so far as may be, a perfect and coherent title, and is preferable to an opinion showing all the defects, which must be remedied afterward.

made in the line of official duty, may be received, and for many purposes they would be *prima facie* evidence of the facts recited.

§ 599. **Affidavits of Pedigree.** Frequent allusion has been made in this work to titles asserted by descent, in which no probate or other court proceedings have been had and the unsubstantial and unsatisfactory nature of such titles has been duly considered. As before remarked, it is customary for counsel to call for additional evidence in such cases as to the right of the party asserting title to make a deed, and this is usually supplied, in the absence of better testimony, by *ex parte* affidavits of pedigree. Facts involved in a question of pedigree should, whenever practicable, be stated upon the personal knowledge of the affiant, but may be established by proof of general reputation in the family, or even by proof of what deceased members of the family may have said.[15] From the necessity of the case, hearsay evidence of certain kinds is admissible in establishing matters of this character, because it is the best of which the nature of the case admits,[16] but such evidence is restricted to the declarations of deceased persons who were related by blood or marriage to the person from whom the descent is deduced.[17]

An affidavit of pedigree may be prepared in manner following:

State of Illinois
County of Cook } *ss.*

Thomas Jones, being first duly sworn, on oath says: That he was well acquainted with James Smith in his lifetime; that said James Smith died at the City of Chicago, Ill., June 1, 1904. That said James Smith was married but once and then

15 Harland *v.* Eastman, 107 Ill. 535; Eisenlord *v.* Clum, 126 N. Y. 552.

16 Harland *v.* Eastman, 107 Ill. 535; Blackburn *v.* Crawford's Lessee, 3 Wall. (U. S.) 175.

17 Blackburn *v.* Crawford's Lessee, Wall. (U. S.) 175; Harland *v.* Eastman, 107 Ill. 535; 1 Greenl. Evidence, § 103; 1 Tayl. Ev. § 576.

to Sarah Williams; that three children were born of the marriage, to wit; Andrew Smith, a son, who died in the lifetime of said James Smith, unmarried and without issue; Thomas Smith, a son; and Sarah Smith, a daughter, now the wife of William Jackson. That at the time of his death said James Smith left him surviving his widow, Sarah Smith, his son, Thomas Smith, and his daughter, Sarah Smith (Jackson), his only heirs at law and next of kin.

(Jurat.) *(Signed) Thomas Jones.*

To the foregoing should be added such facts as to counsel may seem material in the particular case, but the recitals above stated are all that are essential to show a valid descent to lineal heirs. Where the decedent was unmarried, and the descent is claimed by collateral heirs, more detail will be necessary. In such case the affidavit must show the death, marriage and issue of the common ancestor as well as the death, without issue, of any one who otherwise might have participated in the inheritance. The example above given will serve to indicate the manner of framing such an affidavit. Whenever the affiant is a member of the family, or is related, either by blood or affinity, to any of the parties, or where special circumstances have given him opportunities for knowledge of a family history, it is always well to incorporate the fact in the affidavit.

§ 600. **Analysis of Title.** Every person who has ever attempted to critically examine an abstract consisting of twenty removes, or more, must have experienced some difficulty in endeavoring, while grappling with a present question, to still keep in view the past course of title, or to apply it toward the solution of the question under consideration. A master mind, possibly, might be able to successfully encompass the matter and from chaos bring order with no external aids, but to the average lawyer some assistance is frequently indispensable, and this may be obtained by making, what may be called an analysis of the title, as he proceeds in its perusal. This is accomplished by a chain, on which is noted the condition of the ownership of the land after every conveyance, and is a sort of

balance sheet which shows the state of the title at every stage. For tracing minute, varied, or numerous ownerships, it can not be well dispensed with, and its use can frequently be advantageously supplemented by sketch maps of the land itself.

It is believed that no better plan exists for preserving at every stage of the title the true interests of the parties, than by reducing them, at every step, to a common denominator. Should any of the parties in interest by inadvertence, mistake or design, convey more than his or her respective share, or intending to convey all, should convey less, the error, mistake or fraud is instantly detected, and the confusion which necessarily must prevail in subsequent conveyances, will not serve in the slightest to distract the attention of counsel or set him trying to reconcile the irreconcilable by making six go into four. As an illustration, take the case of a manufacturing site in a city. In the course of business, many partners come and go. Some own large interests, some small. They trade among themselves and purchase interests from each other. All the interests are undivided. The purchasers buy interests in the business, but incidentally they purchase corresponding interests in the real estate as well. It will take but a short time to thoroughly complicate such a title, as a demonstration will show. Suppose the abstract revealed substantially the following facts:

Nos. 1 to 5 show a conveyance from the government, and a regular investure of title with unbroken chain to A. B.

No. 6. A subdivision by A. B. (Now trace one lot.)

No. 7. A. B. to C. D., undivided one half.

No. 8. C. D. to E. F., undivided one fourth.

No. 9. E. F. to G. H., undivided one eighth.

No. 10. A. B. to G. H., undivided one half.

No. 11. C. D., E. F. and G. H., a mortgage to O.

No. 12. C. D. to E. F., undivided one half of one half.

No. 13. C. D. to I. K., undivided one half of one half.

I. K., the last grantee, now desires to have his title examined with the result shown in the following analysis. This analysis takes no note of errors, but is simply to separate and keep distinct the various ownerships:

ANALYSIS OF TITLE.

to

Lot 6, Block 42, original Plat of the City of Kenosha, Wis., as shown by the annexed abstract. The numbers correspond to the numbers of the removes as shown in the abstract.

The ownership of said lot after each of the conveyances mentioned in said abstract was as follows:

1 to 6	*Numbers 1 to 5 show regular investure of title in A. B. No. 6 a subdivision by him, Lot 6 being shown on plat of such subdivision.*		
7	*A. B.,* 1/2 *C. D.,* 1/2	*All.*	*Sept. 1, 1858.*
8	*A. B.,* 1/2 = 1/2 *C. D.,* 1/4 = 1/4 *E. F.,* 1/4 = 1/4	*All.*	*Dec. 13, 1858.*
9	*A. B.,* 1/2 = 1/4 *C. D.,* 1/4 = 1/8 *E. F.,* 1/8 = 1/16 *G. H.,* 1/8 = 1/16	*All.*	*Feb. 14, 1859.*
10	*C. D.,* 1/4 = 1/8 *E. F.,* 1/8 = 1/16 *G. H.,* 1/8 and 1/16 = 3/16	*All.*	*May 10, 1859.*
11	*Mortgage.*		
12	*E. F.,* 1/16 and 1/16 = 1/8 *G. H.,* 7/8 = 7/8	*All.* *Subj. to mortgage.*	*Aug. 27, 1859.*
13	*E. F.,* 1/8 = 1/8 *G. H.,* 7/8 = 7/8 *I. K.,* 1/8 = 1/8	*All and 1/8 excess.* *No title in I. K.*	*Jan. 9, 1860.*

The foregoing illustration is necessarily brief and simple. In practice, much more difficult problems are presented, as where the abstract consists of from forty to fifty removes, each one of fractional interests, and not in the easily understood parts shown in the example, but of ninths, fifteenths, etc., until the chain presents one bewildering maze of diverse fractional interests. In no other way known to the writer can these unevenly balanced interests be harmonized and presented in tangible shape than by the method of reduction above indicated. Counsel can then see at a glance the actual interest of

every owner at every stage of the title. He can tell if any have conveyed more than they possessed, as well as whether any interests yet remain in parties who, supposing they had divested themselves of all title, no longer claim ownership; and the further fact, in whom the present title of the premises rests, and the extent of the ownership of each person.

Thus, in the example, I. K. took nothing by his deed, yet supposing that he had in time purchased other interests, and bought and sold from and to others of the present parties, as well as new parties who subsequently came in, this surplus one fourth, or, as it might be in actual experience, one sixteenth, or even a smaller interest, or a fractional part of a fractional part, would have become strangely blended with the legitimate interest. However correct the opinions of Mr. Sugden in respect to note taking on the perusal of English abstracts, it must be apparent that notes of some kind can not be well dispensed with under the American system, and of all the devices to trace title, none can compare in simplicity and thoroughness with the simple "analysis" above presented.[18]

§ 601. **Analytical Chains.** Even when the title is not

[18] Mr. Greenwood, an English writer on conveyancing, says he "has found it a convenient course in perusing an abstract to take a sheet of paper with a double margin and insert the date of the deed in the left hand margin, and on the opposite side put such part of the deed as is necessary to show the devolution of the title and any special clauses or stipulations, leaving the right hand margin for notes and queries. It may sometimes be convenient to keep the devolution of the legal and equitable estates separate. This will depend on the title; but it is always the best course in perusing an abstract to show the devolution of the title to any attendant term of years on a separate sheet of paper. All this may be done very briefly; it is only necessary to make a note in the margin opposite any particular clause or matter, in order that attention may be readily called to it afterward, as perhaps the next or a subsequent deed may have the effect of disposing of the point; and should this be so, it is a good plan to insert a note in the margin of the analysis under the defect previously noted, and thus many of the points it has been found necessary to raise will be disposed of, and those not cleared up will form the material for requisitions on the title." Greenwood's Conveyancing (6th Ed.), 46.

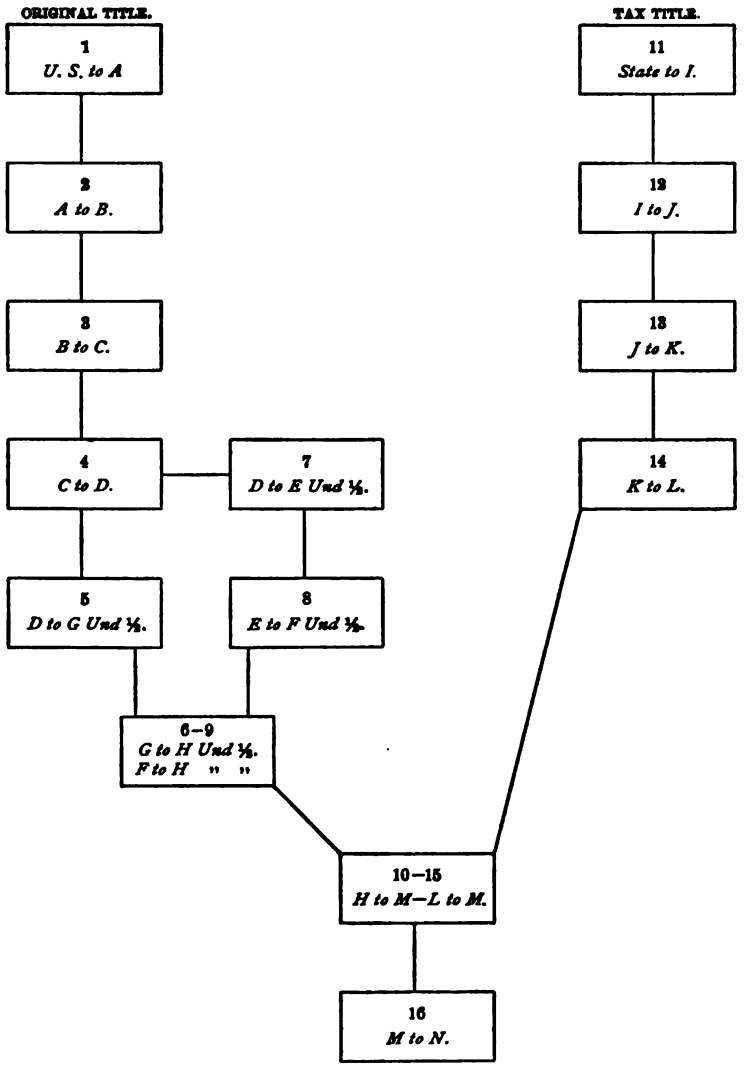
complicated by a multiplicity of small ownerships, if it be long drawn out, that is, extending over a long period of years and passing through many hands, some kind of chain is generally of material assistance in keeping the course of title prominently before the examiner, and prevents frequent recurrence to parts of the abstract that have already been passed over. This can be fairly accomplished by an analytic, or in one sense synthetic, chain, showing all the conveyances and their connection with each other. Whenever an adverse title intrudes, this chain will be a great help, both in keeping the titles separate and in showing their general course, and, if that event occurs, their ultimate union. This chain may be prepared and used in connection with the analysis of title described in the last section, or it may be compiled on a separate sheet, and each used to supplement the other.

The chain may be constructed in any manner that will best serve to accomplish the desired purpose, but a very simple method is to make a geometrical diagram, the instruments being represented by quadrangles, and the connections and course of title by straight lines. This method has the merit of simplicity, and presents at a glance the general course of title in a very clear and concise manner. The quadrangles bear numbers with reference to the abstract, and may be further distinguished by the names or initials of the parties and the dates of transfer. As a mechanical assistance in making this analysis a rubber stamp may be employed for marking the squares, the specific matter being filled in with a pen.

A chain presenting few difficulties might be made somewhat in the following manner. In this example the dates are omitted, but, when this form of analysis is the only method employed, it is suggested that they be inserted.

§ 602. **Sketch Maps.** The great aid derived from sketch maps has several times been alluded to during the progress of this work, and in all cases of "snarls" in the description of land, as well as in keeping counsel posted on the relative dimensions of the property conveyed at each successive remove, they are invaluable. Their aid is more frequently invoked in

ANALYSIS OF TITLE
to
Section 10, T. 1 N., R. 23, E.



abstracts of what are popularly termed "agricultural lands," or lands which are still referred to by the descriptions furnished by the government surveys, but they will be found equally useful in tracing title to all land sold by metes and bounds, and which has never been the subject of formal subdivision into blocks and lots.

To successfully employ these maps, it is necessary that counsel should possess a little knowledge of surveying and understand the use of a protractor and a few other simple instruments.[19] A tracing of the government survey will be found very convenient in all examinations, and if counsel is unable to procure such tracing he should request the examiner to furnish a sketch of the survey in connection with the abstract. In like manner, should he feel inadequate to the task of preparing sketches of the property, arrangements should be made with the examiner to furnish them. In no case should he dispense with their services unless he thoroughly understands the condition of the property both topographically and with reference to its superficial measurements, and in every case where it can be done, the sketches should be made by himself rather than by an assistant, as the work of figuring out the dimensions, tracing the courses, and locating the monuments is of incalculable value in arriving at a proper conclusion and a thorough understanding of the "lay of the land."

The maps or sketches should be preserved with the analysis and other memoranda, or turned over to the client in connection therewith if such should be the understanding. In case they are given to the client the particular tracts under consideration should be colored or shaded, to distinguish them from other parts of the map, and the dimensions, whenever practicable, should be marked on the lines or courses.

§ 603. **Preservation of Memoranda.** "It is desirable,"

[19] Mr. Curwen recommends only a semi-circular protractor, a pair of dividers, and a scale of equal parts. A scale divided into fiftieth parts of an inch he recommends as most convenient, on account of the accuracy with which, by means of it, links, being the hundredth parts of a chain, can be measured. See Curwen on Absts. 21.

says Mr. Lee,[20] "that the purchaser, if his contract is completed, should carefully preserve not only the abstract itself, but all queries and objections, with the answers or statements made respecting the title, as, after a lapse of time, these observations and answers may of themselves be of some weight in determining future questions." The reader will understand however, that answers and statements made in response to queries and objections, play a far more important part in the acceptance of English titles than they possibly could in the matter of American titles. The statements are signed by solicitors or parties making them, and are regarded for certain purposes as a part of the abstract to which they are usually annexed.

Under our system the only memoranda that could be of material value to the purchaser would consist of the analysis of the abstract, or of the title, and these, when properly and carefully made, would undoubtedly be a desirable acquisition and well worthy of preservation. They would not only be of great assistance to the purchaser by enabling him to peruse the abstract intelligibly at his leisure, but would also tend to materially reduce the expense of subsequent examinations. But, being the private memoranda of counsel, he would, of course, be under no obligation to deliver his notes to the client, however valuable they might be, as his opinion is all that is asked and presumably all that is paid for. The methods by which he arrived at such opinion, or the instrumentalities employed, are his own property to be given or withheld as he may see fit. The writer suggests, that in all cases they be retained by counsel, as not infrequently occasions for their consultation will subsequently occur. In his own practice he has found it convenient to keep a blank book in which has been preserved his notes of examinations. On the left hand page is placed the analysis of the abstract and on the opposite page the objections, queries and requisitions for further information, together with his notes and observations. Whenever questions have afterward

[20] Lee on Absts. * 3.

arisen with respect to the opinion rendered on the title, the matters thus preserved have been found of very material assistance. Another advantage will be found, in the aid such memoranda may afford in subsequent examinations of the same property or parts thereof.

§ 604. **Passing the Title.** In examining a title, counsel is frequently compelled to admit evidence which, although it may be satisfactory as a proof of the fact, yet would not be received in a court of justice; for example, affidavits as to facts disclosed inferentially, and to prove deaths, marriages, etc. Such affidavits, though inadmissible under the rules of evidence, are valuable from the reason that they show that living persons can at the time establish the facts therein recited. On the other hand, in receiving evidence admissible at law, counsel is compelled to submit the latter to a severer test than it would be subject to upon an ordinary trial, for it is not a contest between two litigants which has the better title, but a calm consideration by a man in his chambers, whether the seller's title is a safe one against all the world.[21]

§ 605. **What Constitutes a Valid Title.** In the absence of any stipulations to the contrary the vendor, in every contract of sale, impliedly undertakes to furnish to the purchaser a marketable title.[22] It is for the purpose of determining this

21 Sugd. V. & P. 16.

22 The remarks of an eminent English writer upon this subject may not be uninteresting. Mr. Lee says: "Under the term purchaser, the law generally includes, a mortgagee, and also a lessee, to the extent of their respective interests; to that extent they are purchasers; but the rules of law and the evidence of title, as they relate to a lessee, are very different from the rules and the evidence relating to a purchaser in the common acceptation of the term, as likewise to a mortgagee; but the title and evidence usually required on behalf of a purchaser and a mortgagee are nearly similar. Some books indeed have stated that a purchaser, commonly so called, should require the strictest evidence of title, because all his interest depends upon his power of making out a strict title on a future sale; and that a mortgagee, seldom advancing money to the full value of the estate, may well dispense with the most complete evidence of title, as an imperfect title might probably fetch the amount of his advances. Others say that, as a mortgagee can never gain anything beyond the amount of the money lent, he

quality in regard to the proffered title that counsel is asked to investigate it prior to the consummation of the sale. "I am of the opinion that John Smith possessed a good and valid title," etc., is a familiar expression in attorney's certificates of opinion, and they are the controlling words that induce the purchaser to accept the vendor's deed. Therefore the inquiry, what is a "good and valid" title is pertinent in this connection. It may be briefly stated in answer, that the title disclosed should extend to show a full and perfect right to property and present possession vested in the vendor.[23] It must also embrace the entire estate or interest sold,[24] and that free from the lien of all burdens, charges, or incumbrances,[25] and should not only be free from litigation,[26] but from palpable defects[27] and grave doubts.[28] It should consist of both the legal and the equitable titles,[29] and be fairly deducible of record.[30] It may still be a valid title, even though charged with incumbrances,[31] but in that event the opinion should discriminate and the title, if otherwise unimpaired, must be certified as "subject to the lien," etc., of the incumbrance. The terms of the contract of sale will, in many instances, determine the question of title when raised, but ordinarily, while a purchaser will not be compelled to accept a title palpably defective, he can not justify his refusal to accept by mere captious objections, nor is it sufficient for him, when the jurisdic-

ought to run no risk of losing that, not even the slightest; that a purchaser takes the estate for better and for worse, and therefore, rather than reject a title for want of sufficient evidence, he may be sometimes advised to take it, and speculate for a rise in value." Lee on Ab. (Eng.) * 18.

23 Delevan *v.* Duncan, 49 N. Y. 485; Davis *v.* Henderson, 17 Wis. 105.

24 Taft *v.* Kessel, 16 Wis. 273.

25 Roberts *v.* Bassett, 105 Mass. 407; Jones *v.* Gardner, 10 Johns. 266; Davidson *v.* Van Pelt, 15 Wis. 341.

26 Speakman *v.* Forepaugh, 44 Pa. St. 363.

27 Smith *v.* Robertson, 23 Ala. 312; Holland *v.* Holmes, 14 Fla. 390.

28 Gans *v.* Renshaw, 2 Barr (Pa.) 34; Scott *v.* Simpson, 11 Heisk. (Tenn.) 310.

29 Taft *v.* Kessel, 16 Wis. 273.

30 Martin *v.* Judd, 81 Ill. 488.

31 Caal *v.* Higgins, 23 N. J. Eq. 308.

tion of a court is invoked to compel him to perform his contract, merely to raise a doubt.

A defect in a record title, will, under most circumstances, furnish a defense to a purchaser, particularly where it affects the value of the property or would interfere with its sale, and thus render it unmarketable,[32] but there is no inflexible rule, in the absence of stipulations to the contrary, that a vendor must furnish a perfect title of record, and it has frequently been held that defects in the record or paper title may be removed by parol evidence.[33] Where, however, the title depends upon a matter of fact which is not capable of satisfactory proof, or, if capable of that proof, yet is not so proved, the title is not marketable and the purchaser is not obliged to take it.

A title, to be valid, need not necessarily be deducible of record, for a prescriptive title may, under proper conditions, be as strong as a title by grant,[34] yet such titles, unless there has been a continuous holding for at least twenty years, are always liable to defeat from undisclosed defects, and even after the expiration of such period they may still be open to attack through claims by minor heirs, or persons under disability.

Again, a valid title should, as is self-evident, be free from latent defects or taint of fraud; yet this is something that, from its very nature, must frequently pass undetected, even by the exercise of the greatest prudence. As a rule, however, where the legal title is vested in the vendor, and there is nothing appearing from which purchasers can know that there has been any fraud in his acquisition of the title, or any invalidity in any of the deeds in his chain of title, they will be protected in the purchase.[35]

§ 606. **Flaws.** This term may be aptly used to describe an apparent gap or break in the chain, which, when occurring, constitutes in many cases an insurmountable impediment. A requisition must in all cases be made for the missing links,

[32] Shriver *v.* Shriver, 86 N. Y. 576.

[33] Hellreigel *v.* Manning, 97 N. Y. 56.

[34] McNab *v.* Young, 81 Ill. 11.

[35] Sherman *v.* Kane, 86 N. Y. 57.

whether the interruption be partial, as where one of several persons shown to possess a unity of interest fails to convey, or entire, as where no privity of title is shown to exist between present and past owners. Where the original title fails, and requisitions for the purpose of showing connection are returned unsatisfied, the title asserted becomes adverse to the original title and necessary inquiries *in pais* must be made to show a valid title by adverse possession.

An apparent break in the chain often occurs in case of descents, the estate of the intestate never having been settled in probate; and when the only heirs are married women, and a conveyance is subsequently made by them, if no description of the person or capacity is given, the break, upon the record, will, of course, be absolute. When a grantee under an unrecorded land contract has gone into possession, but no deed has ever been made, the same state of facts exists in respect to conveyances by him. Again, and these cases are by no means uncommon, simple or ignorant people frequently go into possession under deeds which they never cause to be recorded, and this apparently breaks the continuity of interest and title. Requisitions, in many instances, will suffice to discover the missing evidence, but when they can not be found, possession and claim of title under the statute of limitations must be relied on.

A serious defect of the character under consideration will frequently be found at the very initiation of the title, the abstract showing only the original entry at the government land office, supplemented, possibly, by the local record of the receiver's duplicate receipt. Now it is immaterial how long the premises may have remained in private occupancy nor through how many hands they may have passed; the title, in such a case, is simply an equity, for no limitation runs against the government. Yet such defects are very common. From a very early day in the history of the public land system, settlers and purchasers seem to have been strangely indifferent in the matter of securing possession of the government patents for their lands, and in hundreds of thousands of instances the foundation of title, as exhibited by local records, to lands pur-

chased from the government, some of them of vast present value, is merely the duplicate receipt above alluded to. Probably this indifference has arisen chiefly from ignorance on the part of purchasers that a patent constitutes the only positive evidence of the transfer of title from the government to the individual, but whatever may be the cause, the fact exists,[36] and it should be the duty of every attorney examining a title to see that this vital link, showing the original derivation, is restored whenever it is shown to be wanting.[37]

§ 607. **Clouds upon Title.** In the examination of abstracts counsel frequently finds minor defects, imperfect descriptions, invalid instruments, and abortive attempts at conveyance, which, while not reaching the merits of the title, nor yet, in many cases, casting any suspicion upon it, still tend in a measure to obscure it. These defects are known as "clouds upon the title," and it is the duty of counsel to detect and point out such defects that proper steps may be taken to remove them. The opinion should properly discriminate between deeds which are defective merely, or which might be made the foundation of a valid title in connection with other circumstances, and those which are absolutely void, for the legal effect of the two classes is not the same. As a general rule, a deed, lien, charge or incumbrance of any kind, to cast a shadow upon title, so as to give the owner relief in equity, must be one that is regular and valid upon its face, but is, in fact, irregular and void from circumstances which have to be proved by extrinsic evidence.[38] If the invalidity plainly appears on the face of the

[36] It would seem from the report of the Commissioner of the General Land Office for the year 1875, that at that time there were remaining in the files of the general and local land offices nearly *two millions* of uncalled for patents, covering, probably, not less than 150,000,000 acres, no small proportion of which were lands purchased of the government more than a half century before, and lying in the older States of Ohio, Indiana, Illinois, etc.

[37] The initial statements taken from the Government Tract Book will always furnish a clue to a break of this kind, and a certified copy of the patent can be obtained by any person showing himself to be entitled to it.

[38] Murphy *v.* Mayor, etc., of Wilmington, 6 Houst. (Del.) 108; Crooke *v.* Andrews, 40 N. Y. 547;

instrument,[39] or, although not apparent on the writing, if it is shown by any of the preliminaries which attend it, or in any of the links which connect it with the title,[40] so that no lapse of time nor change of circumstances can weaken the means of defense, such an instrument does not, in a just sense, even cast a cloud upon the title, or diminish the security of the owner of the land,[41] for the rule is well settled that such an instrument can work no mischief, and that no occasion arises for equitable interference for its removal or cancellation.[42]

It is not recommended, however, that every matter appearing in the abstract, and shown thereby to be irregular and void upon its face, be disregarded for that reason, for the legitimate province of the opinion is to specifically show the legal effect of all instruments or proceedings that to the non-professional reader may seem suspicious, and, by pointing out such matters and showing their invalidity, to allay his fears and confirm his confidence in the title. It is for this very purpose, that intending purchasers seek the aid of counsel, and every doubt or question that may arise to the legal mind should find expression in the opinion. Many questions of this character, which formerly could be summarily disposed of, now require a very different treatment, from the fact that in a large number of States the statute has made certain classes of deeds and conveyances *prima facie* evidence of the facts therein recited, and not only of their own validity, but of every anterior proceeding necessary to constitute such validity. Whenever a deed is primary evidence of title and of regularity in the prior pro-

Sanxay *v.* Hunger, 42 Ind. 44; Davidson *v.* Seegar, 15 Fla. 671. But see, Rigdon *v.* Shirk, 127 Ill. 411.

39 R. R. Co. *v.* Schuyler, 17 N. Y. 599; Sloan *v.* Sloan, 25 Fla. 53.

40 Fonda *v.* Sage, 48 N. Y. 173; Griswold *v.* Fuller, 33 Mich. 268; as where title is deduced through a judicial sale, where the proceedings which were the basis of such sale, and upon which the validity of the adverse title depends, are shown to be void for jurisdictional defects: Florence *v.* Paschal, 50 Ala. 28; Hatch *v.* City of Buffalo, 38 N. Y. 276.

41 R. R. Co. *v.* Schuyler, 17 N. Y. 599; Bogert *v.* City of Elizabeth, 27 N. J. Eq. 568.

42 Fonda *v.* Sage, 48 N. Y. 173; Cohen *v.* Shard, 44 Cal. 29.

ceedings, and can only be overcome by proof of certain facts *dehors* the deed, a cloud is always created,[43] for though the instrument is really void, it has an ostensible validity, and throws a doubt upon the title, and not only can be used for vexatious purposes, but is such a title that, if asserted by action and put in evidence, would drive the other party to the production of his own title in defense.[44]

§ 608. **Inquiries in Pais.** Technically, when an attorney is called upon to pass the title to land under a given state of facts as presented by the abstract, he is not supposed or presumed to extend his investigations beyond what is directly or inferentially disclosed therein. The absence of requisite links in the chain of title calls for inquiries respecting same, but the existence of unrecorded evidence, or of equities not apparent or fairly deducible, do not legitimately come within the province of an examining counsel.

It is, however, strongly recommended, that in addition to the inquiries and requisitions made during the perusal of the abstract, and which are raised by the disclosures therein made, a further inquiry be directed to the present possession and occupation of the land under examination.[45] A due observance of this suggestion will give greater stability to the opinion, and may in many cases prove a mild preventive of a bitter lawsuit. A long series of adjudicated cases confirm the doctrine that open and exclusive possession of land affords notice of the claim of the person so in possession,[46] and a purchaser of land

[43] Tilton *v.* R. R. Co., 3 Sawyer (C. Ct.), 22.

[44] Lick *v.* Ray, 43 Cal. 83.

[45] The importance of this inquiry can not be over-estimated in cases where a long interval exists between the time of acquiring title and its divesture of record. In some cases seven years, and in nearly every case twenty years, will be sufficient to bar an apparent title of record when adverse rights have been acquired; and continuous possession is almost as essential a showing as unbroken continuity of record title. In fact, in an action of ejectment, which is nothing more than an action to try a disputed title, the fact of possession by the plaintiff or those under whom he claims is an essential part of the proof, and the mere production of a deed, without more, will not be sufficient to establish title.

[46] Pritchard *v.* Brown, 4 N. H. 397; Redden *v.* Miller, 65 Ill. 336;

at the time adversely held by another who does not inquire of the party in possession as to his title or right of occupancy, will not be considered a *bona fide* purchaser, notwithstanding he may have examined the registry of titles.[47] A purchaser of land who examines the records is protected by them as far as they can protect him, but he necessarily takes the risk of having the actual state of the title correspond with that which appears of record.[48] The registration laws are designed only to protect purchasers against latent equities; hence, unrecorded conveyances are void as against subsequent purchasers without notice, and while in a few instances courts may be found holding strongly against the doctrine of constructive notice arising from possession merely,[49] though admitting such to be competent for the consideration of a jury in connection with direct evidence of actual notice, the vast preponderance of authority sustains the principle that a purchaser from the record owner is bound to notice the possession of another, and takes subject to the right indicated by such possession.[50]

In any event the safe course is to make the inquiry, for the law will not extend its protection to those who through negligence or inattention suffer an advantage to be taken of their credulity, nor will it afford relief to those who neglect to examine and by personal observation ascertain the knowledge of those facts of which they are presumably conversant. "It is not to be supposed," says Richardson, C. J., "that any man who wishes to purchase land honestly, will buy it without knowing what are the claims of a person who is in the open possession of it. It is reasonable, if men buy in such cases

Maghee *v.* Robinson, 98 Ill. 458; Pinney *v.* Fellows, 15 Vt. 525; Hackett *v.* Callender, 32 Vt. 97. The rule is the same both at law and in equity: Griswold *v.* Smith, 10 Vt. 454.

[47] Russell *v.* Sweezy, 22 Mich. 235; Warren *v.* Richmond, 53 Ill. 52.

[48] Peck *v.* Clapp, 98 Pa. St. 581.

[49] Pomeroy *v.* Stevens, 11 Met. 244; Glass *v.* Hurlbut, 102 Mass. 34; Clark *v.* Bosworth, 51 Me. 528.

[50] Pinney *v.* Fellows, 51 Vt. 525; Russell *v.* Sweezy, 22 Mich. 235; Redden *v.* Miller, 95 Ill. 336; Perkins *v.* Swank, 43 Miss. 349; O'Rourke *v.* O'Conner, 39 Cal. 442; Happin *v.* Doty, 25 Wis. 573; Edwards *v.* Thompson, 71 N. C. 177.

without inquiry, that they should be presumed to have known everything which they might have learned upon due inquiry," [51] "and one important evidence of title to an improved estate," continues Shepley, J., "is the possession of it. When one person purchases of another who is not in possession, he is put upon inquiry into the cause of such apparent defect of a perfect title." [52] When land is vacant or unoccupied, no presumption can arise against the legal or record title.[53]

§ 609. **Continued — Mechanics' Liens.** It has been held in a late case,[54] that a party purchasing land on which buildings are in process of erection, having knowledge of the same, is bound to make inquiry as to the rights of parties furnishing materials or performing work thereon, and that such person is charged with constructive if not actual notice of their lien. Further, that a sale of property after the lien is fixed, to one cognizant of the fact, gives him no rights as against the lien. This is in consonance with the general doctrine on the subject of mechanics' liens, which provides that the lien shall take effect from the time of the commencement of the work, and that no sale or transfer thereafter is sufficient to divest it.[55] It follows, therefore, that an inquiry respecting possible liens should always be made and that the attention of prospective purchasers should be directed thereto.

§ 610. **Continued — Easements and Servitudes.** In addition to all the recommendations heretofore made, it is further suggested that an actual inspection of the premises be had for the express purpose of ascertaining whether there

51 Pritchard *v.* Brown, 4 N. H. 397; Russell *v.* Ransom, 76 Ill. 168.

52 Matthews *v.* Demerritt, 22 Me. 312.

53 White *v.* Fuller, 38 Vt. 201; Thompson *v.* Burhans, 79 N. Y. 93; Weir *v.* Lumber Co., 186 Mo. 388.

54 Austin *v.* Wohler, 5 Bradw. (Ill. App.) 300. A mechanic may file his lien against the person who held the legal title when the work was commenced, and he is not bound to inquire further or take notice of any subsequent conveyances of the property: Fourth Ave. Bap. Church *v.* Schreiner, 88 Pa. St. 124.

55 Dunklee *v.* Crane, 103 Mass. 470; Thielman *v.* Carr, 75 Ill. 385; Mehan *v.* Williams, 2 Daly (N. Y.), 367.

are any servitudes resting upon the land that have not been disclosed by the abstract. This, at first blush, may seem an unnecessary and useless proceeding, yet there are many conditions and circumstances that not only justify such a course, but render it an imperative duty. It is true that, as a rule, a claim for an easement must be founded upon a grant by deed, yet an easement may pass by implication, when its existence is necessary to the enjoyment of that which is expressly granted or reserved, upon the principle that where one grants anything to another, he thereby grants him the means of enjoying it, whether expressed or not.[56]

This is well illustrated in the rule of the common law which provides that, where the owner of two heritages, or of one heritage of several parts, has arranged and adapted them so that one derives a benefit or advantage from the other of a continuous and obvious character, and then sells one of them without making mention of these incidental advantages or burdens of one in respect to the other, there is, in the silence of the parties, an implied understanding and agreement that the advantages and burdens, respectively, shall continue as before the separation of the title.[57]

But in order that an easement should pass by implication, under the grant of an estate, it must be obvious to any observer, while an apparent sign of servitude must be impressed upon the servient estate: in other words, the marks of the burden must be open and visible.[58] Where these conditions exist, their effect upon the servient estate is frequently productive of results that the purchaser neither anticipated nor intended, but of which he might have been fully apprised had proper inquiry and examination been made prior to the acceptance of the title.

The foregoing remarks are particularly true with regard to city property or property in populous neighborhoods, where

56 Lanier *v.* Booth, 50 Miss. 410; Pingree *v.* McDuffe, 56 N. H. 306; Dillman *v.* Hoffman, 38 Wis. 559.

57 Morrison *v.* King, 62 Ill. 30; Lampman *v.* Milks, 21 N. Y. 505; Jones *v.* Jenkins, 34 Md. 1, and see Wash. Easement, 58.

58 Butterworth *v.* Crawford, 46 N. Y. 349.

buildings and improvements crowd and encroach upon each other, ofttimes disclosing, upon even a casual inspection, all the marks of servitude, and thereby charging the purchaser with notice of their existence.[59] Where any doubts exist with respect to lines, courses or dimensions, a survey should be had to fix boundaries.

§ 611. **Continued — Homestead.** It will be remembered that in several of the States the right of homestead is a special estate requiring a special release to divest, and in other States, where it is regarded merely as a statutory right of exemption, certain formalities are expressly necessary to a waiver. Where such laws obtain, and the deeds make no reference to the homestead, even though the possession of the land is shown to be in the parties conveying, a further inquiry should, it would seem, be made with respect to the character of the possession, and a special release or waiver of the homestead right should be obtained when such inquiry expressly or impliedly discloses a homestead occupancy.[60]

§ 612. **Printed Copies.** When large subdivisions are made for general sale to purchasers of small lots, it has now become customary to duplicate the original abstract to the

[59] So held where the owner of lands divided the same east and west and erected a building on the north part, placing the south wall half on each side, with a flue projecting eight inches on the south lot, which was used to carry off the smoke from a furnace permanently attached in the building, the flue being necessary to the use of the furnace; the flue stood exposed to view with chimney thereon, and the owner sold the north portion of the lot to the center of the south wall, with the building thereon, to the plaintiff, and afterward sold the south half of the lot to the defendant, who contributed to the expense of the party wall, and the latter gave notice of an intention to close up the flue, whereupon the plaintiff filed his bill to enjoin the act: Ingals *v.* Plamondon, 75 Ill. 118.

[60] Printed blank forms of conveyance generally contain a homestead waiver, and this is also a part of the form prescribed for statutory deeds, but where forms are draughted for special occasions the waiver is generally omitted when the lands, in fact, are not occupied as homesteads. In subsequent examinations this course frequently raises embarrassing questions and the better plan is to insert the waiver in all deeds regardless of the actual facts.

entire tract by printed copies. This is done to avoid the expense of a separate search for each lot of the subdivision as well as a scrivener's copy of the original, and it is claimed that such printed copies are far more reliable and trustworthy than where a written copy is made from the original for every transfer. Where the work is performed conscientiously and carefully this is probably true, yet the great majority of the profession have set their faces strongly against the use of printed copies and many lawyers refuse to pronounce upon a title disclosed by them, unless the original is also produced at the same time for comparison and inspection. This strongly grounded prejudice arises from the fact that the temptation for the interpolation of foreign matter, or the suppression or expurgation of original matter is so great, that unscrupulous parties not infrequently do not hesitate to resort to such expedients to conceal the defects of imperfect title.

A printed copy, if made by an honorable and responsible person, who, at the close of such copy appends a certificate of verification, loses some of its objectionable features, yet this is but a poor protection, as the printer merely presents what he finds, and if foreign matter has been introduced into the original it will of course be reproduced in the duplicate. Nor does the fact that a comparison of such duplicate with the original has been made by a notary, and of which fact a certificate under his hand and official seal accompanies the copy, make the copy much, if any, more reliable. In both of these instances the opportunities for fraud and imposition are present, while ignorance, carelessness, mistake and accident may all conspire, where no bad faith exists, to render such copy inaccurate and unreliable.

But as printed copies will continue to be used, and as in many instances the cost of an original abstract would be equal to the price of the land, care should be observed to see that every precaution has been taken to insure the reliability of such copy and prove its accuracy. This can, in a large measure, be successfully accomplished by a verification of the printed copy by the examiner who compiled the original, and

it is recommended that, in every instance where a printed copy is offered in support of title, a comparison be first made by the examiner, and a certificate under his hand, that same is a true copy, be appended thereto. To insure further accuracy the examiner should write his name, or at least his initials, upon every page or sheet of the copy, and if after all this, imposition is still practiced, counsel will at least have the satisfaction of knowing that the imposition was beyond his power to prevent and that he has fully performed his duty in the matter.[61]

A certificate of verification should fully identify the copy to which it is annexed by proper references to the original and should unmistakably state the primary fact of correctness. If any divergence from the original is shown this should be noted and if corrections are made in the copy these also should be indicated. The following will serve as an illustration:

The foregoing seventeen (17) pages (this included) is a true copy of the original examination of title except [here note differences, if any, as; *that sundry words abbreviated in the original are printed in full in this copy and sundry words written in full in the original are abbreviated in this copy*] *Corrections Nos. 1 to 40 inclusive, in red ink, made by us.* *Handy & Company.*

§ 613. **Framing Opinions.** After the abstract has been thoroughly perused, the inquiries answered, the requisitions satisfactorily supplied, and the relative rights of parties determined, counsel should proceed to formulate his opinion in a connected and orderly manner. This will include: first, a concise caption or title, similar to that which prefaces the abstract, describing the object and purport of the opinion. Then follows the result of his investigations, and here should be stated all the defects and irregularities which he may deem

61 For a more extended discussion as to what constitutes a merchantable abstract see Warvelle on Vendors, § 292, *et seq.*

worthy of notice as affecting the title. Finally comes the formal opinion, which should be as concise and terse as possible, and based upon the abstract and the defects or other matters noted in the stating part of the opinion. Should the exigencies of the case require it, or the client so direct, counsel may add such directions or suggestions as to him may seem expedient in perfecting what the abstract shows to be an imperfect title, but it is suggested that the better way is to communicate such information or directions together with any hypothetical opinions, by a separate writing, and confine the opinion, which it is proposed to annex to the abstract, solely to the state of the title which the abstract presents.

Another method, and one that is preferred by many lawyers, is to state the general opinion first and then to follow with a recital of the defects or imperfections of title which qualify the opinion. Either method will serve to apprise the client of the condition of the title.

§ 614. **Opinions of Title.** A formal opinion upon the merits of the proffered title does not seem to have been contemplated by the English writers on the subject of abstracts, nor by those American writers who have heretofore ventured to touch upon the theme, and this feature is doubtless an outgrowth of "western civilization." The queries, objections, requisitions, etc., of an English examiner in a measure take the place of a formal opinion, as they tend to note and point out defects and make suggestions whereby defects may be remedied and missing links supplied. But, as abstracts are now prepared, a carefully framed opinion is an inseparable incident and a fitting climax of every examination.

There are two methods of framing opinions of title, both of which are in general use. The first, and most common, consists of statements based upon, and annexed to, a formal abstract, and is made by counsel after a perusal thereof; the second, is where the examiner, after investigating the title, by personal examination of the records or of his own indices thereto, places the title in some individual named subject to whatever impairments he may find of record. This latter

method is also known as "certifying the title." No chain or affirmative evidence is usually shown in such cases. Frequently such certificate is based upon a directed assumption of title in a certain person at a certain date, and the examiner certifies from his examination of the records from such date. In the latter case, the certifier assumes the dual office of examiner and attorney, and in many cities, where no special class of examining conveyancers or abstract makers exists, all abstracts and examinations are made in this manner. The plan has little to recommend and much to condemn it, and, in the opinion of the writer, more satisfactory results are obtained, at least in populous and active cities, by a thorough disassociation of abstract maker and counsel.[62] An opinion of title made in the manner just described would be prepared somewhat in the following manner:

OPINION OF TITLE
to
Lots 17 and 18, Block 3, Town of Hyde Park, Cook County, Ills.

By direction of William P. Smith, at whose request this opinion is given,[63] *it is assumed without examination,*[64] *that*

[62] Possibly the writer's experience has tended to prejudice him in favor of a system with which he has long been familiar, but from what he has seen of "Certificates of Title," he is strongly inclined to condemn their use. Of late years and in some localities an effort has been made by law to abolish the old and well settled system of recording titles, by the introduction of the crude methods of some European countries. By this innovation, usually called the "Torrens System," a Certificate of Title is issued by an officer having the superintendence of a transfer register. The movement seems to be an effort on the part of brokers and real estate dealers to eliminate law and lawyers from transactions relating to land and to restore the old conditions of primitive simplicity in which lawyers and abstract makers are unknown.

[63] This is a matter of protection to the examiner. It shows the privity of contract existing between client and counsel, and prevents claims for damages being asserted by third parties, who may have purchased or advanced money on the assurances of the certificate: See Bank *v.* Ward, 100 U. S. 195.

[64] In every case where an assumption is made it should be so stated,

*on June 11, 1870, the Trustees of the Town of Hyde Park held the title to the fee of said Lots 17 and 18, free from incumbrance. From an examination of the records of Cook County, Ills., (or, of our Indexes to the Records, etc.) of Deeds, Judgments, and Tax Sales, made upon the above stated assumption, we conclude that the title to the fee of said Lots is now vested in John F. Hanson, subject to defects, if any, existing in the execution or acknowledgment of the following deed: (*or; *subject to the lien of the following mortgage, etc.)*

Here follows an abstract or summary of the deed, mortgage, lien, judgment or other matter, which, in the opinion of the person certifying, impairs or clouds the title of the individual named in the certificate. If nothing appears to impair the title, say:

Subject to no objection indicated by our books.

or,

Subject to no objection indicated by the public records.

After this, any special matter by way of qualification or explanation may be inserted which should be followed by the date of the examination and the examiner's signature. In these certificates a wide option is left with the examiner, and in this lies the chief source of danger. He may regard or disregard all such instruments as he may see fit, passing not only on their formal sufficiency, but their legal effect as well, and that without displaying them, or displaying only such of them as, in his opinion, create liens or incumbrances upon the title.

Should the examiner desire to qualify his opinion, as is

while it is always advisable to state as well that same has been done by direction and often at whose direction. This is a direct and positive notice that the examination is imperfect on certain recognized theories of the law of conveyancing and registration.

frequently the case, this may be done by a statement substantially as follows:

This opinion is not to be construed as covering:

1st. Any matter or thing not noted on our indexes to records in Cook County, Ill., of deeds, judgments, and tax sales, and especially unpaid taxes and adverse possession.

2nd. Any other matter or thing, etc.

§ 615. **Continued — Certificates of Title.** A striking instance of the subject under discussion is furnished by a late Missouri case,[65] wherein the examiner compiled an abstract in which he certified that, "as per the county records and the county index to said records," the title to the land in question was "good" on the day of the date of such abstract in one Daniel Cobb, "and that there was no incumbrance thereon, nor any lien thereon excepting for certain taxes therein specified." As a matter of fact a trust deed was then of record purporting to convey the subject-matter of the examination, but executed by one who at the time had no record title, although he afterward acquired same, and this subsequently acquired title was that which the examiner had certified as "good" in Daniel Cobb, the second grantee. The examiner in this case admitted that he was wholly ignorant of the existence of the prior deed, but attempted to justify upon the ground that a deed recorded before the grantor has any record title may be safely disregarded in examinations of title, under the system of registration and notice adopted in the United States, and upon this point the case turned in the appellate court. Upon a question of this character the examiner can afford to take no chances. The law is so difficult; the exceptions to its rules so numerous; the cases so many and so slightly distinguished, so often apparently conflicting, that the risk is too great, unless he is also willing to assume the liability that may attach to

65 Dodd *v.* Williams, 3 Mo. App. 278. Consult in this connection, Bank v. Ward, 100 U. S. 195.

it. What constitutes a lien or incumbrance upon real estate may in some instances be a difficult question to decide; "but an examiner of titles," says Bakewell, J.,[66] "is bound to know the state of the law on the subject, and, where there may be a reasonable doubt as to whether such or such a recorded instrument is a lien, if he chooses to resolve the doubt he does so at his own peril. * * * If he does not choose to assume this liability he may easily avoid it by noting in his certificate every question which arises upon the title as to which there can be the slightest doubt in the legal mind, or by giving a list of deeds and incumbrances, and abstaining from expressing any opinion as to their legal effect."

§ 616. **Opinions based upon the Abstract.** As a rule few lawyers desire to have anything to do with the compilation of the abstract, further than such incidentals as necessarily result from the inquiries, requisitions and objections made upon the title. The assumption of the dual character of examiner and counsel can rarely be successfully accomplished, for an attorney competent to pass upon the grave questions so often presented can hardly spare from his practice the time which must be consumed in the preparation and proper keeping of indices, nor, even when public indices are available, the time necessary for a proper search; while an examiner who makes a business of furnishing abstracts does not, and from the very circumstances of his business can not, devote the time necessary to keep up a theoretical knowledge of the law applicable to examinations of title, while he is entirely deficient in that fine legal acumen that comes only from direct and personal experience in the every-day walks of a lawyer's life. The examiner, by constant practice, becomes very expert in compilations, far more so than a lawyer making occasional searches can ever hope to be, but by constantly directing his attention only to requisites and defects of form in instruments and proceedings which pass under his hands, and though becoming, so far as relates to such matters, an authority, he

[66] Dodd *v.* Williams, 3 Mo. App. 278.

yet loses sight of much of the legal effect of such instruments and proceedings, and for this reason, if none other, should never attempt an opinion.

The opinion of counsel is based, in the first instance, upon the presumption, necessarily entertained, that the examiner has faithfully performed his work and that the abstract is a true reflex of the records, and of every matter and thing shown thereby that apparently affects, impairs or implicates the title under consideration. It may be confined to a bald statement of the title shown by such abstract, with no comments or suggestions, or it may indicate the weakness of the title with recommendations for strengthening same. But, inasmuch as the client frequently seeks professional aid quite as much for advice and assistance in perfecting a title, this matter will depend largely upon the client's wishes.

In the event just indicated, the perusal and analysis will possibly suggest many inquiries, which, unless remedied before the opinion is rendered, must find adequate expression therein and where, upon a continuation, former opinions have suggested acts to be done, the continuation should show compliance with such suggestions. Where the title is defective from any cause capable of easy remedy, as where missing deeds are found upon inquiry, or satisfactory information is furnished in answer to requisitions, the several matters should be placed on record and a supplemental abstract made covering such special matter. Upon the original and supplemental abstract the opinion may be rendered, and, if all doubts have been resolved thereby, such opinion would consist of little else than a statement that the fee of the premises rests in whoever is shown to be the owner, unincumbered and unembarrassed. More frequently, however, counsel prefer to recite the objectionable features, and qualify the opinion by reference to such recitals, leaving the client to accept or reject the title, as his inclination may suggest, or take steps to perfect it in accordance with the opinion. When such is the case an opinion may be rendered somewhat after the following manner:

OPINION OF TITLE

to

Lot 10, in Block 40, of Simpson's subdivision of the N. E. qr. of Sec. 10, T. 12 N., R. 13 E., as disclosed by the annexed abstract, made by Haddock, Vallette and Rickcords, and dated Aug. 15, 1883.

I have examined the annexed abstract, consisting of twenty-three numbers, relative to the title thereby disclosed to the premises above and in said abstract described, and find:

A defective deed, shown as No. 10 from Thomas Jones and Olivia, his wife, to Cyrus B. Maxwell, in that said Olivia failed to release her dower in the manner then (1842) prescribed by law.

A defective deed shown as No. 18, from Benson Hardy to William J. Hanson, in that the wife of said Hardy, she having been shown to be then and still living, failed to release her dower by joining in the execution of said deed.

A mortgage for $500.00, shown as No. 19, from William J. Hanson to Thomas Jackson, the indebtedness thereby secured maturing Jan. 31, 1889.

I further find:

No releases or waivers of the right of dower purporting to be made by Olivia Jones or the wife of Benson Hardy, shown by said abstract to be of record in this county.

No release or discharge of the mortgage above noted.

And I am of the opinion:

That conveyance No. 10 creates no lien, cloud, or charge upon the title, and that the defect noted is cured by the lapse of time and the possession of the therein mentioned grantors' assigns; it satisfactorily appearing that Thomas Jones has been dead for more than twenty years.

That conveyance No. 18 discloses a contingent lien or charge upon the title to the extent of the inchoate right of dower of the wife of Benson Hardy.

That the mortgage, No. 19, is a valid subsisting incumbrance.

I am further of the opinion:

That the title to the fee of said premises is now vested in William Springer, free from all liens, charges and incumbrances appearing of record, and shown by said abstract, except those hereinabove expressly enumerated and described.

To perfect the title of said Springer, I would recommend:

A deed of release from the wife of Benson Hardy.

A deed of release from Thomas Jackson, said mortgagee, or his assigns.

(Signed)

THOMAS W. BROWN,

Date.[67] *Counsel.*

The foregoing crude outline will serve to suggest a form for the expression of opinions, and the general manner in which such opinions should exhibit the defects of the title. It is necessarily brief, and, for the better purposes of illustration, very simple, yet will indicate the method of treatement of more difficult and complicated matters.

A more concise and terse way of preparing an opinion would be to find the fact of title first and then show defects, if any. Should such a course be deemed desirable the certificate may be constructed after the following form:

I have examined the annexed abstract, etc., and am of opinion, that the title to the fee of said Lot was on Aug. 15, 1883,[68] *vested in one William Springer, subject to the following liens and defects.*

Then set out the impairments of title, with such recommendations as may be thought necessary or expedient.

Where the abstract consists of several continuations, made by the same or different examiners, it may be well to preface

[67] This should be the same date as that appended to the certificate of the abstract, irrespective of the actual time at which the opinion was rendered.

[68] The date of the certificate of the abstract.

the opinion with a recital of the different examinations under consideration, thus:

I have examined what purports to be an examination of title by Handy, Simmons & Co., from the government to date of June 10, 1872.

A continuation [or, *a certified copy of continuation*] *of same by Haddock, Coxe & Co., to date of April 20, 1879.*

A continuation by Chicago Title and Trust Company to date of July 1, 1903, and find, etc.

If the abstract itself, for any reason, is not merchantable,[69] it is better to apprise the client of this defect before attempting to make a perusal, that proper steps may be taken to remedy the defect, but should the client be willing to accept the abstract as furnished and direct an opinion thereon, prudence would suggest that counsel specifically note this fact in his opinion, as for instance:

The continuation purporting to be made by Haddock, Coxe & Co., under date of April 20, 1879, I consider unmerchantable, in that it appears to be a copy and not an original, and is without proper certification; but by direction of Robert Smith, Esq., for whom this opinion is made, I assume that it is a true copy, and this opinion is expressly subject to and qualified by undisclosed defects of title, if any, during the period covered by said search.

It is customary, and quite proper, to add certain directions or suggestions as aids to the purchaser in making inqiries *in pais* or with respect to matters not covered by the examina-

[69] This term has now come to be a recognized expression among lawyers, to denote an abstract compiled and certified by a responsible person and which is accepted without question by the profession. There are no rules for determining the fact of merchantability and the matter rests largely in general consensus of opinion, the resolutions of Bar Associations, etc.

tion, and these suggestions may be shown by a note, just before the signature, in this manner:

NOTE.— *The taxes for 1892 are now a lien.*[70]

Satisfactory assurance should be furnished of the payment of taxes for the year 1891.[71]

Attention is directed to the present occupation of the premises, if any, and the rights of the parties in possession.

For greater certainty many lawyers append to their opinions a statement of the matters not passed upon and to which the opinion is subject. Thus, they say:

This opinion is expressly subject to:

1. *Rights or claims of parties in possession not shown of record.*
2. *Defects of title, if any, which may be disclosed by an accurate survey.*
3. *Possible rights of dower of the spouse of owner.*
4. *Mechanic's liens not shown of record.*
5. *Special assessments, if any, which have not been confirmed.*
6. *Taxes for, etc.*

§ 617. **Perspicuity of Expression.** In every case the language of an opinion should be clear and perspicuous. This is a prime requisite. Counsel occasionally shirk a direct opinion by hypothetical statements as to what the title might be if certain matters could be shown; as, that the title "would be good in John Smith, provided," etc. This can not be regarded

70 This is a sort of reminder to the parties for the purpose of fixing conditions of sale and should always be inserted in opinions rendered after May 1, or whatever other day the statute may prescribe as the time of commencement of lien for the taxes of the year.

71 This should be inserted in opinion rendered after Dec. 1, or whatever other day is fixed by law for the commencement of the payment of taxes for the past year. Should the abstract disclose payment the clause should, of course, be omitted.

as a desirable method of expression. The issue should be met fairly.

So also, the use of qualifying adjectives in connection with title is very objectionable. Notwithstanding the fact that a court of equity sometimes hesitates to pronounce a title invalid that it yet will not force upon an unwilling purchaser, and hence pronounces it doubtful, there are no degrees of excellence in titles.[72] At law all titles are valid or invalid. It is not in good form, therefore, to say that a "good" title is vested in any person, for this implies that there may be a "better," and, possibly, a "best," while a "bad" title is simply no title. It is still worse to say, as is often done, that A B possesses "substantially a good title," or, that the title is "substantially good" in a person named. As colloquial phrases such terms may, and do, have a definite meaning, but in formal written opinions they are out of place. The title should be specifically found in whomsoever it is made to appear, and it must rest somewhere. If it is obscured, or insecure in the person named, state the facts and announce the legal effect. There is no such thing in law or in fact as a doubtful title *per se,* although the claim of an individual to title may be the subject of doubt. The fee is always in existence; it is never in abeyance; it is never without an owner; it is never "good," "bad" or "doubtful." The evidences of the rights of ownership may be all or either, but the confusion of terms sometimes betrays counsel into expressions that he does not really mean. The term "marketable title" is employed by the

72 It is the specific claim of title to which a court alludes when passing upon its validity. In common parlance we speak of good titles, bad titles, and doubtful titles but we mean the claim of title and the evidence upon which it is founded, and not the title itself. An allodial title in fee is the highest type of ownership and estate, and this is always "good." A claim to this ownership and estate may be made by several, but unless there is a common tenancy only one can possess it. The *claim* of the others we often denominate *titles;* a palpable misnomer; and in speaking of such claims we frequently say his title is bad, etc., meaning, however, the insufficiency of the evidence of his claim.

courts, and has acquired a definite legal meaning, yet there is nothing gained by its use in framing an opinion.

In a finding of title the estate should always be mentioned. While we are accustomed to speak of the title to land yet this is not strictly accurate. It is the interest in land, or the estate, that is held by a title, not the land itself, and a properly framed opinion should indicate the nature and extent of the interest. To find that the title is vested in a person named is not enough; he may have title, and a "good" title, and yet not have the ultimate ownership. If the abstract discloses that the person named is possessed of the fee this fact should be stated. If there are several united in ownership this fact should be stated and the character of the estate held by them, whether jointly or in common, should be announced. If any lesser estate than the fee is shown, then, in most cases, the ownership of both the particular and the ultimate estates must be found.

§ 618. **Oral Opinions.** Questions as to the propriety or expediency of oral opinions in matters of title are solely for individual solution. It would seem that in so weighty a matter as the acceptance or rejection of a title, if an opinion is worth rendering, it is worth reducing to writing. It is, or should be, the result of careful and critical examination, and presumably, has cost counsel many hours of laborious investigation. Whether the questions presented be trivial or momentous, since the decision of the issue is of importance to the intending purchaser, is it well to leave it to his unaided recollection? Whatever action counsel may have taken, unless he preserves all his memoranda, the pressure of other matters soon drives from his mind, and when, afterward, the purchaser, who then entertains but an indistinct recollection of what was told him, applies to counsel for information on some particular point connected therewith, counsel can remember nothing whatever about it. The opinion, in such a case, except as it may have influenced the sale at the time it was rendered, was practically useless and the time consumed in its preparation, in one sense, wasted and lost. Again, the client may not have

understood the opinion as counsel pronounced it, and a dispute arises between counsel and client as to the advice actually given; and thus counsel is drawn into a controversy, the most detestable in which it is possible for a lawyer to be engaged. All this can be avoided by reducing the opinion to writing. There it remains unchanged, with no chance for disputes or misconstructions; always available when needed; and frequently a strong pillar in support of the title when it is again placed upon the market.

§ 619. **Liability for Erroneous Opinions.** An attorney employed by a purchaser of real property to investigate the title of the grantor prior to the purchase, impliedly contracts to exercise reasonable care and skill in the performance of the undertaking, and if he is negligent or fails to exercise such reasonable care and skill in the discharge of the stipulated service, he is responsible to his employer for the loss occasioned by such neglect or want of care and skill. Like conditions and results also follow an employment to investigate and ascertain whether property offered is a safe or sufficient security for a loan of money.[73]

The obligation imposed on the attorney does not require of him the possession of perfect legal knowledge or the highest degree of skill in relation to business of that character, nor that he will conduct it with the greatest degree of diligence, care and prudence, but simply that he shall possess the ordinary legal knowledge and skill common to members of the profession; and that, in the discharge of the duties he has assumed, he will be ordinarily and reasonably diligent, careful and prudent.[74] This is the ordinary undertaking of every attorney in every branch of legal employment, and while courts have ever been inclined to exercise leniency in dealing with

73 Addison on Cont. (6th Ed.) 400; Dodd *v.* Williams, 3 Mo. App. 278; Dundee Mtg. Co. *v.* Hughes, 20 Fed. Rep. 39; Houseman *v.* Girard, etc., Ass'n, 81 Pa. St. 256; Watson *v.* Muirhead, 57 Pa. St. 161.

74 Wharton on Neg. 749; Shear. & Red. on Neg. 211; Wells on Attys. 285; Gambert *v.* Hart, 44 Cal. 543; Skillen *v.* Wallace, 36 Ind. 319.

questions of this character the rule has always been strictly enforced whenever the facts have been brought within its operation. Hence it follows, as a necessary sequence, that if the attorney fails to bring to the discharge of the duties assumed by him, the ordinary legal knowledge and skill possessed by members of the profession, or has failed to discharge the duties with ordinary and reasonable diligence, care and prudence, he will be guilty of negligence, and liable to the client for the damages he may have sustained by reason thereof.[75]

In most of the cases where the question has been raised the errors charged have related mainly to the management of suits, and consisted in the non-observance of established forms and legal rules,[76] and the damages were the direct result of the negligence of the attorney. The rule, however, is just as applicable to opinions or assurances of title and the attorney must be held to a strict accountability for acts of negligence. But if he acts in good faith, to the best of his skill, and with an ordinary degree of attention, he will not be responsible.[77] He is not liable for mere errors of judgment, nor for mistakes of law in matters where the law is not well settled.[78] These are general principles of universal recognition.

In a case decided by a federal court in Oregon, it was held that where an attorney who is employed to examine the title of property offered as security for a loan, certifies that the security is a "good" one, he thereby warrants that the title shall not only be found "good" at the end of a contested litigation, but that it is free from any palpable grave doubts or serious questions as to its validity.[79] The learned judge who

75 Spangler *v.* Sellers, 5 Fed. Rep. 882.

76 Spangler *v.* Brown, 26 Ohio St. 389; Gambert *v.* Hart, 44 Cal. 542; Skillen *v.* Wallace, 36 Ind. 319; Walker *v.* Goodman, 30 Ala. 482.

77 Wilson *v.* Russ, 20 Me. 421.

78 Dodd *v.* Williams, 3 Mo. App. 278; Morrill *v.* Graham, 27 Tex. 646.

79 Page *v.* Trutch, 3 Cent. Law Jour. 559. There can be no doubt that, in a case similar to the above, it is understood by the client and intended by the attorney, that the title is all the learned judge claims it should be, but no authority can be found, so far as the investigation of the writer has extended, to sustain the statement that the attorney

delivered the foregoing opinion does not, however, fortify it with any citations of authority, and diligent search fails to reveal any; while in a later case, decided in the same circuit, it was held that *prima facie* there is no element of guaranty involved in such employment; that the attorney only undertakes to bring to the discharge of his duty reasonable skill and diligence, and does not warrant or guarantee the correctness of his work any more than a physician or mechanic does.[80] It may be safely said, therefore, that the statement first above made does not present the true spirit of the law in relation to the facts stated, and that there is no implied agreement in the relation of counsel and client, or in the employment of the former by the latter, that the former will guarantee the soundness of his opinions, or that they will be ultimately sustained by a court of last resort.

A more strict rule is observed in case of examiners, or where the attorney professes to furnish information as well as pass opinions in connection therewith; and where one who proposes to make a specialty of examining titles in the course of his business gives a certificate that he has made examination and finds no incumbrance against certain property, he will be liable if the incumbrance is of record in such a way as to give constructive notice to every one interested and actual notice to every one looking for it in the proper way.[81]

It is a further rule, sustained by a long line of decisions, that an attorney is liable for the negligent performance of professional duties, arising from ignorance or want of care, only to the person who employed him — that is, to one between whom and the attorney a contract of service existed. To insure a recovery for any injury arising from mere negligence, however gross, the rule seems to be imperative that there must exist between the one inflicting the injury and the one in-

warrants the title, nor to charge him with any liability upon such a warranty.

80 Dundee Mtg. Co. *v.* Hughes, 20 Fed. Rep. 39.

81 Dodd *v.* Williams, 3 Mo. App. 278; Chase *v.* Heaney, 70 Ill. 368; Clark *v.* Marshall, 34 Mo. 429; Bank *v.* Ward, 100 U. S. 195.

jured, some privity, by contract or otherwise, by reason of which the former owes some duty to the latter, and the rule applies with full force to acts of an attorney in framing an opinion of title. A third party, therefore, who may have acted upon the opinion would be without remedy against the attorney unless something in the circumstances of the case should take it out of the general rule.[82] Malice, fraud, collusion or other tortious act would be sufficient to create a responsibility without reference to any question of privity between the tort feasor and the injured party, but where these elements are wanting no recovery can be had by a third party, and a contract between two persons will not be held to inure for the benefit of a third person from the mere fact that its breach, or the negligent discharge of the duties involved in it, has resulted in injury to another.[83]

§ 620. **Conclusion.** In bringing this book to a close the writer perceives many imperfections in his work, and feels that in abler hands its treatment might have been far different. Yet he ventures to express the hope that to many it will furnish much desired information and be a practical help and guide. The methodical preparation of abstracts of title in the United States has not yet passed the experimental stage; English precedents furnish but little assistance, being founded upon a system that never had any practical application in this country, and, by reason of the peculiar genius of our institutions, never can have. By slow degrees we are formulating a system essentially our own, and if this work, by precept or suggestion, shall be instrumental in assisting in this formation, in discouraging false methods, and in affording a light on obscure points that shall aid the young and inexperienced, the highest desire of the writer, in relation thereto, will be satisfied.

[82] Savings Bank *v.* Ward, 100 U. S. 195; Buckley *v.* Gray, 110 Cal. 339.

[83] Buckley *v.* Gray, 110 Cal. 339.

APPENDIX.

NEW ENGLAND ABSTRACTS.

A peculiar system of abstract making seems to prevail in the New England States, or certain of them. This system is apparently an offshoot from that now, or formerly, practiced by the English conveyancers, and resembles, in many respects, the English abstracts alluded to in the body of this work, particularly in "marginal" divisions. It is not the same, however, as that expounded and illustrated by Lee, Moore, and other late English writers, but is probably a variant of the same general stock. There, as in England, though one plan is to show everything relating to the title of the estate under consideration, another, and the one apparently in popular use, is to commence with some early deed as the root of the title, and insert after it a list of the conveyances made by the grantee to the point or time when the estate passes out of him, and so continue with successive grantees until the present owner is reached.[1]

The instruments are very fairly and fully abstracted, but the examiner indulges in a wealth of abbreviation unknown to any other part of the country. It is arranged very systematically, and, probably, to those who are in the habit of examining such abstracts, conveniently. The name of the grantor, and the date from which his title is traced, is written at the top of the page and over the columns or margins, which are then filled up as follows: The first contains the dates, which include the years of the indexes, and dates of execution, acknowledgment and registration; the name of the officer taking the acknowledgment, and the initials of each grantor, where there are

[1] See appendix by M. H. Durgin, to Curtis' well known "American Conveyancer." (Boston, 1871.)

more than one, to designate his separate conveyances. Following this comes the book and page of the record in two narrow columns. In the next column are inserted the names of the grantees; consideration; notes of dower and homestead; words of grant; covenants; and mention of formal defects. In the last, or right hand column, are placed the descriptions; notes of incumbrances; conditions, recitals, etc. As a further explanation an example is appended:

HIRAM W. SMITH, GRANTOR FROM 1822.

1822 to 1835.			None.	
1835–7.	355	210	Wm. Jackson.	Mtg. $1,000, 2 yrs. (Description.) Nov. 10, 1837. Canceled on margin by Wm. Jackson.
1838–9.			None.	
1839.	493	121	J. L. Woodman	A certain parcel of ld. in Stanford, on sly. side of Rush St. contg. 15 acs. m. or l.
Nov. 20.			$5,000.	
" 21.				
" 21.			Emma, rel. d.	Beg. at S. W. cor. on Rush St. at ld. of O. S. Newell, thc. rung. N. E. by sd. st. as fence now stands 50 rds. 9 lks. to a stone standing by ld. of J. Smith, thc. rung. N. 90° E. 15 rds., etc.
Jno. Smith J. P.			g. g. b. s. & conv. Wty. free.	Reservg. privilege to pass, etc.

The next conveyance by J. L. Woodman would place his name at the head of the page as grantor, and the procedure would be the same until he finally parted with title. All the conveyances made by the grantor during the period in which he held title are noted, whether they include the premises in question or not, but if of other land, reference only is made to them, as "ld. in Charlestown;" nor is any mention made of defects, dates, etc.

ANALYSIS OF ABSTRACT.

Mr. Lee, in the appendix to his valuable work on abstracts, gives the following form of an analysis of an abstract, which may be of service to American practitioners by way of suggestion.

ANALYSIS OF ABSTRACT.

Estate in Foxbury, County of Devon. { 1 manor. 1 capital messuage and cottage. 100 acres of land and right of common.

Observations.	Date, Parties, Parcels.	Uses, Trusts, Limitations, etc.	Terms, Incumbrances.
Certificates of the baptisms or births of the children of Mr. and Mrs. Smith, should be produced, and a declaration under the Abolition of Oaths Act made by a person related to or acquainted with the family, stating that there are but four children of the marriage, should be supplied; and if Mrs. Smith be now dead, a certificate of her burial should be furnished.	1773. March 1. John Jones conveys Manor ..... House ..... 300 acres ..... Common right...	To Abraham Ashford in fee.	
		Use of Ann Downes for life. — as Henry Smith shall appoint. — of Henry Smith in fee.	
	1790. May 8. Henry Smith appoints same premises to		
		Use of H. Thompson 1,000 years. — of John Young in fee.	1000 years in H. Thompson to raise 2,000 *l.* for portions.
		Trust for A. S. for life. —— for H. Smith's children in fee.	
	1806. Jan. 6. John Young, Ann Smith, and four children, release same premises.	to Richard Jenkins in fee.	
		Subject to 1,000 years, and right of Mrs. Smith to live in cottage for life.	

Observations.	Date, Parties, Parcels.	Uses, Trusts, Limitations, etc.	Terms, Incumbrances.
	1815. June 18. Proved 20th July, 1816. Richard Jenkins wills — Manor, house, cottage, 100 acres and common right.	to J. Morris and E. Simpson. Trust for testator's wife for life, remainder. —— for testator's children in fee.	2,000*l.* paid off. Term of 1,000 years. Assigned to Oliver Pearson, in trust to attend for parties entitled under Jenkins' will.
	NOTE.— 200 acres sold by Mr. Jenkins during his life.		

LAND MEASURES.

In the preparation, as well as in the examination of abstracts of title, numerous occasions will arise for the computation of areas, the measurement of lines and distances, and other matters calling for calculations based upon the different methods now or formerly in vogue for land parceling. To assist the practitioner by affording a ready reference to the standard tables of land measurement, the following are inserted.

The measures of extension sanctioned by law in the United States, conform to the standard established by the English government, which is based upon the phenomenon of nature, that the *force of gravity is constant at the same point of the earth's surface* and consequently, that the length of a pendulum which oscillates a certain number of times, in a given period, is also constant. Had this unit been known *before* the adoption and use of a system of measures, it would have formed the natural unit for division, and been the natural base of the system of linear measure. But the foot and inch had long been used as units of linear measure; and hence, the length of the pendulum, the new and invariable standard, was expressed in terms of the known units, and found to be equal to 39.1393 inches. The new unit was therefore declared invariable — to contain 39.1393 equal parts, each of which was called an *inch;*

12 of these parts were declared by act of Parliament to be a *standard foot,* and 36 of them, an *Imperial yard.* The Imperial yard and the standard foot are marked upon a brass bar, at the temperature of 62½°, and these are the linear measures from which those in general use in this country are taken.

TABLE OF LINEAR MEASURE.

12 inches (in.)	make 1 foot, marked	.....ft.
3 feet	" 1 yard, "	.....yd.
5½ yd., or 16½ ft.,	" 1 rod, "	.....rd.
40 rods.	" 1 furlong, marked	.....fur.
8 furlongs, or 320 rd.,	" 1 statute mile, "	.....mi.

UNIT EQUIVALENTS.

				ft.		in.
			yd.	1	=	12
		rd.	1	= 3	=	36
	fur.	1	= 5½	= 16½	=	198
mi.	1	= 40	= 220	= 660	=	7920
1	= 8	= 320	= 1760	= 5280	=	63360

TABLE OF SQUARE MEASURE.

144 square inches (sq. in.)	make 1 square foot, marked	.....sq. ft.
9 square feet	" 1 square yard, "	.....sq. yd.
30¼ square yards	" 1 square rod "	.....sq. rd.
40 square rods	" 1 rood, "	.....R.
4 roods	" 1 acre, "	.....A.
640 acres	" 1 square mile, "	.....sq. mi.

UNIT EQUIVALENTS.

						sq. ft.		sq. in.
					sq. yd.	1	=	144
				sq. rd.	1	= 9	=	1296
			R.	1	= 30¼	= 272¼	=	39204
		A.	1	= 40	= 1210	= 10890	=	1568160
	sq. mi.	1	= 4	= 160	= 4840	= 43560	=	6272640
1	= 640	= 2560	=	102400	= 3097600	= 27878400	=	4014489600

SURVEYOR'S MEASURE.

In the primary division of the public lands, and usually in all subsequent subdivisions of considerable area, the measurements are made with what is called a Gunter's chain, which consists of a metal chain 66 feet long and composed of 100 links. The chain employed by the government in the execution of the public surveys is, however, 66.06 in length. The object in adding six-hundredths of a foot to the 66 feet of the ordinary chain is to assure thereby that 66 feet will be set off

upon the earth's surface without the application of a greater strain than about twenty pounds by the chainmen, thus providing for loss by vertical curvature of the chain, and at the same time avoiding the uncertain results attending the application of strains taxing its elasticity.

TABLE OF LINEAR MEASURE.

7.92 inches	(in.) make	1 link	l.
25 links	"	1 rod	rd.
4 rods, or 66 feet,	"	1 chain	ch.
80 chains	"	1 mile	mi.

UNIT EQUIVALENTS.

			l. =	in. =
		rd. =	1 =	7.92
	ch. =	1 =	25 =	198
mi. =	1 =	4 =	100 =	792
1 =	80 =	320 =	8000 =	63360

In practice rods are now seldom used, distances being taken in chains and links. The foregoing table is used in measuring lines and distances. In the computation of areas or in ascertaining the contents of land, the following table is employed:

TABLE OF SQUARE MEASURE.

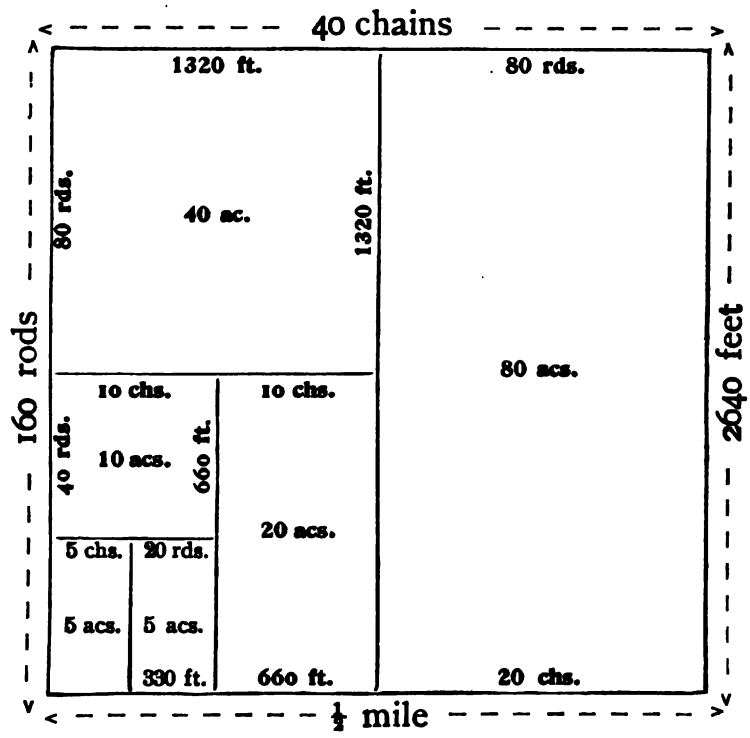
625 square links (sq. l.)	make	1 pole,	P.
16 poles	"	1 square chain,	sq. ch.
10 square chains	"	1 acre,	A.
640 acres	"	1 square mile,	sq. mi.
36 square miles (6 mi. square)	"	1 township,	Tp.

UNIT EQUIVALENTS.

				P. =	sq. l. =
			sq. ch. =	1 =	625
		A. =	1 =	16 =	1000
	sq. mi. =	1 =	10 =	160 =	100000
Tp. =	1 =	640 =	6400 =	102400 =	64000000
1 =	36 =	23040 =	230400 =	3686400 =	2304000000

The contents of land are usually estimated in miles, acres, and hundredths.

As a further aid in arriving a correct understanding of the dimensions of divisions made according to the government survey, a diagram of a quarter section of land is herewith appended, the distances being marked in feet, rods and chains.



The government surveys of all principal base, meridian and township lines are made with an instrument operating independently of the magnetic needle. The solar compass or some other means of equal utility must, of necessity, be used in such cases. But where the needle can be relied on the ordinary surveyor's compass is used in subdividing and meandering.

SPANISH-FRENCH LAND MEASURES.

During the administration of the Spanish-French governors, in the province of Louisiana, the granting power of the royal domain was freely exercised, and the grants so made lie at the foundation of many of the early titles in the States subsequently formed from that province.[1a]

[1a]. The larger part of the southern and western portions of the present territory of the United States was formerly under the

The surveys of these grants are found in many places wrought in with our public surveys, presenting, as it were, curious mosaic irregularities in striking contrast with the simple rectangular system adopted by the national government. They illustrate, in a forcible manner, the peculiar agrarian systems of the governments which preceded us, in the diversified, irregular forms of grants, from urban in-lots, and out-lots, rural tracts of inconsiderable dimensions, and from thence increasing in extent to 7,056 arpens or a league square, the "arpen" of Paris being the standard of provincial measurement.

The following is a comparative statement adopted by the surveyor general's office at St. Louis, Mo., of the land measures of the United States, and the French measures formerly used in the province of Louisiana:

dominion of Spain and France, and both governments made numerous grants and concessions both to companies and individuals. In 1803 the province of Louisiana was ceded by France to the United States, though it was not until many years afterward that the boundaries of the province were definitely established.

The Louisiana Purchase was erected into two territories by act of Congress, March 26, 1804, one called the Territory of Orleans and the other the District of Louisiana. The Territory of Orleans, on April 30, 1812, became the State of Louisiana.

The entire Louisiana purchase, being five times greater than the area of France, viz., 201,900 square miles, excepting certain grants made by French and Spanish authorities, and other legal exceptions, became public domain, subject to the survey, settlement and disposition laws of the United States when the same were extended over the several political divisions from time to time by separate acts of Congress. But all claims which had their origin in some form of concession from a foreign government before the acquisition of the territory by the United States are recognized and protected and after confirmation the titles to lands so acquired have much of the stability of titles derived from the United States.

The grants by the Spanish and French governors lie mainly within what are now the States of Louisiana, Missouri and Iowa. In the State of Louisiana alone there are upward of ten thousand confirmed private land claims.

Linear Measure.			Superficial Measure.		
French.....	United States. Chains.	Links.	French. Arpents.	United States. Acres.	
1 perch equals.....	0.	29.166	1 equivalent to.....	0.85	07
2	0.	58.333	2	1.70	14
3	0.	87.5	3	2.55	21
4	1.	16.661	4	3.40	28
5	1.	45.833	5	4.25	35
6	1.	75.	6	5.10	42
7	2.	04.166	7	5.95	49
8	2.	33.333	8	6.80	56
9	2.	62.5	9	7.65	63
10 or one arpent lineal...	2.	91.666	10	8.50	69
2 arpents	5.	83.333	100	85.06	94
3	8.	75	1000	850.69	44
4	11.	66.666	10,000	8,506.94	44
5	14.	58.333	Arpents. Perches	Acres.	
6	17.	50.	1.....17.551.....	1	
7	20.	41.666	2.....35.102.....	2	
8	23.	33.333	3.....52.653.....	3	
9	26.	25.	4.....70.204.....	4	
10	29.	16.666	5.....87.755.....	5	
100	291.	66.666	7.....05.306.....	6	
1000	2916.	66.666	8.....22.857.....	7	
Side of a league square 84 arpents equal.....2.45 chains.			9.....40.804.....	8	
			10.....57.959.....	9	
			11.....75,510.....	10	
Side of a mile square. 27 arpents equal.....80 chains.			117.....55.102.....	100	
			1.175.....51.020.....	1000	
			11.755.....10.204.....	10,000	

Square league.

A league square contains 7,056 arpents or 6,002.50 acres.

Square mile.

725 arpents 32.64 perches equal 640 acres.

SPANISH-MEXICAN LAND MEASURES.

By the treaty of Guadalupe Hidalgo, ratified May 30, 1848, and the treaty commonly known as the Gadsden Purchase, ratified June 30, 1854, the Mexican Republic ceded to the United States the territory embraced within the present limits of the States of California, Nevada and Utah, the territory of Arizona, a part of the State of Colorado, and parts of the territories of New Mexico and Wyoming. Scattered over this district there exist many ancient Spanish-Mexican titles, municipal and rural, which, under the terms of the treaties, are recognized and protected by the government. These claims and grants are for irregular shaped tracts, illy defined, and bounded

mainly by natural objects. They were made for agriculture, mining, stock-raising, and colonization, and in all sizes, from a village lot to a million-acre tract. Upon confirmation it is necessary to have these titles traced out and fixed, by survey or re-survey, according to the peculiarities of the system of the government from which they originated, and incidentally they must frequently be referred to in subsequent conveyances and subdivisions.

The Surveyor General of California, in a report made in 1851, states that all grants in California, made either by the Spanish government, or that of Mexico, refer to the "vara" of Mexico as the measure of length, and that by common consent, in California, that measure is considered as exactly equivalent to *thirty-three* American inches.[2] It would seem that another length is given to the "vara" by Mr. Alexander,[3] who states its length to be equal to 92.741 of the American yard. In practice, however, the General Land Office has sanctioned the recognition, in California, of the Mexican vara as being equivalent to thirty-three American inches.

The following is a table of land measures adopted by the Mexican government:[4]

Names of the measures.	Figures of the measures.	Length of the figures expressed in varas.	Breadth in varas.	Area in square varas.	Areas in caballerias.
Sitio de ganado moyer.....	Square	5,000	5,000	25,000,000	41,023
Criadero de ganado moyer..	....do.....	2,500	2,500	6,250,000	10,255
Sitio de ganado menor.....	....do.....	3,333⅓	3,333⅓	11,111,111⅑	18,232
Criadero de ganado menor..	....do.....	1,666⅔	1,666⅔	2,777,777⅞	4,558
Caballeria de tierra.....	Right-angled parallelogram.	1,104	552	609,408	1
Media caballeria.....	Square	552	552	304,704	
Cuarto caballeria o Suerte de tierra	Right-angled parallelogram.	552	276	152,352	½ ¼
Fenega de sembraduro de maiz	....do.....	276	184	56,784	1/11
Sala para casa.....	Square	50	50	2,500	0,004
Fundo legal para pueblos....	....do.....	1,200	1,200	1,440,000	2,036

[2] Rep. Genl. Land Office, 1854.

[3] Dictionary of Weights and Measures.

[4] Translated from the "Ordenanzas de Tierras y Agnas" by Galvan, Ed. 1884; and see Ex. Doc. No. 17, 1st Session, 31st Congress, House.

The Mexican vara is the unit of all the measures of length, the pattern and size of which are taken from the Castilian vara of the mark of Burgos, and is the legal vara used in the Mexican republic. Fifty Mexican varas make a measure which is called cordel, which instrument is used in measuring lands.

The legal league contains 100 cordels, or 5,000 varas, which is found by multiplying by 100 the 50 varas contained in a cordel. The league is divided into two halves and four quarters, this being the only division made of it. Half a league contains 2,500 varas, and a quarter of a league 1,250 varas. Anciently, the Mexican league was divided into three miles, the mile into a thousand paces of Solomon, and one of these paces into five-thirds of a Mexican vara; consequently the league had 3,000 paces of Solomon. This division is recognized in legal affairs, but has been a very long time in disuse — the same as the pace of Solomon, which in those days was called vara, and was used for measuring lands. The *mark* was equivalent to two varas and seven-eights — that is, eight marks containing twenty-three varas — and was used for measuring lands.

The United States owned no public land in Texas. Upon its admission into the Union the title to the soil was retained by the State and its lands were disposed of under its own laws. The methods of land parceling followed, in most respects, those in vogue while the State was a part of the Mexican Republic. A table of land measures is appended.

TEXAS LAND MEASURE.

1 VARA=33⅓ INCHES. 1,900.8 varas=1 MILE.

26,000,000	square varas (square of 5,099	varas)=1 league and 1 labor=4,605.5	acres
1,000,000	square varas (square of 1,000	varas)=1 labor .....= 177.136	acres
25,000,000	square varas (square of 5,000	varas)=1 league .....=4,428.4	acres
12,500,000	square varas (square of 3,535.5	varas)=½ league .....=2,214.2	acres
8,333,333	square varas (square of 2,886.7	varas)=⅓ league .....=1,476.13	acres
6,250,000	square varas (square of 2,500	varas)=¼ league .....=1,107.1	acres
7,225,600	square varas (square of 2,688	varas) ....=1,280	acres
5,419,200	square varas (square of 2,328	varas) .....= 960	acres
3,612,800	square varas (square of 1,900.8	varas)=1 section .....= 640	acres
1,806,400	square varas (square of 1,344	varas)=½ section .....= 320	acres
903,200	square varas (square of 950.4	varas)=¼ section .....= 160	acres
451,600	square varas (square of 672	varas)=⅛ section .....= 80	acres
225,800	square varas (square of 475	varas)=1.16 section .....= 40	acres
5,645.376	square varas (square of 75.135	varas)=4,840 square yards.= 1	acres

To find the number of acres in any number of square varas, multiply the latter by 1771 and cut off six decimals.

It will be observed that the Texan vara is slightly longer than the standard recognized in California and adopted by the General Land Office.

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