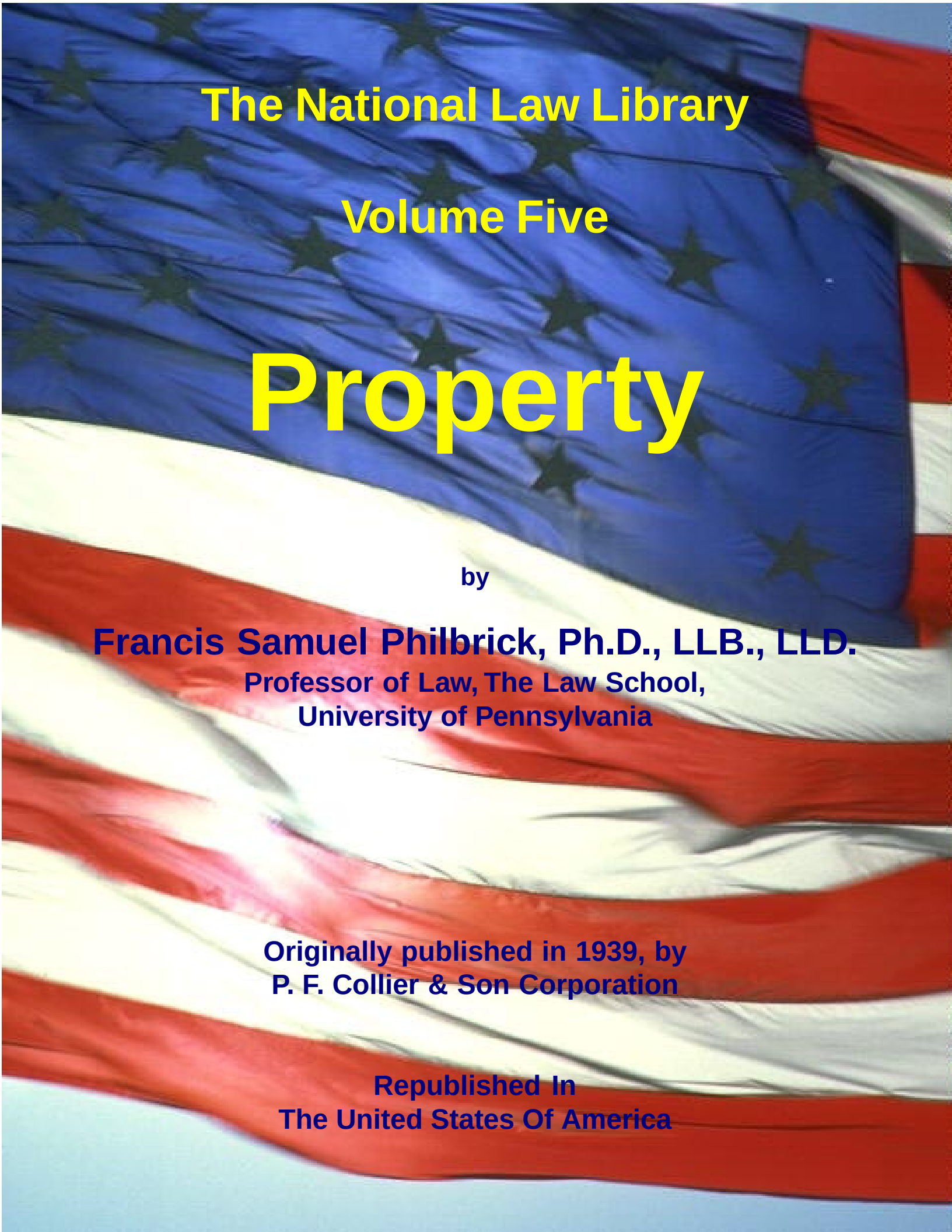

The National Law Library

Volume Five

Property

by

Francis Samuel Philbrick, Ph.D., LLB., LLD.
Professor of Law, The Law School,
University of Pennsylvania

Originally published in 1939, by
P. F. Collier & Son Corporation

Republished In
The United States Of America

SUSPICIONS
NEWS MAGAZINE

Anno Domini 2002
National Law Library Vol. 5

Creator, Proprietor &
Christian Publisher
Alfred Adask

http://www.suspicions.info

POB 540786 Dallas, Texas 75354-0786
The United States of America

Preface

This brief essay on a vast subject is not designed as an epitome of the property law, but rather as an explanation, for students, of what property is, how the property law has grown, and in a general way how its parts are related. Considerable space is given to historical explanations and to "juristic" discussions. It is somewhat the fashion of the day to criticize both, but the author offers no apologies for his procedure.

The property law is full of complexities and anachronisms born of modes of thought we cannot share, of social judgments differing from those which we should, if free from precedents, make today, of classifications inadequate for present needs, of subtleties and in-directions that have distorted and delayed the law's development. It is the author's conviction, and in his opinion nearly every brief prepared by any lawyer justifies it, that almost nothing legal can be understood or applied—statutory clause, judicial opinion, or general principle—otherwise than by studying its origin and its past. As for the attempt to make clear, by history and otherwise, the *nature* of things discussed, that has seemed more worth while than to cram these pages with a multitude of minor rules and distinctions regarding things whose nature a beginner would be puzzled to discern through a multiplicity of details.

For lack of space all annotations have been omitted, except those giving the source of direct quotations. One quality likely to characterize any brief treatment of a large subject is dogmatism; another is the accumulation of vague generalities. An effort has been made to avoid both.

Various acknowledgments must be made. In writing Part I, citations on occasional points were checked, and other authorities called to my attention, by Mr. Morris H. Sheer and Mr. Edward I. Cutler, and particularly, on many subjects, by Mr. Sydney S. Asher, the last being then a Gowen Fellow of the University of Pennsylvania Law School. All of the proof has been read by Mr. Bernard Chertcoff, now a Gowen Fellow, and thanks to his care various inconsistencies, obscurities, and inadequacies have been eliminated. To all three of these students I am grateful for aid and criticism.

Francis S. Philbrick
1939 A.D.

"It does not require a majority to prevail, but rather an irate, tireless minority keen to set brush fires in people's minds."
– Samuel Adams

Contents

2 Preface

6 Part I
Property in General; Nature, Divisions, Formative Influences

7 Chapter I. Property in General
I. General Concepts
2. Property
3. Things
4. Commercial Value

II. The Content of Property Rights More Specifically Considered
1. Rights ad Rem, in Rem, and in Re

III. "Property" a Word of Varying Meaning.
1. "Ownership," "Possession," "Property"
2. Changing Meaning of "Property" at Different Times
3. Geographical Variances of "Property"
4. Various Meanings for Different Purposes

20 Chapter II. Seisin & Possession as the Basis of Legal Title
1. Possession
2. Seisin
3. Relation of Seisin and Possession to Title
4. Consequent Role of Seisin and Possession in Older Modes of Conveying Title
5. Continuing Role of Possession in Transfers of Title

31 Chapter III. Classification of Property Interests
I. Real Property and Personal Property .
1. Origin
2. Some Obsolete and Some Enduring Distinctions
(1) Variant Rules of Devolution
(2) Liability for Debts
(3) Variance in the Law's Remedies Protecting Them
(4) The Recording System
(5) Modes of Alienation
3. Fixtures
4. Equitable Conversion
5. Persistently Varying Treatment of Realty and Personalty .
6. Tendencies toward Unification

II. Legal and Equitable Interests
1. Origin of the Distinction
2. General Relations of the Two Systems

III. Other Classifications
1. Normal Ownership
2. Abnormal Ownership

47 Chapter IV. Ownership & Divided Ownership
1. Definition of "Ownership"
(1) Varying Content of Rights Labeled Ownership
(2) Ownership and Rights in Rem
(3) Ownership and Rights in Re
(4) Ownership and Rights of Definite or Indefinite Enjoyment—Content
2. Divided Ownership
3. Trusts As Example of Divided Ownership
(1) Has the Cestin Rights in the Trust Property?
(2) Questions Narrowed to Controlling Issues
(3) He Holds Equitable Real Rights in the Res.
(4) He Has Equitable Ownership of the Res.

64 Chapter V. Public Policy in the Law of Property
1. How Public Policy Has Shaped Property Law.
(1) By Control of Alienation
(2) By Control of the Use of Property
(3) By Increasing Disregard of Title
2. A Conscious Public Policy Indispensible.

Part II
Technical Description of Property Interests

69 **Chapter VI.**
Generalities Regarding Real & Personal Property

1. Meaning of "Land"
2. Horizontal and Vertical Subdivisions of the Close.
3. Simplicity of Personalty
4. Occasional Peculiar Treatment of Property as Realty or Personalty
5. Relative Importance Today of Realty and Personalty
6. Influence of "Feudalism" upon the Property Law
7. Plan of Later Chapters of Part II

73 **Chapter VII. Estates of Present Enjoyment in Land**

1 Distinction between Possessory and Non-Possessory Interests
2. Conception of an "Estate"
3. Some Characteristics of Possessory Estates
4. Classification of Freehold and Non-Freehold Estates
5. Estates of Right and of Wrong
6. Freehold Estates
   - (1) The Fee Simple
   - (2) The Fee Tail
   - (3) Estates for Life
7. Estates Less than Freehold
   - (1) Leases and Leaseholds
   - (2) Classification
   - (3) Terms for "Years" Certain
   - (4) Tenancies at Will
   - (5) Tenancies from Year to Year
   - (6) Relations of Third Persons
   - (7) Rent
   - (8) Abnormal Termination
8. Estates of Present Enjoyment, Generally
   - (1) Waste
   - (2) "Natural Rights"

93 **Chapter VIII.**
Non-Possessory Estates in Land

1. Future "Estates" and Future Interests .
2. The Origin of Future Interests
3. Common Law Future Interests
   - (1) Reversions
   - (2) Vested Remainders
   - (3) Possibility of Reverter
   - (4) "Conditional" Future Interests
   - (5) Right of Entry for Breach of a Condition Subsequent
   - (6) Contingent Remainders
4. Future Interests under the Statute of Uses
   - (1) Shifting Uses
   - (2) Springing Uses
5. Future Interests under the Statute of Wills
6. Distinctions between Various Future Interests
7. Adjustment of Interests of Holders of Particular and Expectant Estates
8. Estates Held in Co-ownership
   - (I) Tenancy in Common
   - (2) Joint Tenancy
   - (3) Tenancy by the Entireties
   - (4) Community Property

105 **Chapter IX.**
Non-Possessory Interests Less than Estates in Land

1. Modes of Restricting a Neighbor's Rights in His Land
2. Easements
   - (1) Definition and Types
   - (2) Appurtenant and in Gross
   - (3) Negative and Spurious
   - (4) Creation
3. Scope of Easements and Repairs of Servient Tenement
4. Protection of Easements
5. Suspension and Extinction of Easements .
6. Profits a Prendre
7. Real Covenants
   - (1) At Law
   - (2) In Equity
8. Licenses
9. Rent

126 **Chapter X.**

Interests in Personal Property

1. Their Relative Simplicity
2. Divided Ownership and Estates in Chattels
3. Leases
4. Bailments
5. Pledges
6. Liens
7. Other Estates in Chattels

131 **Chapter XI.**

Modes of Creating, Destroying, Renouncing & Transferring Property Interests

1. Original Titles
2. Adverse Possession
3. Prescription
4. "Voluntary" and "Involuntary" Alienation
5. The Conception of Transfer
6. The General Rule of Alienability
7. When May a "Transferee" Receive More Than His Transferror Held?
8. The Rule against Perpetuities
9. Marketable Title
10. Impediments to Marketability and Restraints on Alienation
11. Invalidity of Restraints on Alienation: Of Legal and Equitable Interests
12. The Ancient Basis: Common Law Conveyancing
13. Uses and Conveyances to Uses
14. Essential Character of Conveyancing before and after the Statute of Uses
15. The Evolution of the Deed
16. Uses and Deeds in this Country
17. Contents of a Deed
    (1) Parties
    (2) Description of Property
    (3) Statement of the Interest Conveyed
18. The Execution of a Deed: in Particular, Delivery
19. Acceptance of a Deed
20. Creation and Conveyance of Incorporeal Hereditaments
21. Covenants for Title
    (1) Covenant of Seisin
    (2) Covenant of Right to Convey.
    (3) Covenant against Incumbrances
    (4) Covenant for Further Assurances
    (5) Covenant for Quiet Enjoyment
22. Wills and Intestacy
23. Powers of Appointment
24. Fraudulent Conveyances
25. The Recording System

Part I

Property In General: Nature, Divisions, & Formative Influences

General Concepts

I. Property

Property is thought of by laymen as all the *things that a* man owns. Lawyers, also, ordinarily talk of property in this sense when thinking of a general or "unlimited" interest in the thing involved. Strictly, the law of property is the bulwark that protects men's interests in things; and it does this by recognizing or declaring that A has, as regards a particular thing and some or all other persons (between whom and A there therefore exist *legal relations), rights* in or to that thing, which rights may be maintained by self-help with the law's approbation or maintained with its more obvious aid through proceedings in courts of law. Courts frequently use the word in both senses: "property is more than the mere thing which a person owns . . . it includes the right to acquire, use, and dispose of it."[1]

Dealing, then, with rights in or over things, when the law deals with the entire right-complex held by a man as owner (or with a large part, or at least a very important part thereof—for legal language is inconsistent) it is generally regarded as dealing with "title"; if with individual and limited rights, they have individual names—but these are likewise property, and are "owned" by those who enjoy them. And therefore the layman's use of the word "property" to designate the objects of legal rights, far from adding confusion, saves confusion—by leaving "title" and other words to designate the rights themselves which the law protects *(see* p. 25).

The above simple statements contain many obscurities and difficulties. What is a "thing," for legal purposes; what is ownership; what is the origin and basis of interests; whether rights pre-date judicial decisions, which merely recognize them, or are created for all practical legal purposes by the decisions; what is the nature of legal rights when analyzed with reference to decided cases ;—these are all questions equally fundamental and puzzling. Moreover, since the above statements assume that there *are* no true legal interests except so far as interests are effectively *protected* by law, and since the extent of their protection has always been limited by the procedural machinery available for that purpose, it follows that the substance of legal rights with which "substantive" law deals has been developed or determined—that is, modified—by procedural law: hence called "adjective" law. This is particularly true of property law in its historical development.

2. Things

The concept of *things* has sometimes been given by lawyers a very narrow meaning. Austin[2] defined them as "such permanent external objects as are not persons," "sensible objects, considered as the subject of rights and duties." However, apples, though sensible, are impermanent; yet are under our law things and capable of being property. An electric current, or a definitely reasonable expectancy of winning a beauty contest, are not even "sensible"; but electricity withdrawn by tapping a wire has been treated, if not as property wrongfully taken, at least as property is treated when so taken; and a beauty's justified hopes of winning a beauty contest have been treated as an interest, for unjustifiable destruction of which damages have been given. On the other hand, though a loss of expected gains will generally be allowed as an element of damages when proved with the requisite certainty, an unconscionable frustration of such an expectancy, no matter how definite the proof of imminent profit, may or may not

be made by equity the basis of a constructive trust against the unconscionable actor.

As far back as we know anything about it our land law was full of incorporeal things; but personal property originally presented few inconsistencies with Austin's definition. Not so today.

Outside of that definition would fall all incorporeal personal property—copyrights, patent rights, promissory notes, bills of exchange, insurance policies, claims to annuities, bonds, corporate stock, a seat on an exchange (most of which are capable of inclusion under the vague term, choses-in-action); although such interests constitute today by far the greatest part, measured in money value, of all personal property. Legal remedies have, as just stated, become available for the protection of all these interests that lie outside of materialistic definitions. The common-law actions of trespass, detinue, replevin and trover were originally designed to deal solely with corporeal chattels. Their application to incorporeal interests—for example, the use of trover for conversion of corporate stock as distinguished from the stock certificate—presented great difficulty, and both hampered and distorted the development of property interests.

The distinction between tangible and intangible, "corporeal" and "incorporeal," things was basic in the beginnings of our law (especially that of land), but has constantly lessened in importance. It was never logical, since the law deals solely with rights, which are necessarily incorporeal. But a right that involved possession of something tangible was of enormously preponderant importance in our early law because of its principles regarding title and transfers of title *(see* page 45)—and still remains of exceeding importance.

Confusion might be avoided by excluding the word "thing" from legal language, but this departure from men s every day language would give only a momentary relief, for such artificialities of terminology cannot be preserved. In fact almost every other word, as much as "property," will be found to have a history of indefinite and shifting connotations. In practical treatment the legal meaning alike of "things" and "property" tends toward the infinite content of "everything." Almost anything may be the object of proprietary rights; for example, expectancies, goodwill, and for some purposes family relationships, sentiments or emotional disturbances, fall comfortably within both.

Now, if something is admittedly both a "thing" and "property," and something else is similarly *treated* in law, that fact is highly important; but an agreement that the second something *is* therefore a "thing" or "property" is not absolutely necessary. Nevertheless, it will in time certainly become such. Such terminological embarrassments are everywhere encountered.

Whether or not something is or is to be treated as "property" for legal purposes is determined (or was determined at some time in the past) by applying rough tests. The chief tests have been two. First, are one's interests in the thing legally protected against the world generally ?—such protect ion is characteristic of "proprietary" rights. Secondly, has the thing commercial value? But there is a third test, of public policy, in applying which the courts, explicitly or otherwise, emphasize the purpose for which classification of a thing as property is sought. So, for example, since 1853 a contract subsisting between two persons has, for the purpose of securing them against improper interference by third persons with its due performance, been increasingly assimilated to tangible things, whose owners have always been protected against such interference. Moreover, such contract rights (and various other interests) have through the centuries become assignable to an increasing extent and with increasing ease; hence they have acquired exchange value. And this increase in value has both called for, and been accelerated by, protection of the right against strangers.

3. Commercial Value

Commercial value, the second of the above mentioned tests of what is property, is unsatisfactory both historically and practically.

Not merely the literature of fiction, but life itself abundantly illustrates the fact that a son's expectancy of succeeding to a patrimony may have commercial value in the opinion of moneylenders; yet this expectancy is only slowly attaining any recognition as a "property" interest by the courts. On the other hand contingent remainders, while they remained for centuries easily destructible and to only a very limited extent transferable, had very little commercial value, yet were always regarded as property interests. Until varying dates in the nineteenth century, a true owner of land could not in any state of this country convey his title by deed so long as some third person was actually in the adverse possession of the land *(in Infra,* pp. 51-52) –if a rightful possession, as of a tenant, of course the title was transferable subject to such interest—and this was pure medieval Germanic law; yet his interest had for six centuries been regarded as a continuing property interest. On the other hand, some things recognized today as being, for some purposes or from some viewpoints, property interests meet very well, in their historical de-

velopment, the test of exchange-value. To the transfer of choses in action such impediments existed at law as must have prevented an early recognition of their property aspects; and this would have continued to be true of the non-equity law even after equity compelled the assignor to allow the assignee to sue in the former's name. Again, one's remedial right to sue for damages (perhaps properly speaking one form of chose-in-action) could once not be assigned at all, because to permit "merchandizing in quarrels" would stimulate transfers by the impecunious to others who could afford litigation, thus encouraging what was regarded as undesirable discord; and this prohibition of maintenance and champerty still to some extent prevails. These particular rights of action are, therefore, even today, generally not thought of as property. Nevertheless, to a large extent they survive the death of the person wronged, passing usually to his personal representative, if not as part of at least as does, the decedent's personal property; and they may be assets of his estate in bankruptcy.

II. The Content of Property Rights More Specifically Considered

1. Rights ad Rem, in Rem, and in Re

If A is the creditor of or makes a contract with B, he is said to have against the latter a right "in personam," and B is said to be under a personal duty; and an action to collect the debt, or to collect damages for breach of the contract, is called an action *in personam.* The same phrase is used *if* the claim is not against one individual, but against various individuals.

One may have a contract right to receive a thing, and various writers have called this a *jus ad rem,* and, of course, a right *in personam.* But the most important right to receive a thing in our law is a property right—an owner's right to regain his property which another is wrongfully holding. The phrase *jus ad rem* might therefore well be discarded, or confined to its proprietary meaning.

On the other hand, if A owns land he is generally said to have "a" right—which properly means a legally enforcible claim—"against the world generally" that nobody shall without his consent come thereupon, even before anybody identifies himself, by doing so, as the one person in the world against whom the "right" is to have substantial meaning. There is a practical justification for this somewhat strange language. It is only when the coming onto the land is wrongful, a "trespass," that damages are collectible; and men have come to feel (though the law did not always have this theory—or any theory) that an act can be wrongful only if a pre-existing duty, correlative to a pre-existing right, forbade it. However, since one legal relation between a landowner and "persons generally" would be anomalous, it has recently become usual to say that A holds against such persons a multitude of primary rights corresponding to their duties—notably their duty to forbear from entering upon the land; and that against one of them who actually trespasses he thereby acquires a secondary or derivative remedial right *in personam* correlative to the wrongdoer's duty to expiate the wrong. The pre-existing primary rights, because held against individuals, have sometimes been called rights *in personam,* although such individuals are not in the usual sense "determinate." The more common usage is to call them rights *in rem.* The concept of rights *in rem* is manifestly unsatisfactory at best. Some will agree that it is both useless and pernicious.

A "real right" or right *in re* is a right in or over a particular *res* (thing). That is, it is a right which men once thought of as exercised by the owner directly against, or held directly in, the thing; although, of course, one can only hold rights against other persons with reference to a thing. All real rights are also rights *in rem;* but the latter quality is merely characteristic of (but not confined to) property rights, whereas real rights are exclusively proprietary. In our law they were originally rights evidenced by seisin, and protected by actions based upon seisin. "Every right that assumed the form of seisin thereby become real"—this was Germanic law, and English law.

In preceding sections it has also been noted that mere rights may be treated as things. Rights in rights were a vitally characteristic feature of our medieval law; indeed, the real-izing (which under our legal system also became realtyizing) of rights was the most characteristic feature of that law. If one "owns" a thing, say land, one holds a complex of real rights therein. If one has or holds only an isolated right over another's thing, as a right of way over his land, one owns the land to that extent (p. 138). In either case there is an interest—a desired enjoyment or economic benefit; the law concedes a right or rights or enjoyment—in one case a single right in the land known as an easement, in the other case varied rights that constitute what is known as ownership .of the land. Since both of these rights are protected against interference by any other persons generally they are rights *in rem.* It has seemed to some improper to say that one can

"own" what is only a right in the land of another *(jus in re aliena),* because it then follows that one has real rights in it as one's incorporeal thing *(jura in re propria),* and these rights being enforcible against people generally are *jura in rem.* The only difficulty lies in the foreign phases, which lead one to Roman law, which thought differently from our own on this subject. The preceding has always been the attitude of our law. If valuable it will be treated as property; and we cannot avoid thinking of property as what we own. *Jura in re* are proprietary and protected *in rem,* but rights *in rem* are not limited to proprietary rights—many rights of personality being so protected.

Unusual "things" treated as property is treated have been referred to (p. 3). It is also apparent from the examples there given that something may become legally a thing, and further become property, by development. The law being a living growth, protecting interests that struggle for security, has often eliminated old types of property and admitted new.

Sometimes rights which, admittedly, were originally effective only *in personam* have become effective *in rem—as* in the case of a tenancy for years *(see* page 26). Very similar has been the development of many other contract rights; although these, unlike the tenant's right, remain personal as respects the agreement and its enforcement, yet the relationship thereby created becomes an interest treated as an object of *jura in rem.* The rights of a cestui que trust against his trustee until lately have been referred to as *in personam* but it is clear that in addition the cestui que trust's interests in the trustee's equitable obligation (and some contend, in the trust *res)* constitute *jura in re* that are enforced *in rem;* that is, they are enforced against all persons save a bona fide purchaser for value. Likewise, in a purported present transfer of after-acquired property ("future goods") it is a difficult problem to determine how and to what extent true proprietary rights, as distinguished from mere contract rights, are created.

On the other hand it has sometimes happened that an interest once broadly protected becomes one of narrower incidence. In the old land law an easement of way was "appurtenant" to both dominant and servient tenements *(see* page 279) in the sense that a transferee of either necessarily took the attached benefit or burden as an incident of title. But in this country, because of our recording acts *(see* page 290), the burden does not bind a grantee of the servient land who gives value and takes the title without notice of the burden's existence—either actual notice, or constructive notice resulting from the recording of the conveyance creating the easement. Yet of course the right is not the less a *jus in re—a* property right; nor would anybody deny that it remains effective *in rem,* though not against literally everybody.

2. Content of the Broad Concept of "Right"

Social life involves innumerable relationships between individuals, most of which are nonjural. But relations of great importance—not merely to two individuals as such, but to all others in like circumstances—come to be regarded as involving social interests, and many of these are regulated by law. That is, they become legal relations. It is generally agreed that law deals exclusively with legal relations; that legal relations exist within the area of constraint by law; and that where the authorities of men over each other within such relationships end, there law ends. Now, A may (1) be entitled to control in some manner B's conduct. If that be disputed, he may call upon a court of equity to compel B to act or to abstain from acting in a certain manner; or may call upon a court of law either to compel him to give up property which he detains or to compel him to pay damages for not having acted or for not having abstained from acting in a certain manner—in either case in contravention (allegedly) of principles regulating the relationship existing between them. Again, (2) A may hold an authority, under other legal principles, himself to act in such manner as to alter the existing legal relations uniting B to A or to other persons. If his action be challenged, his authority must, here too, be vindicated in court.

In the first case A asserts a Right in a narrow sense; an authority to control another's conduct within the framework of an existing legal relation. In the second he exercises a Power—an ability to alter an existing legal relation. Both of these authorities are included in "right" as ordinarily used in legal speech and writings. Correlative to A's claim is B's duty; and correlative to A's power is B's liability—so called no matter whether its exercise be beneficial to B or detrimental. These two relationships of Claim-Duty and Power-Liabiity seem to be fundamental.

However, different writers have regarded a varying number of legal relations—from one to four—as fundamental. The number depends upon slight alterations in definition. Salmond, for example, used the following: "A liberty is that which I *may* do innocently; a power is that which I *can* do effectively; a right is that which others *ought* to do on my behalf." On the other hand, Hohfeld and his adherents have used (substantially) the following table:

	Concepts of Legal Authority Over Another Because of:		Concepts of Non-Subjection to Another's Control Because of:	
(1) One may have:	A Claim (or Right)	A Power	A Privilege	An Immunity
(2) The opposites of the preceding (i.e., the contrapositions of the same person when he lacks such authorities or such exemptions) being, respectively:	A No-Right	A Disability	A Duty	A Liability
(3) The correlatives of the authorities and exemptions under (1) – descriptive of the position of a second person against whom the authority or exemption exists—being respectively:	A Duty	A Liability	A No-Right	A Disability

The middle line of this table seems to be of no value unless it be linguistic. A court often finds, indeed, that A has no claim or no power against B; but this can only mean that their relations lie in the non-jural field of freedom, that there is no legal relation between them (within the area of present litigation).

As for the privilege panel of the table, the peculiar relation of its terms to those in the claim panel was due to Hohfeld's definition of privilege as "freedom from right or claim of another"—not including freedom, also, from another's power; but save for that restriction the concept might, evidently, cover the whole field of non-jural freedom. Immunity was defined as "freedom from the legal power or 'control' of another as regards some legal relations"; the last words confining it (unlike privilege) to the field of constrained conduct—that is, of law. Hence the immunity panel necessarily merely repeats the power panel in reverse. To read from the former that B is immune to any power in A when A has no power or is under a disability, but that (reading the opposite) sometimes B instead of being immune is under a liability, is the same as to read from the power panel that when A holds a power B is under a liability to it, but that (reading the opposite) sometimes A has no power or is under a disability. All these statements amount to saying that B is *free* from any power held by A.

If A voluntarily buys B's land at a tax sale and thereafter pays taxes upon it, an equity court may declare that A lacked any power (authority) to obligate B, by such acts, to reimburse him; thereby merely establishing that A acted in the field of liberty outside all law (or in Kocourek's borderland of "mesonomic" relations—see p. 22); all "claims" for reimbursement to prevent unjust enrichment remaining merely moral until the remedy of quasi-contract takes them in. But if in the same proceeding—a suit by B in equity to have removed from his title the cloud of A's taxtitle—the court declares that he cannot have that relief until after reimbursing A for the latter's expenditures, this decision recognizes a true power in B to create in his own favor (by reimbursing A) a claim against A; the exercise of the power creating an enforcible legal relation. It is just as concise to say that A has no power as to say that he is under (or "has") a disability.

On the other hand, to say that the beneficiary of a spendthrift trust "has an immunity" against a seizure of the trust property by a creditor, or that a debtor is similarly immune as respects his homestead or the tools of his trade, or that anybody enjoys an immunity against a taking of his property without due process of law (for example by a wrongful levy), may of course be linguistically permissible and even useful—and the decisions in many legal controversies have been so stated; but these decisions merely mean, at best, under Hohfeld's definitions, that the creditor has no power. However, the "power," here involved would be that of setting in motion the judicial machinery for enforcement of a judgment that has sustained a

claim of the creditor. Aside from the possible undesirability of looking upon this as a power, it seems that such decisions in truth hold that the debtor has a *right* to control the acts of others who seek to take the property in these forbidden ways. These cases, therefore, seem also to fall outside of the field of power.

They fit perfectly, however, under claim and immunity as used by Kocourek. For Kocourek uses privilege and immunity as *affirmative* concepts. To him an immunity is not merely freedom from another's act (which would take us into the non-jural field—both as to claims and powers) but is the capability of *preventing* another's act, positive or negative; and that capability must reside in a claim, because of his definition of the latter as "a legal capability to require a positive or negative act of another person." Likewise, he uses the word only when the protection is an exception to the general rule of law. Thus immunity is "a special kind of claim"; "only a claim to the contrary kind of act." The word is thus useful, though not adding any new form of relation.

A privilege in Kocourek's sense, which is its ordinary sense both in and outside the law, is a freedom of action or inaction resulting from the removal of a prohibition normally existing against such action by some rule of law—or, outside law, of morality or etiquette. Because the holder of a privilege has a capability of effectively refusing to act as another could normally demand, Kocourek defines a privilege as "a special kind of power." But it is to be noted that its holder does not himself alter existing legal relations; the law places him exceptionally outside the normal relations. The existence of a privilege, moreover, always depends upon the choice of the normal rule escape from whose constraint creates the privilege. Usually the form and the exception are both fixed by traditional language; not necessarily logically fixed.

That this is not always so, however, is illustrated by the following examples. A tenant for life or years who is unimpeachable for waste is privileged to use the land in a manner which generally subjects a tenant to a claim for damages. A sheriff may justifiably enter any close to serve a writ; a landlord may properly enter the leased tenement at proper times to inspect them. A may rightfully enter upon B's land to take A's chattels, wrongfully placed there by B or with B's consent, or sold to A by B or with his consent while on B's land; may enter to reput thereon B's chattels wrongfully left on A's premises; may enter to save his own or some other person's life. He may pass over B's land to avoid a flooded portion of a public road; or to collect cattle straying therefrom without his fault. He may destroy his neighbor's property to check a conflagration. In all these cases there are privileges both in the Kocourekian and the Hohfeldian sense. But in all of them, also, the disregard of normal restrictions that are *not* binding upon the actual actor causes no alteration of legal relations previously existing as to him, nor does it involve the creation of new ones; that is, it does not involve the exercise of a power in the ordinary sense. Again, it is said that a land owner is privileged, in Kocourek's sense, to go upon another's land "to exercise a power" to abate a nuisance thereon maintained; and that he is privileged to mutilate on his own land a neighbor's trees in abating the nuisance of their encroachment upon the destroyer's soil and airspace. In each case the departure from a norm is clear, but there seems to be no power. The mere termination of a course of wrongful conduct does not alter existing legal relations—the wrongdoer remains a wrongdoer; the other party's act merely ends the period for which a claim for damages is available. The act in exercise of the privilege merely makes manifest that the normal relation is, by rule of law, absent.

On the other hand a landlord may (particularly in early times he could) distrain upon his tenant's chattels as security for the payment of rent in arrear. The exercise of the privilege is here incidental to the exercise of a true power that creates a lien.

Hohfeld's privilege is sufficiently broad in terms to include all the foregoing Kocourekian privileges. Privileges in both senses are also present if A strikes B in self-defense; if A publishes statements that would be defamatory but for B's public character or A's character (as a witness or legislator) when they are uttered; if A enters upon B's land by license. But to find in these cases a power exercised by A, an alteration of legal relations, seems impossible. On the other hand, when a constable kills B's stray dog, or when a landowner ejects a trespasser without undue force, there are present a Hohfeldian privilege and power, but a Kocourekian power only—provided we choose as our norm in the first case (for in the second doubt can scarcely exist) the rule that "constables may under certain restrictions kill dogs without liability therefor," and not the rule: "one citizen may not—or may not except in self-defense—kill another's dog without liability therefor."

Hohfeld's privilege includes a field often conceived of as outside all law—where one may, for example, destroy a neighbor's business by "fair" competition, sue or show leniency to one's debtor, cultivate or walk in one's

garden, drive one s car, study or burn one's book. Certainly all these acts are called "lawful"; the last three are said to be "incidents of title," and are at least naturally referred to in explaining that conception. Courts have often declared that the "right" to acquire and enjoy property includes a "right" to make contracts to secure it; and the Supreme Court of the United States has held the "right" to contract to be "property." That the latter "right" is essential to the enjoyment of property is evident. Yet such "privileges" and "rights" seem to be liberties; just as the "right" to engage in private banking was a liberty until statutes made that area of freedom an area of law. And even where true rights are involved, as Justice Holmes has remarked, "a large part of the advantages enjoyed by one who has a right are not created by the law.... What the law does is simply to prevent other men to a greater or less extent from interfering" with the acts of enjoyment.[3] Freedom being particularly precious, men are litigious and courts correspondingly much occupied in protecting it. Particularly, men have realized that one man's property may restrict another's liberty, or insure his own. Hence the protection, even constitutional in this country, of the liberty to acquire property. But the superabundance of judicial discussions and delimitations of that liberty, or of other liberties, does not make them a part of the field of law as ordinarily defined: men's steady desire is that they shall remain outside that field. If the acts above referred to are acts-within-the-law, then almost all human acts—incident to the enjoyment of contract and property, and lawful expression of personality—are equally so; and legal relations would exist as to all of them between each citizen and all other members of the community. Inasmuch as legal traditions and general customs are such that few of these acts are ever challenged, hence need and receive no protection by judicial pronouncement, perhaps no great harm results from their recognition as privileges—they are like the infinitude of "rights" and "duties" *in rem* which never have a practical existence; but, seemingly, their recognition as privileges has no advantage. Under Kocourek's definitions they are mere extra-legal liberties; liberty ending where the constraint of law begins.

The word "power" has long been used to designate an ability in A to alter B's legal relations, with A or other persons, without B's concurrent action and usually independently of positive action or immediate control by a court (such as is present in the distribution of a decedent's estate to his next of kin made by the administrator).

Sometimes such exercise of a power is in performance of a duty, as when a conveyance of land is made in pursuance of a contract with B or an agency for C, or when A exercises a special power of appointment held in trust *(i.e.,* he passes B's title, by deed or will, to some of a group that is the beneficiary of the trust). In these cases the exercise of the power plainly creates various new legal relations, and it terminates the potential constraint by judicial process to which the holder of the power had been subject. Manifestly, no Hohfeldian privileges can here be present. Whether Kocourekian privileges are present again depends upon the choice of the normal rule (that applicable to persons generally or that applicable to administrators and donees-ofpowers) whose relaxation would create privileges.

In the vast majority of cases, however, powers are exercised neither in performance nor in violation of a duty. This is true of any landowner's power to make any person a gratuitous grantee of land; of any chattel owner's power to "abandon" title thereto, and his further power to create, by such abandonment, in any other person who desires the chattel a power to acquire original title thereto by occupancy; of the power of a devisee or gratuitous grantee to refuse the title already conveyed, thereby divesting himself of his new legal relations. If A licenses B to cross land no trespassory relation arises when B enters, but A has a power to restore, by revoking the license, B's duty not to cross unpermitted. In all these cases there is a Hohfeldian privilege to exercise a power, but none in Kocourek's meaning of the word.

Other examples are the power of some bailees to gain liens on chattels by improving them; the power to subject the owner of an abandoned ship to claims for salvage; the power of one assignee of a credit-claim to gain priority over earlier assignees thereof by giving prior notice to the debtor; a pledgee's power to sell his debtor's pawn after default. If land is limited to A in fee, subject to a conditional limitation over to B in fee that is dependent upon B's conduct, B has a power to gain the title by satisfying the condition. If A be named grantee in an instrument handed to a third person with instructions to give it to A when he satisfies a condition, he receives immediately at least a power to acquire the title. And where a creditor holds a claim barred by the statute of limitations the debtor has a power to reestablish, by a part payment or a promise to pay, the original claim-duty relationship. In all these cases there is a Hohfeldian privilege, but whether there is one in Kocourek's sense depends (as stated above) upon what is taken as the field of operation of

the normal rule. In the last three cases such a privilege seems absent. In the three preceding cases there is no such privilege unless the normal rules are taken to be those which, respectively, regulate the unsolicited improvement of another's property generally (not merely abandoned ships), fix the general ranking of similar claims in order of time, and deny to creditors generally (and even to lien-holders) power to sell by sell-help their debtors' property. In the first case such a privilege is more clearly, by ordinary legal phraseology, recognized as present.

All the terms are manifestly artificial. "Right"—long used to comprehend Hohfeld's right and power, and privilege in the Kocourekian sense—is restricted to one of those three authorities. "Duty," which has apparently served as the correlative of all in serving as that of Right in its comprehensive sense, is similarly narrowed. Again, a layman would understand privilege to be release from *any* normal constraint—whether imposed by another's claim or by his power (or possibly by his privilege); but this is not so under Kocourek's definition. The employment of "disability" as the negation of Power alone carries an implication that Power comprehends all "ability" to constrain others. It is equally arbitrary to limit "liability" exclusively to constraint by another's Power. "Immunity" would mean to laymen absence of constraint by any of the three authorities— with a corresponding complexity of opposites and correlatives; but Hohfeld confined it to the field of power. However, arbitrariness of definitions seems to be an inescapable prerequisite to obtaining any satisfactory terms.

There are other difficulties of more substance. It seems evident that the vast scope of the Hohfeldian privilege lessens its usefulness in analysis. But some illustrations are useful. Consider the offer of a contract to buy land. Such an offer does alter the offeree's legal relations, *provided* we assume that every possible offeree stands, before any offer is made, in legal relations with all other persons as possible offerors.

At any rate, the actual offeree acquires a power to bind the offeror, by acceptance, to a right-duty relationship. In Kocourek's terminology, therefore, the offer is the exercise of a "mesonomic" power—not totally outside the law ("anomic") nor already coercive ("zygnomic"), but potentially capable of becoming coercive. The offer restricts, in a sense, B's preexisting total freedom from contractual alliances, but only by enlarging his capabilities of action, enabling him to step, by acceptance, from outside the law into its field of coercive relations. On the other hand, if the offer be one of a gratuitous conveyance of land, or an oral offer of a gift of a chattel not handed over, no legal results whatever follow acceptance; and it would therefore seem impractical, looking backward, to regard the original offer-power as other than a liberty (Hohfeldian privilege) outside the law. By the same test, it might seem practical that voidable legal relations—such as a rescindable sale induced by fraud, or the sales and conveyances of infants and bankrupts—even though ultimately actually nullified by exercise of a power, should be meanwhile regarded as true albeit destructible legal relations; yet also practical that acts which are presently without legal effect, although not void—as an infant's executory promise, or a contract made for one person by another who lacks authority—should be regarded (Kocourek) as lacking legal character,- albeit capable of vivification by affirmance. But it does not seem possible to include, as Kocourek does, among legal relations (relations existing through and for the law) "powers" to break contracts or commit crimes or torts; although true legal relations are of course *created* by such wrongful acts—which relations *are* alterations of legal relations theretofore existing under the accepted doctrine of rights *in rem*.

In short, analysis of the loose concept of "right" still presents difficulties, and terminology cannot be regarded as settled. It also seems clear that if the distinctions between the component elements of that general concept should be made the basis for distinguishing decided cases in seeking precedents they are likely to cause more harm than good: the vague term "right" seems sufficiently -to cover the substance of the interest to which the law should attend.

It is due to the varied content of what are loosely called '"rights"—from inattention to that variety, or emphasis for immediate purposes upon one or another element—that there have resulted the divergent meanings of "property"- above illustrated (pp. 3, 4), and which will now be further illustrated.

III. 'PROPERTY" A WORD OF VARYING MEANING

I. "Ownership," "Possession," "Property"

The words *owner* and *ownership* apparently date from the mid-fourteenth century and late sixteenth century respectively. In their place the phrases "general property" and "special property" were earlier (and are still) employed, but apparently only rarely down into the sixteenth century. In the sense of a man's valuable belongings, the word *property* was apparently rare before the eighteenth century.

The place of all the preceding words was long filled in common legal usage by the words *possessor, possessions, estate,* or by such phrases as "he who has the thing," "he to whom the thing belongs." In other words, the general signification of the words property and ownership was developed, under other names, before those words were used; moreover, all the words above referred to remained words of common speech.

Even under more favorable circumstances the vast changes that have taken place, in the course of centuries, in the law—reflecting alterations in the procedure of the courts, in the nature of commerce and business, and even in the social fundaments underlying these—would have prevented that fixation of content which is essential to terms of precise meaning. Of those modes of user which people generally consider inseparable from the ownership of property some have apparently always existed as liberties outside the law, some have a relatively modern origin in statutes, most have for centuries been regulated by the non-statutory law; but the limits of their enjoyment have varied much historically and from place to place. Title is not today what it once was even as regards land, although that has for many centuries been the best protected of all men's belongings. Much less have rights remained unaltered regarding even the most common and important of particular interests in land, or regarding many forms of personal property.

As for *property* in the layman's sense of interest protected, variations in these interests have been vast; not merely be-cause shrinkages in protective rights have wholly removed some things from the field of property while expanded protection has fortified the position of others, but also because totally new interests have come into the domain of law; that is, have by its protection been made property.

As already said, it is usually most convenient as a matter of words to refer to the thing or interest protected as "property," although in legal effect the reference is to the complex of protective rights that give legal content to. the. interest.

2. Changing Meanings of "Property" at Different Times

The changes in the *meaning of property at different times* are illustrated in a multitude of ways. In considering a few examples it is useful to bear in mind the two senses in which the word is used.

Consider the development of leaseholds. These scarcely were heard of before the late twelfth century; at that time the tenant had only a contract claim against his lessor; he had not—and never acquired—seisin, which was the basis of the only interests recognized by the feudal land law; and consequently his interest was not, and it has never become, "real" property. Yet he had, as soon as leases are heard of, somewhat of a "real" remedy—i.e., the land was specificially recoverable by him. First from his lessor, against whom covenant secured specific performance, or—if that was impossible because a second tenant had received it—other lands of equal value under a warranty implied from the lessor's mere covenant that the termor should enjoy the land. Then (before 1250), against such a second lessee. And finally against all persons, mainly through the long development of the action of ejectment out of trespass, partly by statutes. The security of occupation thus assured him must steadily have increased the desirability and promoted the assignability of leaseholds; the statute of 32 Hen. viii c. (1540) transformed the covenants of the parties into *jura in re (see* page *296);* the whole institute became one of property law. It is evident in this case how a widening conception of wrongs, and corresponding development of duties, were at once made effective through and recorded in legal remedies; and as the duties acquired a generalized and stable character their correlative rights entered the law's consciousness. Such has been the general course of legal development. The effectiveness of rights means the security of interests thereby protected. In both senses property is simultaneously established.

"The common law declares all contingent estates, when the person to take it is not ascertained, to be a mere possibility not coupled with an interest, and to be neither devisable, descendible, alienable by voluntary conveyance, nor subject to execution... Such a naked possibility is in law neither an estate, property, right nor claim. One having such a possibility may in the future have a right or claim, but cannot be correctly said to have any existing claim."[4] Contingent remainders have been recognized property interests for centuries, but it is only since statutes have, very recently, been making them indestructible, that they have attained importance as assets in bankruptcy. Most of the forms of incorporeal personal property named above (p. 3) are, substantially, of very modern origin; some of them are throwing out new forms of still indefinite extent. So far as regards attachment of or execution against a debtor's property, it is only within the last century that equitable interests have been brought within that description.

Powers to dispose of land by conveyance *inter vivos* have varied exceedingly from age to age. Originally, they could not be con-

veyed free of the preemption rights of the grantor's heirs. In both England and the United States public policy has at different times been very marked in impeding or obstructing transfers of landed property *(see* page 162). The modes of conveyance have been subject to requirements whose strictness and subtlety made the law of real property infinitely complex.

As regards wills much the same is true. A man is today permitted to dispose by his will of any "property" which, were there no will, would pass either to his heirs or, through his personal representative, to his next of kin; and today rights of action may generally be so disposed of, since they have come generally to survive the death of their holder. But great limitations upon such powers of disposal existed in our earlier law. Indeed, even today there by no means prevails judicial unanimity in asserting the existence of a basic constitutional right—as part of the "title" to property— either to dispose of this by will, or to have one's heirs or kindred take it under the intestacy laws. On the contrary, the majority of courts concur in excluding these fights, save by tolerance of legislatures, from the right-content of property.

Similarly, the fights of entry of a disseisee and the right of entry to enforce forfeiture for breach of a condition subsequent (pp. 52, 254), although descendible, were in the old law not alienable by will or deed.

3. Geographical Variances of "Property"

Geographical variances in the meaning of property, even from state to state in this country, are equally clear, notwithstanding our background of common experience and the general similarity of our basic legal purposes. This is particularly true of property in the sense of right-content or title—for the *objects* (or "subjects," as many prefer to say) of property rights are probably almost identical throughout the country.

If one owns land in different states, one's enjoyment thereof may be restricted by infinitely varying public control under the police power—municipal ordinances respecting fire-risks, the keeping of hogs, utilization of the land under zoning ordinances, state statutes regulating rural drainage and school districts, and so on. The non-statutory law respecting nuisances will similarly vary; the owner's status will not be precisely the same in any two states as mortgagor or mortgagee, or as respects the rights of creditors against the property under judgment and equitable liens, and through executions. In case of the owner's death intestate, the rules of different states will vary in fixing the degree of relationship to the decedent within which persons sharing the land as heirs must fall; or in determining what other persons (particularly widows, adopted and illegitimate children, collaterals of the half-blood) shall be statutory heirs. In the few states recognizing community property of spouses the whole conception of individual title varies from that elsewhere prevailing. If land be a- homestead the owner enjoys in all or nearly all states an immunity, as regards it, to attacks by creditors; this being of very recent origin, created in two-thirds of our states in the last fifty years.

If one buys an automobile in one state and drives it into others, the sum-total of rights that constitute title, obligations attached thereto and liberties ordinarily associated therewith, may differ very considerably from state to state; for example, with reference to requirements regulating transfers of the' title, driving with a foreign operator's license, liability for injuries to passengers taken in as guests, attachment of liens, penalties for mechanical defects, regulation of the number of permissible passengers, etc. In recent years a totally new encroachment on the field of liberty formerly enjoyed has appeared in some states; they have imposed upon drivers of automobiles licensed in other states, as a precondition to lawful use of their highways, a consent to the acquisition of personal jurisdiction over them by local courts, in actions brought against them for damage to persons or property done in driving their cars in the state visited, through service upon a public official thereof.

Another mode of stating these geographical variations in the rights and duties of a property owner is the rule of conflict of laws that title to land is determined by the law of the locus—as respects existence, mode of creation, and the nature of rights and obligations included; and that the same is true, though today in lesser degree, of corporeal chattels. Of course, the rule arose, not from consciousness of the variations now under discussion, or of any sense of their importance, but from the doctrine of territorial sovereignty, under which the law of each country or state is supreme.

Probably even greater variations of the meaning of title exist in the case of incorporeal personalty. When physical evidences of such exist, convenience frequently gives to the law of the place where such evidence is located dominance in determining the creation, existence, and content of title; but these are modern departures, steadily enlarging, from a medieval doctrine, then applicable even to corporeal chattels, that "movables follow the person"—that is, are subject

to the same law as their owner (in our legal system the law of his domicil, or legal residence).

Nor need such variations rest upon a statutory basis. "Even the incidents of ownership may be cut down by the laws and usages of a state." [5]

4. Various Meanings for Different Purposes

Finally, the things or interests included under the description *property* vary with the *purposes for which that description is adopted.*

The determination of what is property for the purpose of taxation has given rise to an immense amount of litigation; and the conclusions of different courts have varied greatly as respects the same objects. Of course, anything treated as property must have existence in the eye of the law; but for different purposes it concedes or denies existence with exceeding inconsistency. There can be a sale or a mortgage, spoken of as immediately consummated, of things not yet in existence—which things have never been regarded as subject to taxation; and even if those transactions be regarded as really only creating present indefeasible rights to future title by sale or mortgage, then *these* rights are agreed to be property rights, which nevertheless are not taxable. And if contracts are made *to* sell or to mortgage ordinary chattels the former will create no property right whatever, whereas the latter will create an equitable right—an "equitable lien."

In general, even the complete power of disposition conferred by a general power of appointment is never spoken of or regarded otherwise than as a power in one person over another's property; yet, in a majority of our states, realty or -personalty actually appointed by the insolvent holder ("donee") of such a power to a "volunteer" is treated in equity as assets for the creditors of the former in priority to the claims of the appointee. Whether this is on the theory that it was fraudulent not to appoint to his creditors or to himself for them, or on the theory that a complete control *(jus disponendi)* of the title amounts in equity to full title (particularly when joined to rights of immediate enjoyment; the donee being for example a life tenant), matters not in substance; for, as already several times remarked, whether the things be assets because they are "property" or because they are treated as "property" is treated, is a tenuous and usually undesirable distinction. Yet all courts agree that these things were not property of the power-donee under common law principles, nor therefore for purposes of taxation—since by tradition one is taxed only on property to which one holds "legal title," and the common law did not regard the complete *jus disponendi* as title. However, most of our states do now, under inheritance tax statutes, tax the property as though owned by the donee, and this even though the power has not been actually exercised, and some states do this even when the power is special *(see* page *458);* whereas under the Federal statute the power must be general and must have been exercised.

Things may be assets for creditors in equity which are not property for such legal purposes as taxation. Since a creditor's right is not possessory, but only one to realize on his debtor's assets by sale, nothing can be assets that is not alienable. The interest of the beneficiary of a spendthrift trust may be reached by some creditors and not by others. Expectancies—though, as already noted (p. 6), not property for most purposes—may be assets of a bankrupt; and which of them are such has varied under different bankruptcy statutes of this country.

The word "goods" in the original English Statute of Frauds was early held not to include choses in action; and this exclusion has necessarily exercised a great influence in the United States.

Goods unlawfully manufactured or owned (such as intoxicating liquors during prohibition, narcotics, gambling devices and the like) may be property for some purposes, such as taxation, and not for the other purposes, such as the commission of the crime of larceny. The same is true of cats and dogs.

An unfortunate dictum of Lord Eldon (1818), to the effect that equity acts to protect property only, has greatly hindered the extension of equitable relief by compelling courts of equity either to adopt artificial definitions of "property" or to repudiate Eldon's dictum. The latter has substantially been done in many instances—in protecting the political rights of voters and candidates, sentimental interests in corpses, rights to privacy, in one's non-literary letters, in establishing a putative father's right to have cancelled a registered false birth-certificate under which the alleged child could claim the status and property rights of legitimate offspring, rights to preserve the family reputation, prevent alienation of a spouse's affection or prevent a daughter's seduction, or to enjoy security against unwelcome amatory pursuit, against improper expulsion from membership in non-proprietary clubs, and against libel or slander that is "merely personal". (although, strictly, none such can exist if the person libelled has any property or does any business). Under decisions by other courts, however the tendency has been to take the first of the two alternatives above stated; for example,

in protecting a complainant against libel or slander involving or exclusively constituting defamation of business products in protecting interests in gathered news, in protecting a manufacturer's expectancy that labor will flow to his factory in adequate amount if unimpeded by strikers, and in recognizing a right to be protected against improper interference with business goodwill or methods of transacting business. And even in some of the instances of the first group confusion has resulted from an anxiety to avoid a direct contradiction of Eldon's proposition.

As respects the prohibition in our Federal Constitution against taking "property" without due legal process, not only a franchise and an existing contract, but a right to contract have been held within the protection of the prohibition— this last with momentous social consequences in making impossible the regulation by Congress of wages, and therefore of labor conditions. The right to sue (for money— perhaps unsuccessfully, and therefore apparently the mere right to sue) has been protected under the same clause of the Constitution. True, rights to contract, to labor, or to sue have repeatedly been declared by the Supreme Court to be part of the "liberty," as well as part of the "property," which are guaranteed against such a "taking." A general course of business has been similarly regarded. Although the Supreme Court has queried whether reputation is property, it has recognized that a corporate name may be property; which it could only be as a part of good-will, which .of course has commercial value—which, in turn, as has been noted (p. 6), is a very common test of "property."

It is clear from the examples given in the preceding pages that there is no definiteness in the meaning of title. This may, of course, be otherwise expressed by saying that the liberties, powers, and claims, of the "owner"— his legal relations to other persons in regard to the property— are endlessly variable. Nevertheless, the general concept and label are indispensable.

(1) Buchanan *v.* Warley, *245* U.S. 60, 74 (1917).

(2) Austin, "Jurisprudence" (5th ed., 1885), 358, 776.

(3) "Common Law," 220.

(4) In re Banks' Will, 87 Md. 425, 440 (1898).

(5) Per Holmes, J., in Otis v. Ludlow Co., 201 U.S. 140, 151—2, 154 (1906).

Part I, Chapter II

Seisin & Possession as the Basis of Legal Title

I. Possession.

Possession is a concept that has played a primary role in the development of our property law, and some knowledge of that role is indispensable to an understanding of the law's large divisions and basic principles.

Physical possession (de facto or actual possession; custody, detention) may exist in the sense of physical control, yet if this is not recognized and protected by the law there will be no *legal* possession. This is particularly true of the custody held by a servant when acting as such (and therefore particularly in his master's presence); he enjoys no legal remedies. Few exceptions aside, however, whoever has physical possession has legal possession. To the constitution of physical possession two elements are necessary: first, and somewhat vaguely, a sufficient, a reasonable, actual control of the thing of which possession is claimed; secondly, a certain mental state or animus—namely, an intent to maintain that control "against the world generally." This does not mean *"all* the world," nor does it necessarily include the true owner (for then there would be no difference between possession and adverse possession), be he known or not known as such to the possessor; nor need the claim to exclude others *be made* on one's own account.

Of the first element it has been said tht "any power to use and exclude others, however small, will suffice, if accompanied by the *animus possidendi,* provided that no one else has also the *animus possidendi* and an equal or greater power." But there must be actual control, however weak.

Thus, a little girl who picks up a pretty beaded purse may have little strength to hold it, but her control is actual, whereas a ruffian walking beside her and about to seize it has no control until the seizure; and though her animus be only directed to the beads, the law would not attempt to measure its intensity as compared with the ruffian's animus toward the bag's pecuniary contents; hence she has possession. But a hunter chasing a wild animal has no actual control over it unless it is so severely wounded and he in such close pursuit that it is, reasonably speaking on the basis of general experience, "in the bag." And a fisherman raising his nets is not in possession of fish, although he will certainly secure them *if* nobody frightens them away, until the net is so nearly closed that their escape is practically impossible. The control may exist, of course, only indirectly through control of something else; as, for example, of a house, a yard, an automobile, a safe or vault, the clothing on one's person.

As regards the second element, it is not necessary to claim "as owner" in the literal sense. But when the law says that actual control of a thing coupled with an intent to maintain control against the world generally creates legal possession, the law also says that such possessor has a right to maintain and to regain possession against the world generally—i.e., against all who hold no higher right. And these rights are the essence, they indicate the practical meaning, of title in our law *(see* pp. *55—56, 58).*

The concept and therefore

the word "possession" have, of course, been subject to change, and the meaning of the word is therefore subject to the indefiniteness that in varying degrees characterizes nearly all words, and to which even those of the exact sciences are not wholly immune. The older any word is, and the more active has been its use—the more fundamental the concept it expresses and the more varied its application—the more evident, always, are historical influences. For example, a "window" has not long had the characteristic of glass that chiefly distinguishes it today. The concept which that very old word embodies is so indefinite that only the vaguest definition can cover its development; for nothing save the history of buildings and words and the past uses of both can explain why in different circumstances the words balistraria, crenel, eyelet, peephole, loophole, porthole, and French-window have been used within the field which any usual definition of the word "window" would include. The only important difference between the concepts of a "wall-opening for sight or air" and of "possession" is that the former, whatever be the word used to express it, is infinitely less likely than the latter to be the subject of litigation. Whether it is desirable or regrettable, in relation to the administration of justice, that fundamental concepts such as that of possession should be somewhat indeterminate, and therefore flexible in their application to facts, is a question upon which the opinions of lawyers are divided. However that may be, almost all legal concepts, like other concepts, are in fact characterized by these equivocal and casual qualities.

The theoretical requirements of many property concepts are fairly definite. But a paucity of facts, evidence of inconsistant facts, or the difficulty of interpreting conduct, may render impossible a definite conclusion that a particular concept fits the facts of a given situation. Yet, since courts must decide the cases brought before them, some conception of public policy (usually as intuitively felt by the judges, because indeterminable by exact balancing of social interests) will then necessarily determine their decision. Such obscure situations are often presented in problems of possession or its disturbance. If the physical facts are in equipoise and one disputant holds title, possession will be attributed to him. Particularly, the line between a mere disturbance of possession (trespass) and an ouster therefrom (whether an original dis-possession or a repossession by "entry") is necessarily vague. In these cases, as a matter of policy, the law has for centuries permitted an injured party to exercise an election in treating a dis-possessor (disseisor) as such or as a mere trespasser, or to treat a former tenant who remains wrongfully on the land as a trespasser or a continuing tenant. A sense of public interest may cause a relaxation of technical requirements in favor of an officer of the court levying an attachment or an execution. Again, in interpreting statutes which make "possession" of prohibited articles criminal, but to the end of enforcing the legislature's supposed real intent to punish only serious offenders (possessors as directors, of an unlawful enterprise, possessors in bulk, or for a considerable time), courts may carelessly deny any possession to merely casual and momentary possessors—instead of denying only the type of possession supposedly contemplated by the legislature.

Of these cases, however, only that of the attaching officer truly illustrates variations in the meaning of possession. The rest are essentially exceptions to the normal or expected consequences of possession. The cases which most complicate the law of possession are those of crimes. In them a desire to find the defendant guilty or—more frequently— innocent (as in the cases just referred to, but without the excuse of statutory construction to serve as an explanation) results in extraordinary refinements upon, or distortions of, the concept of possession which generally prevails in non-criminal cases.

Despite all such variations, the concept of possession is in the great majority of civil cases applied usefully and with considerable consistency. Had it been impractical in application it could not have retained for seven centuries basic importance in our law.

2. Seisin

Seisin, speaking loosely, was the legal possession of old Germanic law. "For at least three centuries after the Norman Conquest our lawyers had no other word whereby to describe possession." [1] It is true, however, that possession, apparently, has never had in any century precisely the same meaning which attached to seisin in any other century. Before the end of the sixteenth century, both concepts and words were well established.

While the word possession had not appeared, many situations which we today cover with that label—indeed, the vast majority of them—were included within the concept of seisin. On the other hand there were certain exceedingly important forms of dispossession (described by the terms "abatement" and "intrusion") that were treated as disseisins, yet were not typical disseisins because they lacked an actual ouster. Also, after a true disseisin seisin might in

some cases (probably actually numerous) be regained by acts which we would not today describe as amounting to a repossession, although Littleton (1485) did so describe them; namely by mere "continual claim" against a disseisor whose strength made an actual entry upon the land impossible or dangerous. Nor is this analogous to the "constructive possession" of our modern law, since the latter is attributed to one person only when no other person is in actual possession—though the analogy does fit Littleton's usage.

When seisin existed, it enjoyed a protection analogous to and in the main coincident with that accorded today to legal possession. But "possession" also then existed in the case of a tenant for years, and the law's protection of such possession was not the same as its protection of seisin; nor was it identical with the protection given today to a termor's possession. Also, without even the single exception (as Littleton stated the law) mentioned in the preceding paragraph, actual seisin could not be gained without acquiring actual possession. Both could be gained, however, by any wrongdoer; and the usurper could pass both to anybody else. And, as will appear in the next section, when the man whom we would call owner lost his seisin he was left with a "mere right" which we would call an imperfect title; and the way he recovered both seisin and what we would call complete or perfect title was by merely reacquiring possession. "On the one hand the freehold [estate] could not be transferred but by livery of

seisin; on the other, livery of seisin could not be made by any person who had the possession without transferring the freehold." [2]

After the word "possession" entered the law, it and "seisin" gradually acquired definitely variant meanings. In the fifteenth century *possession* became the proper term to designate legally protected control of chattels personal, whereas in the two preceding centuries it was constant usage to speak of the *seisin* of such chattels. The reasons why seisin was thus detached from chattels yet for centuries retained vitality in the land law can only be conjecturally stated. On one hand seisin was quite unconnected, in origin, with feudalism's basic concept of tenure, and the application of its principles very often totally defeated the claims of feudal lords to wardship, escheat, and other feudal derivatives of tenure. This must have tended to delay the ultimate development, although not greatly, since the feudal incidents began to lose vitality when tenure received in 1290 from the statute of *Quia Emptores* the blow which ultimately destroyed it. Of a contrary and vastly greater influence was the exclusive position in the land law, and special importance in early governmental arrangements, of freehold estates, of which seisin was the basis. Particularly important was the fact that the common law rules governing the inheritance of land, with the basic principle of *seisina facit stipitem,* although also derived from Germanic law and quite independent from feudalism in origin, were perfectly adapted to the desires of the great landowners—especially, of course, the rule of primogeniture. To these associations with vital social interests seisin apparently owed its preservation as a concept of the land law. The practical differences between it and possession gradually decreased until finally, long after its own importance was gone and long after feudalism had lost all reality, "seisin" became "a technical term to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass."[3] This last phrase was old and actual law; the preceding explanation was a fictitious legal principle of literary feudalism.

Before these changes in the meaning of "seisin" had more than well begun terms for years had become of vast importance. Originally not a property institute at all *(see* page 26), when they became such they were perforce, for lack of seisin, denied recognition as real property, and thus became personalty as chattels "real." The landlord was then regarded as seised of his reversionary estate (if a freehold) while the termor was possessed of the land itself; and this usage persists in our law today.

The differentiation of the two concepts was also unavoidable in distinguishing the rights of a guardian from those of his ward actually on the land, and the rights of any feudal lord from those of his vassal occupying the feudal tenement. True, some confusion of the two concepts inevitably continued; but such instances were exceptional. The way out of the difficulty lay, of course, in applying the differentiation (present and clear as far back as reversions and remainders were recognized, and necessarily accentuated by the development of leaseholds just referred to) between seisin "in law" of an estate and "actual" seisin of the land. Legal speech followed this development. An illustration is found in the fact that after the Statute of Uses *(1536)* declared that persons "having" the use of lands should thereafter have a corresponding legal "seisin, estate and possession of them," the courts proceeded to concede acquisition of the seisin, but not of the possession, without actual physical entry.

At times the perduring doctrines of the old law made it essential to recognize a double seisin—a distinction between seisin "in law" and "in fact." For example, before his actual entry upon the inheritance an heir was nevertheless seised in law *(i.e.,* enjoyed the remedies of seisin) unless somebody else had wrongfully entered and usurped the actual seisin; just as an owner away from his property today has "constructive possession" provided nobody else has taken actual possession of it.

There was also a distinction between actual disseisin and disseisin at election. Originally the latter included, quite logically, only cases of factitious disseisin; the freeholder being allowed "as against a trespasser to suppose himself disseised, merely for the sake of taking his remedy by assize or other real action." But Lord Mansfield (with the support of some medieval relaxations that had marked the way) extended the privilege to include a factitious seisin; that is, he made it cover the case of a freeholder who, although actually disseised, preferred to treat the disseisor as a mere trespasser. This doctrine is similar to the election allowed a landholder today in ignoring or taking advantage of a trespass.

Disseisin on one hand, and dispossession on the other hand, became distinct. Disseisin required an actual ouster; it therefore required the adverse claimant to be a willful wrongdoer. Adverse possession required neither. It requires only a claim of right hostile to that of the true owner, and this is inferred from acts of user such as would be done by an owner. Variant statutes of limitation—even more than variant remedies—made the distinction important, for even the old undesired real actions would be used when circumstances required it. But the distinction between them has ended; in England by the statutory abolishment of both in 1833, in the United States partly by legislation and partly without. Probably the doctrines ceased largely to be living law in colonial times; yet the one consequence of disseisin which was most important, inability of the disseised owner to transfer his title, persisted generally in this country until very recently; and some more recondite and less important doctrines of disseisin lived into the nineteenth century.

As will appear in the next section, the situation with respect to seisin (and disseisin) of land was substantially duplicated in the case of chattels, though with greater simplicity of incidents.

As used today in our lawbooks, words of seisin and disseisin can all be more properly displaced by words of possession and dispossession except where the former are used with reference to freehold estates as distinguished from the land in which they exist.

3. Relation of Seisin & Possession to Title

With the exception of a few rare situations our law has never undertaken to determine in one proceeding that one person, among all persons in the world, is the sole or true owner of certain land or chattels. Our doctrine of title has been for seven centuries one purely of relativity. It merely determines which of the parties to an actual dispute and (subject today to the new practice of declaratory judgments) between whom litigation has begun, holds the relatively better right. The non-equity law held even the applications of the narrow rule within a further narrowed field—by rules of pleading that eliminated all disputed issues save one, which was narrowed to the utmost possible extent, by rules of parties that excluded all claimants save those immediately interested under that issue, and by rules of evidence that similarly confined all testimony. Equity, with greater liberality of principle in all these matters, disposed in one proceeding of as many reasonably imminent potential claims as possible, and our modern non-equity law has adopted the equity practice. Still, the general principles remain as above stated; and in determining whose *is* the better relative right, possession has always exercised in our law an overwhelmingly preponderant influence. To determine ownership we can compare one possession with another, to the older subordinate the newer.

Possession is a fact, but its mere existence engenders a right—a possessory title, a right to retain or regain the property from anyone who has no better right to hold it. "Just so far as possession is protected, it is as much a source of legal rights as ownership is when it receives the same protection."[4] And the fact and the right being inseparable, it is common judicial language to say that "possession *is* title"; instead of saying that it is the basis of a limited title (or, as is constantly but inaccurately said, "is prima facie evidence of title in fee"). In all cases in which a possessory title suffices to support plaintiffs action, the requirement in common-law pleading of certainty in laying the title was satisfied either by mere allegations of possession in the plaintiff, or by alleging that the property was the goods and chattels, the land, the close, or "the freehold" of the plaintiff. Possessory title is alienable; it may be taxed, although this is apparently rarely done; it may be sold on execution; it is a sufficient "estate" with which convenants for title will run, and one which will prevail

when united with one of two competing equal equities; there may be a homestead interest in it; its holder may collect damages for a permanent injury to the realty.

All this rests on principles of Germanic law that have come down substantially unmodified since the Middle Ages. An understanding of it requires attention to two matters: one, the changing relation during the last seven centuries between possession and ownership; the other, the changes which have taken place in the apportionment, as between a wrongful possessor of property and its dispossessed owner, of those rights of user which constitute the enjoyment-content of title.

As regards the first, even in the thirteenth century nothing was commoner than separation of seisin from "right." "The smallest degree of civilization will produce the phenomenon of ownership divorced from possession,"[5] as in cases of loss or loan. All the more inevitably, therefore, men—and the law—have always been conscious of their normal coexistence: "Man, by an instinct which he shares with the domestic dog, will not allow himself to be dispossessed of what he holds."[6] Whether the concept of possession or

that of title was first "the conscious production of juristic speculation," might be disputed, but apparently it was the first. Moreover, our law has never, in practical application, separated the two. As Salmond says, "Ownership without possession is right unaccompanied by that environment in which it normally realizes itself"[7]; and this was equally true, of course, of ownership and seisin six centuries ago—although, as will again be noted, the relation of the old "mere right" to seisin was not the same as that of modern "title" to possession.

In the interest of public peace in a lawless age when self-help must be rigidly curtailed, the writ of Novel Disseisin restored mere seisin, however untitled, against anybody— even the true owner—who usurped or disturbed it; and for a short while protected it for a year and day against judicial interference if it originated under a judicial ban. But the former doctrine (outside the statutes of Forcible Entry, be-ginning in 1381, which enforced the same policy through criminal law) was obsolete by the mid-fifteenth century except as to a seisin held under certain very exceptional circumstances. With those exceptions one who (1) owned land, and who (2) was entitled to be presently seised thereof, (3) could rightfully enter upon it against a wrongdoer. And when those exceptions finally disappeared-both in England and in this country in the first half of the nineteenth century —the triumph of title over mere possession was *in one aspect* complete.

However, the right of an owner to enter forcibly, without *civil* liability, upon a former tenant for years upon the expiration of the term was established only very recently. Moreover, it is a mistake to imagine that the right to exercise self-help by physical entry is one that has steadily been increasingly exercised ever since government became powerful. Entry by action of ejectment long ago replaced physical entry in perfecting a forfeiture of land for breach of a condition subsequent. In England it is apparently scarcely ever exercised in the case of land, but is unrestrained by "any rule of law, statutory or otherwise" in the case of chattels—and is as to them presumably freely exercised. And the same is substantially the situation in the United States, despite (or should one say in accord with?) what might have been expected to develop as the rule under frontier conditions. Particularly interesting is the abundance of statutory restrictions upon its exercise.

One very important factor in this whole development was the fact that the necessity of proving seisin—which, as will appear in the following paragraphs, was a condition of right almost inseverable and indistinguishable from title—as a precondition to effective dealings with the title, led to the recognition of mere formal entries as sufficient to revest a disseisee with seisin, though falling short of actual repossession. Such formal entries (which were really only "formal assertions of the right") were abolished in England in 1833. Various statutes of similar kind in the United States were doubtless due to similar causes. The result has been to bring closer together seisin and possession, as indicated at the end of the preceding section.

Notwithstanding the somewhat inconsistent character of these developments regarding entry, it is plain that the meaning of "title" was in their course fundamentally altered.

There had theretofore been no effective title save as a right *to enter;* for if that right of an owner was cut off (in the anomalous cases above mentioned) and he nevertheless wrongfully entered, he could not *retain* possession. Today, however, title equally justifies entry or detention; supports equally a declaration or a plea. But the title which thus triumphed was no abstract concept of general ownership. It was merely the better right to the immediate possession as between two disputants.

For the better understanding of the nature of our present doctrines of title it remains to compare the practical meaning of possessory title today and under medieval law.

Secondly, then, seisin being the normal relationship to land alike as matter of fact and of right, and possession being indistinguishable from seisin save in a few abnormal cases (and that of the lessee falling wholly outside the land law), anybody who clearly occupied land acquired thereby a wrongful seisin. Under the old law (and perhaps still in England, although not in the United States) this was necessarily seisin of a fee simple; not for the strange reason frequently given—that a wrongdoer "may not qualify his wrong"— but because the old law made in no field inquiries into limitations of intent. Likewise, any such disseisor could by feoffment transfer to another the fee estate thus tortiously acquired. A mere fresh trespasser, without precedent occupation, could in one instant, by the ceremony of feoffment, invest himself with and divest himself of the full seisin. One rightfully seised of an estate for life could usurp and tortiously enfeoff another with a fee simple, although at the cost of forfeiting his own rightful interest. A tenant for years could do the same. The only thing anomalous was that in some of these cases there was disseisin without physi.. cal ouster.

The estate thus acquired by the disseisor (or his grantee) was of course an imperfect one as against the disseisee until temporal limitations cut off the latter's higher rights;—flrst his right, while the disseisor lived, of physical entry; then the right to use the possessory assizes that protected a mere prior seisin; then the right to have recourse to a writ based upon a right of entry under judgment of court; finally, even recourse to a writ of "right." At this last stage (the anomalous circumstances above referred to having the effect of eliminating the right of self-help), there was a separation of both possession and possessory title from the "mere" right that constituted highest title.

But this old-time contrast between seisin and "right" is utterly unlike the modem contrast between possession and "title." The difference lies in the fact that the incidents of effective title, as we understand the word, were then inseparable from the seisin, and were not included in the "right"; this last meaning merely a right *to enter* (which one whom we would call "owner" did not have in the anomalous cases already repeatedly mentioned) or right to bring an action. The disseisor's tortious seisin gave him the indicia and powers of ownership; his estate, subject to its imperfections, was heritable, alienable *inter vivos,* and (after 1540) devisable. The disseisee, on the other hand, had nothing to alienate in an age whose standard conveyance was effected by livery of seisin. His right of entry was not one of the few interests alienable by grant, nor was he later able to devise it by will. His right of action was a chose-in-action that has never been alienable otherwise than as a conveyance of his "title," and which became alienable in that manner only in the nineteenth century. His only incident of ownership, onginally, was that his right of entry and his right of action would descend to his heir, but from any heir who was never himself in possession absolutely nothing descended, since inheritance was traced "not [from] the person last entitled, but [from] the person who, under that title, had last had seisin in deed of the lands."[8] This was the law until 1834 in England, and at least very generally until earlier dates in the United States. No rights of dower or curtesy sprang from the disseisee's right of entry. If while disseised he died heir-less, his feudal lord had no escheat; if he left infant heirs, the lord had no wardship. In all these instances the reverse was true of the disseisor's estate.

American law has only recently escaped from the most fundamental incidents, and indeed also from some of the most curious refinements (such as descent cast), of these medieval doctrines.

In particular, the medieval preference of the disseisor, and of our adverse possessor who stands in his place, prevailed in most of our states down to varying dates in the 19th century (and even into the 20th) as respects the disseisee's inability to convey, by will or deed, title to land that is in the adverse possession of another. Moreover, as pointed out above, this disability continued without countervailing relaxations of the requirements for an "entry" that would end the disability. On the other hand the adverse possessor's interest could always be, and is today, inherited and alienated by deed or will as an estate in fee simple. All our statutes of limitation still embody, of course, the same preference. They are statutes (in the words of their parent Act of 1623) "for the quieting of men's estates"—to wit, of wrongdoers' estates, not of the titles of dispossessed owners. They presuppose the effective though defeasible title of the dispossessor, and make that perfect by cutting off the former owner's right of entry. True, we *think* today of the adverse holder's interest as being only an "inchoate" title—but it has the actual incidents of present title. It may be abandoned, and never "ripen"; but so also, undoubtedly, might the interest of the medieval disseisor have been abandoned. A re-entry by the true owner immediately and completely recreates his title, but the same was true of re-entry by the old-time disseisee. It has been noted that a possessory estate in land may be

taxed as such; nevertheless when land is under adverse possession it is the dispossessed owner who is habitually taxed. Although this appears superficially, to be a triumph of (paper-)title over (title-by-)possession, its true explanation is a very practical one resting on two simple facts—one, that the government will always tax somebody; the other that the assessor prepares his roll by taking from the recorder s books the names of record titleholders. Were it not for our recording system the result would doubtless be reversed. Similarly, land under adverse possession is today habitually sold under execution as property of the dispossessed owner. This does embody a modern aggrandizement of paper-title, for it results from the dispossessed record owner's present power to convey that title; only property capable of voluntary alienation being leviable and involuntarily alienable by law.

But there is no very great triumph, even here,' of record title over possessory title; for both are subject to levy and sale, such as they are.

No fictitious seisin "in law" was ever attributed to one who was actually ousted; nor even to heirs and remaindermen after an abator or intruder had actual seisin; nor to the holders of incorporeal hereditaments whose rights were obstructed by adverse claimants. However, in modern law an owner off his land is conceded a legal possession—usually called "constructive"—when there is no other person actually in possession of the land.

So also in the case of chattels, "the position of the disseisor of a chattel was the converse of that of the disseisee. The converter, like the disseisor of land, had the power of present enjoyment and the power of alienation. If dispossessed by a stranger he might proceed against him by trespass, replevin, detinue, or trover. He could sell the chattel, or bail it. It would go by will to the executor or be cast by descent upon the administrator; was forfeited to the Crown for felony [of the disseisor]; and was subject to execution [as his property]." In short, "the disseisin of land finds its almost perfect counterpart in the conversion of chattels."[9] But "the wrongful taking of chattels was ... a more effectual disseisin in medieval times than the ouster from land. The dispossessed owner of land ... could always recover possession by an action. Though deprived of the *res,* he still had a right *in rem.* The disseisor acquired only a defeasible estate. One whose chattel had been taken from him, on the other hand, having [in the Middle Ages, pp. 8o] no means of recovering it by action, not only lost [control and enjoyment of] the *res,* but had no [enforcible, and therefore in practical legal fact, had *no]* right *in rem."*[10] In the medieval Year Books, title was therefore often attributed to trespassers (including those who might also be, in present terminology, converters or thieves), vendees or bailees or trespassory takers from trespassers, and purchasers without delivery from an owner's bailee.

Even when the right of the dispossessed chattel owner had found relatively adequate protection by detinue, replevin, and trover, still "his right *in rem* means a right to recover possession by recaption or action. But these rights are as personal in their nature as the corresponding rights of entry or action in the case of land. It follows, then, that they were not transferable. And such was the law."[11] The dispossessed owner of chattels was, and until into the nineteenth century continued everywhere to be regarded, like the disseisee of land, as holding only an inalienable chose in action. As to the nature of his interest there is not yet agreement; and for that reason, primarily, he has not fully gained the power of alienation by voluntary transfer inter vivos or by will; nor, therefore, has his interest become unquestionably capable of involuntary alienation by law.

It was an inescapable consequence from the history just reviewed that proof of actual seisin or possession, existing as between the occupant and claimant peacefully—that is, not originating in the occupant by ouster of the claimant—constitutes *prima facie* title in the former *as against the latter.* Otherwise stated, mere possession, by one who has no other or better claim—be he squatter on land, finder or converter or would-be thief of a chattel—confers the right to *retain* undisturbed possession against all persons who neither themselves hold nor act under another who holds a higher title to the property. The power of the occupant's possessory title is wholly unaffected by its possible wrongful nature as against third persons unless the plaintiff is claiming in their right. It is good, nevertheless, against all others. If the plaintiff has some right and puts defendant to proof of more than a bare possessory title, the defendant succeeds if he proves either that he is the "true" owner or holds under the true owner, or that his possessory title is older than the plaintiffs' or than any possessory title under which the plaintiff claims.

On the other hand, if plaintiff in ejectment or other recuperatory action was in possession of the property until defendant took it from him, the plaintiff receives the benefit of the rule that possessory title is good against any person not

holding a higher title. Proof by him of earlier peaceable possession enables him to regain possession from any person who without a higher title ousted him or excluded him therefrom; hence the rule of common law pleading, already referred to, that he might declare indifferently on his possession or his ownership. The defendant must prove his better right to overcome the plaintiff's *prima facie* case. If the action be trespass, such a defense will show that the disturbance of possession was rightful. If the action be ejectment, detinue, replevin, or trover, judgment follows proof of the better right to immediate possession.

"To have a good title to land is to have the essential part of ownership, namely the right to maintain or recover possession of the land against all others"; and the same as to chattels. And similarly, title short of perfect title is only this same right "against all except those who can show a better title.[12]

A myriad of judicial pronouncements have declared that possession of land is prima facie evidence of seisin in fee; meaning, as thus used, evidence of *true and general* title. But such a presumption can play no part, properly, in legal proceedings not concerned with absolute, true, or general title; and consequently can only rarely play any part whatever in our property law. When A litigates with B the issue of *their* relative rights, the alleged presumption can properly have no effect outside that issue. In trespass, with a plea that the disturbance was by command under a *jus tertii* higher than plaintiff's, old precedents holding the command nontraversible were properly overruled, since plaintiff's general title could not be in issue until after proof of such command. By parity of reasoning, a presumption of general title cannot logically enter into an action between A and B which tests merely the relative or better right to immediate possession (as in ejectment, trover, detinue, or replevin) of the two litigants. The only presumption is that the particular peaceful occupant has better right than the particular claimant, who must therefore first give evidence of right *to* possess and, to prevail, must carry the burden of establishing such higher title by a preponderance of evidence.

Considerable confusion has resulted from a failure to bear in mind the principles just stated. Even in the modern case which has done most to clarify the English law one distinguished Justice said: "The fact of possession is prima facie evidence of seisin in fee." If this were so, then (1) it is evident that a prior possessory title would not necessarily prevail over a later one, and the balancing of their relative merits would involve endless difficulties, if not utterly arbitrary preferences. Moreover, (2) clearly the presumption would be rebutted if either party—the defendant intentionally or the plaintiff, who could safely rely upon his mere possession, inadvertently—shows that a third person holds a title superior to the rights of the plaintiff. Some American cases have been decided on that principle, and some English cases. But the leading English case for this view has been there repudiated and overruled and its doctrine is contrary to the decided weight of authority in the United States. The true principle was stated in Asher v. Whitlock by Chief Justice Cockburn: "possession is good title against all but the true owner."'[8] And the view of that great judge almost certainly correctly expresses the English law. But whatever be the situation in England, in this country the general and the better view is that the plaintiff in ejectment (as well as the defendant) need prove no absolute title, but only a relatively better right than the defendant's.

From the above principles it also follows that one who *wrongfully* disturbs or dispossesses another can never defeat the latter's action (recuperatory or for damages) by mere plea and proof of a *jus tertii* higher than plaintiff's. Consequently, under this rule a mere possessor recovers full value from a later possessor who has wrongfully taken. This view very heavily predominates, but there are various cases contra. By parity of reasoning an adverse possessor of land should receive its full value when taken by eminent domain; and that is apparently the prevailing view, although here also authority is divided. Although the majority view on these points is in agreement with the rule allowing full recovery by a bailee against a stranger, it is true that both views date from a time when title apart from possession was almost in-conceivable. It is equally true that the minority view is in accord with the rules, which reflect ideas dominant in the later times when they originated, that regulate recoveries against wrongdoers by tenants for years or for life, mortgagors and mortagees, and other persons holding definitely limited interests in land. These more modern cases naturally lend themselves to the argument that full recovery by a mere possessor is based upon a presumptive title in fee. As has been stated, that view is quite irreconcilable with a vast mass of authority, both old and modern. Whether it is more in harmony with conditions and needs of the present day is decidedly open to doubt.

But of course one sued as a trespasser or converter may prove that he was not such by showing a *jus tertii* under the

authority of which he acted; for it is then not, properly speaking, the right of a third party. Likewise he can defeat ejectment, detinue or replevin if he prove the rightfulness of the dispossession by "connecting himself" with the *jus tertii.*

When the plaintiff brings ejectment, trover, detinue, or replevin against one who has *not* dispossessed plaintiff, the defendant is the party protected by the rule that a mere possessory title is good against all save those with a title of higher type. *Here,* the rule that the plaintiff can only succeed on the strength of his title, not on the weakness of defendant's, means that plaintiff must prove at least a possessory title earlier than defendant's, though not necessarily ul

timate or highest title; and the defendant (by way of narrowing the issue) may be allowed to eliminate the latter claim by plea and proof of *jus tertii* in that sense. He is not, however, by the better and majority view allowed to succeed merely by proving a higher title, of whatever quality, than plaintiff's without regard to his own lack of better title.

On these points there has been much confusion in the case of ejectment, as to which the cases are not wholly harmonious, the confusion being caused by misunderstanding of the phrases that the action "tries title," and that plaintiff must recover "on the strength of his title." The cases are almost wholly harmonious, on the other hand, in actions of trover and detinue, which turn upon precisely the same principles as ejectment. In replevin, which should equally turn solely upon the issue of better right to immediate possession, the weight of modern authority is in accord with that principle.

Notwithstanding the statement by most distinguished authorities that "there is hardly any case in which possession can be absolutely extinguished except by destruction of the thing," which would imply that all finders are trespassers, they are not so treated in applying the principle stated above regarding "peaceable" acquisition of title in connection with a plea of *jus tertii.*

But in ejectment by a mere possessor against a subsequent bare possessor of land the prior possession may exist as a constructive possession for the purpose, in applying the *jus tertii* principles, of holding the later possessor necessarily a trespasser. His status as such is not, apparently, limited to cases in which he actually ousts the first possessor—that is, is a disseisor in its original sense.

4. Consequent Role of Seisin and Possession in Older Modes of Conveying Title

As in the constitution of title, so also in its transfer seisin was vital in our ancient law, and possession has until very recently been little less so. Before 1535, though there were more than a dozen forms of conveyance, two were particularly important, the grant and the feoffment.

(1) The *feofiment* was a public and somewhat ceremonial transfer of possession, also designated in law-books as "livery of seisin" and as one form of "transmutation of possession." By it the feoffee, or transferee of the feudal fieff, was clothed or invested with the seisin that was indispensable to the holding of any freehold interest in land—that is, of any estate for life or of inheritance.

By a feoffment there could be simultaneously *created,* not only (a) any freehold estate of present enjoyment, but also (b) certain present freehold estates of future enjoyment which were to take effect in enjoyment upon the termination of the particular estate of immediate enjoyment. Indeed, they could be created only in this manner. These present interests of future enjoyment were known as reversions and remainders; and they were the most important "future" interests known to the ancient law, as they are also of the present law. All these estates, if fees, were called "corporeal" hereditaments; that is, they entitled their owner to actual possession, sooner or later, of the land.

(2) The *grant* was a deed; and usually a deed of conveyance of an interest already existing. Of all future interests, and also of "incorporeal" hereditaments—so-called because they never gave possession of the land—it is commonly said that they "lay in grant." It is true that for the transfer of future interests after they were once created, and for both the creation and subsequent transfer of some incorporeal hereditaments, a grant was employed. But there were several qualifications of the general rule as it is commonly stated.

(a) Some incorporeal hereditaments were created just as were reversions and remainders. This was so of the incorporeal hereditaments later most important in our law; namely, easements and profits. Because there could be no seisin of these (nor therefore "estates" in the ancient sense in them) they could not themselves be passed by livery. But because they were said to be "appurtenant" to, and held to be therefore inseparable from the land, they could also not be passed separately by grant. Hence they were created and transferred with corporeal hereditaments when these were either created or transferred by livery.

(b) In the case of certain other incorporeal hereditaments, unimportant in our own later law, a mere grant sufficed for either their creation or transfer. But *(c)*

in the case of still others the deed alone was ineffective. This was true of the advowson, the most important incorporeal hereditament of medieval times; also of one which is of primary importance in modern law, namely rent receivable from another's land. The grant of the former was perfected when the appointed clerk was admitted to the benefice and received the profits thereof (or perhaps when he had grasped, in presence of a witness, the handle of the church door); that of the latter, by the terre-tenant's recognition of the transferee ("attornment") This last was necessary, (d) to perfect the grant of a remainder or reversion; and to that of rent-charges.

It is clear law that our ancestors could not conceive of a transfer of title without transfer of seisin. These acts perfecting grants are analogues to livery. The ideas underlying possession have always been control, and enjoyment through control; these may be perfectly satisfied in the case of incorporeal interests. It is equally evident that the confusion in procedure results from the fact that landed interests originating at different times could not be exactly fitted into existing categories; nor did their variant development permit a later rationalization of the law.

Similar general ideas originally prevailed regarding chattels. Chattels personal were manually delivered. Chattels real were created, on the same principle of publicity that was satisfied by feoffment in the creation of freeholds, by parol agreement and entry; and attornment satisfied the same need in their subsequent assignment. However, between the thirteenth and mid-fifteenth century actual delivery came to be unnecessary in a present sale (bargain and sale) or a gift by deed of a chattel personal.

5. Continuing Role of Possession in Transfers of Title

In the course of the nineteenth century the concepts of title and possession had become quite distinct. But there is still a very close connection between them in many legal transactions because of the continuing publicital value of possession; that is, it gives public notice that *some* right is claimed.

Leaseholds of short duration are still everywhere creatable by mere agreement and entry.

For centuries an actual entry was required to create the lease that was the basis of ejectment; and in England this remained positively necessary in some cases down into the nineteenth century; but in this country it was apparently never required. The propriety of such a possession, taken only to try the title, was originally doubted, but the practice seemed to be required because it was in England a penal offence to convey any title when the grantor was out of possession. The very recent dates, throughout this country, at which owners gained the power to convey their titles to land under adverse possession have been referred to (p. 47).

"In English law, until . . . 1845, land could in theory be conveyed in no other method than by the delivery of possession. No deed of conveyance was in itself of any effect. It is true that in practice this rule was for centuries evaded by taking advantage of that fictitious delivery of possession which was rendered possible by the Statute of Uses. But it is only by virtue of a modern statute [of 1845] . . . that the ownership of land can in legal theory be transferred [in England] without the possession of it."[14] In the United States much the same is true, the differences being, first, that although in various states for a century or more, by express statutory or judicial declaration, no livery of seisin has been essential to the transfer of title, such declarations are not universal; and, secondly, that although deeds are everywhere understood to pass title without livery, great doubt exists regarding the mode of their operation—whether by virtue of the English Statute of Uses (1535) adopted as local law, or by virtue of similar local enactments, or (without regard to any such roundabout procedure) by virtue simply of statutory provisions regarding deeds that imply a legislative declaration of their power to pass title directly.

But it is in the law of personalty, in which present-day transactions are of enormous daily extent, and in which slow and expensive transfers are both impossible and undesirable, that the importance of possession is most strikingly revealed.

Aside from present sales and gifts by deed, a delivery of possession (control) is still as indispensable as it was under our old law for the transfer of title to chattels, and apparently for the same reasons—as an expression of the actor s intent and for its publicital value. In order to understand the present law it is necessary to note that "in the thirteenth century every sort and kind of alienation ... is a 'gift'"; including sales, exchanges, mortgages, leases, as well as the gratuitous transfers which we know as gifts today. On the other hand, at that time the giver almost always kept something. "We may take it as a general principle of ancient Germanic law that the courts will not undertake to uphold gratuitous gifts or to enforce gratuitous promises... Every alienation of land . . . is a 'gift,' but no 'gift' of land is gratuitous; the donee will always become liable to render service, though it be but the service of prayers"[15]—that is, before *Quia*

Emptores (1290) ended subinfeudation. Our gift, whether of land or chattels, has become gratuitous, but both as to it and non-gratuitous transfers of chattels (unlike land) the change of possession remains. Transfer of possession-that is, of reasonably effective control—is still necessary, although manual tradition or its equivalent is not, for the consummation of a chattel gift unless made by deed—which was already practised in the fifteenth century. If so made, then by the great weight of authority tide passes today (as in the case of land) by delivery of the deed without delivery of the property.

In the law of sales, also, very much remains of the ancient ideas. Once the specific goods intended to be sold are agreed upon, and in the absence of a contrary intent, title—as between buyer and seller—passes today regardless of delivery. This was scarcely law before 1800; although since perhaps 1500 no delivery was required when the purchaser had paid the price or given earnest money, or if credit was expressly agreed upon. Moreover, an absolute and unqualified legal title is not transferred: the property passes subject to the unpaid vendor's rights. Normally he retains possession until paid, by presumption of common intent; but if the buyer becomes insolvent before payment, then regardless of intent the vendor has not only a lien but also, after shipment of the goods, a right of stoppage in transitu until they come into the buyer's possession.

Under the statutes against fraudulent conveyances, in determining whether fraud against creditors has been present, possession has played a dominant role resting squarely on the medieval relation between possession and title. "In the United States retention of possession is everywhere at least evidence of fraud against creditors, and in about a third of the states, by statute, there must be an immediate, notorious, and continuous change of possession in order to make a sale valid as against either creditors or purchasers.[16] In this country, too, without the aid of statutes, the rule has become generally established that delivery of possession alone can perfect a sale as against third parties; a second buyer who first lawfully secures possession has title against an earlier purchaser. Under our Uniform Sales Act (in 33 states) the same is true; assuming that the earlier bill of sale, if one be given, has not been recorded.

Some changes in the law that are of interest in connection with possession have been introduced in recent decades in relation to bills of lading and warehouse receipts. The practice of selling goods, while being transported by a carrier, by delivery of the bill of lading is old; and in this country similar use of warehouse receipts and delivery orders upon warehousemen is very common. All these documents of title are receipts by or orders upon a bailee. Normally, they merely serve as evidence of the bailment contract, and facilitate the application of common-law rules governing the rights and liabilities of bailor, bailee, and transferee of the document. Such is their function in the normal case when used to "pass" title to the goods which they represent; the intent of the parties effectuating that result, and the title-document proving the intent. All non-negotiable documents of title have merely this evidentiary quality.

As such documents were constantly used in business as proof of possession or control of the goods, and as authority for the holder of the document to transfer or receive the goods thereby represented by indorsement or delivery of the document, the idea necessarily arose that a transfer of the document is a transfer of the possession, that is, a symbolical delivery, of the goods. But unless the title-document actually controls possession of the goods, these and the document might pass into the hands of rival claimants. It is therefore provided under the Uniform Sales Act, Uniform Bills of Lading Act, and Uniform Warehouse Receipts Act, that title-documents by which delivery is due to bearer or to the baior's order must be surrendered for cancellation when the bailee delivers the goods; that negotiation of the receipt to a bona fide purchaser for value passes to him whatever title to the goods his negotiator and the original bailor held; and that his rights prevail against all claims of the bailor himself and against the claim of any prior vendee of the goods to whom the bailor may have given a bill of sale. The effect of these provisions, strengthened by the fact that even a non-negotiable warehouse receipt, unless bearing upon its face the words "non-negotiable," becomes negotiable if a purchaser for value believes it to be such and elects so to treat it, is to make the negotiable title-document in very truth the representative of the goods, dealings with which prevail over dealings with the goods themselves. These developments are not modifications of nor inconsistent with the general doctrines of possession, but merely present those doctrines in a new form demanded by commercial convenience.

In the field of chattel mortgages and conditional sales, statutes based upon the notice value of possession have required registration of such mortgages and contracts in order to protect the right of the mortgagor or vendor against strangers dealing with the mortgagee or vendee on the

faith of his actual possession and supposedly unincumbered title.

"Our law, of course, is very far from treating any possessor as capable of giving a good title. Nevertheless the tendency of the law is distinctly in the direction of giving to one who has been entrusted with possession the capacity of an owner, and in favor of this tendency it is to be observed both that convenience of trade, which is always subserved rather by the certainty of the newly acquired title than by the protection of an anterior right, is promoted thereby, and also that it is fairer in a conflict between two innocent persons to prefer one who relied upon the ownership of the possessor of goods rather than one who voluntarily entrusted the possessor with the property." [17]

(1) Pollock and Maitland, II, 31.

(2) Butler, in Coke on Littleton, 330b.

(3) Lord Mansfield, in Taylor d. Atkyns *v.* Horde, 1 Burr. 6o, 107 (1757).

(4) Holmes, "Common Law," 214.

(5) Holdsworth, "History" (4th ed., 1936), II, 79.

(6) Holmes, "Common Law," 213.

(7) "Jurisprudence," Sec. io6 (4th ed., 1913, 265).

(8) Challis, "Real Property,,, * p. 180.

(9) Ames, "Lectures," 189—91.

(10) Ames, "Lectures," 179.

(11) Ames, "Lectures," 185—6.

(12) Williams, "Real Property" (23d ed., 1920), 637.

(13) *L.R.* 1 *Q.B.* 1 (1865).

(14) Salmond, "Jurisprudence" (4th ed., 1913), 413.

(15) Pollock and Maitland, II, 12, 13 (note 1), 82, 213; Ames, "Lectures," 185n.

(16) Williston, "Delivery as a Requisite in the Sale of Chattel Property" (1922), 35 *Harv. L. Rev. 797,* 8o6.

(17) Williston, "Transfers of After-Acquired Personal Property" (1906), 19 *Harv. L. Rev. 557.*

Part I, Chapter III

Classification of Property Interests

I. Real Property & Personal Property

1. Origin

This has been for centuries the most important classification of the property law. The nomenclature is explainable only by history. So far as it coincides with an older underlying division of property into *movables* and *immovables* there was once nothing artificial about it. If one considers only the few most important belongings of primitive times— land, clothing, implements of husbandry, weapons—the naturalness of the latter classification is evident. Applied to such property, the medieval law phrase *mobilia sequunter personam,* if freely translated as "movables are personal," would have suggested a type of personal property readily identifiable and understandable. For centuries, too, land played in English Society, and to a less extent in American, a preponderant role: economically, as a basis of class distinctions, as the basis of political rights, and of governmental organization. Naturally enough the landowner was a favorite of the law, and in countless details—some for reasons of policy, others for convenience—the treatment of land and chattels varied. And this is still true. What was, from a present-day point of view, regrettable (aside from confused terminology) was the application to realty and personalty of different rules of succession; or, at all events, the continuance of that difference long after it ceased to have, or where it never had, any social justification.

But the division of property into realty and personalty is not *at* all identical with the distinction between movables and immovables. The former is not at all the simple one above suggested, but purely adventitious and artificial. It arose in the following manner. In Roman law an action *in rem* was used to vindicate a *jus in rem,* and an action *in personam* to assert a *jus in personam.* The distinction was therein based upon the nature of the right, or duty, involved. But Bracton (following Germanic law despite his discussion of the Roman) restricted the action *in rem* to actions effective in recovering specific property; and the only *res* that could in his day certainly be recovered by its owner was land, because, being most important, it was best protected by legal remedies. The highest in power of these remedies therefore became "real" actions. His classification rested upon the results of legal action, and not upon the nature of the claim asserted. When Bracton wrote, the only action available to recover chattels was debt "in the *detinet,"* in which the plaintiff—quite properly, since a movable might have been lost or destroyed—declared the chattel's value. Either because the recovery of such things was inherently uncertain, or because the declaration of value made equivocal the demand for the thing, Bracton classified debt in the *detinet* as an action *in personam;* and later law so classified the recuperatory chattel actions of detinue and replevin. Thus land, and a few isolated rights in land treated as inseparable therefrom, became realty or real property; and all other property became personalty or personal property. So, as above

noted, a term for years was personalty; for though an action was early devised by which the termor recovered *possession,* he did not have or recover seisin, had no real right, had no *real* action.

Although the distinction between realty and personalty, as it exists, is unfortunate, some distinction is inevitable and desirable between movables and immovables. This latter bulks unduly large in our law as a survival from medieval Germanic law, in which it was a distinction of primary importance; in that law as in ours today there was a double law of property. "As regards possession, acquisition of ownership, real rights, the law of pledge, of family estates, and of succession, it subjected immovables to legal rules different from those applying to movables."[1] Of the whole medieval law it can be said that "movables have no duration and are not capable of being mortgaged; movables can be freely disposed of, whereas the alienation of immovables is subject to every kind of restriction; debts are payable out of movables but not out of immovables, for this would be an indirect way of alienating the latter. Movables can be confiscated, but not immovables, for the same reason; the rights of the husband or guardian are much more extensive over movables than over immovables; the inheritance of movables is founded on the presumed will of the deceased, whereas the inheritance of immovables is planned, taking into account the rights of the various interested parties; . . .movables are controlled by the-custom of the domicile of the owner, immovables according to the place where they are located. The majority of these rules were unknown to . . . Roman legislation ... This division of possession corresponds to the economic state of the early Middle Ages." [2] The development of feudalism only strengthened the contrast, by giving land the peculiar and predominant position above indicated.

To some extent the variant treatment of realty and personalty has resulted logically from the original basis of the distinction between them. To a far larger degree it corresponds to the differences between movables and immovables. Both principles frequently appear together. For example, leaseholds are today regarded by many as obviously immovable because the land is—hence their creation and incidents depend upon the law of the land's location; but for purposes of devolution the leasehold is personalty. A consistent theory is impossible. The original procedural basis of the distinction between realty and personalty has greatly altered through the centuries. The distinction between movables and immovables is both meaningless when applied to incorporeal things, and often of slight importance when applied to land and corporeal chattels. The consequence is that the law is complicated by both distinctions. The first should be abolished, and the latter minimized as it was in the late Roman law. There would then be one system of property law instead of two systems.

2. Some Obsolete and Some Enduring Distinctions

(1) VARIANT RULES OF DEVOLUTION. English public policy of the feudal age led to varying treatment of realty and personalty when the owner died intestate. Title to the personalty went to the personal representative, and from and

through him, after administration of the estate, to the next of kin. Title to the realty passed directly and instantly to the heir.

In half of the states of this country since varying dates of the nineteenth century (none, apparently, before 1850)— and in England since 1926—the personal representative takes possession or (in varying degrees) control of the realty, although very rarely title thereto. In the few states where he takes "title" it is one qualified by coincident interests held by the heir or devisee. In other states the latter take full title, but subject to a contingent power in the personal representative to sell for the payment of debts, and in most of them the power can be exercised only under an order of the probate court.

Two of the common-law canons of descent excluded *(a)* all females and *(b)* all males save the first born. Both of these were suited to, though they did not originate in, feudal conditions. Both of them were suited to an aristocratic society, and their effects were strengthened in that respect by the institution of entails. Doubtless because admittedly unfitted to a democratic society both canons have ceased to exist in English law since 1926. In this country primogeniture prevailed in half of the colonies until the Revolutionary period, and in some other colonies the eldest son enjoyed a double portion, but except perhaps in entails no trace of his preferred status survived the eighteenth century. The preference of males over females, however, had not wholly disappeared at the middle of the nineteenth century.

(2) LIABILITY FOR DEBTS. Another distinction, long since abandoned, was the original freedom of land from claims by creditors. Although the breaking down of that exemption began in 1285, a slow development ever since that time has been required to bring to their

present inclusiveness and strength the rights of creditors against their debtor's interests —legal or equitable, and whether he be living or dead.

In England, although personalty could be sold under a writ of *fieri facias* or execution from 1285 onward, the creditor's right against his debtor's land was, until 1864, merely to have his claim reduced by the rents and profits collected and sequestered—unless the debtor by his will charged his land with such debts and in such order as he preferred; usually he had not, himself, possession of the land, but if he had he must account for receipts. In this country, as a result of an English statute of 1732 which generalized earlier developments in Massachusetts and Pennsylvania, lands have for two centuries been dealt with on execution much as has personalty; and the power to deal similarly with lands of decedents was more or less generally assumed in colonial and later times without statutory basis. Likewise the lien of mere judgments was in some states assumed without statutory authority. All three of these practices have in this country become universal and statutory. Powers of sale are exercised, generally, alike by courts of law, of equity, and of probate. Traces, however, of the old English remedy of sequestering the rents and profits (extending the land under an elegit) still remain.

A creditor, merely as such, has no interest in his debtor's property. Liens upon lands—rarely upon personalty—are secured by judgment, and by execution; the duration and effects of such liens depending upon each local statute. Save under statutes the jurisdiction of equity courts to deal with creditors' bills was entirely dependent upon the existence of some lien creating an interest in realty; and this was afforded by a judgment—the heir being liable, also (with the same result of loss of the land), for specialty debts of his ancestor.

Even today many forms of real and personal property are exempt. Both in sales under executions and in the administration of decedents' estates, however, real estate is still liable only after the exhaustion of personalty. This situation presumably arises not merely from the law's inertia but from an unvarying judgment of what is socially desirable.

(3) VARIANCE IN THE LAW'S REMEDIES PROTECTING THEM.

The freehold interests which alone the feudal land law recognized were fully protected by a great variety of writs, some (possessory) merely based on right to possession, some (droitural or proprietary) based on "mere right," and writs of entry intermediate between the two preceding. All of these were replaced by a mere possessory action in England in 1833, and in this country either professional ignorance or a reforming spirit had earlier accomplished the same result. These various recuperatory remedies assured the specific recovery of land. The substitution of ejectment for the old real actions reduced the cost and delay of such recovery, and summary remedies under modern statutes have still further reduced them. For the protection of chattels and leaseholds a few remedies were only slowly and painfully developed during the last four centuries of the medieval period, and even then they were very imperfect. Not only did the variant protection given to land and to other property create our double system of property law, but within each form the remedies available have controlled the development of substantive principles. The vastly greater social importance of land in a feudal society resulted in a correspondingly fuller remedial system protecting it (and likewise in other forms of special favor, such as its originally complete exemption from creditors' claims); and it has been seen that this difference in procedural protection was the origin of the differentiation of realty from personalty.

It is a commonplace of our legal history that much of the law's older theory is only discoverable from its forms of procedure. Illustrations of this truth have appeared in the earlier discussion of the relation between possession and title, and of the use of the common-law actions for their protection. But some further reference to the matter is desirable. As already indicated, even the medieval writs of right did not test or vindicate title in any absolute sense. They dealt with relative seisins, relative rights to have actual seisin. Nevertheless, these writs and their procedure dealt with the assertion of a "mere right" when possessory remedies had been lost, and they did distinguish "between the simple assertion or vindication of title"—albeit relative— "and claims for redress against specific injuries."[3] But even this ceased long ago to be possible in our law. Nearly all the old real and mixed actions, possessory and droitural, were abolished in England in 1833, and never had any actual existence in this country. Ejectment replaced all of them; and although it is substantially our only means of trying title to land, its peculiar remoteness from any concept of absolute title will appear in a moment. Similarly in the case of chattels, the law started with recuperatory ideas, however limited, in its actions of debt, detinue and replevin; but those

ideas never held ground against the substitutional remedy of damages which characterized assumpsit and trover; and these two actions were rapidly displacing all others long before the common-law actions were abolished (in the second half of the nineteenth century) in nearly two-thirds of our states. Thus, "the distinction between proceedings taken on a disputed claim of right, and those taken for the redress of injuries where the right was assumed not to be in dispute" tends to become obliterated.[4] This tendency was accentuated by other technical changes in the common-law actions. Trespass, for the protection of possession against wrongful disturbance, has always been an absolute remedy: no distinction has even been made between acts by the defendant for another or independently, nor any distinction between his various possible states of mind. In detinue and replevin all acts have been reduced to one—a wrongful detention. In trover much old law has been sloughed off, leaving requisite but one act (to be sure one of most uncertain content)—wrongful assertion of defendant's right to control the chattel of another. Thus, the law of wrongful injuries is used to try questions of property right; with ideas of absolute liability still supreme in trespass. Absolute title is never dealt with save in a few extraordinary situations; relative right is only indirectly tested; alike in the work of students and of practitioners there is a slurring of rights, an exclusive attention to wrongs and remedies.

As respects ejectment its remarkable character must greatly have accentuated the general tendency. The common-law distinctions between "real" actions that were truly recuperatory, "personal" actions that merely gave damages for breach of a personal duty, and "mixed" actions that returned both damages and repossession of the property, had become somewhat confused as early as the twelfth century. Into that system ejectment never clearly fitted. It was certainly long regarded as personal, perhaps because (no true reason of the law) it was devised to protect leaseholds, which were personalty. By it the termor regained possession; it was therefore a true real action. But later it also gave the plaintiff damages, and became a mixed action. This made it difficult to think of ejectment as a true title-action. Another of its characteristics made this even more difficult. To try disputes involving freehold titles it was made over in form by using John Doe and Richard Roe as fictitious tenants under imaginary leases of the freeholders whose titles were in dispute and who were the actual parties; the defendants' supposed tenant having supposedly ousted the plaintiff's. But Doe and Roe could not be identified, hence the action escaped the bar of the doctrine of *res judicata:* the same issue could be tried over and over between the same freeholders, because the Doe and the Roe might be different. Hence, even as a trial of relative title the action became utterly inconclusive. Until very recently one might have said, in Lord Mansfield's words of nearly two centuries ago:

"In truth and substance, a judgment in ejectment is a recovery of the *possession* . . . without prejudice to the *right,* as it may afterwards appear, even between the [same] parties."[5]

Finally, the action tried title only against a wrongdoer in possession; one who was himself in possession must resort to a bill in chancery to remove from his title clouds thrown upon it by the claims of persons out of possession. Ejectment, therefore, as above remarked, has always been peculiarly far removed from a clear-cut action to try title. Its celerity and cheapness recommended it to litigants, and possibly also its very inconclusiveness. Certainly that quality has been entirely harmonious with the general qualities of our legal system.

Great changes, however, took place in the last century. In all the code states the landlord became the "real party in interest" who alone could sue. In all the code states, and by special statutes in other states, all fictions were removed from the action by statute, thus subjecting the judgment to the rule of *res judicata* (the decision binding parties and privies). In still other states legislation give such effects to the old style judgment after two trials, or otherwise. Thus the action has been much improved as one to try title. And some other advances have been made. The substitution of ejectment for the old real actions reduced, and summary remedies under modern statutes have still further reduced, the cost and delay of such recovery. The old ejectment and old bills to quiet title or remove clouds from title have in various states been combined in one statutory action; and even more summary statutory actions by which to recover possession have everywhere been provided for special circumstances.

However the remedies be judged which existed for the protection of land, those which have protected chattels have been much weaker. Title to them under our medieval law was weak. If one then voluntarily parted with possession of a chattel, he had a remedy against his bailee only—none against third persons taking by delivery,

trespass, or theft from the bailee. But the only action available against the bailee was *detinue,* which was recuperatory in appearance but not in realty, since the defendant could be held only for damages if the chattel could be secreted. If possession of one's goods, on the other hand, was involuntarily lost there existed, indeed, a criminal action *(actio furti)* that made possible the recovery of the goods from the thief or any subsequent possessor, however innocent. However, (and this long remained true) the crown kept them; so that remedy was also, as regards the owner, not recuperatory.

It was displaced by trespass *de bonis asportatis,* which action—unless as used in the local courts—gave only damages, and could not be used at all against other persons than the original wrongful taker. As for *detinue,* which originally lay only against a bailee, by the late fourteenth century it had become maintainable against anybody who wrongfully detained a chattel, no matter how he originally acquired possession. However, the precision necessary in describing the goods (and in England the defense of wager of law allowed the defendant until a century ago) made the remedy undesirable. Nor was it ever in this country made truly recuperatory. *Replevin* likewise started with a narrow field, being originally available only against a landlord who wrongfully distrained for rent upon the plaintiff's chattels. In England, although soon extended to any wrongful taking, it was not available for merely wrongful detention, but it became so in this country early in the nineteenth century by judicial authority or by statute. Naturally, therefore, it generally superseded detinue, although not in our southern states. It might apparently have been established as a genuinely recuperatory action; but for some reason the law's development was otherwise, the action being everywhere regulated by statutes, and these everywhere permitting the defendant to pay damages in lieu of returning the chattel. This result was further accentuated by the development of *trover.* Since every wrongful taking or detention included in the facts required for the maintenance of detinue or replevin was also a conversion, and since those actions had become essentially actions for damages, like trover, that action very largely superseded in this country both the others.

Thus, precisely as in the thirteenth century, chattels are today unprotected by any true recuperatory action. In six centuries we have progressed little. It is for this reason that self-help is uncurbed and still active in the recaption of chattels.

The lack of such an action seems to be the explanation of passages in the medieval Year Books which attributed title to trespassers and thieves. For although it would have been inevitable, when there was such wrongful seizure analogous to a disseisin of land, to regard the converter, like a disseisor of land, as for most substantial purposes the owner, it would have been equally inevitable to heed—had they existed—the disseisee's rights to recaption or of action. The difficulty was that, in any comparable sense, they did not exist, for neither trespasser nor "thief" fell within the purview of the old replevin or detinue. But even had those actions been applicable, the disseisin analogy would have led men to think of ownership as having passed to the wrongdoer by his act, preceding the payment of damages. We have seen that even as to land the medieval law did not succeed in clearly separating the concepts of title and possession. Even after it became clear that title to a chattel does not pass to a converter until after judgment rendered in favor of the owner, it has cost much trouble—and very recently—to establish the principle that in fact the title passes only when the judgment is satisfied.

The remedies just referred to were designed for the protection of tangible, specifically identifiable chattels. The problem of adapting them to incorporeal personalty was one unlike anything presented in the development of remedies to protect realty. Not the least of the difficulties of protecting such property, which is for the most part a product of complex industrial society, have arisen in the field of criminal law. The very limited list of common law crimes against property (almost wholly crimes against personalty) have proved themselves to be very inadequate as an analysis of and check upon wrongful conduct under present day conditions.

Equity has supplemented the common law protection of both realty and personalty. Because of their flexibility trover and assumpsit, the two great engorging actions of the law, were loosely known as equitable; and some of the general counts of assumpsit were deservedly characterized by Lord Mansfield as bills in equity in a more technical sense. Every common law action was supplemented, and some were profoundly influenced internally, by the remedial system of the chancellor. The overwhelming importance of land in English society, and the fact that it alone could positively be recovered in specie, made it once veritably unique in the

eye of the law, and it is only within the last century that its importance has in England been appreciably lessened. No doubt

land was unique in England in the eyes of the early law judges, too; but the law had no remedy to offer save damages; hence the inadequacy of its remedy, and the basis for intervention by the court whose procedure made effective aid possible. Of contracts for the conveyance of interests in land equity has therefore for centuries compelled, when feasible, specific performance. And since equity rarely renounces a jurisdiction once gained, however greatly circumstances change, the situation is the same in this country, even though land has never been unique among us in the sense and to the degree that it was unique in England, but very much more of a commercial article. On the other hand the law's substitutional remedy of damages, given in lieu of chattels when a contract for their sale is broken, has always been equally regarded by equity as a satisfactory remedy when *ordinary* chattels are involved. But specific performance is given of contracts for the purchase of unique chattels or for their use.

To quiet justified fears equity uses the injunction—to protect a reversioner against waste; to protect a possessor of land against unreasonable interference with his enjoyment of life thereon (nuisances); to prevent recurring or continuous trespasses that lie beyond relief at law. It is used to prevent similarly threatened torts against unique chattels and interferences with interest of personality; to prevent breaches of contracts for services of unique quality; and (labor controveries) to prevent interference by strangers with subsisting contracts of other persons. The great modern expansion of the remedy has been outside the land law. Equity enforces agreements that cannot be enforced at law regarding the use of land; and to a slight degree this is already paralleled in the field of personalty. There is the beginning of a parallel development in bills to remove clouds on the title to personalty. As will be seen in a moment even actions to recover land and chattels based upon purely equitable rights have had some recognition.

This entire development evidences, of course, the deficiencies of the common law remedial system.

The moral imperfections of that system are similarly evidenced by the maintenance of equitable defenses against common law actions or claims. Since these defenses have become available, legal title cannot prevail against an "equitable title"—that is, the equitable right to have the legal title. Lord Mansfield apparently thought an equitable title sufficient basis for an action to recover land, but the question is still an open one in England. In only a few states of this country has such progress been attained, although it is overdue. There are similar, but even fewer, instances of equitable replevin.

(4) THE RECORDING SYSTEM. Under this system real and personal property are very differently treated.

As respects land *(see* page 474), the idea of the system is to give to one who desires to acquire title security against opposing title claims that are unregistered. Thus, all must register instruments under which they hold land in order to be safe; and an intending purchaser must, in order to be safe, inspect all registered deeds of grantors in his chain of title, and take notice of their contents. But as respects personalty, few transfers are recorded, and such as are so treated have only recently been brought under operation of the system as exigencies demanded. The system, speaking generally, is designed to protect only subsequent grantees ("purchasers") of land as against earlier grantees who fail to register their deeds; not to protect subsequent creditors against such unregistered grantees. In the case of personalty, on the other hand, recording statutes have been designed to protect creditors quite as much as subsequent buyers.

In general, the variant treatment of the two types of property is not to be regarded as merely a survival of old attitudes, but as an independent present recognition of land's relative rarity and dominant social importance; and as due, also, to the inconceivable inconvenience that would result from requiring registration of the infinitude of sales of personalty of little value, such as our daily purchases of household supplies.

As a matter of fact we are in such transactions almost always secured by the honesty of the merchants with whom we deal. They hold adequate title documents; and the aggregate of the community's daily transactions in personalty vastly exceeds, pecuniarily measured, its transactions in land. The practice of making formal examination of title in one case (at very great expense) and not in the other is very largely a matter of habit. So great are the defects of the recording system in the case of land, and so great the risks run notwithstanding any feasible examination of registered documents, that our practices as to land can hardly be regarded as one satisfying the demands of intelligent precaution. Very much is taken on faith, as in dealing with chattels.

Credit transactions upon the basis of book-account assignments and trust-receipts have,

however, increased so enormously in recent years that the uniform acts prepared by the Commissioners on Uniform State Laws have provided filing requirements for these security transactions.

(5) MODES OF ALIENATION. In general, the distinction between realty and personalty has long been little emphasized in conveyancing. Somewhat greater formality is required to rid oneself of title to land; for title to chattels may be lost by mere abandonment, whereas this is not true of land. That is, it is not true of corporeal hereditaments held of right, although incorporeal hereditaments and the imperfect title of an adverse possessor may be abandoned. Since the passage of the Statute of Frauds a writing has been necessary for the transfer of any interest, with few exceptions, in land; whereas such has never been required for sales of personalty of slight amount. By the Uniform Sales Act this amount is now fixed at $500. Of course, the writings used to transfer title—the deed and the bill of sale—are very different in form; but the traditional differences go far beyond positive requirements. Varying requirements for the execution of proof of devises of realty and bequests of personalty have practically disappeared.

In this country realty has long been equally liable with personalty for debts; transfers of both have been, as above pointed out, equally subject to nullification when in fraud of creditors; and realty, which was not subject in England to the doctrine of reputed ownership in bankruptcy proceedings, has in this country been made subject to a substantially equivalent doctrine—namely, estoppel—operating over a much wider field.

The rule of *Caveat Emptor* has nearly disappeared from the law of chattels, but in the conveyance of land it remains intact. The right of the contract purchaser of land to avoid the contract for complete failure of the vendor's title does not (in this country) exist before the time set for performance. It is therefore somewhat doubtful precisely what is a complete failure; and, as to mere defects of quantity or quality, the doctrine is qualified by equity's doctrine of specific performance with compensation, even in favor of a vendor. Aside from these difficulties, the contract purchaser, when the contract is silent on the point, is entitled to a deed with all the warranties usual in the jurisdiction of the *locus.* But if the purchaser accepts a deed containing less, his protection does not extend beyond whatever convenants, if any, it contains. He cannot recover the purchase price paid, on the ground that the consideration therefore has failed. And there are no implied warranties in any actual conveyance of land. The strong tendency in the law of sales of personal property to widen and strengthen warranties, is paralleled by an equally plain tendency (in the United States) to make all covenants for title available to remote grantees of land; that is, to minimize the common-law distinction between those covenants which do, and those which do not, "run."

3. Fixtures

The inconvenience of the distinction between realty and personalty is strikingly illustrated by the doctrine of fixtures. When a movable is firmly attached to land there results, subject to qualifications, a conversion of personal into real property-as a contrary conversion results when trees or marble are severed from the earth. Therefore, subject still to qualifications, a shift of title results if the chattel and land belong to different persons and if the chattel is affixed by its owner—for if it be affixed by some mere wrongdoer the majority of courts have held that the owner keeps his title, though a minority have not. The law's original rule was that the conversion and the change of title necessarily followed: everything affixed to the soil became parcel thereof; and fixtures were these things, originally chattels, which became realty by such annexation. This is the definition still given of fixtures by some writers, and the sense in which it is frequently used in judicial opinions; and this meaning, because the literal meaning, seems most acceptable.

As early as the fourteenth century, however, a relaxation of principles became visible when chattels were affixed for purposes of trade; after the right to detach these was conceded as a matter of public policy to promote trade, a like favor was allowed termors who affixed chattels, particularly in houses, as ornaments or for personal comfort and greater enjoyment of the premises. All litigation in this field necessarily presents the question whether there has been a definitive fixation of a chattel, thereby made inseverable, or only as it were a pseudo-fixation, temporary or provisional, that does not forbid detachment. Now Chancellor Kent, at least a century ago stated that the courts had made the right of removal "almost . . a general rule, instead of being an exception,"6 and it is perhaps the *detachable* chattel that is most generally known today as a "fixture," precisely reversing the original meaning of the word.

In the case of a chattel be-

fore attachment and again after severance, the law has not been wholly consistent in treating it either as land or chattel during the attachment. But the former is the better view, and more consistent with the precedents.

When the question whether attachment was definitive arose between the common-law heir and the kindred of an affixing owner in fee, the former was long accorded preference, under a maxim that "the law favors the heir," which finds illustration in various fields of the old law. In England, too, the privilege early conceded to trade tenants of removing trade fixtures was never conceded to agricultural tenants; presumably because the judges, almost all of whom for centuries were of the landed class, considered public policy as plainly against the latter concession, as it was in favor of the former; although Parliament, in a more democratic age, has established the privilege by legislation that began in 1851. In this country there should never have been any such distinction; and authority on the point, although scanty, seems all opposed to it. Partly because some agricultural products—such as plants raised for sale—are clearly removable; partly because many such products are removable as emblements; partly because of the loose inclusion under the term "fixtures" of many things treated as chattels, but really never affixed at all; and partly because even some true agricultural fixtures are difficult of distinction from trade fixtures—and "trade" has come to be substantially any gainful occupation—it is probable that there exists a *practice* of removal much broader than the base of decisions supporting the right. Again, since in this country heirs and next of kin have so long and generally been identical, the old favor to the heir could not properly exist, although English precedents have to a surprising extent been blindly followed by our courts. The question has also constantly arisen between the personal representative of tenant for life and the reversioner or remainderman, and between the owner of land and his grantee, or contract purchaser, or mortgagee. The decisions in all this litigation, great in amount, reveal few definite principles. One cannot say that under our present social policy all claimants are equal; for a bona fide purchaser enjoys a general preference, and legislation has also created various arbitrary priorities—for example, in favor of mechanics' liens; moreover, in finding intent "the relation of the parties" is made the basis of various assumptions that affect the result, in which assumptions logic seems to be blended with public policy. It is only possible to say that whether or not a chattel is a fixture depends primarily upon the intention of the parties, and only secondarily upon physical facts. The application of these two tests is very difficult.

By definite agreement of both parties the character of chattels actually annexed to land can generally (though not in some states) be made what they choose as between themselves; as when a chattel mortgage is given of things actually annexed to the land, or when a contract vendor reserves title to chattels which the buyer, with the seller's consent, thereafter affixes to land; or when one by license affixes chattels to another's land. Conflicting principles make difficult the question whether such agreements bind third persons.

Suppose a chattel is affixed, but title is agreed to be not in the landowner. Now, on one hand, a would-be buyer who gives money in good faith to a person who is not the owner ordinarily secures no title to either land or a chattel (pp. 68, 111, 152); how, then, can the landowner in the case supposed pass title (either outright or by way of mortgage— or even pass a mortgage lien) to the chattel affixed but owned by another? Yet, in the great majority of states such a grantee of land with annexed fixtures acquires title to these. Statutes have made some exceptions to the general rule first stated: another exception is, in effect, made in this situation by judicial legislation. Recourse is had to the fact that a conveyance of land by the holder of only a naked legal title, to a purchaser for value and without notice of "equities" available against the grantor, gives such purchaser perfect title. The affixer's legal title is treated, in disregard of strict principles, as a mere equity—either because he is charged with a misrepresentation to the purchaser of the land or from a tendency to ignore all unrecorded claims to realty.

Regarding the parties individually, it is of course the owner and affixer's intent that is most important. His claims may be barred by application of the rules that a deed shall be construed against a grantor, and hence against a mortgagor (no matter whether conveying title or lien); although the basis for the strict rule prevailing in these cases is often overlooked. When his claims are not so foreclosed, his intent, or an implied agreement, may be inferred. If found (1) from the intimacy of fixation, this must be reasonably consistent with the alleged intent, there being no fixture resulting from bare intent without annexation, and nothing actually annexed remaining a chattel if severance is impossible without material damage to the land. Or (2) the annexer's intent may be

inferred from his relation to the land—an owner might more naturally intend permanent annexation than would a tenant; or from *(3)* the character of the thing, as either lending itself to removal and use elsewhere or, on the contrary, as better adapted to a permanent location. The varying emphasis upon the physical test leads on that head to bewildering and sometimes ridiculously in-consistent decisions. The other test is even more difficult. Both are applied as presenting mixed issues of law and of fact.

Owing to the prevalent custom of using the word fixtures to indicate severable chattels, it is also very common *(a)* to include under that rubric things which neither historically nor linguistically have any relation to fixtures properly speaking. That is to say, things are called fixtures (and go with the land) which neither are nor ever were affixed—as keys, fish in ponds and deer in parks, piled fence posts, and piles of manure produced on the land. Likewise chattels once affixed but temporarily severed—as the screens and blinds of a house, garden poles, and doors and windows. And as these things are said to be "constructively annexed," in order to bring them under the primary meaning of fixtures as things affixed, likewise *(b)* many things are said to be "constructively severed" in order to bring them within the secondary meaning of the term. Logically, none of these things should have been regarded as fixtures, but all should have been treated, like emblements, independently. Linguistic usage, however, in this country, has ignored logic for over a century.

4. Equitable Conversion

Although there cannot be an actual physical transsubstantiation of money into land, yet—as realty and personalty are only concepts—it is possible to shift things from one classification of property to the other. There are several varieties of conversion, and that which is called "equitable" must be distinguished from the others.

(1) Actual conversion results when a chattel becomes realty by annexation to, and when movables are created by severance from, land. (2) It is also constantly said by courts that land when sold is "converted into" money and the money into land; meaning, that one type of property is replaced by the other. In addition (3) there may exist what is known as equitable—or, since its application is no longer confined to chancery courts, constructive—conversion; that is to say merely conceptually, for the purpose of applying rules that were first developed in chancery. In other words courts may *treat* either type of actual property as being already what the owner "intended it to become"; more accurately, *as if* the substitution just referred to had taken place. This is called "equitable conversion." Or a court may refuse to recognize the actual substitution (which law perforce recognizes) in the second case above mentioned and treat the money as if it were still land, and the land as if it were still money; and this fiction is called "re-conversion." In England equitable conversion was often resorted to in order to remove land from the common-law rules of inheritance.

(a) "Equitable conversion" by *a contract* for the conveyance of land in exchange for money comes into play when one of the parties dies before the performance date and the property, for purposes of devolution, is treated as already altered in nature.

(b) Equitable conversion *by will* arises from a testamentary order that lands be sold or bought by the executor— not a mere power to sell, nor mere procedural instructions, but an imperative and unconditional direction, express or necessarily implied. Of course, property only constructively converted remains taxable and alienable according to its actual nature. A conversion may be complete, or "out and out"; but if made for a special purpose—particularly the sale of land to pay debts—there is, notionally, a conversion only to the extent which that purpose requires. That is, the residue of purchase money which would go to the person who would have taken the land.

(c) Equitable conversion may also result when land is acquired by a partnership for firm purposes. Since the partner's "share" is only a right to share money remaining after all assets have been sold and debts paid from the proceeds, the land is in England and in some of our states treated as personalty—except that its devolution depends upon the legal rules governing realty. That is, it is treated as personalty as between living partners, or between living partners and the heirs and personal representatives of a deceased partner, or between the heirs and personal representatives as regards such decedent's share. But the general American rule recognizes no such conversion in the absence of a partnership agreement to that effect; that is, a partner's interest in firm property is realty. To this principle there is a qualification. Partnership property being primarily liable for firm debts and inter-partner claims, the legal title of any firm land held by an individual partner devolves upon his

death subject to a trust, and is treated as personalty when necessary for those purposes; but then there is an *actual* sale. Until then, the firm has only an equitable interest in such land. And the share of the dead partner in the firm realty is, in view of the substantial nature of his "share" above stated, likewise only equitable. However, if one partner, in settling the affairs of the firm and in good faith, *actually* "converts" firm realty into personalty, or *vice versa,* to an extent which is not required by the adjustment of claims, the excess retains the legal character so given to it.

Finally, outright conversion, fictionally, of firm realty into personalty for all purposes results from an agreement of the partners to that effect. The *word* conversion need not be used nor the process contemplated.

Upon the fact of conversion may depend the taxability of the property according to its nature as real or personal, or the rate at which or state in which it is taxable. The issue of conversion is necessarily involved in the administration of the estate of a decedent who has made a contract (unexecuted at his death) such as above indicated, or who has in his will given such an order as that above indicated, or who has been a member of a partnership.

The simplest applications of constructive conversion are puzzling; but particularly in the settlement of decedents' estates their combination with other subtleties—the distinction between real and equitable assets and the doctrine of marshalling results in a procedure that is of formidable difficulty. The problem is covered by local statutes.

5. Persistently Varying Treatment of Realty and Personalty

It is quite evident that so far as the distinction between realty and personalty coincides with that between immovables and movables some distinctions between them are necessary and others desirable.

For example, there must be differences in mere legal procedure, such as the attachment of the movables of a debtor likely to remove from the jurisdiction property subject to execution, or the garnishment of his credit claims. His land, obviously, is always available to creditors. The remedies for wrongs done to property of the two types must perhaps vary somewhat; but the lasting influence of the common-law actions undoubtedly leads us to look upon many distinctions as unavoidable which in truth arose merely from medieval conditions or attitudes.

Again, land being immovable both convenience and the doctrine of territorial sovereignty have always dictated that its taxation, the creation and alienation of interests therein, and the rules determining succession to the owner's rights upon his death intestate, should be controlled by the law of the *situs.* With movables the situation was very different. As a result of a complicated historical development their regulation was until very recently controlled by the law which determines the owner's personal status, namely the law of his domicil; which in England and in this country is the place where one has one's habitual home or place of residence, with no present intention (rare exceptions aside) of leaving it. In this country cases of variance between an owner's domicil and the place where his property is located have been excessively frequent, and variant treatment of his land and chattels equally common. But in very recent decades the current of decision has run very strongly against the old view, and it is evident that the principle will soon be authoritatively established that the law of the *situs* should control corporeal chattels whenever attribution to them of an actual habitual location can possibly be made. Land and chattels are thus becoming increasingly subject to a common rule. Only in rare cases is there doubt either of the habitual location of corporeal chattels or of their owner's domicil. When difficulties do exist, however, proof of domicil is, because of the mental element, likely to be more perplexing; and the *situs* rule has the advantages of avoiding this, and of spreading succession taxes more widely among the states when the owner dies. Nevertheless, in administration cases, the greater convenience of the domiciliary rule is shown by the actual practice of the courts of the *situ:,* which in the various states where chattels are located habitually apply the domiciliary laws to succession.

On the other hand advantages seem clearly to favor, and indeed to require, continuance of the rule that incorporeal chattels should ordinarily be controlled by the law of the owner's domicil as respects distribution on death, succession taxes, and garnishment. But even here the courts more and more find an actual *situs* of such property, particularly if used in business away from their owner's domicil.

Likewise, it seems convenient to permit of abandonment of title to movables by (for example) renouncing possession with that intent; and equally convenient to apply that doctrine to inchoate titles to corporeal and incorporeal hereditaments gained by adverse possession and adverse user, but desirable to deny its applicability to other interests in land.

It has likewise seemed convenient to record interests in land and to require for the transfer of such interests a publicity and formality not required in the case of chattels, although modern problems are lessening these differences between the two forms of property.

It is very difficult, however, to determine what distinctions are socially desirable. Whether land or chattels should be primarily liable for debts is a question which, apparently, should permit of an easy answer. For example, in 1808 Illinois provided by statute that a debtor might elect to offer either lands or chattels in satisfaction of an execution, and in 1845 was ready to break more completely with tradition by an enactment that lands should be taken first; and for a frontier state where livestock and household belongings were rare and precious, and wild lands abundant and cheap, that seems a perfectly reasonable view. Yet it seems remarkable that perhaps no other state rejected the rule which arose under the economic conditions, and was adapted to the views, of a society totally different from that of this country; !t is equally remarkable that Illinois has adhered to its rule notwithstanding that her social interests must long since have become indistinguishable from those of neighboring states that never departed from the common-law rule. Similar remarks may be made upon the peculiar Pennsylvania rule (since 1813) which denies extension of a judgment lien to after-acquired lands.

But very many minute distinctions between the two types of property remain without basis in necessity or present convenience. They are residual traces of rules supposedly once adapted to conveniences of long past times. So, for example, in the long struggle between the heir-at-law, representative of a landed aristocracy, and his ancestor's creditors who desired to subject land to their claims, the heir was long ago vanquished in this country; yet traces of his former preeminence linger as absurdities in our present law—as in the doctrines of constructive conversion (seemingly due in general, and some of its illustrations clearly so, to that struggle) and of fixtures above referred to. The rules of marshalling seem also to preserve distinctions that are, in our society, inept.

6. Tendencies toward Unification

The distinction between realty and personalty is one of the two causes that have produced infinite complexity in our property law; although, as already pointed out, its, most deplorable incidents did not spring directly from the distinction, but from the different rules of descent and distribution that were based thereon. The distinction originated in an historical accident of procedure which was substantially corrected centuries ago. Its practical importance, and almost its existence, depended upon a rule of inheritance, long since abandoned in this country, of an ancient society that had even earlier disappeared. For centuries the necessity of their constant comparison has counseled amalgamation of the two forms of property, and there has been steady progress toward the end. In a country dominated by a landed aristocracy such a consummation was impossible, but both in the United States and in modern England it has been to an encouraging extent realized.

In this country land has always been a cheap and commercial commodity. It has long been equally subject with chattels to the payment of debts; and exemption of the homestead is merely the equivalent of exemptions of a workman's tools or wages. For over a century and a half the country has been substantially clear of the English canons of descent; since a century ago in a majority of our states real and personal property of intestates have gone to the same persons and in the same proportions, under rules substantially those of old English statutes regulating the distribution of personalty. Among us, therefore, there has never been justification for any difference between heirs and next of kin; nor therefore excuse either for the existence of varying rules of descent and distribution or for withholding realty from the personal representative. What Judge Dillon said in 1894 [7] could have been said with complete accuracy at any time in the nineteenth century, and with slight qualifications at any time in our history:

"Real property with us does not serve as the foundation for personal distinction or family grandeur, and is invested with no peculiar sanctity. Its uses are those of property simply. It is an article of commerce, and its free circulation is encouraged." 'The division of property into real and personal, whereby each class possesses distinct qualities and is governed by different rules as to acquisition, mode of transfer, devolution, etc., is largely, although not wholly, artificial; and so far as it is artificial it must be abrogated, and the law of real and personal property made, as far as practicable, substantially uniform, and thereby simplified."

Of the five great distinctions noted above *(see* pp. 73—88) the first two should wholly, or almost wholly, disappear. The third distinction should be re-

moved except so far as movables demand special procedure because of their mobility. In particular it should be lessened by progress toward specific performance of contracts for the sale of personalty; and a considerable step in this direction has been taken by the Uniform Sales Act, which has been adopted in thirty-three states. It seems very clear that systematic reform of property law will be based upon continued assimilation of the two types of property. This would accord with social and economic conditions in this country, and is already far advanced by casual and piecemeal legislation or by judicial innovations.

A sure remedy for the recovery of chattels in specie should be provided (in which case they would also become "real" property in the old sense), and no man should be forced to sell them to a wrongdoer at a jury's valuation. Some transactions involving chattels should undoubtedly be brought within the protection of the recording system, in addition to those which it already covers (page 465); but both as regards this and as regards some differences in transfers of title, including distinctions under the Statute of Frauds, the treatment of land and other property must remain somewhat different.

It is not always easy to say whether a given type of property is properly to be classed as realty or personalty; and some types are classified differently for different purposes.

II. LEGAL & EQUITABLE INTERESTS

1. Origin of the Distinction

Much of what was developed in the chancellor's court as equity had earlier analogues in remedies of the common-law courts. Much of it, also, it has been thought, need not have developed if the chancellor's administrative office had used boldly the powers conferred on it by the Statute of Westminster II (1285) to develop new actions on the case. Still, the law had had at its disposal. hundreds of writs, yet it could not give satisfactory justice; and the failure under the Statute of Westminster was perhaps primarily caused by the rigid pleading required under all writs by the judges, rather than by inertia in framing writs. What we know of the conditions under which injunctions and specific performance developed justifies one in believing that equity did in fact originate, as has been stated countless times, in attempts to correct the rigor and supplement the deficiencies of legal rules, and also to do justice where for other reasons, such as the intimidation of juries by local magnates, the law could not. It would therefore do injustice to equity's whole development to accept literally the statement "that the principle 'Equity acts upon the person' is, and always has been, the key to the mastery of equity" [8] although that is the complete key to its administrative processes, and therefore to much of its success, and consequently to much of its growth. The real key to an understanding of equity's principles is the fact that circumstances alter cases; as Lord Ellesmere stated in 1615, and as Aristotle had pointed out, and as all men are sufficient philosophers to recognize. And constant attention to that truth put equity on a higher moral plane than that of the common-law courts. Equity was no body of ancient tradition, but grew by the deliberate fashioning of doctrines to control, on a general principle of emergency, the operation of the common law, either to avoid hardship by confining or to enlarge justice by extending the working of its rules. That it gave a completer and a better justice explains its origin, its continual expansion; indeed, its continued vitality even today. Its superiority has long been so manifest that very much of legal reform lies in a progressive subordination to its doctrines of conflicting legal principles.

2. General Relation of the Two Systems

The natural (though not inevitable) consequence of the fact that equity has always dealt primarily with property has been that nowhere else has it checked and displaced legal principles so greatly as in the field of property. A very great authority has said:[9]

"The Courts of Law... necessarily held, that where the law was *silent,* no person ought to be disturbed, and that any such disturbance was equally a violation of the law . .. as the taking away a right which was positively given by the law. The Court of Chancery, in the exercise of . . . [its jurisdiction based on "principles of equity and conscience"] . . . necessarily in some way interfered with the co-existing state of law, positively or negatively, and affected the condition of some party relatively to his legal rights. This was done in various ways. The court in some instances infringed upon some legal right of enjoyment, or of action, or of defense; sometimes it gave and enforced rights unknown to the law; sometimes it extended or varied the remedies given by the law; sometimes it found itself obliged to usurp, as it were, upon the law in giving a remedy, where one might be obtained at law, and in some instances it afforded means for the enforcing or protection of rights be-

yond what could be obtained by the ordinary course of the law."

The accuracy of these assertions is illustrated in infinite detail in our case law. Indeed, the facts are notorious.

It is true that in some fields equity merely aided or supplemented the common law's rules and remedies respecting property and those claiming interests therein. But if one accepts the test stated above by Spence, such instances are not numerous.

When Chancery actually revised partitions already completed at law, this was a direct denial of legal rights just declared and made of record. Equity led in according to villeins rights against their lords when at law they were rightless. Was this not a contradiction of the law—until it followed and took them under its protection? When equity went beyond the law in creating equitable waste *(see* page 228) it encroached upon a field of legal liberty. As Lord Hardwicke stated in one of these cases, "I always *incline* to adhere, *as near as justice will admit,* to the rule equitas sequiter legem"; and in another, *"When* the court finds the rules of law *right,* it will follow them, but then it will likewise go beyond them"; and in another, "Courts of equity will break in upon the common law where necessity and conscience require it."[10] On the basis of fraud, accident, and mistake equity has "exercised jurisdiction *over the legal right or interest itself,* by extinguishing, shifting, or controlling it, as regards tangible property, real or personal, and rights of action, without introducing any coexisting equitable title."[11]

The common law made the wealthiest woman virtually a pauper by the act of marriage, but equity gave her relief under the doctrine of "separate property." No one could deny that, in substance, the law took her property from her and gave it to the husband; how can one deny that, in substance, equity took it in turn from him and restored it to her? Equity forbade a mortgagee to enforce a forfeiture for non-payment precisely on the date due. It restrained the enforcement of judgments whose fruits would be property, and even restrained actions asserting rights of property. As regards various uses of property—tolerated liberties, at least, under the law—it provided the preventive weapon of the injunction. Indeed, in all the above cases it clearly cut down either the actual incidents of legal title or extra-legal liberties respected by the law.

Particularly, seizing upon the distinction between title and its beneficial content, by its doctrine of uses equity circumvented and nullified the property law's two most fundamental doctrines, those of tenure and of seisin, and their various consequences (pp. 396, 402). The preamble to the Statute of Uses was a wholly justifiable indictment. And when, after most of the equitable consequences became legal doctrines by that Statute, uses revived in more limited (but, as they have come to be today, nevertheless immense) extent as trusts, they continued to be chancery's "most violent invasion of the law." For through that institute, as Spence says, equity

"introduced a right of enjoyment of property distinct from the legal right, and has made the legal right subservient to this beneficial title to enjoyment, and regulated the exercise of the legal title in reference to the beneficial title, according to principles of its own; thus establishing a distinct right of enjoyment of property ... founded on a title purely equitable, ... depriving some party of the common-law rights incident to legal ownership, and giving to some other party rights over the property not recognized by the law."[12]

Moreover, by extensions of the trust concept, it laid hold of other whole provinces of the law.

Manifestly, the law courts during equity's infancy regarded the chancellor's jurisdiction as constantly conflicting with the law, although Coke admitted equity to be "a just correction of law in some cases." [13] As St. Germain put it, "Equity taketh not away the very right, but only that that seemeth to be right by the general words of the law ... Equity followeth the law . . . where right and justice requireth; notwithstanding the general rule of the law be to the contrary."[14] This view was doubtless the accepted rationalization of chancery's powers in 1523, but it is impossible to view it as other than sophistry, in view of equity's justified boast that it looks through form to substance—on which principle truly rests much of its moral contribution to the administration of justice. For "transparently, in point of substance, a legal right consists wholly in the beneficial uses that may lawfully be made of it."[15] Such pleas of confession and avoidance as St. Germain's later gave way to the more clever formula used by Lord Ellesmere: that equity, as Coke truly contended, did not act upon nor affect the legal right—and therefore law could not complain if it did act *in personam,* through the corrupt consciences of respondents. This proved to be for the chancellor an impregnable, albeit sophistical, defense.

In recent years there has been much discussion whether equity has collided with law and

even nullified legal doctrines, or whether it was powerless to do that, did not conflict with law, and constitutes a mere mass of addenda to the law's principles. Certainly it is not a self contained independent legal system. But it is more than a body of addenda to the non-equity law, for displacements and nullifications cannot be regarded as merely glosses of primary rules.

In thirty states of this country the administration of what were once law and equity is entrusted to a single court in which there are only civil actions, the old-time distinction between actions at law and suits in equity being abolished. The merger of substantive "law" and "equity" which such unified administration might have been expected to produce has been retarded and minimized by a judicial view that the distinction between legal and equitable *rights* is indestructible. This is true only in the sense that history is indestructible. Since the rules of the two systems often conflict, and since the equitable right always prevails *when they do conflict,* that is clearly the only ultimate or true rule of our legal system, the only true *legal* rule. The devitalized and imposturous rule of law, once dominant, is necessarily annihilated. Of course it may still be called "equitable" to indicate its origin, or to indicate that it retains from such origin peculiarly equitable characteristics. This is useful. On the other hand, the continued use of the label retards realization of the fact that the "equity" rule has become also that of the one-time non-equity portion of our legal system.

This diffusion and dominance of equity progressed through the establishment of "equitable defenses" to legal actions. The phrase has become a misnomer except as a historical label. At one time a person sued in ejectment for land which the plaintiff had contracted to convey to him could go into equity, secure specific performance, and then plead his new legal title if secured in time, or have continuance of the action enjoined if it was too late to make that plea, or have enforcement of the judgment enjoined if already rendered against him. Such affirmative procedure in equity was really only a defense (except in a narrow pleading sense), and a truly equitable defense, to the law action. Hence, when in all the code states and in many others (all today) statutes enabled the defendant at law to plead his equity directly as a bar to the further prosecution of a legal action, the name "equitable defense" was naturally continued, although the equity was now in fact a legal defense.

Such defenses were first developed by equity in the field of specialty contracts (incorporeal personalty) and only much later in the field of realty.

It has already been pointed out that although the merger of law and equity should logically have proceeded in the code states to the point of permitting affirmative action "at law" upon what was formerly only "an equity," this development has not even there been attained; and of course in other jurisdictions special statutes would be necessary to at-tam it. Moreover, some equities have been much more uniformly recognized than others as legal defenses, and their recognition has been carried farther. The result has been characterized as chaotic. It is, for example, not at all true that everywhere a defendant in ejectment can defeat the plaintiffs legal title by pleading an equity for reformation of a deed essential to plaintiff's claim, or a contract entitling him to get plaintiff's title by specific performance, or even a decree of specific performance already rendered, much less by pleading a trust in defendant's favor—that is, that equity would regard plaintiff as trustee of the land for defendant. Difficulties of old procedure, and particularly confusion as to the role of the jury under such pleadings, have been great obstacles in the way of merger.

As has been said with regard to the continued assimilation of real and personal property, so also as respects the relation of equity to law it seems clear that systematic property reform in this country should continue the strong tendency hitherto prevailing toward an increasing dominance of equitable principles in our legal system. The contrary attitude of the recent statutes reforming the English property law must seem to an American reactionary. A host of what were for centuries legal interests have, under those statutes, been made henceforth equitable; and with few exceptions all equities are made ineffective against a purchaser of the legal title, even though he have prior notice thereof.

Something must therefore be added regarding the doctrine of bona fide purchaser for value. Two matters, likely to be confused, are constantly denominated by the preceding words. One is a technical doctrine of purely equitable origin and equitable application. The language is equitable in origin. In equity a "purchaser" is, as often used, one who is not a volunteer, without adding "for value"; a "volunteer" being, in equity, not one who offers to give or do something for nothing but one who wishes to take something for nothing. And a "purchaser" is, secondly, one who actually *acquires* legal title. A person who gives money in good faith

expecting to get title, but who receives none because his vendor has none to convey, is only a would-be purchaser, notwithstanding that the courts constantly call him a purchaser. Equity follows the law and does not contradict the fundamental legal principle that generally one can only convey such title as one holds. As already pointed out, however, *the law,* acting (under statute or independently thereof in different cases) upon ideas of justice which are "equitable" in a loose sense, abandons its fundamental dogma in some cases and makes a true purchaser of one who otherwise would have been but a would-be purchaser (pp. 68, 92, 371).

This is a matter quite distinct from the equitable doctrine, although the influence of the latter may have been potent in the other. The equitable doctrine is an illustration of equity's respect for legal title. It is this: that a purchaser for value (in the sense above explained) of the legal title, who takes this without notice of existing equities against it, is a *bona fide* purchaser thereof and will hold it free of such equities. They are cut off. But the absence of good faith does not mean the presence of literally bad faith. "Notice" is "knowledge, reason to know (inquiry—stimulating facts), duty to know, and notification (notice based on formality)."[16] Value generally includes a pre-existing debt, and the amount is important only as it bears on the claim of good faith; even promises to pay have by some courts been deemed sufficient.

There has been much discussion in recent years of the rationale of the doctrine, and opinions are much divided. The long unchallenged view was that equity's end was to restrain corrupt consciences, by maintaining attaching equities against buyers taking with notice. Another view is that equity's object was rather to reward, by nullifying the equities, those who bought with a good conscience. From this point of view—which is merely the obverse of the other (unless, as a mere matter of words we state the second object as one to promote commercial transactions by clearing titles of qualifications)—the equitable doctrine must have influenced the development of the legal doctrine just referred to.

Dispute has centered mainly, however, on the question whether the equities thus cut off are rights *in rem* or *in personam* This question has, inherently, nothing whatever to do with the doctrine's general nature or purpose. They became needlessly entangled because of the contention of Langdell and Ames that an equity (or a legal right) *in rem* must be good against *everybody,* and therefore such an equity must be good against a *bona fide* purchaser of the legal title; wherefore the equities cut off must be rights held *personam* But this was a misconception. The view is steadily strengthening that many equities are held *in rem,* although both legal and equitable rights *in rem* may be cut off.

III. OTHER CLASSIFICATIONS

1. Normal Ownership

Normal ownership is of legal interests, and the holder of the title ordinarily holds it for his own benefit. Also, ownership is normally in one person, ordinarily confers present enjoyment of property, and enjoyment under it is ordinarily subject to no conditions or restraints other than those which public policy imposes upon property owners generally.

2. Abnormal Ownership

There are various exceptions to the normal situation just stated. In particular there are the following exceptions of great importance. The first, is that of *equitable interests,* discussed in the preceding section. Where such exist, ownership (whether legal or equitable) is not held for the benefit of the owner but for that of the equitable beneficiary, under equitable principles.

The second is that of estates of postponed enjoyment, somewhat misleadingly called *future interests.* The third is that of *conditional interests* of various kinds. The fourth is that of *co-ownership* of a single thing by several persons. The fifth is that of ownership by one person of isolated *rights in the property (or thing) of another person;* which is manifestly, as respects that thing, only an instance of co-ownership, although it is never so called. All of these exceptional types of ownership except the first will be somewhat discussed below. All of them except the third are types of divided ownership, which in our legal system is a characteristic of basic importance. Its general discussion in advance of detailed consideration of its various manifestations will explain why they fit so naturally into our law.

(1) Huebner, "History," at 164.

(2) Brissaud, "History of French Private Law" (Howell's transl., 1912), 268—69.

(3) The words are quoted from Pollock, "Torts" (11th ed., 1920), 12.

(4) The words are again those of Pollock, *op. cit.,* 13.

(5) Taylor ex dem. Atkyns v. Horde, 1 Burr. 6o, 114 (England, 1757).

(6) "Commentaries," II, * p. 343.

(7) Dillon, "Laws and Jurisprudence" (1894), 238-40, 385.

(8) Ames, "Lectures" (1913), 233.

(9) Spence, "Equitable Jurisdiction" (1846), 1, 429—30.

(10) Respectively, Barth v. Cotton, 1 Dick., 183, 205 (1743); Paget *v.* Gee, Ambl. 807, 810 (1753); Wortley v. Birkhead, 2 Ves. Sr. 571, 574

(11) Spence, "Equitable Jurisdiction" (1846) 1, 432, 621.

(12) 1 *Idem,* 431.

(13) Coke's "Fourth Institute" (ed. 1797), 79.

(14) St. Germain, "Doctor and Student," Dial. I, c. 16 (Muchall's ed., 1874), p. 45.

(15) Billson, "Equity and Common Law" (1917), 69.

(16) The analysis of the American Law Institute as stated in Merrill, "The Anatomy of Notice," 3 *U. of Chicago L. Rev.* 417, 427 (1936).

Part I, Chapter IV

Ownership & Divided Ownership

1. Definition of "Ownership"

The definition of ownership has caused much difficulty to analysts of our legal system. In this essay emphasis has in various places been given to the fact that our law has never known any other meaning for title or ownership than a relatively better right to possess; which of course means a better right to enjoy through such control.[1] But the matter has become needlessly involved with complexities, mistakenly supposed to be essentials, that must be discussed in order that they may be eliminated.

(1) VARYING CONTENT OF RIGHTS LABELED "OWNERSHIP."

Austin pointed out a century ago the variable meaning of "ownership:' Let us define perfect ownership, following him, as involving (a) indefinite and exclusive liberties of user—protected (b) by the right to exclude others from participation therein, and (should they oust the owner) by the right (c) to recapture the thing which is the object of ownership—plus (d) indefinite duration of such liberties of user. This definition manifestly assumes an owner in possession of the property. The situations presenting difficulty are those in which the person called "owner" lacks possession, *i.e.,* lacks liberties of direct user. Assuming, further, a general coincidence of ownership and rights *in rem,* since it is convenient to deal with them together, we may now consider various situations in which persons not in possession are nevertheless habitually called owners or said to have rights *in rem.* They will clearly reveal the perplexingly varied content of rights, powers and liberties which may be covered by the term ownership, and will throw light upon the role of rights *in rem* in the constitution of ownership.

(1) The *owner of land who was dispossessed* was always recognized as retaining a paramount "mere right" akin to the "ownership;' of present law. Yet it is only within a century that he has been able to convey his title; he has never had an action against trespassers; he has always had only a right of entry to recover the land, enforceable by a fleeting power of sell-help and by a right of action (both right and remedy passing to his heir). But the dispossessed medieval owner of a chattel, because he was without effective recuperative remedy or powers of alienation, was not even known as owner and did not come to be known as owner until he had gained the limited rights of action against strangers which are all that our law has ever afforded. These rights, however, were broader than those of disseisees of land.

(2) In the case of a *bailment,* the bailor is labeled "owner." Not only does *he* lack liberties of user; the bailee's liberties depend upon all the circumstances of the case; in large part, user is ordinarily suspended as to both parties. The bailor has a transferable interest, but unless he has the immediate right to possession as bailor at will he cannot sue third persons for trespass. He cannot bring recuperatory actions against them, or even sue for damage to his reversionary interest if the bailee has recovered judgment for full damages or, possibly, made a voluntary settlement for them. The bailor, nevertheless may intervene in a pending action brought by the bailee. At the same time, as already noted, the bailee, as pos-

sessor, has always been treated by our law as holding against third persons all the rights of an owner. For centuries legal speech has recognized the division of the enjoyment-content of title by calling the interests .of the two parties "general property" and "special property" respectively.

(3) In the analogous case of a *lease for years,* the lessor is labeled "owner." His reversion is "the title;' and is alienable; he lacks possessory remedies (trespass and ejectment) against strangers; but his action for damage to the reversion—the lessee's right to recover damages for harm thereto being much less generally recognized than the bailee' s—is scarcely entangled with the tenant's rights.

(4) When the bailee happens to hold a *common-law lien,* a considerable number of decisions have allowed the bailor to maintain trespass and likewise trover and replevin against a stranger, on the ground that the lien is a privilege which the lienholder alone may assert. But other cases have held that the bailor should first extinguish the lien. This view should logically prevail in actions which rest upon an immediate right to possession, for it alone is consistent with prevailing doctrines regarding the bailee's rights and with those regarding the plea of *jus tertii.*

(5) When the lien-holder is a pledgee, the *pledgor* is likewise known as owner. Against a third party he can, speaking generally, only maintain an action on the case, but the very nature of the action logically requires that damages be restricted to the harm done indirectly to the reversionary interest. If, however, the third party's act substantially frustrates the purpose of the pledge, various cases have allowed the pledgor recuperatory actions inconsistent with the general doctrine of bailments.

(6) A *conditional seller* was at common law treated as owner against even *bona fide* would-be purchasers for value from the conditional buyer in possession; and we still so protect him if he properly records the contract of sale. The vendor purports by the contract to reserve ownership pending full payment, but his title is a bare security title pending default by the buyer. The buyer has the usual rights of a bailee as respects actions against and settlements with third persons for interference with the goods; in addition he is in most states and for various other purposes treated as owner by the law. After default the vendor's rights become dominant, but not immediately absolute.

(7) On the other hand, the law has never regarded as owner the man who has conveyed land *subject to a condition subsequent.* He holds after such conveyance a present interest of possible future enjoyment, and its content or protection is a single real right—a *jus ad dandum aliquid* which is enforceable against any transferee of the title. After condition broken, nothing is lacking to the reconstitution of his perfect title save an entry upon the land that consummates forfeiture of the covenantor's title; until that consummation the covenantee is not spoken of as owner.

(8) The *holder of an option to purchase land* has no legal action for injury to the land, nor has equity protected him, as it has the contract purchaser, against spoliation of land by the optionor. Nevertheless, the power of the option holder to purchase is transferable *inter vivos,* while, inconsistently, the weight of authority holds this power to be beyond the reach of creditors unless through a creditor's bill. This option to purchase passes on the holder's death to his executors or his heirs. But though he may "own" the option-right or the power, he is not even a contract purchaser of the land; and as regards the devolution of his property is therefore, by the better view, not treated as "equitable owner" in case of his death before exercise of the option.

(9) Finally, *dower inchoate,* if it be accepted as a real right because it cannot be cut off by subsequent transfers of the husband's title, is one that gives no action against an adverse possessor or one committing waste, and is inalienable and therefore not available to creditors unless by bill in equity. When the dower becomes *consummate,* the widow is clearly entitled to compensation if all the land in which she has dower rights is taken under eminent domain. There is much confusion, however, as to her right to have an injunction against waste or to maintain actions for damages or to recover the land in which she is to enjoy her life interest. Can she have these remedies before, or only after assignment of the specific land? It is clear that she should have equitable relief before the assignment of the specific land if the injury or adverse possession involve all the lands of which she could by possibility be dowable. It is better agreed that all common law she could not, until the lands were assigned, alien her interest otherwise than by release to

the terre-tenant, nor could her creditors reach it unless by bill in equity. Statutes in various states, however, have removed her disabilities in aliening before assignment, and she can have her remedy in equity. As respects dower consummate there are therefore important rights *in rem* in the usual sense of that phrase even before assignment; yet, pending assignment it would certainly be extraordinary usage to refer to her as having any estate in the land, or as "owning" anything more than a chose-in-action.

(2) OWNERSHIP AND RIGHTS IN REM. The distinction between rights *in rem* and *rights in personam* has caused much controversy. That the very concept of a right *in rem* is of doubtful utility has been pointed out (p. 8). In our juristic literature of recent decades attempts have been made to use this poor distinction as a basis for a second distinction, namely that between legal rights and equitable rights, by writers who contend that the former are rights *in rem* and the latter rights *in personam.* And as both distinctions were accepted by the authors of the recent property reform legislation in England, and apparently made the very basis thereof, they call particularly for examination; all the more because equities received in that legislation an unfavorable treatment which is certainly not to be desired in this country, and apparently were so treated because of an exaltation of legal title (as understood to be a right *in rem)* which is equally undesirable for our own future legislation.

It has been remarked that it is a characteristic of proprietary rights that they are rights *in rem* (p. 10); but that they share this characteristic with various rights of personality. The definition of property as being a right *in rem* or consisting of rights *in rem* apparently originated With John Austin. But two meanings are very commonly given to that phrase; although in practical application they run together.

One meaning is that of "real rights"; that is, rights sometimes described as "in the thing itself' or existing "without regard to particular persons"; acts done to or against the thing being thought of as wrongs to it, and so to the rights of the owner *in* the thing. The conception, however unsatisfactory, has greatly affected the language of our law. The procedure of a sheriff in seizing and selling a judgment debtor's goods under a writ of execution is said to be *in rem* because his acts directly affect "the property" (that is, the owner's right in it), transferring title from him to another. Similarly, an action against a *thing* as defendant, and designed to lead to the creation or extinguishment of title directly by a court's judgment, or by act of its agent appointed to transfer title in accordance with the judgment— in other words, by its inherent powers— is known as a proceeding *in rem;* and the judgment is said to be *in rem.*

Another and equally common meaning of the phrase *in rem,* when reference is to rights, is that of validity or enforceability against the world generally. Rights of a plaintiff which are, in this sense, either *in personam* or *in rem* may be enforced against the defendant's property by procedure *in rem* as explained in the preceding paragraph. The judgments, however, under which such action is taken, declare the plaintiff's right, and are therefore *in personam* or *in rem* in correspondence therewith. (The case of an action against a *thing,* above referred to, is different.)

Now real rights *(in re)* are in fact always enforceable against the world generally *(in rem).* But (1) not all legal analysts have agreed that *all* real rights are "proprietary"— since, as will be explained below, they do not use ownership" to include rights in the land of another; and also because they apparently do not recognize as *separate* real rights those which, together—"rights" including liberties, powers, and claims,—make up ownership. Also (2), possibly some would deny that these last rights *are* "real," since they have never been regarded as giving possessory rights in the land, and interference with their enjoyment is therefore not a *direct* interference with land, so that not trespass, but trespass on the case, was the remedy against such interference.

(3) Some writers (all Austinians particularly) must refuse to recognize rights in incorporeal things as "real," because for them there are no such "things" that can be the objects of rights. And (4) it is not unanimously agreed that all proprietary rights are rights enforceable against the world generally. It depends upon the definitions of ownership and of rights *in rem* whether that proposition is correct.

The concepts of ownership and of rights *in rem,* though generally used as interchangeable, are of course wholly distinct. Assuming that the relationship between a person and a thing is correctly described by the latter phrase, that relationship might doubtless either coincide with or fall within the contours of the relationship of perfect ownership as above defined. But if the contours of each concept—that is, its con-

tent of legal relations—are in fact, as illustrated in the above situations, constantly altering, it is manifestly hazardous to assume an area of constant coincidence sufficient to justify the view that the two terms in question are synonymous. Nevertheless, Austin sought to classify all property rights, or the law of things, by distinguishing rights *in rem* and the rights *in Personam.* In doing so he also postulated: first, that rights exist only when there exist duties correlative to them; secondly, that true proprietary rights are exclusively in *rem;* thirdly, that "things" are exclusively tangible; and fourthly, that no right can exist *in rem,* nor therefore be a property right, unless its correlative duty is negative—a duty to forbear or abstain. These postulates do not fit our actual law. There are various interests which are habitually, indeed universally, regarded as property interests—i.e., regarded as rights in or over things in the sense above indicated —which are by Austin's postulates arbitrarily excluded from proprietary rights.

Possibly because of the first, he ignored all powers. Yet the power of alienating title is evidently one of the most vital of the rights that make up ownership, and a power of appointment can be no less a property right because it exists separately. Moreover, powers of sale and powers to forfeit titles (by reentry after breach of a condition subsequent or otherwise) had for centuries before Austin wrote been treated as property interests. Because of the third postulate, his system could never cover what has been for six centuries a considerable part of our law of things.

Even more hampering, in his day, were the other two postulates. The fourth presumably led Austin to ignore rents, and covenants between lessors and termors that imposed affirmative duties and ran at law with the land. It would equally have required the exclusion from proprietary interests of legal and equitable charges. The same would be true of covenants of affirmative burden that run with the land in equity in the United States, although these do not exist in England, and the statutory and non-statutory pseudo-easements (likewise peculiar to the United States under that name), which entitle land owners to require of neighbors the maintenance of line fences and party walls. Austin's second postulate as well would have excluded these interests from the law of property.

If we ignore all of Austin's postulates, and ask how the above interests should be classified, the answer will in part depend upon the emphasis put upon procedure. For example, a proprietary remedy (trespass on the case) was always available to protect easements and profits, whereas a contractual remedy for damages was employed in case of the breach of covenants. As for rent, whether due from a termor or reserved on conveyances of fees, the remedy of debt was in original theory a real remedy, but its character has altered; distress, which was a procedure *in rem* available to recover rent service, was unavailable to enforce rents seck and rent charges. Certainly, neither a medieval mode of thought regarding rent nor procedural ideas based upon an abandoned medieval system of actions should control classification. On the other hand our substantive theories have perforce been expressed by procedure; to a considerable degree they have by reaction been modified by procedure. So far as substance can be detected through procedural forms, the procedural test has the very decided merit of being indigenous to our law.

The answer to this question of classification would in part depend upon the definition of rights *in rem,* and here the difficulty is even greater than with reference to procedural tests. There is rather general agreement to lay aside the Austinian requirement that a right *in rem* must bind *all* the world; nevertheless, the instant that is done agreement becomes difficult as to the point at which to stop. If, to make a right *in rem,* it suffices that it be enforceable against an indeterminate number of unidentified persons, then in all the nine cases above analyzed—both those in which it is usual to concede and those in which it is usual to deny "ownership" to the right-holder in question—there exist rights *in rem.* With reference to the interests just mentioned as excluded from Austin's proprietary rights, the number of persons who might possibly buy the fee or the leasehold that is subject to the rent obligation, the legal charge, covenant running at law, or pseudo-easement, is as indefinite as is the number of those who may by possibility trespass upon A's land, and violate A's preexisting right *in rem* that nobody shall without his consent enter the close. Under accepted definitions, therefore, the rights should apparently be classified unhesitatingly as rights *in rem.* Again, if one in this country acquires for value title to servient or encumbered land and has no actual knowledge of the easement, profit, covenant or other encumbrances on the land, he takes it free from them, provided he is not affected with constructive notice by the record in his chain of title of a

deed that shows the existence of such encumbrances. A legal right is thus destructible (in this case and in various others) by a *bona fide* "purchase" for value of the servient land. Were it not for our recording system nobody could say whether the persons capable of acquiring the title only with notice of the encumbrance would or would not be "a very large" class of persons, nor could one, therefore, say whether the right would or would not be a right *in rem.* Indeed, no one could know whether the number capable of acquiring title without, or only with, notice would be the larger. Given the recording system, one can safely say that a right good against all save a *bona fide* purchaser for value is good, assuming that it appears on the record, against all persons in the community.

But whatever be the answer given to the question whether particular rights are or are not rights *in rem,* it is not an answer to the question whether the rights are property rights. To adopt the former as the test of the latter is idle and indefensible; idle because it will not work, and indefensible because it is a concept wholly foreign to our law—which is why it does not work. The classification of rights as *in rem* or *in personam* is one of neither Roman nor English law, but of the glossators. So far as it entered western European legal systems as a part of the Reception of the Roman law to which it related, it may possibly serve satisfactorily as a basis for their classifications. In our law the phrases rights *in personam* or *in rem* are useful shorthand descriptions of loose character, but their application as tests to control our classification of the indigenous concepts of our own legal system causes more confusion than it removes. The interests omitted by Austin from the law of things are property interests because our law treats them as "property"—by the practical tests of alienability and commercial value, as encumbrances upon what we call "title," as directly affecting and limiting the complex of legal relations known as ownership, as being (in convenient language) "real" rights. The benefits of such interests do not pass from the original beneficiary according to the theories and subject to the restrictions that relate to contracts; and the burdens do pass with the title to the encumbered land in a way that contract burdens do not. Legal or equitable, the interests are enforceable *in rem* in any meaning of that phrase that may be chosen. Each is enforceable according to the principles regulating benefit or burden which prevail at law or in equity respectively; but with the certainty that, as regards burdens, the practical difference between law and equity will in the end be minimized by the recording acts. This holds good as well with respect to the nine types of property interests above mentioned. They are all examples of divided ownership—distribution of liberties of user, powers of alienation, and rights of control, between two persons. Our law may call one owner; it may to varying degrees treat both as owners. It must be agreed that ownership, however useful, is not an exact concept. It is equally certain that we cannot determine who is "owner" by looking only at the respective rights of control against third persons, and asking against how many persons such are enforceable; much less, by arguing whether such rights against third persons should be called rights *in rem.*

(3) OWNERSHIP & RIGHTS IN RE. "Rights *in re*" like "rights *in rem,"* is a somewhat obscure expression. Moreover, opinions differ regarding the relation of rights *in re* to ownership very much as they differ regarding rights *in rem.* The term "rights *in re* is nevertheless indispensable, since our law writers use its only possible substitute, rights *in rem,* almost entirely to indicate the scope of incidence of the duty which is the correlative of such rights. Historically speaking, real rights are those which in medieval law carried the vestment of seisin. As seisin was indispensable to any substantial existence, enjoyment, or protection of a property interest, the definition above given of real rights as understood in our present law—rights namely, which so manifestly and significantly exist in or over a thing that acts of interference with it are regarded as necessarily violations of the right— was an inevitable result of their historical origin. Their existence, and consequent protection by the ancient real actions, were not confined to corporeal freehold interests, including reversions and remainders, but extended to such incorporeal interests as were recognized by the early law, particularly rents and commons and easements.

These historical facts are not simply matters of the past, but still influence us. Real rights, real obligations, real actions, real judgments, real procedure are concepts inseparably tied together by a common underlying idea. A real right is one veritably in or of "the land,"—i.e., of the title to the land; it is a fragment of complete ownership. A real obligation, correlative to a real right, is one borne by the property, *i.e.,* one enforceable directly against the title. A real action

demands possession of the property, *i.e.,* it asserts title. A real judgment gives possession, or it directly passes or establishes title without a transfer of possession. Real procedure appears in the enforcement of a judgment or a decree when the direct effect thereof, or the effect of the acts of an officer or appointee of the court, is to alter title. These ideas have been steadily implicit in our law for centuries. Debt and rents have illustrated particularly well in their development the distinctions between real and personal obligations, actions, and remedies, and the changes which time has made in those relations. But in the application of the general conception underlying all the above phrases our law has never been controlled by subtleties.

Speaking of Bracton's attempts to classify institutes of the English law of his day "in the pigeon-holes provided by a cosmopolitan jurisprudence" (the present section certainly shows that we have mistakenly followed Austin's attempts to do the same thing), Pollock and Maitland remarked that "after a brief attempt to be Roman our law falls back into old Germanic habits," *i.e.,* it fell back in the thirteenth century, and it has stayed there.[2] The fundamental conception underlying the definitions above stated is characteristically Germanic. In particular, Germanic law classified its actions according to the relief demanded, and so for our law "the reality of a real action is found [was found before the fourteenth century—as it still is] either in the claim for possession of a particular thing, or in a judgment which awards to the plaintiff or demandant possession of a particular thing." In other words the real actions asserted the most fundamental of all real rights, the right which was for some six centuries the sole test of title in our law, and which with slight modification remains, namely, the right of entry or recaption.

It is probable that such views as exist contrary to that just stated go back to Austin's discussion of the distinction between a *jus reale* and a *jus ad rem.* The distinction has been the subject of a controversy in Germany which began before Austin's time and is not yet concluded. Its obtrusion Into analyses of our own law would for that reason be regrettable at the best, but it is more so for three other reasons. First, because Austin, though diffuse on minor points, made no clear pronouncement on the vital point in controversy, namely, whether the *jus ad rem* should be regarded as a concept of the property law or solely as one of the law of obligations. Second, because he gave to the phrase a content that was reconcilable neither with the literal meaning of the phrase nor with the English law of his day. Third, because such a varied content as he gave the phrase has no application or iota of utility in our own law of obligations. This is so, notwithstanding that such variety of content is entirely consistent with treating the concept as purely one of the law of obligations in the sense of Roman law or of the Pandect law of Germany. The first point alone is here important. No matter what may have been Austin's ideas, it is clear in our law that a mere contract relating to a thing does not create at law proprietary rights therein; and this is not irreconcilable with the possibly real quality of equitable rights under a contract specifically enforceable, nor with the proprietary character of any contract *res* as against third persons or as respects creditors' claims when the right of either party has commercial value. The increasing emphasis placed upon those developments, however, by students of our law could only lend aid to the view that nothing in the doctrine of the *jus ad rem,* as it ever existed or still exists, supports a denial of the existence of a proprietary right *in rem* to recover property from one wrongfully withholding it. For those who devised and for centuries used the phrase, it indicated a property right although one *in personam.* In our law we do not need it as the description of a legal proprietary right; and in equity it could serve at most as a novel but unnecessary label to which old controversies would attach. It should be discarded. If retained, no usage precludes us from giving it any content consistent with its literal meaning; we should, then, exclude other meanings (such as Austin borrowed from the obligation concepts of the civil law, and Salmond's marital *res),* and include the recuperatory rights *in rem* which have for centuries been the heart of our property law.

The only other argument that might be advanced against recognition of such a right as proprietary is based on no more than a *priori* reasoning, that the duty corresponding to a proprietary right *must* be negative. As Salmond, following Austin, puts it: "All real rights are negative. . . A real right available against all other persons can be nothing more than a right to be left alone by those persons. No persons can have a legal right to the active assistance of all the world. The only duties therefore, that can be of general incidence are negative."[4] In truth, the only *active* assistance required is on the part of, at most, a few actual wrongdoers, in the enforcement of the reme-

dial right. The antecedent duty *in rem* of all possible future wrongdoers to return the property (and the right *in rem* to recover from all such) therefore offers no difficulty on that point. Aside from the purely presumptive reasoning just stated, there is no authority opposed to the recognition of the right in question as one *in rem.* If real rights are rights in, to, or over things in the intimate sense above indicated, nobody doubts that what we call "title" is, at least in the main, a complex of real rights. But in our law title has for centuries had no other meaning than a relatively better right to retain or regain possession.. For centuries the latter right, that is, the right of entry as respects land, the right to recover chattels by action so far as there was any recuperatory action, was the sole test of title. How, then, can it be doubted that the right to recover possession is a *jus in re* enforceable *in rem?* It was precisely this real right and the real action which protected it which, existing in the case of land but not of chattels, made the former "realty."

Despite clarification on details, however important, such as the one just discussed, the general conception of a real right is vague, and always has been. The difficulty lies in the persistence of a primitive mode of thought. The objects of rights are either corporeal or incorporeal things; and such things are property because the law enforces rights held against other persons with respect to those things. Both Germanic and Roman legal systems, however, started with the thought that a man either owned "things" *(i.e.,* his own) or held mere "rights" *(i.e.,* in the things of others). Both ideas still persist, in this country as in Germany, today, and in both countries laymen also think of themselves as standing in legal relations to things. All of these are rather crude conceptions. No code or official exposition of a code, however, has made them a part of our legal system, as they are a part of that of Germany. To make the conception of direct relations with a "thing" easier, the Code of that country has even denied that name to incorporeal interests recognized as things (as in our law) since medieval times. The official justificatory commentary upon the Civil Code of 1900, after declaring that the property law regulates "the legal relations of a person to a thing,"—and that a real right "bears upon *(ergreift)* the thing itself," proceeds as follows: "The essence of being 'real' [1] lies in the direct physical control *(Macht)* of a person over the thing. [2] No importance attaches to the distinction whether this control is exercised by the person entitled, himself, or is exercisable only through some process controlled by an organ or officer of the law. [3] The decisive characteristic is . . . that the right can be exercised independently of another person's volition; [4] that the presence of another person under a correlative duty is unnecessary. [5] From this it immediately follows that real *(dingliche)* rights can exist . . . in corporeal things. Over things that exist only in imagination ... an actual control *(eine reale Macht)* cannot be exercised."[5] It is manifest that these propositions (aside from the last) are acceptable only as a layman's description of real rights as they exist in our law. In truth, no legal right can be constituted by mere physical control of a thing (corporeal or incorporeal), but only by legal control of other persons; after which one's right can be *manifested* by physical acts in dealing with the thing. Salmond has stated the contrast between real and personal rights with clarity. "Every right involves not only a real, but also a personal relation. . . In real rights it is the real relation that stands in the forefront of the juridical conception. . . In personal rights, on the other hand, it is the personal relation that forms the predominant factor in the conception. . . For this difference there is more than one reason. In the first place the real right is a relation between the owner and a vast multitude of persons, no one of whom is distinguished from any other... Secondly, the source or title of a real right is commonly to be found in the character of the real relation, while a personal right generally derives its origin from a personal relation.. . If I have a real right in a material object, it is because I made it, or found it, or first acquired possession of it, or because by transfer or otherwise 1 have taken the place of some one who did originally stand in some such relation. . . Each of these reasons tends to advance the importance of the real relation in real rights, and that of the personal relation in personal rights."[6] The propositions of the German codifiers are likewise acceptable as the substantial distinction between contract and property rights. It is fortunate, however, that the exigencies of codification have not forced us to remove such obscurities as may exist in our distinctions between those conceptions, for the attempt to do so in the German Code is not wholly convincing as a model for our own law.

Whatever objections may be made to it, the phrase "real rights" remains useful to designate the characteristics of a

property right other than the general incidence of the duty correlative to it. It is certainly no less useful—possibly all the more so at present—because one cannot definitely say exactly what those characteristics are. A general immediacy of relationship between the right and its object, a general directness of incidence by wrongful act to the object upon the right, are usually stated as its characteristics. But that is an unsatisfactory description, even within the non-equity law; more so as to equitable rights.

(4) OWNERSHIP & RIGHTS OF DEFINITE OR INDEFINITE ENJOYMENT-CONTENT. There prevails among our law writers another theory of ownership for which Austin is largely responsible. This is based upon the distinction between titles of determinate and indeterminate enjoyment-content. This theory, also, does not wholly accord with ordinary legal language and conceptions. Contrasting the bundle of "rights" that constitute normal title with these components separately considered, Sir William Markby has said: "However numerous and extensive may be the detached rights, however insignificant may be the residue, it is the holder of this residuary right whom we always consider as the owner" —but *quaere* in view of the above discussion. "An owner might, therefore, be described as the person in whom the rights over a thing do not exist separately, but are merged in one general right. Or an owner might be described as the person whose rights over a thing are only limited by the rights which have been detached from it." "So long as the rights [detached from the aggregate of ownership] are in the hands of any other person they have a separate existence, but as soon as they get back into the person from whom they are derived [or a transferee of his interest] . . . they lose their separate existence, and merge in the general right of ownership."

Austin's definition of ownership ("property") was, accordingly: "any right concerning a thing which gives to the entitled party such a power or liberty of disposing of the subject as is not capable of exact circumscription; as is merely limited generally by the rights of all other persons, and by the duties (relative or absolute) incumbent on himself." This was, substantially, a definition of the *dominium* of the Roman law; a definition not in the remotest approaching the meaning of ownership in Germanic law or in our own, which in this respect is and always has been purely Germanic. Austin took his definition from German writers on the Pandects and gave it out, ostensibly, as part of a universal juristic scheme. But he was forced, later, to trouble himself with the question whether it was consistent with English law, and he did not adhere to his own definition. The definition denies the name "ownership" to any right of enjoyment limited either in content or in duration. Excluded, therefore, notably are all rights held by one landowner in the land of another, including all those above discussed as not adjustable for other reasons to the Austinian definition of proprietary rights (pseudo-easements, rents and rent charges, affirmative covenants running at law and in equity). For all of these are determinate real rights. The exclusion of rights *in re aliena* will be discussed in a moment. Before doing so we may consider the relation of "ownership" to rights in one's own things *(in re propria).*

The matter has been little discussed. In a scholar's edition of a famous book one reads that although "absolute" ownership involves "free as well as exclusive enjoyment," "free power of disposition," and "indeterminate duration," "those who have rights of exclusive, though restricted, enjoyment, are nevertheless commonly termed owners"; and that "the term owners is commonly used to include those who have the right of exclusive enjoyment of anything for a limited time"—instancing for both of these exceptions English tenants for life.[9] Markby referred to the problem thus: "The word 'ownership,' and its English equivalent 'property,' as well as the corresponding words in other languages, ... have been used to describe generally the position of any person who has a right or rights over a thing. Any person having a *jus in re* has been called owner; not indeed of the thing, but of that right ... Nor can it be denied that between the ownership of a thing and the so-called ownership of a right there is much analogy. Both owners have *jus in re* and *in rem.* Both can deal with the object of their right (with the usual limitation) as they please. The ownership of the right as well as the ownership of the original thing can very frequently be divided; subordinate rights may be again detached from it and made over to others."[10]

The language of Markby is unsatisfactory. One may have "rights" in one's own things or in another person's. In Germanic law, as already noted, a right that carried seisin was a real right *(jus in re);* and certainly when seisin and proprietary rights were inseparable in men's minds such rights in one's own things were proprietary. By chance, because they

were not anciently rights that carried seisin, hence could not be created or transferred by livery, our "rights in the land of another" resembled in our law to *some extent* the Roman view that there could be no ownership of those interests. But although they have never in our law been protected by a possessory remedy (trespass), they have otherwise had all the characteristics of real or proprietary rights. Ownership is a bundle of real rights—liberties, powers, and claims. All agree that each of these relations of the "owner" to other persons with regard to the thing owned, is a separate and distinct relation. Add them and the sum is ownership *of the thing* in the entirety of possible modes of enjoying it. Take any one separately and it would seem necessarily to be ownership of the *thing* as respects that one particular mode of enjoyment. Whether the thing be one's own (because one holds many liberties, powers, and claims therein), so that the isolated interest in question is called a *jus in re propria,* or be the thing of another (who holds such a complex of interests therein), so that the isolated interest in question is called a *jus in re aliena,* makes no difference.

To say, as Markby did, that one holding a complex of real rights owns the *thing* that is their object, whereas one holding an isolated real right owns that right but no part of the thing that is its object, is illogical. It makes no difference practically whether we say that one owns an easement, profit, covenant running with the land, mortgage, leasehold, or bailment—meaning an *interest* so described, or understand by those words the *right* that is the legal means of enjoying an interest. But in ordinary speech we own things or interests in things. If we own "rights" in another's property then we own rights in our own property, hence all the rights constituting title; that is, we own ownership. The proposition is also irreconcilable with the history of our law as will be shown in the next division of this section. And it is inapplicable to the actual classifications of our law; because for example, leases for years and bailments may either be for purposes so limited that they cannot reasonably be classed under an "ownership" defined as allowing indefinite user of the land or chattel, or the contrary may be true; yet every record of our law testifies that the bailee and the lessee do hold limited titles to or "special property" in, the chattel or land that is the object of their respective rights.

The same is of course true when that object is incorporeal property. Then, indeed, the holder of an isolated right therein owns (in part) a right, but only because it is also a thing, the object of his splinter of title.

The explanation of Markby's language is merely the influence of Roman law, whose *dominium* was an absolute title, and under which therefore a right *in re aliena* was not regarded as conferring a limited or partial ownership.

The matter is, of course, primarily not one of language. Theory must be consistent with the actual treatment given in our law to the title splinters in question. That treatment, and the language of our courts, are entirely consistent with the above reasoning. "Material objects . . are property . . . because they are impressed by the laws and usages of society with certain qualities, . . and . . . whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched."[11] "A man may be deprived of his property, therefore, without its being seized or physically destroyed, or taken from his possession"—witness thousands of cases on conversion !—"Whatever subverts his rights in regard to it, annihilates his property in it. It follows that a law which should provide in regard to any article in which a right of property is recognized, that it should neither be sold or used, nor kept in any place whatsoever within this state, would fall directly within the constitutional provision [against taking "property" without due process of law]; as it would in the most effectual manner possible deprive the owner of his property, without the interposition of any court or the use of any process whatsoever.[12] As was said by Judge Jeremiah Smith, a failure to conceive of title as a complex of lesser rights, when construing a due-process provision, would make the constitutional provision read: "No person shall be divested of the formal title to property without compensation, but he may, without compensation, be deprived of all that makes the title valuable."[13] To give another example, as said by Mr. Justice Cardozo, "government in casting about for proper subjects of taxation is not confined by the traditional classification of interests or estates. It may tax not only [complete] ownership, but any right or privilege that is a constituent of ownership."[14] Despite our ordinary phrase, rights in "another's land," everybody knows that such a right is an incumbrance on, a subtraction from, that other's title; and that the holder of the right has, by every practical legal test, a property interest (which he can, under qualifications alienate etc.) in the thing. The American

Law Institute and the Supreme Court of the United States agree that the interest is property. And since the object of this discussion is to show the misleading character and utter inadequacy of certain traditional classifications in our law, a final example may well be given of interests which offer much resistance to all our standard property classifications—legal or equitable, real or personal, rights in one's own or in another's things: namely, pew-rights. Specific performance will be given of contracts to convey them, damages for breach of such contracts; they are subject to mortgage; and so on. Regardless of all our difficulties in labeling them they *are,* by plain practical tests, property.

Regardless, then, of our ordinary use of the label "ownership" to include all the individual "rights" merged therein, it seems quite impossible to deny that they are in literal fact independent, separable particles of ownership—and ownership of their *object.* Moreover, it is a fact that in common legal speech we do "own" interests, such as easements, that are protected by limited real rights. Consequently, the attempt to restrict the meaning of ownership to titles embracing an indefinite congeries of rights would be futile, and furthermore undesirable because it does not seem that anything would be gained by it. The distinction between a compound right of indeterminate beneficial content, and an isolated right of limited and definite content, fits the facts of our law. Confinement of the rubric "ownership" to compound rights of indeterminate beneficial content is another unreality in jurisprudence imported from Roman law, as will appear in the discussion of the next topic.

2. Divided Ownership

As a matter of fact, *divided ownership* is, and has always been, not merely a characteristic but beyond doubt the most fundamental characteristic, of our property law. This is owing merely to a peculiarly logical development in English law of the distinction between general title and immediate enjoyment. It is a simple idea that ownership of property is desired only in order that one may use and enjoy it; that title is useful only as is the shell of a nut, for the protection of this inner content of enjoyment; that ownership is only a bundle of rights. Vague, even definite, recognition of this last idea, is much older, as has already been pointed out, than the admirable emphasis given to it by Hohfeld and his immediate predecessors in tracing its appearances and illustrating its utility in different fields of law, and in urging a systematized nomenclature for the various types of enjoyment theretofore only casually distinguished. Looking to these components of manifested ownership, Austin defined a full title as "a right—indefinite in point of user—unrestricted in point of disposition—and unlimited in point of duration—over a determinate thing."

This is entirely acceptable as a definition of complete and ideal legal title, unrestrained by equity, to land or to tangible personalty. But the definition is utterly inapplicable to a legal system which, like ours, has for at least seven centuries "swarmed," to use Maitland's word, with incorporeal property, and persons treated by the law in every way as the owners thereof. The definition is therefore inconsistent both with lay and legal speech.

Our law has always recognized two fundamental ideas. The first is, that the *enjoyment-content* of title is its essence. As Lord Coke asked at the outset of his exposition of Littleton, "What is the land but the profits thereof?"[16] Quite properly it is held today that a grant of unlimited rights of enjoyment in land is a conveyance of complete title. The second is that, some rights of enjoyment being severable from others, *"title"* is divisible among the several holders of such apportioned rights.

Divided ownership is a characteristic of the oldest stages of many legal systems. "What must seem a contradiction in terms to the property notion of Roman or of modern civil law—namely, that there may be two or more property rights in the same thing—is evidently the most general rule in the institutions governing the tenure of land." [17] The Roman law conception of ownership was that of unlimited control and enjoyment expressed in Austin's definition. From that the Roman jurists distinguished sharply the *jura in re aliena,* and "upon this contrast they built their entire law of things: ownership and real rights of usufruct were not, as in the [Germanic] medieval law, essentially identical, but were types of control fundamentally different in their nature."[18] On the other hand, divided ownership was a chief—apparently it would be justifiable to say the foremost—characteristic of medieval Germanic property law.

"The concept of ownership as the fullest right that one can have in a thing, as 'a right directed to the dominion over a thing as an entirety,' was known from the earliest times not merely to the Germanic law of chattels but also to the Germanic land law . . . The conception of ownership, however, had not by any means the sharp

definition in the medieval land law which is familiar to us in the Romanized modern law. In particular, it was not in principle dissociated from and opposed to restricted real rights. The reason for this lay in the forms of the actual economic relations of that time, upon which the growth and form of legal ideas was dependent ... Even after the development of individual ownership the old communism continued to influence the rights of associations, of neighbors, and of kin. To all this was added the development of land tenancies, which led to a wide distribution of the economic produce (rents and profits) of the soil among different persons, and made exceptional the union of all rights of enjoyment in one hand. It must be remembered that *until far into the Middle Ages the value of land lay solely in such produce;* its utilization in exchange played almost no role whatever.

"This is the explanation of the fact that the conception of a general legal and physical control, of a general right of control without more definite description, constituted for a long time the final and the central idea in the medieval land law. This idea of a right of control capable of varying limitations and gradations without being thereby affected in its essence, was for a time quite sufficient to classify such legal relations to the soil as actually occurred. They all appeared solely as degrees, differing in their content, of the one universal fact of a physical dominion over, and directed to the usufruct of, a material thing; all of which rights, moreover, were equally visible under different forms of seisin in lands."

These peculiarities in the land-holding relations of the Middle Ages, and the consequent conception of a property right "as a form of physical dominion distinguished only in extent, and not in essence, from other limited rights, naturally led to a conception of ownership as partitioned out among various persons whose rights were of varying strengths, and who were therefore not equals but arranged in a hierarchy: a conception which from the standpoint of the Roman law was quite impossible."[20] True, the Reception somewhat altered the situation. The Roman *dominium* was purely a title concept, but the medieval Romanists and feudists nevertheless applied it to the system of multiple controls or seisins which was so prominent a feature of medieval economic and legal life. Thus arose their distinction between *dominium directum* and *dominium utile;* the former designating superior seisin, in the Germanic sense an ultimate ownership; the latter designating a seisin of immediate enjoyment that was only an inferior or subordinate ownership, and this dichotomy was applied equally to private law and to the relation between feudal lord and tenant. "The distinction thus made between the right of ownership and a limited real right (rights of tenancy, of usufruct, of pledge, of dower, etc.) . . . nevertheless never caused the essential verity of all rights of control in lands to be lost sight of. The right of ownership which corresponded to proprietary seisin—namely, that right which was directed to the control of a thing in all respects—was distinguished from real rights that appeared in forms of limited seisin only in its extent, its content, and its purpose, and not in its essence. It remained a real right along with other real rights, and these were to use Gierke's apt expression, nothing else than 'splinters of ownership that had become independent." [21]

It is scarcely necessary to say that all that is stated above applies directly and fully to our own law. It applies with one modification, namely, that since our law has never suffered a Reception of the Roman law (and because we are less theoretically or philosophically inclined than are the Germans) it is all truer of our law than it is of modern German law. Nobody can see that more plainly than a foreign scholar. As Brissaud, one of the most learned, said: take the English doctrines of a hierarchy of estates (vastly more elaborate than anything known in continental systems), superimpose thereon the doctrines that created separate legal worlds of copyhold and uses, "and we shall succeed in understanding that the English jurists based everything upon the idea that no one can have an absolute right of ownership over an immovable."[22]

The four great doctrines that have shaped our property law have been those of *seisin, tenure, uses,* and *estates.* Of these only seisin can even be conceived of apart from the concept of divided ownership; and not even seisin can be historically separated from that concept. All four doctrines operated through it; their creative power was completely dependent upon it; from it as a single root all may be said, practically speaking, to have sprung.

Pound has rightly emphasized the vast influence upon our law of the feudal concept of *relation,* but in reality that relation was only one aspect of a general principle that ran through our whole property law. When Maitland declared that no property law is so "feudal" as the English, it would have been more exact to say

that nowhere else was so manifest the common principle which underlay alike the property law and feudalism, even in its political aspect. The feudal relation rested on the severance of use from title. A feud, said Spelman, was "a right which the vassal hath in the land or some immovable thing of his lord's, to use the same the mere propriety of the soil always remaining in the lord." [23] Exploitation of land, taking of the "esplees," was the underlying idea (since it was the fundamental requirement or test) of seisin; but every disseisin made evident the differentiation of seisin and mere right. Without long schooling in that distinction our unique concept of an estate, as title severed from the land, ultimate right set over against immediate enjoyment, could never have entered our law. From this, in turn, grew the entire unique field of future interests.

Tenure, seisin, estate: these three concepts were established before uses. It is a total misconception that divided ownership was a *creation* of the court of chancery. As in various other respects, equity here followed the law; the essential basis for uses lay in legal precedents centuries old, and in the courts of common law the use originated. It is, however, undoubtedly true that because equity looks through form to substance it has made the distinction between title and enjoyment a primary reality in its various processes; and that consequently the development of the concept *since* medieval times has been very largely the work of the chancery court. This is true even in the field of future interests. The legal interests known as future uses were simply created by operation of the Statute of Uses upon interests which before the Statute had been equitable. The similar legal interests known as executory devises and created under the Statute of Wills (1540) received the same liberal treatment probably because before this Statute Englishmen had so long been disposing at death of their property with chancery's aid by methods outside the common law.

Nevertheless, the concept remains in practical fact prominent in the non-equity law. The liberties and powers of enjoyment that compose ownership were once completely and are still very largely dependent upon possession. Possession is, as Jhering said, "the objective realization of right." Title (or ownership, "property") is nothing but a relatively better right to possession and the enjoyment which possession insures. This merely relatively better right of one man than another to retain or regain possession, or enjoyment, is not complete title; but for at least seven centuries it has made him owner against the world generally, embodying and proclaiming the doctrine of divided ownership.

In the thirteenth century it was clear that the bailor's and bailee's respective interests were both proprietary, not contractual. The terms "general property" and "special property" have since that time been used to designate those interests. They might equally well be applied (and in the thirteenth century might with even greater propriety have been applied) to the termor and reversioner of land. What is true of the bailor-bailee relation in general is true, of course, of that between pledgor and pledgee. It is equally true of the relation between the general "owner" and any other security holder—a lienee, a mortgagee (no matter what be the theory of the mortgage); between the donee of a power and the owner of the property subject to the power; between the owner of a profit, an easement, a covenant running with the land at law or in equity, and the general owner of the land whose title is thereby encumbered; between the administrator who holds a qualified title to a decedent's land and the heirs who hold the general title; between the holder of the particular estate and holders of estates in reversion and remainder; and between vendor and vendee under a conditional sale.

It is clearly impractical to anticipate agreement as to precisely what rights, powers and liberties should be considered essential constituents of complete title under all circumstances. Our inconsistencies in this matter are very numerous.

When mere liberties are abstracted—as when one is forbidden to keep pigs or explosives in an urban district—we undoubtedly think of "ownership" or "title" as essentially unimpaired. This can be theoretically justified. The same is true without exception when an owner's liberties and rights are restricted merely by the rights of his neighbors to be free from tortious acts by him; indeed, as seen above, these constituted the precise restraints which Austin recognized as *not* preventing the presence of complete or ideal ownership.

There are other situations in which "title" is spoken of as restricted or encumbered, without being divided. Thus, an owner's "title" is so regarded when others hold such rights in the land as profits, easements, and real covenants; likewise, when his creditors hold mortgages on his land or chattels. Like language is used when his powers to alien are limited by trusts, or by wills and deeds giving him the title but giving

another the power to alien, and when his power to sell chattels is controlled by price restrictions. Similar restrictions upon powers of transfer are imposed by rules of public policy upon an infant or a *feme covert.* Restriction is particularly plain when private title exists only by concession of the state and under whatever conditions it imposes, as in the ownership of dogs, and of fish and game rights, or when that title is subject to superior public rights as in the case of land bordering navigable streams.

But when powers of immediate enjoyment are abstracted, as in cases of tenancy and of bailment (including the security rights of liens and pledges), the law's considered language recognizes double ownership. This seems to be an inescapable result of its emphasis upon possession as title. Moreover, it seems to be practically satisfactory.

3. Trusts As an Example of Divided Ownership

Superficially, trusts certainly seem to be the most striking illustration of divided ownership in our legal system. In addition to the legal ownership of the trustee, courts of equity for centuries have talked of the cestui's equitable "estate" and of his "beneficial" or "equitable" ownership. Nevertheless, whether trusts do in fact illustrate divided ownership is a question on which there is much difference of opinion.

(1) HAS THE CESTUI RIGHTS IN THE TRUST PROPERTY?

Assuming the trust *res* to be legal property, it was long conventional theory that the trustee held the legal title and was alone capable of claiming any incidents of such title, so that even the possibility of having possession of the *res* was denied to the *cestui,* or of employing the remedies appropriate for their protection. It was held that the *cestui,* holding only the equitable obligation of his trustee, was restricted to suits against him for the enforcement of the trust. So long as this view obtained, the only rights in the trust *res* that could possibly exist were the trustee's legal rights. Until after the decision in Lumley *v.* Gye (1853) no analysis could well go farther. But since that decision it has become clear that the *cestui* has at least, in addition, equitable rights *in rem* protective of his interest in the trustee's equitable obligation. In that he manifestly has interests, and they are property as against third persons. But the question is, whose property? Has the cestui any real or proprietary rights, while the trust endures, either in the trust obligation or the trust property?

The *cestui* has (a) rights *in personam* against the trustee and (b) against persons who have actual knowledge of the trust—the duty of the latter being not to hinder the trustee's performance of his obligation. He also has (c) rights *in rem* against people generally that if they gain knowledge of the trust they shall not obstruct its performance, and (d) that if without knowledge but also without value they take a conveyance from the trustee they shall reconvey to the cestui. These statements go no farther than to assert that the *cestui* has real rights in the trust obligation. The question remains whether there is implicit in them the conclusion—whether from their application it would necessarily result—that he holds real rights in the trust *res.* The distinction between the trust *ret* and the trust obligation as possible objects of the cestui's rights has not always been sufficiently emphasized.

Two points should be particularly noted. The first is, that because the equitable right of the *cestui que trust* is cut off by the trustee's conveyance of the trust *res* to a *bona fide* purchaser it does not follow that the cestui's right is non-proprietary—not real but only in personam or personal. It was contended by those who favored the latter view that if the right were *in rem* it must be good against everybody, and so against a *bona fide* purchaser of the legal title, which it was not, wherefore it must be *in personam.* But this was a misconception. Possibly nobody denies today that a right *in rem* need be good only against persons generally. And it has been seen that various legal rights whose objects are land or chattels—rights concededly real, and some universally recognized as constituents of legal ownership—are subject to the same infirmity as equitable rights in being subordinated to the claim of a *bona fide* purchaser. Hence the cestui's equity *may* be proprietary—no matter whether it be a real right in the trust *res* or in the trustee's equitable obligation (as regards interferences with this by third persons)— despite that infirmity. In view of our recording system, the requirements of a right enforceable *in rem* are satisfied either (using the theory of real rights in the equitable obligation) by an equity that is enforceable against everybody except, or (using the theory of real rights in the trust *res)* by an ownership that cannot be cut off by the trustee's conveyance to anybody except, a bona fide purchaser for value. Consequently, "the fact of the acquisition of complete ownership by an innocent purchaser

from the trustee can never be citable as proof that the right of the *cestui que trust* is non-proprietary, since whether proprietary or not the rights acquired by the innocent purchaser are the same. The only question in such a case is whether it is from the trustee or from the *cestui que trust* that the beneficial interest is carried by the trustee's deed."

The second point to notice is, that, whatever be their objects, the enforceability of the *cestui's* rights does not depend upon the character, *in rem* or *in personam,* of the actions available to him, nor upon the character of the court's decree. Some difficulty has been found in answering this question: upon the theory of real rights in the equitable obligation, can an equity properly be called one *in rem* when enforceable against everybody except a *bona Me* purchaser for value? Or, upon the theory of real rights in the trust *res,* can it properly be called an equitable ownership when it cannot be cut off by the trustee's conveyance to anybody other than a *bona fide* purchaser for value? In view of the recording system in the United States, it is clear that the answer must be affirmative to both questions.

(2) QUESTION NARROWED TO CONTROLLING ISSUES.

Whether or not it is in fact the trust *res* in which the *cestui* holds *real* rights, it seems clear that many facts advanced as evidence that he has such rights therein are irrelevant. On the other hand, decisions and statutes which allowed dower or curtesy in the *cestui's* equitable freeholds, doubtless did involve a general assumption that the *cestui* had an estate "in the land"; likewise did those which made the interest available to creditors through levy or in bankruptcy, and the fact that the creation and content of a trust of land depend upon the law of the situs of the *res.* But, after all, as respects these matters, the difference between rights in land and rights to control land indirectly is one either easily overlooked or in practical matters justifiably ignored. Not irrelevant, but certainly of little importance to us today, is the fact that upon escheat of land subject to a trust the feudal lord took its title clear of the *cestui's* claim. Likewise pertinent is the question whether the trustee's disseisor should take free of the trust, but a single English decision affords an unfortunately narrow basis for discussion, particularly since it involved restrictive covenants, but not trusts.

Actions by a *cestui* upon *contracts* regarding the trust *res,* made by him with strangers or with the trustee, manifestly throw no light on the nature of the plaintiff's relation, within the trust relationship, to the *res.* Actions at law by the *cestui* to defend or reacquire possession of the trust *res* of which he is or has been actually in possession, are equally without bearing on the nature of his relationship to the *res* under the trust relationship. His rights fall outside of, and are conferred by law independently of, that relationship. Equitable suits maintained by the *cestui* against an unfaithful trustee, alone or joined with strangers who collude in his breach of duty, for acts other than interference with the trust *res* that hinder performance of the trust, manifestly point to real rights held by the *cestui* in the trust obligation; but it is equally manifest that they cannot indicate anything else.

The crucial question is whether the *cestui* is allowed to sue for *interferences with performance of the trust* that are caused by interferences with the trust *res.* By such a suit he would certainly assert rights under the trust obligation. It is equally undeniable that by such suits the *cestui* would actually protect his interests in the trust property. The trust exists for the sole purpose of insuring him the beneficial enjoyment of the *res;* and nobody would contend that his only interests lie in the obligation that is a mere mechanism to make the *res* available for his enjoyment. But the question would still remain whether such suits could be held to rest upon rights held by the *cestui* in or over the *res;* or only supported as representative suits brought for the trustee, the normal protector of the *cestui's* interests therein. The distinction between actual interests and legal rights is difficult to make. By tradition, once one exists the other should be conceded. One thing seems clear. Any interference whatever with the trust property (the *de minimis* doctrine aside) must at least threaten to hinder performance of the trust. Of course, a *cestui* may sue his trustee to compel the latter to bring actions against trespassers, disseisors, and converters. But the weight of authority is that of such wrongs only the trustee can complain; so that the *cestui* is bound if action by the trustee is barred by the statute of limitations. This is a logical consequence of two views: one, that the sole object of the *cestui's* rights is the trustee's obligation—and that, therefore, he cannot possibly have other than rights *in personam;* the other, that the abrogation in code states of the distinction between legal and equitable actions has left unimpaired the distinction between legal and equitable rights, and that in cases of trespass, dis-

seisin, or conversion the right violated is necessarily "legal."

The persistent influence is still visible of Lord Coke's pronouncement that the *cestui que use* (before trusts existed),

"had neither *ius in re* nor *ius ad rem,* but only a confidence and trust for which he had no remedie by the common law, but for the breach of trust his remedie was only by *subpoena* in chancerie."[24]

How much of that one-time law is still true law regarding the *cestui que trust?* Surely nobody would deny that today the *cestui* should have a right to recover the *res* when the trustee is unfaithful: it has been allowed when there is no trustee, and the need is greater in the other case. Nor is there any doubt that in many ways the equity is treated by law as a proprietary right under ordinary practical tests. In the situation in which the issue of the proprietary nature of equities (at least the full-bodied equity of the *cestui que trust)* is presented in its purest form—namely, when the trust *res* is an equitable interest, and the question is whether a bona fide purchaser thereof takes free from equities—the American Law Institute has recently taken the affirmative position. But all details of a technical nature aside, our law throughout its history contains much that supports the statement of Jhering: "Enjoyment is the very purpose of a right, the maintenance of a right is only a means to an end . Enjoyment is something which right can never lack—enjoyment without powers of disposition invariably founds a right, mere powers of disposition do not. The law centers in its whole life and being about this distinction."[25] That is why we *have* courts of equity. That is the source of almost all progress discernible in our legal development.

Speaking of the "legal title" held by a mortgagee in a third of the States of this country, Mr. Tiffany has remarked that "this title, however, does not make him owner of the land except in so far as the exercise of the rights of an owner is necessary and desirable for the protection of is his security. Why not this true of a contract vendor who has no beneficial interest save his rights of security? Why is it not true without qualification of the strict trustee who has no beneficial interests whatever? Speaking of the legal estate that passes to the heir of a mortgagee, his personal representative taking the claim to the money, even Maitland called it "the ghost of a departed right." Why is the trustee's less so? The answer must be, only because our legal theory is in one field a little farther advanced than in the other, a little less dominated by words and forms born of our divided jurisprudence of law and equity.

The situation presents some manifest injustices, sacrifices of undeniable interests to legal forms. This is bad law. Such decisions should be repudiated. To permit suit by the *cestui* against the wrongdoer (joining the unfaithful trustee would be a mere formality) would be only a proper recognition of the *cestui's* rights in or over the *res* (unless, of course, we call such actions "representative"). In a very few cases the *cestui* has been recognized, under real-party-in-interest statutes, as the proper person to protect his interests in the trust property; but even here form, in the joinder of the trustee sometimes obscures substance.

(3) HE HOLDS EQUITABLE REAL RIGHTS IN THE RES. Interests, remedies, rights—this has been the order of legal development. There are interests, and there are at least indirect remedies protecting them; is it unreasonable to say that "rights" should be recognized as present? Were the division of our legal system into law and equity not involved, the *cestui's* full beneficial interest would be, quite technically, recognized as title or ownership; as is the case when the purposes of the trust end and he receives a deed. Since the trustee has no beneficial interest himself, it is necessarily the value of the *cestui's* interest that the trustee recovers in damages when the *res* is damaged. The trustee's "right" has no basis of interest. Why should not the *cestui's* interests be treated, as it has in fact so long been known, as beneficial or equitable ownership of the *res?*

No violence is thereby done to the concept of real rights. It is admitted that as regards contracts and the trust obligation, they do exist in equity (and, as regards contracts, they also exist at law). If equitable real rights can thus exist in an incorporeal thing, why may they not exist in a corporeal thing, the trust *res?* The idea that necessarily "an equity is a claim on a right, not a right directly in a thing" rests on the assumption that equity can only act *in personam,* because it once exclusively did so act and still generally does. Again, equitable real rights would very properly differ in some characteristics from legal: hence there is no reason why violation of the former should not be limited to acts of conscious wrongdoers. The essence of a real right seems to lie in its guaranteeing a directly beneficial interest recognized by the law as existing of right. The right will then be described as "inhering in" or

"bearing directly upon" the property; any interference with the latter will, ordinarily, be regarded as directly violating the former, and the right will involve such control of the property as is needed to make the right effective. Such control usually involves, within the field of law, possession or the right to possession; but this was never true in our law of rights in *re aliena,* though these (the only real rights of the Roman law) have always, as already noted, been recognized as real rights. Within the field of equity such control exists over use of the legal title as insures production and husbanding of the benefits to which the beneficiary is entitled. The *cestui's* right is protected by all appropriate legal and equitable remedies; the title of the trustee and his participation in the use of those remedies is a remedial device existing solely in the *cestui's* interest; and the *cestui* displaces him in their use when justice requires. Why, then, should the normal, but formal, intermediacy of the trustee "deprive the *cestui que trust* of that directness of relation to the property which no doubt is a very general characteristic of ownership"? "In that connection . . . the essential matter is not directness of remedy but immediacy of right," and both right and even direct remedy are enjoyed when justice requires.

It seems, also, to be a novel limitation upon the definition of a real right to say that acts in violation thereof must be such "exclusively because of their incidence on the *res."* If by that it is meant that one act may not at once violate two rights of different nature or in different "things," our law clearly justifies no such assumption. If it is meant that a real right must, if violated at all, be violated "directly," we need only remember that real rights in property have always been protected equally by trespass and by case. That a stranger who destroys the trust *res* interferes with the performance of the trust obligation is of course evident, no matter who holds real rights in the trust property, trustee or *cestui.* It seems equally clear that a suppositious real right of the *cestui* in the *res—in* the sense already explained— might be violated indirectly through an interference with the trust obligation. There seems to be no good reason for requiring that violation of a real right must be "direct"; or for excluding from real rights those not "directly" violated.

(4) HE HAS EQUITABLE OWNERSHIP OF THE RES. Nor is any violence done to the conception of ownership; the substantive incidents supporting attribution of ownership to the *cestui* are much fuller, as a matter of practical fact, than in various cases of legal interests as to which the term is accepted without question. Nor is there any reason of history or legal logic why divided ownership should not take the form of legal real rights in the trustee and equitable real rights in the *cestui* in the same *res.* There is no more difficulty than in cases of divided legal ownership alone. In fact there is less, for when there is conflict equity prevails, and viewed as an institute of the legal system as a whole the "legal" title appears, not indeed as a mere form, but certainly as a mere protective shell for the "equitable."

At the present moment it seems entirely permissible to say that the *cestui* has imperfect or limited real rights in, or a growing but still incomplete ownership of, the trust *res.* "The right to redress against the invader has come to be regarded in equity as essentially the right of the *cestui que trust,* and none the less his right because in deference to the common law it is pursuable only in common-law courts, and therefore only in the name of the common-law owner, so far as in that way the ends of justice can be conveniently and adequately attained."[27] The ultimate dominance of the equity view makes it the view of the legal system, as a whole, and the cases in the Code states show that form will certainly gradually be adjusted to what is already substance. If this prove true, the result will be that the use, which began its career in the common-law courts as a *jus in rem,* and which only after its abandonment to the protection of chancery succumbed to the latter's form of remedy and "came to be regarded as merely a right to a subpoena . . . lost all character as a *jus in rem* and passed into the category of choses-in-action," [28] will have reversed that process, and become again what it was in its beginnings.

Whether justice can as well be done under the theory of equitable ownership as under the older theory of the cestui's rights remains a justly controverted issue.

(1) What immediately follows was suggested by his remarks, "Jurisprudence" (5th ed. 1885), 789—93, and by those of Dean Stone in 17 *Col. L. Rev.* 472, 478.

(2) Pollock and Maitland, "History," II, 570—71.

(3) Pollock and Maitland, "History," II, 570.

(4) "Jurisprudence" (4th ed., 1913), 204—05. But see Terry, "Leading Principles" (1884), Sec. 134—38.

(5) "Motive zu dem Entwurfe eines burgerlichen Gesetzbuches" (1896), III, 1, 2—3.

(6) "Jurisprudence" (4th ed., 1913), 205—06. *Cf.* Terry, "Leading Principles" (1884), Sec. 377.

(7) "Elements of Law" (6th ed., 1905), Secs. 317—18, 316.

(8) "Jurisprudence" (5th ed., *1885),* 794.

(9) Williams, "Real Property" (23d ed., 1920), 2—3, ed. by T. Cyprian Williams.

(10)Markby, "Elements of Law" (6th ed., 1905), Sec. 321.

(11)Wynehamer v. The People, 13 N. Y. 378, 396 (1856), per Comstock, J.

(12)Idem at 433—34, per J. Selden.

(13)Eaton v. The B. C. & M. Railroad, 51 N. H. 504, 515 (1872).

(14) Burnet v. Wells, 289 U.S. 670, 677 (1932).

(15)"Jurisprudence" (5th ed., 1885) 790.

(16)Coke on Littleton, 4b.

(17)C. Brinkmann, "Land Tenure: Introduction" (1933), 9 Encyc. of the Social Sciences, 74.

(18)Huebner, "History of Germanic Private Law" (Philbrick's transl., 1918), 231.

(19)Huebner, "History of Germanic Private Law" (Philbrick's transl., 1918), 227—28.

(20)Idem, 232.

(21)Huebner, op. cit., 229; cf. 162, 168, 368, 370, 384, 405.

(22)"History of French Private Law" (Howell's transl., 1912), 411, n. 1, citing on terms for years Pollock and Maitland, "History," II, 105.

(23)Quoted by Butler, note to "Co. Litt." 191a, at II.

(24)Coke on Littleton, 272b.

(25)Jhering, "Geist des Roemischen Rechts" (3d ed., 1877), IV, 338.

(26)Tiffany, "Real Property" (2d ed., 1920), Sec. 610.

(27)Billson, "Common Law and Equity" (1917), at 212.

(28)Holmes, "Early English Equity" (revised, 1908), in (Assoc. Amer. Law Schools) "Select Essays," II, 712—16, quotation 716.

Public Policy in the Law of Property

The whole of the common law of property (the traditional as distinguished from the statutory law) must necessarily be regarded as having originated in social choices; that is, in deliberate preferences among social interests.

1. How Public Policy Has Shaped Property Law

What should, by protecting its holder in acts of control and enjoyment, be made property—or, by withdrawing protection, destroyed wholly or partially; what property should be best protected—and so become "real" property; to what extent particular liberties of action should be recognized as inherent in land ownership, and—particularly— how to adjust among neighboring owners the mutual interaction of liberties thus accorded; whether it should be held lawful for one owner to use his own land for the sole purpose of lessening similar enjoyment by his neighbor, or causing him actual damage, as by erecting spite fences or digging spite wells; whether an owner should be allowed to create new types of interests in those to whom he alienates; what interests the law should recognize as capable of being held by one man in the land of another; what interests should be alienable, and in what manners, and which should be inalienable; whether the power of alienation should be confined to the owner's life or extended to testamentary gifts upon his death, and in the latter case subject to what formalities, and whether or not with freedom to cut off a surviving spouse or children; whether, if undisposed of at his death, the owner's rights should pass to his descendants or other relatives, and in that event with what distinctions between realty and personalty, and within what degrees of relationship; whether devises should be permitted to corporations, ecclesiastical in particular, and subject to what conditions if permitted at all; whether, in his conveyances to others, an owner should be permitted to postpone the consummation of the transfer until the removal of some impediment to its immediate and complete operation (a contingency, a condition) included by him within the terms of his grant—and if so, what sorts of suspended operation should be permitted, and for what period of time; whether a landowner should be allowed, in his own alienations of title, to impose restraints upon alienations by his successors in title—and if so, then to what extent and in what manner ;—all these questions of law have been problems of public policy and the rules regulating them necessarily represented, originally, social choices more or less deliberately made by the judges or legislatures that for any jurisdiction established them.

Very few of these problems of policy are mere matters of ancient history. Nor are all of them settled today.

(I) BY CONTROL OF ALIENATION. The history of alienation reveals most strikingly conflicts of interest and changes of policy. Originally, a landowner's conveyance *inter vivos* to a stranger was subject to preemption rights in his heirs; and although that restriction early disappeared, there are under

present-day statutes against disinheritance some similar restrictions upon the effectiveness of such conveyances. Also, transferees came at a very early day to be subject at common law to the surviving spouse's right of dower or curtesy, and this—in the common law form or (more usually) a statutory substitute—has not disappeared. In 1290 by the Statute of Quia Emptores the holder of a fee acquired complete freedom to alienate the whole of his lands without consent of his feudal lord, but only at the price of losing his right, theretofore existing, to make himself feudal lord of a grantee to whom he alienated a part only of his lands. By will he could convey no lands (after the Norman Conquest) until 1540; and only of two-thirds of lands held by military tenures until 1666. Attempts of great landowners to tie up land in a family by entailing it were opposed by the efforts of those who favored easy commerce in lands, and the conflict was marked by alternate victories of one party and the other over some four centuries. Other attempts to fix the course of titles through great periods of time by creating future interests (of which entails may be a part) are, as already stated, peculiar to English law; that is, there is implicit in such interests a unique national legal policy. Of relatively recent development are restraints upon alienation of realty as respects postponement of the time when the interest transferred shall "vest" in the alienee. Of very recent development are restraints upon the power of alienating perfected interests in land; and upon the time during which accumulations of income (interest, rents or profits) are permissible. The alienation of personalty has a much simpler history than that of land; but it is an interesting fact that the extent to which the distinction between law and equity still affects the mode of alienation in the case of the largest item, in money value, among forms of personal property—namely, choses-in-action—is a mooted point.

(2) BY CONTROL OF THE USE OF PROPERTY. Both as regards the doctrines by which one's use of land is restrained under the common law of malice-torts and nuisances, and as regards the general restraints imposed by the state's police power, it is only in very recent times that the liberties of a landowner have been seriously interfered with. The above mentioned restraints, and all others that exist, howsoever they may actually have originated, fall within what is now known as the police power in a broad sense; that is, "the power of promoting the public welfare by restraining and regulating the use of liberty and property."[1] In other words, if not traditionally existing they could now be created and justified under that power. The growth of restraints upon property rights under this head during the last half century has been enormous. For the purpose of improving public health, protecting morals, preserving large aggregates of community wealth, and fostering general comfort, an individual's property may be appropriated, damaged, or destroyed—although generally not without some compensation, aside from necessities of war. He may be compelled to join with his neighbors in improvements of their lands for their common benefit. Before he can sell property of certain types he may be compelled to observe administrative regulations regarding purity, standard weights and packages, and food mixtures; and before he ships other property from one state to another-or imports anything from a foreign country—he may be compelled to secure certificates of inspection and compliance with transport regulations. If his property is used for amusement purposes, for a drug store, or for any of various other special purposes, and only particularly when it is said to be "affected with a public interest," it is subject in each case to special regulations. The rather limited extent to which individual landowners could contractually subject land sold by them to restrictions as to use *(infra,* p. 296) were generally resorted to for economic ends, although often with incidental aesthetic gains to the community. Not even equity has, with rare exceptions, protected esthetic interests. However, private regulation of these matters has been displaced, in thousands of cities and towns by zoning ordinances which, although predominantly motivated by a desire to give stability and consistency to land values, also give full recognition to the protection of health and to aesthetic gains. A tendency seems to be now visible in the opinion of the courts in nuisance cases to substitute this new public policy for the law's former doctrines.

(3) BY INCREASING DISREGARD OF TITLE. It is habitually assumed that one thing that Government cannot do is to take one man's property and give it to another; but statutes authorizing private roads over one man's land for another's convenience—in effect, by forced sale of an easement—have been held constitutional in some states. Courts of equity, in "balancing conveniences," have too frequently done the same thing; arrogating to them-

selves an authority which might well in earlier times have been held unconstitutional even if exercised by a legislature, and usually failing even to mention, while weighing material interests measurable in money, the imponderable interest—the centuries-old tradition of inviolable property rights—which by their decisions they repudiate. Yet judges are undoubtedly increasingly inclined to feel that only by such decisions can justice be done; that economic changes (for example, encroachment over the boundary of a great building instead of a medieval Englishman's cottage) compel an exception to the traditional sanctity of property. Dominant economic interests have unquestionably—inevitably and perhaps, from a social point of view, properly—always been favored. Excellent examples of special favor are shown in the treatment of the mining and lumber interests at different times in various of our states. The decisions referred to constitute in effect, where an industry is favored as against an individual complainant, a subsidy; the incongruity is that this is conferred by judicial legislation.

2. A Conscious Public Policy Indispensable

Deliberate consideration of such economic and social changes is a duty. We are only beginning to consider seriously the relation to public interests of the power of gift, *inter vivos* or by will. Following the exhaustion of cheap public lands, renewed attention is again directed to the social interest involved in easy and efficient property transfers, and to the adjustment of formalities of conveyance to that end.

Dependence upon developments in the social milieu is, of course, not peculiar to the property law. But the law is, naturally, most conservative where it involves our, basic preferences; and in few other parts of the law are they so fundamental as in the field of property. To appreciate how deep lie the foundations of the property concept it is useful to remember that its psychological root is the opposition between person and thing; and that its distinction between "mine" and "thine" is the basis of the distribution of wealth.[2] Property and the property law are the base of the economic order, and at the same time economic practices act with constant and immense influence upon property, making it more or less extensive and forcing changes in the law. For centuries it was the direct and open basis of political organization; it is still of vast significance in social and political organization, even of democratic countries; in non-communistic societies private property is regarded as inseparable from solid progress; the right to acquire it and be protected in its enjoyment are regarded as "natural rights" under our own legal system; and "personal conditions, including freedom, are limited by property rights, and today vary more or less with the scope of property."[3]

It is manifest, moreover, that some basic rules of property, such as our old-time principle of primogeniture (abolished only ten years ago in England), were equally the result of the dominance in society of a certain class and the cause of its persistent dominance. It is equally manifest that there may be created by law whole categories of property—such as patents and copyrights and corporate stock in public utility corporations, and that legal rules will stimulate or retard the development of every form of property. Nor is it difficult to see that the forms of private property that receive effective recognition under law, and the methods, easy or difficult, which it provides for their respective transfer (by government patent and by inheritance, will, deed, sale, or gift), constitute control by law over all distribution of wealth.

The preceding considerations explain the otherwise inexplicable perdurance in the property law of rules adapted to past eras of society.

Not only does the history of property afford countless illustrations of its double role as creature and creator of law in its own *field;* its transformations have left their mark upon every other field of law, even where one might, on first thought, least expect its influence. This is true, for example, of the criminal law, in which, supposedly, men's reasoned judgments of public policy regarding property ought to be most prominent, but nowhere else is the ephemeral quality of such judgments more sharply or abundantly illustrated. In different centuries different things have been felt to deserve society's special protection. In Lord Hale's time, for example, there could be larceny only of such animals as men ate—for only they were property. Laymen may still marvel, too, as did Hobbes, "that he who steals a shilling's worth of wood that the wind has blown down, and which lieth rotten on the ground, should be hanged for it, and he that takes a tree worth forty or fifty shillings should answer for it only in damages."[4] Without other examples, the conclusion may be safely accepted that "offences relating to property ... have been subject to greater vicissitudes than those which relate to the person, owing to the al-

tered circumstances of national wealth, and of the distribution of it among various classes of society."

The property law is full of special creations for the protection of particular classes. Such are liens conceded to favored types of creditors; security devices provided for all creditors; usury laws and bankruptcy statutes passed for the relief of debtors. In particular there were persons whose powers as property owners were normally restricted for reasons of public policy. This was for centuries true of married women and of infants, and remains true of the latter; and in recent decades it has been increasingly true of spendthrifts. It is common usage to speak of these cases as situations of personal incapacity (of course very properly), and as though they were *only* that, conceding an assumedly complete "ownership" to such persons even when they are deprived of the power of untrammeled disposition, and conceiving of the personal incapacity as merely a restriction upon the enjoyment of complete ownership. The attribution of ownership to such persons is entirely consistent with the conception of ownership in our law. Of course, however, such cases are instances of incomplete or imperfect ownership.

(1) Freund, "Police Power" (1904), iii.

(2) Ely, "Property and Contract in Their Relations to the Distribution of Wealth" (1914), 1, 96. "For purposes of social theory property is to be conceived in terms of the control of man over things."

(3) They are also limited by contract, "Because today when we want to change personal conditions we encounter contract as an opposing force, wherever it is rigid and inflexible"— 1 Ely, op. cit., n. 2, supra, 58; and the contract is treated as property.

(4) "Dialogue between a Lawyer and a Philosopher," quoted in Amos, "Ruins of Time Exemplified in Sir Matthew Hale's 'History of the Pleas of the Crown'" (1856), 194.

Part II

Technical Description of Property Interests

Part II, Chapter VI

Generalities Regarding Real & Personal Property

1. Meaning of "Land"

For centuries a medieval Latin maxim, in part given currency by Coke, was accepted as a correct definition of the landowner's title: "Up to the sky and to the center of the earth." The space thus roughly defined is known in law as his "close." With reference to land in mining regions the maxim has never been challenged; nor, apparently, with reference to tunneling near the surface. The city of New York, for example, some of whose water-mains from reservoirs distant from the City lie at places far below the surface, has deemed it expedient to clear its rights by purchasing easements from landowners through whose deep strata the mains run. But the growth of aviation promptly led to a challenge of the surface-owner's unlimited rights, in quality or in extent, in the airspace above his land. The present tendency, revealed in legislation and in the Restatement of our property law by the American Law Institute, is for the recognition of the surface owner's rights in so much airspace as is necessary for reasonable enjoyment of the surface. At present this seems to include complete rights to a minimum elevation of 500 feet in non-congested areas. That his rights or potential rights, in higher space are subject to a public right of flight is definitely established by recent decisions. Very probably this right will not be held or made to include stunt or advertising flight, and certainly .the surface occupant will continue to enjoy the protection of the ordinary law of nuisances. Only within the reasonably "usable" airspace will an unlicensed entry be a trespass.

Subject to such qualifications as may be established in the public interest in order to foster aviation, the airspace is as truly "land," legally, as is the solid earth. Even within the limits in which property rights in the airspace are recognized it is barely possible that the police power might be held to justify overriding them by permitting public user inconsistent with such rights. The doubt arises from the fact that all the precedents reveal the police power as a restraint upon an owner s use of his own property.

So, also, buildings firmly affixed thereto are "land," and likewise temporary pools of water or permanent ponds wholly within one owner's surface boundaries; or, of course, a lake of asphalt or a saltine. It will, however, later appear that the surface owner does not *own* vagrant water or oil or gas which is at any moment within the confines of his close but in reality unconfined.

Like everything else in the law the above statements of what is legally land today conceal a historical development. Only arable land, apparently, was originally regarded by the law.

Finally it may be remarked that because of our definition of land it is necessarily indestructible. Take away any quantity of the soil (which many cases have characterized as "the substance" of land, or "the freehold"), and the new airspace so created is still "land."

That movable property made immovable by permanent fixation to the soil is thereby conceptually converted into real property (hence the above statement regarding buildings)

has been already noted (p. 94). To what has already been said it may be added for emphasis that since land itself may be severed and made personalty there is no reason why a chattel actually affixed should not remain land unless or until severance, and the English law tends toward this treatment. But in this country the intent of the affixer, considering who he is, has become almost the determining factor in modern cases. The great majority of cases concern fixtures placed by a *lessee.* If they are "trade" fixtures it is universally agreed that they are removable at the end of the tenancy. The presumption is constantly stated that the tenant does not intend them to become realty at all; hence, while actually affixed, they are distrainable as chattels for rent and liable to be attached under execution by the tenant's creditor. Similarly, the tenant successfully resists an attempt to claim them made by a mortgagee of the land, after or before fixation of the chattels. The same tendencies, less marked, are discernible when other than clearly trade fixtures are involved. When a *licensee* attaches chattels he is treated much as a tenant, and again for the reason, primarily, that it must be assumed that he would not intend to make them realty. If the *landowner* makes the attachment the contrary assumption rules. Hence, if he has already made or thereafter makes a contract to convey the "land," the contract vendee is prima facie entitled to have it with the chattels attached; and if under like circumstances he mortgages the "land" the mortgage presumptively covers the chattels. A *trespasser* who affixes chattels is not treated as a tenant or licensee. No matter how mistaken and therefore innocent he may be, his intent is disregarded; and equally his expenditure of labor and materials, however great. Here the old maxim *(quicquid plantantur solo, solo cedit)* is too rigidly applied; the landowner gets title to the chattel as a true fixture, and his enrichment is not recognized as an unjust one for which the wrongdoer may recover reimbursement.

2. Horizontal and Vertical Subdivisions of the Close

It has always been assumed that the surface owner could split up his airspace or the ground beneath according to his will. Precise "vertical" partition (though lines running to the earth's center and to the sky can be vertical only above the earth's surface) by selling off portions of one's surface holdings is of course a daily occurrence. Separation of title to the surface from title to coal or other underlying mineral strata has been common for centuries, without, of course, any attempt to define their contours at the time of such separation. Definite tunnel spaces have often been conveyed (p. *294).* In recent years not only have leases of definite portions of airspace become exceedingly common, but individual ownership of such airspaces has also become fairly common in cooperative apartment buildings; and has also been made the basis of some great urban industrial undertakings. Such titles will very probably be held by the courts, or declared by statute, to be limited in duration— that is, particularly to the life of a building; for obviously the public interest could not be served by recognition of continuing title to such aerial spaces (heretofore only parallelepipeds, but manifestly theoretically capable of fantastic forms, and inaccessible without trespass upon adjoining land), held by other persons than a surface owner.

Such horizontal division of the close was characteristic of early Germanic law. It was wholly foreign to the Roman law.

3. Simplicity of Personalty

It is obvious that most of the preceding remarks have little or no practical application to personal property. No problems of boundaries or of content enter into the description of a tangible chattel. In case of incorporeal personalty such as corporate stock (which carries rights to share in the control and profits of the corporation) some artificial but practical description is available, as the number of a stock certificate.

Of course, an owner of an apple or piano may subdivide it horizontally or vertically or otherwise at his will; but the law will obviously never be called upon to define his rights in this respect.

In one respect, however, personalty is less simple than realty. The latter is "land" (as above explained) or anything treated as land; and the legal characteristics of land, although in themselves these may be less simple than those applicable to personalty, apply to all such realty. On the other hand there are various forms of personalty, all of them modem forms of "incorporeal" property, which are each sui generis. Thus, whole bodies of highly specialized law apply to corporate stock, negotiable paper, patent rights, and copyrights. Of course there are many fields of specialized law in the field of real property; but with few exceptions (such as mining law or western water law) the underlying fundamental principles are not so peculiar unto themselves as in the mentioned types of personalty.

4. Occasional Peculiar Treatment of Property As Realty or Personalty

For the sake of convenience an English landowner's deed to his land or castle might well be held to pass title, without specific mention of them, to a chest of earlier deeds constituting his proof of ownership; or to such "heirlooms" as battle banners, suits of armor, and the like, associated with the traditions of the estate. No "heirloom" seems ever to have been discovered in this country of "three generations from shirtsleeves to shirtsleeves." But slaves have here similarly passed with deeds to land; and doubtless the special privileges of a landowner with respect to wild animals enclosed within a game preserve too large to permit of regarding him as already their owner, would pass as readily in this country as they have passed in England.

5. Relative Importance Today of Realty and Personalty

The opinion has earlier been expressed that the total value of personal property today vastly exceeds the value of all realty, and that the same is true of the total of daily sales of the two forms of property. A recent scholarly investigation indicated that liquid claims amounted in 1912 to a fifth of our total national wealth, and had doubled in amount by 1929.

However, these assertions, assuming their accuracy, do not constitute proof that personalty is today socially the more important type of property. Certainly land never had in this country the social, honorific, political, and economic primacy which it held in England. But it has primacy everywhere in systems of taxation; and most economists would doubtless assign it primacy as a basis of capitalistic society.

6. Influence of "Feudalism" upon the Property Law

It is traditional to ascribe a great influence upon the law of real property to "feudalism." The influence is, moreover, generally regarded as maleficent, so that the word "feudal" is not infrequently no better than an expletive used to stigmatize a rule which is disliked because it is old and which, it is therefore felt, must be undesirable—as, indeed, it often is. But "feudal" is often a misnomer. It has elsewhere been pointed out (pp. 42, 43—46) that, because feudal tenure rested upon the distinction in Germanic law between title and immediate enjoyment, which still runs through all our law, writers have frequently characterized as "feudal" influences which are such in only a secondary sense. These qualifications, however, do not affect the essential justice of the attribution to feudalism of a primary influence upon the law.

Feudal *tenure* was a vital reality until sub-infeudation was ended in 1290 by the Statute of *Quia Emptores.* Theretofore, A could enfeoff B of part of his lands in fee simple (and so of all if conveyed in parcels), yet reserve services from B to A as his feudal lord. The Statute made such lordships impossible, making B feudal tenant of A's lord; that is, it ended any increase of the rungs of the feudal ladder. As a practical matter this doomed tenure, for many lands were held on trifling honorific or economic services of which from the beginning it was not worth while to preserve the evidence, and the maintenance of others ceased to be worth while when radical changes took place in English society. Thereafter there could be nothing resembling a *new* tenure save when a man granted away less than all of his estate (his interest), whatever it might happen to be, in any lands he owned. The portion retained is known as the reversion, by virtue of which the land reverts in enjoyment to the grantor or his heirs upon termination of the lesser estate. The death blow to tenure and free development of the reversion date necessarily from the same time. As a matter of fact, *Quia Emptores* by dooming tenure doomed the whole feudal system. As Dean Pound has said, "when Coke [in 1628] dared to write of ownership in fee simple and to think of the tenant in fee simple as absolute owner of the land in which he held an estate, the substance of tenure was gone" [1]—and of feudalism.

In our colonies a few incidents of socage tenure had some vitality except in New England, and not all the colonies ever took the trouble to abolish them either separately or collectively. Such particularly, were certain rents which, theoretically, were tenurial, but were substantially (since there was here nothing else of "feudalism") only land taxes. Theoretically it may be argued that in one of our states feudal tenure *might* (on this very fragile basis) still exist, and that in a second state traces of feudal rents, though fast disappearing, still remain. But to speak of "feudalism" in this country even in colonial times is absurd. King Charles found that the system was dead in England when he tried to raise and finance a feudal army. In this country the attempts to collect quit rents were everywhere fought as representing a degrading control of free citizens by absentee landlords. So far as they were collectible they were regarded

as land taxes that should be devoted to public uses. Of course, one can say that lands are held "of" the states in this country; but they are not held feudally, because the feudal incidents are gone. Unfortunately, however, the word "tenure" has persisted; and meaning little has been used with uncontrolled laxity. Thus it happens that in the few situations where its presence is, or has been supposed to be, still a requirement of the law, its varying or indeterminate meanings have been a source of confusion (pp. 177, 199, 303, 311).

Escheat, the right by which the feudal lord took the lands of his heirless tenant, has likewise never really existed in this country. Nevertheless it is commonly used in referring to the right of the state to take lands (or personalty—such as bank accounts) of heirless decedents, although that is, with. us, really only one form of eminent domain or sovereignty. It is purely a literary exercise to draw a parallel between inheritance taxes collected by the state and reliefs collected by inferior lords, or between escheat of heirless lands to the state and escheat to such lords.

The plainest marks of feudalism are in the classification of estates. The distinction between *freeholds* and non-freeholds (p. *185)* is the most striking. Aside from this only a few minor remnants of the feudal period remain to be eradicated. The distinction between freeholds and chattels real cannot be dismissed as a mere legal antiquity, since it burdened us with a double system of property law that is still. with us (p. 71). But the freeholder has lost all social and political preferences. The economic importance of the leasehold is probably at least equally great.

Of feudalism's next most fateful legacy, the common law *canons of descent,* only one has had any recognition in this country for over a century, and that one which is entirely suitable to present conditions.

Nothing of all the preceding has any direct application to personalty except the continued exclusion of leaseholds from real property as respects devolution on the owner's death, and for most, though not all, other purposes (p. 197).

7. Plan of Later Chapters of Part II

In discussing property interests it will be necessary to define them, explain how they are created and transferred, and consider their most important characteristics, particularly their destructibility, alienability, and their consequent liability to the claims of creditors against their owners. Instead of dealing with all these matters incidentally to the discussion of each estate and interest, it seems that desirable emphasis may better be placed upon matters that belong together, if the following plan be adopted. In Chapter VII estates of present enjoyment, or possessory estates, of land will be discussed, including in the discussion a general description of each interest, particularly as respects destructibility and alienability. In Chapter VIII, non-possessory estates, or estates of future enjoyment of land, and also certain non-possessory future interests not usually classed as estates, will be similarly discussed; in Chapter IX, other non-possessory interests that are held by one person as rights in the land of another; and in Chapter X, all sorts of interests in personal property. Chapter XI will then be devoted to the methods by which property interests are created and transferred, together with certain topics of general application.

This plan, unfortunately, ignores the primary work of lawyers and judges, namely, problems of construction. No attention to these, with rare exceptions, seems feasible in a summary and elementary statement.

(1) 16 A.B.A.J. at 556

Part II, Chapter VII

Estates of Present Enjoyment in Land

1. Distinction between Possessory & Non-Possessory Interests

We have seen how enormously important possession has been in the history of our property law. With possession there was always inseparably united the conception of an "estate"—remembering that in early centuries we must substitute "seisin" for "possession." Any title of which one could be seised was an estate, no matter whether it conferred present seisin of the land, in which case the seisin was said (with the land in mind) to be "actual," or was merely capable of ultimately giving seisin of the land, in which case the seisin (thinking of the right or title pending that time) was said to be "in law" (p. 44). Legal speech remains the same today. The former estates are *estates of present enjoyment,* and therefore possessory; the latter *of future enjoyment,* and therefore non-possessory. These phrases refer to immediate or postponed enjoyment of the *land.* All estates are present rights or interests, enjoyed as such subject to rules adapted to their varying natures.

Such interests, conferring presently or potentially seisin of the land, were "corporeal"; and if estates of inheritance, were *corporeal hereditaments.* Those which never could confer seisin were, under a like assumption, *incorporeal hereditaments.* These names we still retain.

Among the non-possessory interests known as future interests there are some which are not generally known as "estates" (p. 241).

2. Conception of an "Estate"

The word "estate" is used by laymen to mean land itself. Lawyers frequently employ it as meaning merely the durational measure of rights in land, indicated by the labels "for years," "for life," and "in fee." It most usually and most properly is used, however, to indicate the interests whose durations are measured by those terms.

The conception of an estate was incipient in Bracton's time *(c.* 1260), but the word was of later origin. The conception of an "estate" as one's interest in or title to land, has received in Anglo-American law a unique development. It had as its foundation two other conceptions of early Germanic law, of which they were primary characteristics. One was that of divided ownership (p. 141). Several persons may hold simultaneously an equal (or greater) number of partial interests in the land, differing in nature. Also, land being indestructible, there was no reason why either complete or limited liberties of enjoying it should not be held successively by various persons. The other conception was that of the incorporeal "thing," of which one could be seised as readily as of land (pp. 3, 243). Our entire law of primary landed interests is a logical application and development of these two ideas. Even estates of present possession illustrate the extraordinary prominence in our law of divided ownership. Estates of future and successive ownership illustrate it even more impressively. The title to land, conceived as an incorporeal thing, is subjected to partition precisely as is the land of which it insures enjoyment; with the sole difference that partition of the title is confined to varying combinations of a number of fixed interests. The whole doctrine is an extraordinary product of bold imagination.

3. Some Characteristics of Possessory Estates

Some qualities of all the estates included in this chapter may here, once for all, be summarily referred to.

(1) The NORMAL TERMINATION of the fee simple, fee tail, the different varieties of tenancies for life, and the term for years is by the expiration of the period indicated by the limitation which creates them. The tenancy from year to year is terminated by a notice, of which more will be said in describing that interest; and the tenancy at will by an indication by either party thereto of a desire to end it, save by statutory modifications likewise hereafter mentioned.

(2) ABNORMAL TERMINATION, OR DESTRUCTION 15, however, possible in the case of all interests. This depends, it is true, somewhat upon what is meant by "abnormal" and "destruction." All estates less than a fee simple can be destroyed by their merger in a fee simple. The fee tail may be destroyed, or the entail "barred," by methods mentioned hereafter. The term for years may be prematurely ended by the landlord's eviction of the tenant, if accepted as such by the latter; or perhaps in very rare cases by the tenant's disclaimer, if the landlord enforces a forfeiture.

From very early times life, estates could be terminated by the happening of a stipulated event (p. 194); and such premature terminations seem to be properly called abnormal. A fee simple could be terminated, after 1535 by the device of a shifting use, and after 1540 by that of a shifting devise, prior to the normal termination of the estate. The executory interests under the two statutes mentioned have been since those dates standard conveyancing devices, but *their* normality seems no reason for referring to the termination of the fee simple as other than "abnormal" and a "destruction."

(3) In view of the fact that possession or (as regarded future interests) seisin was for centuries an absolute prerequisite to the alienation of interests in land, ALIENABILITY is naturally a characteristic of all estates of present possession except the tenancy at will (p. 209). Alienability includes *liability to claims of creditors* of the holder of the estate, and to *partition* among coowners (pp. 74, 268).

(4) The historic rule of our law that possession, right or wrong, is title against a wrongdoer has been discussed at length above (p. *55 et seq.).* The division of authority when no *mere* possessor but a tenant for years is the plaintiff, and the action is not one to recover possession but one for damages, has also been noted (p. *59).* A like division of authority exists regarding the right of the holder of a particular estate to recover damages for harm both to his estate and to future interests following it, and will be later referred to (p. 268).

4. Classification of Freehold and Non-Freehold Estates

There being no seisin of a term for years, such interests fell outside the feudal land law. There were no "estates"

in them; they were not real property, nor therefore "hereditaments" going on the owner's death to his heir, but personalty that went to his personal representative. Nevertheless they will be discussed as real property below.

Seisin was possible, in the conception of a feudal age, only of interests for life or of inheritance. An estate of inheritance was a fee. Estates for life and in fee were regarded as suited to the *status* of a free man in a feudal society—so much so that their grant by a lord to his villein enfranchised him; they were the "tenements" or holdings of the feudal land system; such terretenants were "freeholders," their tenements were "freeholds," and their interests were *freehold estates.* And such they remain today. However, since a tenant has possession, and the distinctions between possession and seisin have fortunately been almost forgotten, leaseholds are also, today, universally known as "estates."

The estates recognized by law are the fee simple, fee tail, estate for life, terms for years, tenancies from year to year, and tenancies at will. They will be discussed in this chapter as interests of present enjoyment of the land; in the following chapter as interests of future enjoyment thereof.

The English property legislation of 1925 abolished, as legal interests, all estates save the fee simple and term for years; but allowed all other estates to continue as equities. The proposed Uniform Law of Property Act of the American Law Institute (1938) includes no alterations in the traditional scheme of estates. With only very slight exceptions, this scheme has long been treated by the courts as complete and unalterable. However, the resemblance between a fee simple and a long term of years is certain increasingly to raise problems; and has already raised some, for example, with reference to dower in a *perpetual* leasehold.

5. Estates of Right and of Wrong

It has several times been mentioned that wrongful estates may be created by wrongful con-

veyances, made by one who is not the true or complete owner. This was by far a larger chapter in the old law than it is at present (pp. 50, 371). Conveyances capable of passing interests other than those rightfully held by the grantor became less and less common after the introduction of legal conveyances to uses in 1535, all such being "innocent," because of the manner of their operation (pp. 366, 396). Today all conveyances are innocent in the sense that they convey only what the grantor holds. But an adverse possessor today, like an ancient disseisor, still holds an actual estate and he may freely convey it all to another, or create out of it lesser wrongful estates, either of present or future enjoyment, subject to the infirmities of the estate out of which they are created.

6. Freehold Estates

(1) THE FEE SIMPLE. Fees being estates of inheritance, a fee whose course of devolution was simply to "heirs," without qualification, was a fee "simple." Under traditional rules of descent, still respected on this point in American statutes today, the land descends to lineal heirs (descendants) if such there be, but subject to provisions varying in different states for a surviving spouse or possibly parents. In this last case it *ascends,* though the old law never permitted this. If there be no descendants the property goes to collaterals: that is, relatives descended from an ancestor common to them and the decedent. In this country (and in various other "civilized" countries) descendants, however remote, are preferred to ancestors and collaterals, however close. In general, too, no limit is placed on the degree of relationship within which collaterals must stand in order to inherit (p. 162). Inheritance depends merely on proof of relationship, as it does in the case of descendants.

It was apparently assumed, in the beginning, that a fee simple would endure forever. This axiom of the medieval law's mathematics of estates had important consequences. Today we have abundant statistical information contradictory of such an assumption. Heirs, both lineal and collateral may soon die out. In fact, escheat to the state of fees simple for which no heir can be found is familiar to newspaper readers *(cf.* 247).

While the feudal system retained vitality even the fee simple of a tenant was not an absolute estate: only the ultimate chief lord, the crown, held that. But the feudal system, as already noted, never had any reality on this continent. Colonial socage tenants in fee simple were virtually complete and absolute owners (pp. 177—78). Even, today, however, no owner in fee simple has an "absolute" interest in the sense that he may do with the property what he wills; it is subject to the control of the state, in the interest of his neighbors and of the common good, during his life and at his death (p. 163).

A patent from the state, acquisition by adverse possession (which also results in an "original" title, not that of the dispossessed former owner), a conveyance by deed or a devise by will from a former owner, are the only present means of acquiring an estate in fee simple. But the conveyance by deed may be by rule of statute construing or annulling an attempted conveyance in fee tail (p. 191); and in a few states an apparent life estate may be held by a court to be (or by statute may be made) a fee simple because the life tenant is given complete liberties of consumption or an absolute power of disposal.

It is exceedingly important to note that a conveyance from 0 "to A and his heirs" is a conveyance *solely* to A. The words, "and his heirs" merely delimit *his* estate by indicating how it shall devolve upon his death intestate, if he then owns it. The heirs take from him by inheritance, not from 0; in the language of the law they do not take as "purchasers."

Because a fee simple is one that descends simply to heirs, it was a positive requirement of the common law that that word of general inheritance must appear in the limitation creating the estate by deed, although a considerable latitude of expression, even inaccurate, was allowed by the courts if it satisfied the main requirement. No such rule was ever applied to wills, the fundamental law regarding which was not developed in the courts of common law; in their construction the courts sought the testator's intent from all his language. The common law rule was formerly well established in this country by judicial decision, but as a result of statutory reform the practice in dealing with deeds is now that earlier established regarding wills. There is, however, this difference: that various statutes make a conveyance "to A" (without words of inheritance) *presumptively* a conveyance of a fee simple, on the manifest ground that the grantor intends to convey all that he owns or (less certainly) has a power to convey. This rule is wholly independent of, although it well accords with, the well settled rule that a deed is construed against the grantor. The common law rule had in 1936 been wholly or partly supplanted by judicial decision or statutory rules in forty-two states of this country.

The qualities of a fee simple absolute may generally be indicated by the statement that it is

the fullest interest in land known to the law, restrained only by public policy affecting all property rights. Some general characteristics of the fee simple as a possessory estate have been referred to above (p. 184), and others, shared with all other possessory estates, will be elaborated below (p. 224 et seq.).

(2) THE FEE TAIL This is a fee that descends solely to direct descendants or "heirs of the body." Its name is derived from the fact that collateral heirs are cut off (from taille, cut or carved).

Before 1285, upon a conveyance "to A and the heirs of his body," the land descended as limited, but it was held by the courts that upon the birth of issue A could convey a fee simple. This made the estate, for purposes of conveyance, a fee simple conditional. However, the grantor desired the land to revert if the grantee's lineal heirs came to an end, and in his aid parliament ordered in 1285 (by the Statute De Donis Conditionalibus) that such should be the condition of the grant, and strictly enforced. This made the estate necessarily less than a fee simple. The Statute created the fee tail. The grantor retained a reversion. The "reversioner" thus favored was of course in 1285 (before *Quia Emptores)* a feudal lord. For centuries a struggle continued between great landowners, who sought to "tie up" land in their families, and opposing forces.

For the creation of an estate tail by deed it has always been necessary to include in the limitation the phase "heirs of the body," or another phrase including the word "heirs" and clearly indicating lineal issue. As in the case of fees simple, the phraseology of wills was not so restricted, and such words as "issue," "descendants," "in fee tail," served equally well. Entails may be equitable as well as legal.

The fee tail might be a *fee tail general,* in which descent was to males if present, otherwise to females; or a *fee tail male* (or *female) general,* descending respectively to all male or female descendants; or a *fee tail special,* in which descent was restricted to issue, of either of the preceding three varieties, by a particular spouse of the donee. There has been almost no variation from the first type in this country.

In our colonial period entails existed in most of the colonies. Today there are still large remnants of them. In four states of whose common law the Statute *De Donis* is not a part, and in which no similar local statute exists (both exclusions being doubtless based upon an opinion that it is a medievalism), the courts have held, or have declared in dictum, that the fee simple conditional exists (by adoption of a common law antedating 1285!). The normal estate tail has in recent years been referred to by statutes or recognized in judicial decisions as existing in half a dozen states. In three-fourths of all the states it has been provided by statutes or (in a few cases) by judicial decision that limitations which at common law would have created estates tail shall create something else. The proposed Uniform Law of Property Act of the American Law Institute (1938) abolishes both the fee simple conditional and fee tail, and provides that limitations formerly creating them shall create a fee simple.

The characteristics of a tenancy in tail in possession differ from those of possessory estates generally as regards alienability. The rights of creditors attach to the estate, to the limit of its alienability under local statutes. A minority view, evidently based on the minimum power of the tenant, is that, in the absence of explicit statutory declaration to the contrary, the creditors can reach no more than the tenant's life interest. No interest in an entail can be devised. The characteristics of the five types of statutory and judicial substitutes for the estate tail vary from those of the estate tail proper, and those of each substitute type vary from those of the other substitutes.

After the passing of *De Donis* the tenant in tail of any generation could for a time effectively deal with no more than an estate for his own life. If he attempted to convey the entail, it was destroyed in his grantee upon his own death and the entry of his heir, for the Statute declared that his issue should take. But this did not long remain true, for its inconveniences were too great: for example, leases made out of the entail were prematurely cut off, forfeiture for treason of the tenant in tail was effective during his life only. To convey more than a life estate he must "bar the entail," that is, cut off the rights of his descendants. Before 1506 the courts definitely established the power of the tenant, if in possession of the land (or acting in collusion with the person in possession), to destroy the entail, particularly by a common law conveyance known as a common recovery. It might seem that to bar the heirs was entirely to destroy the *fee,* so that nothing could be conveyed. But the courts were aiding the tenant in tail, who wanted the fee but wanted it free of *De Donis.* The law, therefore, adopted the view that barring the entail merely destroyed a restriction upon a fee simple, and held that a fee simple was conveyed. However, if a conveyance was employed that was ineffective as a

disentailing assurance, the grantee received a "base" fee simple, defeasible on the grantor's death (at the option of the issue). By a common recovery the tenant could not merely bar the entail but also destroy all future interests limited thereafter. No tenant in fee simple has ever been allowed to do what was thus permitted to a tenant in tail.

The pendulum swung the other way when, about 1650, the landowners acquired a far more effective method of perpetuating control over the future of their lands. This was by means of a trust known as a *strict settlement,* which could be perpetuated indefinitely by having the heir apparent of each generation join his father (under adequate persuasion by the latter, if necessary, regarding the former's income or desires) in making over the settlement, in its original terms, for another generation. An entail was capable of little variety of choices, whereas in a settlement one may express very freely preferences among persons, and advance to some extent one's economic predilections. Such strict settlements played a vast part in England's social and economic history, but in this country they have been very little used.

So far as entails are still possible in this country they are barrable by ordinary deed purporting to convey a fee simple, but, as at common law, not by will. It is essential to the operation of a disentailing deed as such that it contain the assertion of an intent to bar the issue. For no reason good in modern times (p. 64), some statutes restrict disentailing powers to tenants in tail who are in possession or who act with the occupant of the land. Modern disentailing deeds have the effect of the old common recovery; the deed conveys an absolute fee simple, not only destroying the entail but also all future interests expectant thereon. The employment of a conveyance ineffective as a disentailing deed still creates a base fee simple or whatever other estate it purports to grant, defeasible on the death of the tenant in tail.

(3) ESTATES FOR LIFE. Such interests may be either for the life of the grantee himself or for the life of another person *(pur auter vie);* or for the lives of two or more persons. In the last case the measuring lives may include those of the grantor or grantee. If the grantee be so included and survives the others named he thereafter holds a life estate of the normal type. If he pre-deceases them there then exists what is seemingly a property interest whose owner is dead. This, in itself, is not peculiar; but the fact that the interest is non-heritable (and being realty it could not devolve as personalty) is distinctly peculiar, and was unpalatable to the dead tenant's creditors. The difficulties of the situation have been generally regulated by statute, but in different ways; and there are even states which have not lessened the original embarrassment. In them, as at common law, anybody may take the property as ownerless, as a "general occupant"; but possibly the heir, if he be mentioned (unnecessarily and improperly) in the creation of the estate as one "to A and his heirs," might still have a prior right as he had at common law as "special occupant." The American Law Institute states the present law as not recognizing the general occupant, preferring the special occupant, and, in the absence of such, passing the interest as personal property.

The estate may be for a life without qualifications, or it may be one which, though it may possibly endure for life, is subject to termination before the indicated death by the happening of another event. If not specifically so limited, it must at least be, "an estate which cannot last longer than the life or lives of one or mote human beings, and is not terminable at any fixed or computable period of time or at the will of the transferror." If so terminable, it is an "estate for life determinable." The event that terminates it may be one whose occurrence is uncertain, or may be one to the time of whose certain occurrence no latest possible date can be assigned. An illustration of the first is the exceedingly common testamentary gift to a decedent's widow until her remarriage, which is a life estate because she may never remarry; and is indeed, usually expressed in the will as a gift to her "for life or until she remarries." Similarly, if the grants be "to A and B during their marriage," " to A so long as he lives on Blackacre" (even though he lives there at another's will), or "to A so long as he remains away from Russia." An illustration of the second is a conveyance to A for life if B shall so long live; which is really an interest in A for B's life. But a grant to A for fifty years if he (or B) shall so long live is a term for years, possibly terminable earlier by the death of A (or B). The law does not deny that a man *may* die before any given date. But the gift in question cannot be a life estate, because this would then be determinable by the ending of the term—an event certain to happen, and not merely at the latest when, but only when, the fifty years expire. The law regards it as contradictory of a gift for life to declare that it *must* terminate within any definite span of years, no matter how long, and no matter how old the grantee at the time of the grant.

To refuse to assume that a man *will* certainly die within a certain period may seem in particular cases foolish, and in fact nothing even in medieval ideas and conditions makes its origin clear. It may well be wise of the law, however, to avoid the complications inherent in any attempts to speculate upon life expectancies.

Life estates may be created by an individual's conveyance (which is, of course, really by rules of law giving effect to such conveyance), or by adverse possession, or *directly* "by operation of law." Dower rights, inchoate and consummate, and curtesy rights, initiate and consummate, were creatures of the customary law; but they have been everywhere displaced by statutory provisions for a surviving spouse, often under the old names. Likewise created by operation of law was the "estate for life after possibility of issue extinct," which arose in a tenant in tail special upon the death of the other spouse, by whom or upon whose body issue was to be begotten. The homestead estate, purely statutory, originated in Texas in 1836.

Life estates were formerly often created by a rule of conveyancing law when a grantor intended to create a fee but failed to use the words essential for the effectuation of that purpose. A grant "to A" was therefore (pp. 365—6) long held to be merely a life estate, and no evidence to show a contrary intent was admissible. In "construing" wills courts frequently find life estates expressed therein by implication. Some of the situations in which this is done have become so standardized that they can be stated as definite rules of property. The basis of such constructions in wills is usually an assumption that the testator "must" have wished to dispose completely of his interests, and for the purpose of effecting this supposed intent. The creation of estates by implication is not confined, theoretically, to life estates, but, practically speaking, it is so confined.

The characteristics of a possessory estate for life present two aspects. Its holder enjoys the fundamental liberties and rights common to all possessory estates (p. 228), and is subject to the restraints of the doctrine of waste (p. 224). But, being only part of a fee simple, the life estate is necessarily followed by a reversion or some other future interest; and as the complete title is in the owners of all existing interests the law has found it necessary to restrain conduct or require conduct of the life tenant (that is, of the holder of the possessory estate, who is usually in fact a life tenant) in various ways that fall outside the doctrine of waste. These will be mentioned in discussing future interests (p. 267).

Of course. the life estate is alienable, likewise partible, and subject to the claims of the tenant's creditors. But this is true only in a general way. Particularly the homestead estate and estates of dower and curtesy, have special qualities.

7. Estates Less than Freehold

(1) LEASES AND LEASEHOLDS The interests commonly called "leaseholds" may in fact be created by will, in which case they are "tenancies" but are not, strictly speaking, "leaseholds."

Although, as already several times noticed, leaseholds are still personalty for purposes of devolution upon their owner's death, they are for various other purposes realty; and it may fairly be said that the tenant's interest has been increasingly assimilated to real property ever since the actions available for his protection ceased, five centuries ago, to be personal. It is therefore most properly discussed as realty.

A *lease* (sometimes called a "demise") is the act by which there is created a leasehold interest in land. In old law the phrase "lease for life" was common, but of course livery of seisin was required to create the freehold. Today a deed can create the interest, but "lease" is hardly ever employed in reference to other than interests less than freehold. Nor is it properly used in referring to the grant of incorporeal hereditaments (p. 432). If the interest be a leasehold at will or for a short term, the act may be a "parol agreement and entry"; that is, an agreement that the interest shall presently pass (not an agreement to give it sometime in the future), followed by a taking of possession. In the old law this was required to be by an actual entry except in cases where the statute of uses gave possession by execution of a use (p. 259). In our present law the requirement is unchanged. In the United States the statute of frauds of most states permits only leaseholds of "one year or less" or "less than one year" to be thus created. To create a longer term a writing is everywhere necessary, and although by tradition this takes the form of a sealed instrument of a rather specialized type, such formality is rarely a positive requirement.

The essence of a lease is twofold. On one hand there must be the transfer of possession of the land from the lessor to the lessee, the creation of a possessory estate. Nobody can be a tenant of land who has not possession. One may find in reputable books the statement that the tenant lacks full legal possession because the reversioner who is "seised" has that.

This is an attempt to give to "seisin" some meaning which it neither has today, nor ever had in medieval law. Every part of the law of landlord and tenant refutes such a fantasy. The tenant has complete possession; the landlord himself is a trespasser if he enters, unless for inspection of the premises or to demand rent or for other special purposes, and under proper circumstances of time and manner. Any dispossession of the tenant from even a part of the premises will eventuate, if he so wishes, either in an eviction by the landlord or a surrender by himself that terminates the tenancy. The necessity of possession in a tenant is the distinction between him and a licensee, or between a "cropper" who is also a lessee and one who has merely a cropping contract, or between an employee who is a mere occupant and one who is a tenant.

On the other hand, the leasehold must be smaller than the lessor's estate out of which it is created, for a lessor must be a reversioner that is, he must have the right to possession in the future when the leasehold ends. If the leasehold is created out of a freehold it is, simply, a leasehold; if created out of a larger leasehold it is a "sublease," and there are two reversioners, the immediate and the "head" landlord. Nobody can be a lessor who is not a reversioner; when all one's estate is given out there is simply a transfer or conveyance of it (called an "assignment" if the interest transferred is a leasehold), and no tie remains between grantor and grantee. It is well settled that no reversion is constituted, when a tenant assigns his full term, by reserving a right of entry, or a rent different from that which he himself is obligated to pay, or by inserting new conditions. Such cases are not subleases but assignments.

Attention has been called above (p. 177) to the relation between the death of feudal tenure and the free development of the reversion. Since the latter was the only legal relationship that at all resembled feudal tenure, and since the relationship between lessor and lessee offered most resemblance thereto because of the payment of rent (and perhaps other acts suggesting feudal "services"), it has become usual to say that "tenure" exists between the "landlord" and the "tenant." Even in this situation the "tenure" is only a word, really meaning no more than that the tenant occupies the land of ("holds" of) the reversioner. So, for example, when the reversioner assigns, the one-time requirement that the tenant attorn to the assignee, based on the feudal idea of a personal relationship between them, has in most of our states become obsolete without legislative action. When used in connection with freehold estates, in such phrases as "tenant in fee simple," the word "tenant" is a mere feudal relic of no present significance; he "holds" only in the sense that he owns, as one might be tenant of a piano. It was once much more usual than today to speak of a "lease for life," but the life estate was rarely if ever called a "leasehold," nor is the relationship between the reversioner and the holder of any other estate than a leasehold known as "tenure." The word does no particular harm in this part of the law.

The *leasing instrument* is normally of double character. First, it embodies a lease, which, as just explained, is a deed that conveys an interest in land. This is the primary benefit accruing to the tenant. Secondly, the instrument *may* contain all sorts of contractual provisions, as well as certain future interests in the land reserved to the lessor in addition to the reversion which the law gives him.

These "contractual" elements, however, are also of a double character, having both contractual and property characteristics. On the side of the tenant there is almost always a promise to pay rent. This is not absolutely essential, for a landowner can make a gift of a leasehold interest in his land as well as of the complete title. But rent has always been the primary reason for leases: they were favorite medieval investments, free from many insecurities that burdened realty. Hence the saying that "rent is incident to the reversion," although we shall see they can be severed (p. 335). One aspect of this, historically considered, is that the right to rent was originally a real right, a right "in the land" the rent "issues out of the land," it is part of the issues or profits of the land. But today we think of it as issuing from a purse; we cannot feel the meaning of the old phrases. However, remedies for the collection of rent retain traces of old-time real procedure (p. 336). The tenant may make various other promises—to repair buildings, keep them insured, not assign or sublet without the landlord's consent, lay drains, rotate crops, etc. On the other hand, the landlord may make some of these or other promises. Any covenants made by the landlord are benefits, additional to the leasehold, received by the tenant. Covenants made by the latter, and the conditions upon their breach which enable the landlord to deprive him of the land, are the benefits on the side of the landlord.

All these promises ("covenants," since they have for centuries been almost invariably under seal) have peculiar property characteristics. Centuries before the doctrine of third party beneficiary arose in the ordinary

law of contracts as an exception to the contract doctrine that none may sue or be sued thereon save the original parties thereto, the doctrine developed that such covenants in leases as "touched and concerned the land" ran with the land. And since 1541 this has meant that their benefits run to transferees of the promisee's estate (whether the leasehold or the reversion, which are of course equally "land"), and their burdens run similarly against transferees of the promisor's estate. These rights are highly peculiar. They are generally treated as property rights, and so rights in the land of another—that of the reversioner or of the tenant according as one or the other bears the burden. Yet the rights are enforced by a contractual action. However, in important leases all important covenants are stipulated to be also conditions, for breach of which the landlord may enter—although the tenancy for years may be ended upon the breach without entry unless otherwise stipulated. This right of entry is a future interest, purely a property interest.

An *implied covenant of quiet enjoyment* is also present in every lease. Such a covenant is known as one "for title," and no covenants for title are implied in conveyances of freeholds (p. 436). The tenant, however, may sue thereon if he is evicted, either by the landlord or by the holder of a title paramount to the landlord's. The covenant does not cover ouster by a mere wrongdoer. Of course, the tenant can recover in trespass damages for the entry; may bring ejectment to recover possession; and can recover mesne profits in trespass or in ejectment. In case of constructive eviction (p. 222), he may sometimes have an injunction against it as a nuisance. And, if he so desires, he may acquiesce in eviction and surrender his leasehold (p. 392).

The holding by the two parties of different estates in the land at the same time constitutes a "privity of estate" between them, and is the most important of their property relationships. By the covenants there is created between them "privity of contract." A clear distinction between the contractual and property aspects of the leasing instrument is most important. A failure to make it has created immense confusion (p. 392). No interest in land can be created by mere contract; references to leases as contracts embody a fundamental mis-conception.

When created by deed, chattels real are rarely created otherwise than alone and as estates of immediate enjoyment. But it is quite possible to give A, by will or deed, a term of years with a "remainder" to B thereafter (pp. 250). It is also possible, since chattels real were never subject to restraints of feudal tenure, to create them in futuro—as by simultaneously giving interests in land to A for 10 years, then to B for 10 then to C for 50 years. The terms in B and C are generally called leases "in reversion," being created out of the reversion, though the name is not satisfactory. But if a term of 20 years is given to A, and however soon thereafter one for 20 years (or other period) is given to B, these are called "concurrent" leases; and whether B is intended to have the rent incident to the reversion on A's lease, a part of which reversion has been assigned to him, depends upon the intent manifested in the second lease. If B is given no benefits of the part reversion assigned to him, in effect there is no difference between his position in this and in the preceding case.

In case of a leasehold created to begin in the future, and likewise in case a lessee who has a lease intended to begin immediately has not yet entered, the lessee is said to have only an interest in the term (interessi termini). The idea is that only the taking of possession creates "tenure" and a "tenement" and the "tenant" who holds it. This is consistent with the requirement of possession as essential to the constitution, today, of what has been called above the "leasehold." Possibly under the old law, there was also until entry no "estate." But there is evidence both ways in the law. The intended tenant does hold a lease, and he does have a right to the possession, which should and by the weight of authority does suffice to sustain an action of ejectment or a bill for an injunction against waste, and which satisfies the law's requirements (substituting possession for seisin) for corporeal hereditaments, all of which in the old law were estates. Moreover he can alien his interest. It is far more significant that the *interesse termini* was transferable in centuries when choses-in-action were not assignable, and when the requirement of possession as a basis for conveyances of freeholds might have been expected to influence conservatively the transfer of chattel interests. The interest has, it is true, other characteristics which support the view that it is not to be considered an estate. Its presence between two freeholds will not prevent their merger as does the presence of a "vested" interest (p. 257); nor is it vested in the sense that such tenant can take a release from the "landlord" of the "reversion"; nor is it vested, in the opinion of some, in the sense that it is exempt from the rule against perpetuities (p. *375).* The law's theory is unclear, but it seems permissible to say that the holder of the *in-*

teresse termini, although not a tenant, has an estate.

The strange idea is sometimes encountered in law books that the tenant owns nothing, but has only a right—which sometimes is not even referred to as a property right, but only as a contract right—in the land of another. Although this is everyday language, it is a fact that even Austin conceded ownership to a lessee.

(2) CLASSIFICATION. These interests are known indifferently as chattels real, tenancies less than freehold, or estates less than freehold. The first two designations are unexceptionable. To the last name exception might be taken by persons who cling to the feudal views that recognized estates in freeholds only. The name of leaseholds is commonly used as synonymous with the two preceding; but it has already been remarked that the interests in question may equally well be created by will, or by deeds that would not be called leases.

The possible types of these tenancies are three: the term for years (certain), the tenancy from year to year, and the tenancy at will. Their characteristics will be indicated below.

The so-called tenancy at sufferance is no tenancy whatever, but it certainly is an interest in the land and a possessory estate. A tenant of any type who wrongfully continues in possession after the termination of his tenancy is said to "hold over" and to be a tenant at sufferance. He does not "hold over" in the sense that he continues to hold the same estate; but only in the sense that he continues to hold possession. Because he entered rightfully he cannot be sued as a trespasser for breaking the close; nor in trespass for mesne profits until after entry by the landowner. But he is in possession, for he is continuing the acts, and with the requisite animus, that constituted his possession while a rightful tenant; and therefore has been allowed since Coke's time to sue strangers for trespass. The possession is necessarily adverse. If the owner so elects, he may therefore sue him in assumpsit for use and occupation, or in ejectment. The idea has been somewhat common that the circumstances preclude a claim by him of possession "of right," which, it is assumed, is essential to adverse possession. But that is a misconception (p. *356).* If the landowner elects to waive the wrongdoing then everywhere by the will of both parties, and in almost all jurisdictions by the landowner's choice regardless of the wrongdoer's will, he may be made again a true tenant of some type—for another year (the most common view), or from year to year, or for the term of the original tenancy, according to the view taken in a particular state—and becomes liable again for rent. And the same is true of a tenant whose lease is automatically extended by failure to give notice of intent to surrender, if he properly does so but then holds over.

(3) TERMS FOR "YEARS" CERTAIN. These tenancies need not be, literally, terms for years. The name is employed to include terms for months, which are very common, for weeks, which are rare, or for days, which are very rare; and there is no reason why shorter terms should not be recognized.

To create such a term there must be a fixed date beyond which it cannot extend—which, it has been seen, distinguishes it from any freehold; and it must likewise begin at a definite date, although this may be in the future. But either or both of these dates may be defined in the leasing instrument by reference to events whose date can be ascertained at the moment of the letting. So, for example, leaseholds would presumably be good that are for a number of specified future holdings of dates definitely ascertainable, as a leasehold for three successive presidential inauguration days or for certain holidays; to continue "during the minority of A," "for as many years as A shall name," "for as long as the Woolworth building has already stood." But leaseholds are not created if stipulated to continue "as long as the lessee shall continue his present business," or "until the lessor shall sell the premises." A lease "for 100 years if the lessee shall so long live" creates a term of 100 years, the only uncertainty being as regards the date at which death shall *end* it; but a like uncertainty attends all leaseholds, since all are liable to destruction at unpredictable times by merger, forfeiture, or surrender. On the other hand, a grant to A so long as he shall live cannot be a leasehold, both because no term of years can be that long, as already explained (p. 194), and because the date of termination is not ascertainable at the time of the letting.

A distinct beginning has been made in fixing by statute the permissible length of leaseholds in agricultural lands, and there are traces of a disposition to limit similarly, though less rigorously, leaseholds in urban lots.

(4) TENANCIES AT WILL. A tenancy at will is an estate terminable at any time by either landlord or tenant. But it must be remembered that either a freehold or a term of years may be granted with a power in the grantee to terminate it at will; and the latter is not a tenancy at will, since the power to ter-

minate need not be held by both parties.

Emphasis has already been given to the fact that trespassers and licensees, who have no possession, must be distinguished from tenants at will, who do have possession. The acquisition of possession is a matter of fact; a trespasser or licensee may acquire it. But it is an adverse possession unless and until the landowner's will converts it into a tenancy at will. However, mere silence and failure to object, mere acceptance of the wrongful situation as a fact, cannot, under the name of "acquiescence," constitute volition to substitute a rightful for a wrongful holding; for if that reasoning were allowed no adverse possession could ever ripen into title.

The tenancy may, of course, be created by a formal written lease, but such a mode of creation is rare. Since it is unaffected by the Statute of Frauds, it may be created by explicit oral indication of its nature or by merely giving possession of the land. A contract purchaser of land who occupies before receiving a deed, a person who enters as an intended grantee under a supposedly valid but in fact invalid deed, or an in-tended lessee who enters under a lease that fails, or a negotiator for purchase or lease who is given possession, are all lessees at will. The same interest is created when a formal lease fails to specify the duration of a term thereby intended to be given, or to specify the nature of the tenancy.

Termination of the tenancy could be accomplished at common law by giving written or oral notice, or by any behavior giving reasonably clear equivalent notice; or by doing any acts on the premises inconsistent with the tenant's right to exclusive possession and amounting, therefore, to eviction of the lessee. By statute or by judicial alteration of the common law, probably at least half of the states of this country now require a notice of some (varying) length of time to be given by the landlord, unless the parties agree otherwise. The reason for this is the right (thus truly a reality in those states) to remove annual crops (grains, garden vegetables, etc.) planted and cultivated by him, as emblements. Such *fructus industriales* are for most purposes treated as chattels, under the statute of frauds and otherwise. To refer to them as "fixtures," however, is a misnomer. The annual products secured by labor from perennial bushes and trees, such as berries, hops, and turpentine are sometimes also classed among emblements.

Subject to similar exceptions, the tenant may terminate the tenancy by simply relinquishing possession, but not by a notice without relinquishing possession. Since the landlord may end the lease, if he desires, without reason, he may of course do so if the tenant's waste or his disclaimer (p. 224) or other ill behavior afford reason. The tenancy is also ended by rule of law if either party dies, or if the landlord conveys all or part of his title to all or part of the land, or if it is transferred by act of law for the benefit of his creditors. In both cases the explanation is said to be the peculiarly personal relationship of the parties, which ceases if strangers become parties to the title. That explanation is difficult to reconcile with the view, taken in a few jurisdictions, that the tenancy continues, despite such conveyances, until the tenant learns of them. This last amounts to requiring notice of a volition to end the tenancy; a volition then inferred from a feeling that the entrance of strangers into the relationship should end it. Even less widely supported is the view that the tenant's futile attempt to assign his estate or to create out of it a sublease (neither of which can be done) destroys his estate only when the landlord learns of it.

Of course, the tenancy at will, likewise, does not pass to the tenant's personal representative upon his death, nor can it be devised.

(5) TENANCIES FROM YEAR TO YEAR. Such a tenancy is a single tenancy, not a series of yearly tenancies. This has several important consequences, particularly as regards the landlord's remedies for the recovery of rent. Although terminable at the end of any year if either party desires, it is very unlike a tenancy at will because it must always continue for at least one year.

Unless in the first year notice is given by one party to the other that the tenancy shall end at the expiration of that year the estate continues; and so in every subsequent year. In almost all states the obligation to give notice in order to be released is reciprocal. At common law the notice was required to be given at least six months before the end of a current year; in this country statutes in various states have required notices of from one to three months. But legislation has been abundant, and there are peculiar variations, such as notice of a year, power of summary termination by the landlord at the end of any year, or notice by the landlord only. In the case of tenancies from quarter to quarter, month to month, or week to week, the notice required is almost everywhere a full quarter, month, or week. The parties may by contract substitute their own provisions on the subject.

These tenancies can be cre-

ated directly by act of the landowner, but they are usually created "by operation of law" upon a situation arising from acts of the owner intended to have another effect, and which are ineffective for the intended purpose. It may be created directly by any words sufficiently manifesting an intent to do so. It has been held that this requirement is satisfied by such words as "for one year... and an indefinite period thereafter," or "for one year . .. and so on"; but in this case it *is* clear that the first year is a term certain, the other tenancy then beginning.

The tenancy is also created by a letting without indication of its nature, or by a lease which is for some reason invalid, if the tenancy at will thus created is followed by the payment of rent for a year or as part of a year's rent. This result should be held to rest upon a mere presumption that the rent is paid and accepted with an intention consistent therewith. It should be rebuttable, therefore, by evidence that the rent is given and accepted as rent under a tenancy at will that shall last at least for the period for which such rent is paid; and this would presumably everywhere be so held, although the other result is constantly stated as one inevitably following from the stated facts. Any tenancy at will, whether created as above assumed or otherwise, can probably be made the basis of a tenancy from year to year except in two states, in which a tenancy at will (or at least one arising from an attempt to create orally a tenancy which the local statute of frauds requires to be created by writing) cannot be transformed into any other interest. And the actual payment of rent, being only evidence of intention, any other evidence to the same effect will serve for the same purpose. When a term of years expires the parties may agree upon a renewal, and this is ordinarily regarded as one from year to year, though sometimes it is held to be a tenancy for a year, and in the exceptional states just mentioned a tenancy at will.

The tenancy from year to year is assignable and passes to the tenant's personal representative upon his death, and neither these transfers nor similar transfers of the landlord's reversion affects the tenancy. Upon death of the landlord, whether his reversion goes to his heir or personal representative depends upon whether it is a freehold or a chattel real. For not only may a tenancy from year to year be created out of a term for years: it has even been held (in England at least) that a tenant from year to year can give out of it a sublease for years certain or from year to year, and in either case retain a reversion; the sublease, however, being necessarily subject to premature termination by the termination of the tenancy out of which it was granted.

(6) RELATIONS OF THIRD PERSONS. The very special consequences which follow transfers of the term of years or a tenancy from year to year call for special comment.

Assignment of the reversion is traditionally made by formal deed. That of the leasehold is made by any writing (to satisfy the requirement of the statute of frauds) manifesting the intent to transfer the whole estate; and this is usually indorsed on the lease. A leasehold that can be created orally can almost everywhere be orally assigned. Either reversion or leasehold may be assigned by operation of law, particularly upon the death of the owner, under executions, and in bankruptcy proceedings. Precisely what is assigned by the reversioner is sometimes difficult to say. The distinction between successive and concurrent leases has been adverted to, and it was noted that in case of the latter the transfer of the reversion may or may not include a transfer of the right to the rent (pp. 200, 203). A transfer by the reversioner stated as one of the "lease" can only mean, properly, benefits under the lease as distinguished from, and severed from, the reversion to which they are normally incident.

The reversioner may assign his entire reversion in all of the land, which amounts merely to a transfer of his title or change of ownership; and of course it is unimportant whether the conveyance speaks of reversion or of land. He may do the same as regards part of the land, which has the same meaning as respects that portion. He may assign part of the reversion in all of the land; as when a fee simple reversioner gives out a life-estate only. In this case the assignee (sub-reversioner) holds an estate of limited and subordinate duration and is owner for a limited time, while the original (or head) reversioner remains ultimate and general owner. A similar result follows as to part of the land if part of the reversion is assigned in a portion only of the land. Likewise, the leaseholder may assign his estate; but here the word "assignment" is held to a restricted meaning. He "assigns" only when he transfers his complete estate or term, in either all or part of the land. He "sub-lets" when he transfers only part of his term in all or part of the land. In case of assignment the assigner becomes tenant of the original landlord as regards all or part of the land. In case of a sublease, the original tenant becomes a reversioner and a landlord; the sublessee is the tenant of his assignor, not of the

head landlord.

Very important consequences attach to these distinctions. Reference has been made before (p. 201) to the covenants which constitute the portions of leasing instruments which are contractual in form, and the conditions subsequent imposed upon breach of covenants vitally important. The burdens of the reversioner's covenants run against all transferees of the reversion, in whole or in part, as above enumerated. The benefits of the tenant's covenants, and of conditions subsequent imposed upon their breach, run in the same manner. But it is very different on the side of the tenant. The benefits of the reversioner's *covenants* run only to, and the burden of the tenant's covenants run only against, the tenant's assignees. But the burden of *conditions* imposed upon breach of the tenant's covenants run also against his sublessees. Such conditions are rarely attached to covenants made by the reversioner.

It has earlier been noted (p. 201) that those covenants of the parties run which "touch and concern the land." A covenant "touches and concerns the *land"* when it touches and concerns the covenantee through the land; which it does when of such nature that its benefit to him results with sufficient directness from the effect upon the leasehold estate of its performance; in other words, when he receives the benefit of performance with sufficient directness through his relation to the land. If the benefit concerns the covenantee in this sense the burden concerns the covenantor. What is "sufficient directness" only accumulated precedents can show (p. 297 *et seq.).* Covenants to pay rent, manure the land, rotate crops, repair buildings, insure premises and use insurance money upon the premises, renew the lease, and to sell the land to the lessee if he elect to buy, have, for example, been held to satisfy the requirement. The contrary view has been taken of covenants to pay money to strangers, not to open near by a business competing with the covenantees, to keep up milk routes served by the covenantee while operating a creamery leased to the covenantor. A covenant that does not "touch and concern" the parties through the leasehold relation is said to be collateral thereto. When a covenant relates to a thing as yet not existent (as a covenant to plant and prune hedges), the old law was that assignees were not bound unless the covenantor expressly covenanted for himself "and assigns." On this point the present law is much divided, with a growing tendency to ignore or repudiate the requirement that assigns be "mentioned."

The landlord's implied covenant for quiet enjoyment (p. 202) also runs with the land.

The covenants are said to run "with the land;' and are also said to run "with the land and the reversion." Either phrase, covers all the transfers of both leasehold and reversion. As rights in and over things are, strictly, the "property" with which law deals, the reversion and leasehold are both land in a legal sense and their holders are landowners, although the tenant's ownership includes possession of the physical land.

Contract continues to unite the original contracting parties throughout the life of the stipulated tenancy, regardless of assignments of either interest. The privity of estate uniting the original parties necessarily ceases when one of them has parted with all his interest in the land. A similar privity of estate is immediately created, however, when either reversion or leasehold is assigned, between such assignee and the other original party. And privity of contract likewise exists between these, and likewise between respective assignees of the reversion and the leasehold, for the statement that a covenant "runs" means that the assignee becomes as truly a party to the contract as were the original parties themselves. Finally, it is to be noted that the promissory benefit and burden that thus runs with the land on either side (that is, with either estate) does run, literally, with it; so that no transferee enjoys the one or bears the burden of the other longer than he retains the estate—or, in other words, no longer than there is a privity of estate to which he is a party.

Two comments upon the last statement are necessary. First, this is true unless an assignee, in consideration of the assignment to him, explicitly agrees *to perform* the covenants; and taking a leasehold "subject to" covenants in the lease is not a promise to the- assignor to perform them, much less a promise to do so after parting with the leasehold. Moreover, the landlord can not hold the assignee on such a contract with his assignor except in jurisdictions recognizing the third party beneficiary doctrine. Second, "privity of estate' does not mean that the assignee must enter upon the premises. He has the estate, or title, by the assignment.

The above results may, of course, be altered by the recording acts. A lease will be destroyed if a subsequent purchaser takes title to the reversion, or another person becomes tenant under a later lease, for value and without notice. But leases, except short terms (and of course tenancies at .will), are generally within the

recording acts; and the record, and usually the tenant's possession as well, will give notice. Transferees of the reversion must take subject to leases that are not within the recording acts, as incumbrances upon the title.

The common law actions available to the parties were based upon the relationships just stated. These still control the remedies available except so far as statutes have given altered remedies for the collection of rent. The landlord could sue for the rent in an action of debt, that being based upon privity of estate because of the medieval conception of rent as something issuing out of the land, owed by it, and owned by the reversioner. Debt could not be used against the original tenant after assignment, nor against any assign after he had passed the leasehold to another, except for rent that had become due while the defendant was in enjoyment of the land.

On other promises than that to pay rent the reversioners were confined to the contractual remedy; and on the tenant's side only covenant was available, for no promise made by the landlord could be the basis of a real action. Covenant was available to the landlord or any assign of the reversion, against the original tenant, throughout the duration of the term, for non-performance of the promise to pay rent or of any other promise. It was available to these plaintiffs, however, only for breaches occurring while they were entitled to the benefit of the promises sued upon—in other words, while they respectively held the reversion. Against assignees of the leasehold covenant lay only for breaches that occurred while they respectively held that interest. The tenant or his assign could sue the original reversioner, as covenantor, throughout the duration of the term. But no assign of the reversioner was liable for breaches other than those occurring while he held the estate.

The liability of the original covenantors for breaches of their promises made by assigns of their estates is said to be secondary, and that of the assignees primary. This is the result of grafting equitable views upon legal doctrines. The original parties promised, therefore they may be sued; but if they pay they may sue for reimbursement the assignees who failed to fulfill the covenants. As between original and later promisor (for the assignee does promise when the covenant runs), the former is only a surety. If equitable doctrines are even farther adopted in the law procedure, the original covenantor can have exoneration, compelling suit to be defended by (or even brought first against) his assignee.

When a lessee dies, his personal representatives are liable, *as such,* to the extent of his assets for breaches of his express covenants in the lease. They are also assignees of the leasehold by operation of law, and *personally* suable on the covenants; but their personal liability (since they are only involuntary assigns by acceptance of the representative office) is limited. The same is true of covenants by the reversioner. As regards his implied covenant for quiet enjoyment, however, that is held to bind only by privity of estate, and the personal representatives are not liable for its breach.

If a tenant covenants not to assign without the landlord's consent, and an assignment is made with consent, by the decided weight of authority the covenant is not discharged but is a continuing obligation that runs with the land. The tenant, however, despite his covenant, has the power to make an effective assignment without consent, for he holds the estate, and a man may in general transfer his property. Moreover, since the covenant runs, it binds successive assignees, whether rightfully or wrongfully made such. There is merely liability in damages for breach of the covenant.

(7) RENT. Some points regarding rent should be given emphasis.

In the first place, not all payments due from a tenant are rent. The old conception of rent has here left curious distinctions. If there be a covenant to pay taxes to or for the landlord, or to pay amounts toward the value of improvements made by the latter, these are not rent, for they did not issue as profits from the land; the obligation is not of the land, but personal. If the tenant contracts to pay periodical sums for the enjoyment of easement or profit rights in Greenacre, granted to him at the same time as his leasehold in Blackacre, rent does not include such payments, because m medieval thought it could not issue out of an incorporeal hereditament. Finally, if one be leased land with livestock or implements or a furnished house thereon, money paid in consideration of the use of these various chattels is not rent, because there is no lease of them but a bailment, and because rent cannot issue out of chattels. A layman, accustomed to hear of the "rental" and "leasing" of typewriters and evening dress is surprised by such distinctions. Even lawyers frequently ignore them in drawing leases. All of these points are important, however, because the landlord's extraordinary remedies are strictly for rent alone, and their misapplication is both unproductive and expensive in procedural costs, if not in liability for damage

caused by misuse of an action. Despite the preceding statements, however, of common law principles, the landlord may be given by statute a lien for "rent" including various payments such as those indicated.

The lease may make payment of rent a condition for whose breach forfeiture may be enforced by entry under judgment in ejectment, or may even create the leasehold with a conditional limitation which terminates it immediately upon mere default in paying rent. In the latter case, a more summary remedy to recover possession would generally be available.

Another point of importance turns upon the legal rule regarding the time when rent "accrues," or becomes due and payable. Rent is not regarded as gradually accruing daily up to the moment set by contract or legal tradition for payment. No part is due until the very *end* of the due day. The rent being due only at the end of the rent day, if the landlord evicts the tenant or, in a tenancy at will, terminates the tenancy *during* that day, no rent whatever becomes due; or if on that day the reversion is assigned, the assignee takes all the rent; or if the landlord dies between two rent days, his heir (as assignee by law of the reversion) will take all rent accruing at the next rent day. (But the right of action to recover to rent accrued at a *past* date would pass to the personal representative in such a case). This was the common law. It recognized no apportionment of rent "as to time," that is, as to time when due. In about a third of our states the rule has been changed by statute as regards leases for years; and in more than half the states as respects apportionment between a life tenant and the holder of a future estate following it.

Apportionment of rent "as to amount" was always recognized by the common law, both as regards the duty to pay and the right to receive. If the land is held by several persons, the original tenant and assignees, each portion of land owes a corresponding amount of rent, for which, as we have seen, the real action of debt (or a modern equivalent) lies; and the contractual obligation of each tenant is similarly limited, although not that of the original tenant and covenantor. But the extraordinary remedies of the landlord, for the collection of defaulted rent by distress or forfeiture, could not be limited under the old law to portions of the land as divided. Likewise, if the reversion in different portions of the land is held by several persons, they are entitled to corresponding portions of the rent. Or the landlord, while retaining all the land and part of the rent may grant to another person a distinct fraction of the rent, dividing this as the land is divided in the other case. Or the reversioner may keep all the land and the reversion, but grant all the rent to several persons—in which case the rent is completely parted from the reversion to which it is ordinarily "incident." In these cases the right to receive rent is apportioned.

Rent may be extinguished or suspended in various ways. The landlord may release to the tenant the right to collect rent from any part of or from all of the land; and in the former case there is simply a reduction of rent, which is conceived of as sill owing by the entire premises, contrary to the apparently intended meaning. This release is a deed which conveys a real right. If the landlord evicts the tenant from even part of the premises the entire rent is suspended while eviction continues; and there is no liability for rent accruing at due dates in that interval. An eviction under paramount title has the effect, necessarily, of extinguishing liability to the former landlord. When the rent is payable in advance for the period during which eviction by the landlord occurs, the better view is that the tenant can only be reimbursed in fixing damages in a tort action for the eviction; but, unjustly, when there is eviction by one holding paramount title no remedy against the former landlord exists. Although in case of eviction by the landlord from only part of the premises there is no apportionment of the rent, if such eviction is by one holding better title there is an apportionment in the sense of an absolute extinguishment of part and consequent reduction of the total rent. A taking of the land under eminent domain should have the same effect.

Eviction need not be an exclusion—whether a withholding of possession when occupancy should begin, or later—compelled by force. The tenant may refuse to enter or may subsequently voluntarily leave because the landlord fails to perform covenants essential to an occupancy of the nature agreed upon by the parties. Such "constructive" evictions are numerous. Leases having once been almost exclusively for agricultural purposes, and the law being still controlled by the idea that rent is owed by the land, it is still the predominant view that when land is let with buildings thereon the destruction of the latter neither extinguishes nor reduces the rent. But this is generally held not to apply to an apartment or house leased solely for residential purposes. The situation should be covered by an express stipulation in the lease. In approximately a third of our states statutes relieve the tenant of liability, totally or partially according to circum-

stances, with distinctions between destruction, mere damage, and damage rendering buildings untenantable.

The normal remedies for the recovery of rent at common law were debt and covenant, assumpsit being used upon unsealed promises to pay a rent (which must be a sum certain) or to pay the reasonable value of the use and occupation of land. In the latter case the occupant must be a possessor, in other words a tenant, and very often he is merely a permissive possessor or tenant at will. The distinctions between these remedies somewhat affect procedure today where here is only one civil code action. At common law the reversioner could seize and hold (distrain upon) chattels on the land belonging either to the tenant or to strangers and even, under statutes, sell them. Even in states which still recognize this remedy it is now assimilated to attachment, the seizure being made, and subsequent procedure controlled, by public officers, and not by the landlord. But the right of distress did not include any right in the chattels preceding actual distraint. They could be removed from the premises. Nevertheless, without the aid of statutes, the courts sometimes treated the landlord's right of distress as a "lien" in the sense of giving priority over other creditors. Modern statutes in many states go farther. Speaking loosely, they give the landlord a lien upon any crops growing on the land, or chattels of the tenant kept thereon. This "lien" includes a power of sale for reimbursement, and of course it is the basis of priority of right from the moment of its inception. Sometimes the lien covers not only rents but the value of supplies furnished and advances made to the tenant. Statutes in probably all states also give the landlord summary actions both for ousting wrongful occupants and for collecting rents.

(8) ABNORMAL TERMINATION. The three non-freehold estates just described normally terminate as already indicated: the term for years by the expiration of the term, the tenancy at will by the expression at any time of either party's volition, the tenancy from year to year by the common law notice of six months or its local statutory substitute. Any tenancy, however, is liable to termination in two other ways which, since they are not inherent in the character of any particular estate, and are also actually exceptional, seem to be properly described as abnormal. Neither of them is confined in its application to leaseholds, and both will be later referred to with more particularity. These two modes of destruction are *merger* (p. 257), particularly by release of the reversion to the tenant or surrender of the tenancy to the reversioner, and *forfeiture* by disclaimer.

But disclaimer seems to be obsolescent, perhaps obsolete. The tenant may, it is said, "forfeit" his estate if he either directly or indirectly and with reasonable clarity brings to the knowledge of his landlord his repudiation of the latter's title, and refusal any longer to recognize his occupation as continuing thereunder. To a layman, such a disclaimer would seem by its very name to indicate that the estate ends by the tenant's volition. But the law does not permit any estate m land to be destroyed by mere repudiation or abandonment. If here destroyed at all it must be by forfeiture. It is highly doubtful whether such a disclaimer as described, or even one made by formal affirmation during judicial proceedings, can serve today (as it once did) as cause for the reversioner's forfeiting the leasehold. If, in addition to the disclaimer, the tenant remains on the land claiming the fee simple, he is still tenant if the landlord elects so to regard him, though the latter is free to bring ejectment against him immediately as an adverse possessor.

8. Estates of Present Enjoyment, Generally

(1) WASTE. Waste was originally any treatment of the land by the holder of a particular estate therein other than an entail (one of many special favors shown to tenants in tail) which did damage to the immediately expectant estate of the reversioner or remainderman. Today the law protects not only them but various other persons who hold either rights of enjoyment subsequent to those of the wrongdoer, or of immediate enjoyment concurrent with his own; but not all persons falling within those descriptions.

The words "damage to the estate" do not mean mere economic loss to the holder of the expectant estate; they include violations of his rights causing no actual harm. In early law any use of the land that altered its nature, as by cutting timber and making woodland into meadow, or converting meadow into arable, was waste, even though in the course of good husbandry; presumably because such acts endangered the title by affecting essential descriptive features of the land, rather than because they might at times be economically detrimental. Even changes that were clearly economically beneficial might nevertheless be "meliorating" waste. Such positive acts of misfeasance as those above indicated, or tearing down buildings, substituting new buildings of a different kind, or opening or working mines, have been called "vol-

untary," but it would seem preferable to describe them as active waste, or waste by commission. They are scarcely more voluntary than waste by permitting buildings or other structures to fall into disrepair by neglect; although a difference is discernible when there is destruction by fire. Such waste is generally known as "permissive," but may equally well be designated as negligent or passive, or waste by omission. The settled construction of two very old statutes on waste (of Marlbridge, 1267, and of Gloucester, 1278) was for centuries that they covered both varieties of waste. There is little authority until very modern times for the view that tenants for years are not liable for passive waste, or that any liability therefor is based upon the violation of covenants to repair. Neither limitation has authoritative standing in this country.

English law two centuries ago ceased to impose liability for accidental fires as constituting permissive waste, and by inheritance or adoption that is the law of this country. Neither English nor American law, in their modern stages, classifies under permissive waste damage done by strangers. The Restatement of Property by the American Law Institute states the duty of a beneficial life tenant as being one "to preserve the land and structures in a reasonable state of repair,"—or, stated otherwise, to prevent "substantial deterioration"—to the extent that his net income from the land over other carrying charges is "sufficient." But this is subject to exceptions made in the creation of the particular estate, which may have made it one without impeachment for waste," likewise to exceptions of accidents, extraordinary forces of nature, and acts of strangers. It is supposed that very similar principles define the duty of the tenant for years. The tenant may be freed from liability not only by the words creating his estate, but also by covenants to repair made by the reversioner; and a license by the latter for the doing of the acts will of course bar an action by him for their consequences. The first form of relief is common in the creation of estates for life, certainly at least excessively rare (if ever found) in grants of terms; the second form of relief is common in leases for years.

But many difficulties remain. Among them, in the field of ameliorative waste, are the obstacles in the way of interior alterations of old hotels and other urban buildings, held under long terms of years, in order to make them more profitable without buying at perhaps an exorbitant price the consent of the lessor. With reference to a tenant for life the Restatement of Property states his duty as "not to change the premises . in such a manner" that the owners of expectant estates "have reasonable ground for objection thereto." Under that principle, the old-time examples above given of alterations in the character of land, if made "in accordance with the practices of good husbandry," should not be waste today; and alterations in a building should not be waste if they are so clearly demanded by a complete change of conditions that an owner in fee simple would "normally" make the same changes.[1]

The Statute of Gloucester provided that tenants for years or life, including estates of curtesy and dower, should forfeit their estates and pay treble damages for commission of waste. In about a third of our states the rule of treble damages exists today. Forfeiture is probably nowhere exacted unless for malicious waste, and then rarely, or when the total remaining value of the defendant's estate is needed to offset damages.

A landlord's protection against waste by a tenant at will has never been covered by the old action of waste or its modern derivatives, but is afforded by damages in an action of trespass after entry. Such a tenant, moreover, is liable for active waste only, termination of the tenancy being an adequate protection against waste by neglect.

Waste by a guardian on lands of his ward comes down from medieval times. As stated above, modern statutes have extended "waste" to include various other situations outside the original common law conception. The most important of these gives protection to persons holding rights of *present* enjoyment equal to those of the wrongdoer in possession, as co-owners with him. Similarly a purchaser at an execution sale may be protected against waste committed thereafter, before he receives possession, by anybody in rightful possession. Regardless of any other relation between the parties, the tendency is to protect any person whose rights of enjoyment are threatened by acts of a rightful possessor.

Equity greatly altered the law of waste, creating "equitable waste" in two ways. A life tenant unimpeachable at law by the terms of his grant might nevertheless be enjoined by equity from doing acts destructive of the inheritance. It allowed him to do what was waste at law provided he was not unconscionable in his use of the privilege. Equity also enjoined some acts as waste which were not at all, or only in a different sense, waste at law. Thus, the cutting of oaks, they being timber trees, was waste at law, but equity would enjoin the cutting of any

trees (usually oaks) planted for ornament of the estate, because in fixing damages at law account could only be taken of their timber value. Substantially, legal waste is cut down; in effect there is no legal right to do equitable waste (p. 105). Of course equity will not enjoin ameliorative waste.

(2) "NATURAL RIGHTS." Every holder of an estate of present enjoyment in land, whether an estate of right or of wrong (p. 186), has certain fundamental liberties of enjoyment, and rights against occupants of neighboring lands which protect him against interference therewith. The liberties and rights are traditional constituents of his possessory title. They were formerly frequently called "natural easements," and are now generally known as "natural rights." The first term is inappropriate because even the protecting rights are not, as are easements, rights in *another's* land. As for the second term, it is a survival from times when doctrines of Natural Law colored legal language; neither the liberties nor the protecting rights are in any special sense "natural," although certainly the former are nearer to men's conception of a "state of nature." The distinctions between natural rights and easements, and their relation to both easements and licenses will be again referred to (pp. 277, 328).

The liberties in question are four in number.

(a) The first is the liberty to enjoy his land unmolested by others, protected by a *right to exclusive possession.* Enough of this has already been said in various places. The right is absolute: the unauthorized protrusion of a fist or a horse's hoof into the close, passage of a bullet through the air, or of a balloon, have been held trespasses. A wire strung through the airspace is more than a trespass: it is a dispossession for which ejectment will lie. Intention has nothing to do with the doctrine. One who in the dark steps inadvertently upon his neighbor's land is a trespasser, although no litigation is likely to result. The recent development of aviation has for the first time caused us carefully to consider whether such absolutism of private right is today desirable, at least as regards the airspace. Special circumstances under which even the surface of another's land may be entered upon without subjecting oneself to liability for trespass have already been mentioned (p. 16).

(b) The second liberty is that of enjoying the surface of one's land as nature left it. This is known as *the right to lateral and subjacent support* for land in its natural state. Each landowner may dig in his own land subject to liability for violations of his neighbor's right of support. The right is absolute in nature. Any subsidence, however slight, violates it; no minimal limit has ever been set to the amount of disturbance required to constitute the wrong save, apparently, by one English case that has been substantially overruled, and a very few American cases.

The wrong is done when the surface actually falls, and the statute of limitations then begins to run against the right of action. Each new fall gives rise to a new cause of action, and the general view is that recovery must be had in one action, when brought, for both past and prospective damage caused by *that* subsidence. The measure of damages is ordinarily the amount by which the value of the land is diminished by the subsidence. To differentiate between individual subsidences and their respective effects is manifestly a matter of speculation by the jury.

The burden of sustaining particular premises in their natural state, whatever their form or size, and whatever their distribution among different owners at one or at different times, rests upon so much of the surrounding land (regardless likewise of its ownership or transfers thereof) as would in its natural state suffice to support the other. Apparently this must be a band of varying width, depending upon the solidity of its own constitution (of rock, sand, etc.) at different points, and likewise upon the similarly varying constitution of the land to be sustained. One can have but the vaguest idea of the actual situation. Decided cases thus far throw almost no light upon details. If A's land has been mined, this can only lessen the *physical burden* of supporting it. It does not at all affect the legal duty of supporting the land as it was in a natural state, which duty is the same after the mining as it was before; but the "weakening" will affect subsequent negligence of neighbors regarding buildings on the weakened land. If B's adjoining land is thereafter mined and A's land nevertheless does not fall, that does not conclusively prove that A's zone of natural support for his land in its original heavy state is still intact; for A's land is not in its natural state, and, moreover, even as respects present conditions a subsidence might occur only some time after the weakening. Suppose, then, that beyond B's land C's land is excavated, and that the other two tracts fall. If the jury declares that A's land would have fallen had both A's and B's been unmined, clearly C is liable to both B and A.

If the verdict be that A's land either in its natural state or its present state would not have

fallen but for the weakening of B's, should B be liable to A? He rightfully dug so long as he did not disturb A's land in either its heavy or its lightened state; the jury's verdict is not that he did that (and the precedent conditions indicate that he did not), but that C and B did it together. Although the actual physical forces affecting any given tract necessarily balance, the measure of those from a particular adjoining tract are presumably beyond the ability of science to measure. The common law rule is in fact an unworkably crude principle in any save the simplest cases. The speculations of a jury are the only possible result of attempts to apply it.

Although the duty to support adjoining land in its natural state is absolute, that is not the nature of one's duty as regards buildings on a neighbor's land. The only *direct* duty as to them is not negligently to damage them. We may ignore the simple case of acts that would constitute negligence even were the land unimproved, and are therefore more plainly negligent when it is weighted with a building, since such a case rarely occurs. If, then, the excavator does not cause his neighbor's land in its natural state to fall—that is, if the jury finds that in an unimproved condition it would not have fallen—he is not liable for any harm to it when it subsides with a building on it; nor for damages therefrom resulting to the building unless the jury finds that as to the latter he was negligent. But if the jury finds that the land even in its natural state would have fallen he has, legally speaking, caused land in its natural state to fall, though actually there is a building on it. He should therefore be liable, under the general principle of tort law, for the natural and proximate consequences of that act, one of which is the damage to the building. And although the courts have on this point been much divided, the weight of authority and of reason favors the view just stated. It is adopted by the American Law Institute.

It may be a question whether the defendant's acts or acts of nature, such as the alternate freezing and thawing of the ground, cause a subsidence. The ordinary principles of tort law govern such a case. If the digger sets the scene for the operation of natural forces he is liable for whatever conduct is negligent, and the jury finds the facts respecting his negligence and its natural and proximate consequences. One who digs in sandy or otherwise unstable land is governed by the same principle of ordinary prudence, which in such circumstances demands, of course, unusual precautions. Failure of the excavator to notify the owners of adjoining land, in order that they may themselves take such precautions regarding their buildings as they deem advisable, may in many cases tend to show negligence. But as regards the duty to support surrounding land, in its natural state, that duty being absolute, a notice cannot, it would seem, in any degree cast upon an adjoining owner a burden to support his land himself. There is not yet, apparently, in our law a duty always to minimize the harm with which the conduct of others threatens us.

In order to satisfy his duty an excavator may substitute sustaining structures for land removed. In cities of large size, where dangers from excavation are great, municipal ordinances regulate the entire subject.

(c) The third liberty is that of enjoying life upon one's land free from unreasonable interferences therewith caused by uses of surrounding land, or *the right to be free from nuisances.* A nuisance is such a use of one's own land as unreasonably interferes with the enjoyment of life on neighboring land by possessors thereof. It is not, as constantly defined, a harm to the adjoining *land.*

It has been remarked of two of the rights just discussed that they are "absolute." This does not mean that they are absolute because, positively, no one may without liability violate them. In that sense all rights, however defined or limited, would, once they are defined, be absolute. The characterization means that the innocence or malice of the wrongdoer are immaterial as respects his liability, and that the terms by which the wrongdoing is defined—the "enter" and the "fall"—are unqualified. This is not true of the third right now under discussion. It is only a "reasonable" enjoyment of life that is protected; but, also, the interference must be unreasonable. It follows that the enjoyment protected is the reasonable enjoyment of an ordinarily reasonable person. The sensibilities of old, infirm, or otherwise abnormal individuals are not allowed to determine whether a nuisance exists. It has been elsewhere remarked that all communal life involves voluntary submission to some annoyances from neighbors, particularly in cities. Such annoyances are all reasonable.

The right to be free from a nuisance is violated, naturally, when there is a nuisance to the complainant; in other words, only when his enjoyment of (life on) his premises is actually interfered with. The statute of limitations then begins to run.

Nuisances may consist of various forms of annoyance, or in the maintenance of conditions adverse to health or shocking to the moral sense. Some are

held to be necessarily, or *per se,* nuisances. Others are created by performing at unseasonable times or places acts which in themselves are innocent; or by keeping in improper places things which in other places would be unobjectionable. No matter how carefully the site for a business enterprise is selected, how far from persons likely to be annoyed, how expensive the plant, how scientific its operation, how great the loss involved if removal is compelled to another location, the operation of the plant may still create a nuisance. As often said, the necessities of one man's business are not the measure of another's rights. Literally hundreds of acts, businesses, structures, animals, noises, fumes, odors, vibrations, and so on, have been pronounced to be or not to be nuisances under particular circumstances, but with all this variety of facts there is little variation of principle.

It is well established that one may "move to a nuisance" if he will, and then enforce his rights against the wrongdoer. If this were not so, any nuisance maker could destroy property values about him to a still greater extent than he does under the actual rule. Closely connected with this is the established possibility of prescriptively acquiring the right to continue acts which were in their inception nuisances. If this were gained against surrounding *land* as such, without distinction between the uses to which it was put during the prescriptive period and those to which new owners desire to put it later, the destruction of property values would also be immense. The prescriptive right of a soap factory to operate regardless of surrounding truck gardens would prevent their conversion into city lots and the erection of apartment buildings thereon. On the other hand it is equally well established that a portion of a city, at least, may be already so completely abandoned to noise and smoke and dirt that anybody moving into it must accept life there as it is. The reconciliation of these several principles is none too clear in the decisions of the courts. The problem of prescription is involved in the greatest obscurity.

Litigation concerning alleged nuisances is very largely in equity, upon bills for injunctions. Present day equity is in this field modifying conceptions of fundamental property rights even more startlingly than it did earlier in the field of waste. The consequences of the doctrine of "balancing conveniences" have already been referred to.

(d) The last liberty is that of *enjoying stream, surface, and percolating waters.*

The right of *riparian possessors on a natural stream* is to use its waters in manners mutually reasonable. The stream must therefore come to each lower owner without unreasonable detention, diminution, or pollution by the owners above. There is no ownership of the water, even though it flow wholly on the land of one landowner, except of such as has been abstracted from the stream for a domestic use. Otherwise there is merely a right to use reasonably, thereafter returning into the stream all that has not escaped through such use, particularly by inevitable evaporation or percolation. If a lower owner, by damming the stream, backflows higher lands, that is a trespass, and the right of the upper owner to be free therefrom falls, not here, but under the first of the liberties under discussion.

A *natural stream* exists only when it is (very predominantly in its recent history, at least) not a drainage ditch or other artificial creation, and when its waters run in a relatively permanent course, between visible and well defined "banks." Water also runs over the surface of land in directions determined by contour levels which are relatively permanent, and certainly less subject to marked change than a stream's banks, but they are not to a layman visible and well defined. A *riparian possessor* is one whose land abuts, however little, upon the stream, no matter what may be the size of the tract or its shape back from the stream, or the conveyancing history of the whole or its parts. Since any tenant for years has the same rights as an owner in fee simple, it follows that tenants of an owner whose land touches the stream, no matter how numerous they are, no matter how far from the stream their individual holdings may be, no matter how nominal may be their rent or how long or short their tenancies, enjoy riparian rights. Yet a grantee of any of their tracts, because he does not "hold under" the abutting owner, has no rights. Mutual reasonableness of user is relied upon to solve all difficulties. The admirable suggestion in a few cases that the "riparian" area should be limited to the watershed of the stream has as yet no following.

What is unreasonable, to be found such by a jury, depends upon the size of the stream (and if inconstant then upon the season of the year and its consequent condition), and upon the uses to which it is habitually put in the locality, as well as upon the nature of the defendant's specific acts and their effect upon the plaintiff. However, there are uses which are inherently reasonable and uses which are inherently unreasonable. No amount of water taken for "domestic" uses can be unreason-

able; presumably because such amounts were small in England when the rule was formulated. Domestic uses are today generally regarded as including such uses as watering a garden or live stock, as well as uses for drinking, cooking, and bathing. Manifestly then, uses permissible in a private home would cease to be such if the house is converted into a hotel or the garden expanded into a ranch. On the other hand, the decided majority rule is that a sale of water to occupants of non-riparian land by a riparian owner is necessarily unreasonable. Its relaxation is unavoidable when a city borders a stream, whether or not the municipal corporation owns riparian land.

In the western semi-arid states of this country the common law system was at first more or less adopted, but even where so adopted has been displaced by a different system. The basis of this is a right of prior appropriation. Some regard this as merely a special outgrowth of the common law rule of mutual reasonableness. This appropriation system is in turn becoming subject to restraints of reasonableness.

The rules regulating *surface waters* are different.

Surface waters are, in general, not only puddles and at least ordinary ponds, but also such waters flowing over land as cannot be called a natural stream. Stream water that is for a short distance spread out over the surface of land, between two portions of its course within banks, has not been regarded as surface water. The possessor of land may use surface water as he will. He owns it as it lies in stationary bodies; he may, by appropriation, make that which moves across his land his property.

In some states large ponds are subject to special rules, which are in the main rules of mutual reasonableness of user. Likewise, flood waters, although in almost all states they are treated either as stream or surface water, are exceptionally treated as a distinct type of waters, sharing the characteristics of the other two types—of surface water in that they may be freely appropriated, and of stream water in that the water taken must be used upon the land where taken.

Under the dominant view in this country, known as the common law rule, any possessor may with impunity, in the proper "improvement" of his premises—that is, in alterations thereof made by him in good faith for what he regards as improvement,—cast surface waters away from his land in any direction. Although so stated in some cases, it is not established doctrine that it must be diverted in the course of "good husbandry" or "prudent improvement." Quite clearly, it may not be cast off with malice; that is, with definite intention to injure another and without the object of improving one's own land. In all jurisdictions surface water may be cast off over lower land. But in a dozen or more jurisdictions, the lower lying owner may not throw the waters back upon higher land, such jurisdictions attributing to the higher owner, by the so-called civil law rule, the right to have the waters drain downward. There is a little support for the view that the lower owner has a *right* to the benefit of drainage water from above. However, water cast off must not only be, but must be cast off as, surface water. It may not be artificially concentrated and so thrown upon adjoining land.

The use of *percolating waters* has until now been defined in but few cases. A stream beneath the surface with all the characteristics of a surface stream has been so treated. The right of any possessor to draw within his well or pipes all the water, sulphur, oil or gas which his powers are capable of capturing has in recent decades been challenged, but it is a right generally regarded as unqualified (p. 164). However, the sinking of spite wells has been to some extent curbed by judicial action or statute (p. 161), and the attempts which have been made under the police power or doctrines of public utility to restrain free exploitation of gas or petroleum deposits, although up to the present time futile, will no doubt ultimately lead to the establishment of some system of mutually reasonable liberties.

The liberties and rights above discussed are, of course, only a few of those that a landowner enjoys. They are merely those which, both because of importance and because their exercise affects the liberties of other persons, have given rise to litigation.

(1) American Law Institute's "Restatement" (1936), I, Sec. 140.

Non-Possessory Estates in Land

1. Future "Estates" and Future "Interests"

The latter of these words is of broader meaning than the former. An estate has already been substantially described p. 181), and may now be defined, as any title to or interest in land that either includes possession of land presently, or may confer possession of it in the future. This definition is not precisely that adopted by the American Law Institute.

In accordance with this definition, tenancies less than freehold have been included in the preceding chapter as estates of present enjoyment. They were not such in ancient law only because seisin was then different from possession. The present chapter deals with non-possessory estates, that is with estates that either will or may give possession in the future; and also with some other future "interests." On the other hand, interests that have never included possession of land, and therefore cannot be "estates," are discussed in the following chapter.

Various interests that may confer possession of land in the future have never, by mere literary tradition, been discussed in law texts dealing specifically with future interests. Such, for example, are dower inchoate, curtesy consummate, and (although this has disappeared from our law) the right of escheat. Brief reference has occasionally been made to these interests in works on future interests. Still other interests exist that may confer possession; the mortgagee's right to foreclose for default; the mortgagor's power against a mortgagee in possession to terminate that possession, by payment; the power of a person named as grantee in an escrow instrument to perfect it as a conveyance by performing a stipulated condition. It is manifest that other qualities of these last three interests, and likewise of the first three, are of great importance, and have naturally led to their classification and discussion in other portions of the law than future interests. Another interest included within the definition of "estate" as above given is a general power of appointment, exercisable by appointment to the holder of the power; and the taxation of the property over which the power exists (p. 458) as belonging to him is good evidence that the future enjoyment aspect of the interest is in this case evident and important. Nor is it, indeed, less evident in any one of the other cases mentioned. Finally, enjoyment of interests that never confer possession may be made to begin in the future. This is true of rents, easements and profits, which will be described in the next chapter, but without special reference to that aspect of their nature. These, too, have been referred to as future interests, although not discussed as such in detail, by eminent authorities.

The American Law Institute excludes from its definitions of "estate" and "future interests" all the interests mentioned in the preceding paragraph. The question whether it is impractical or undesirable to discuss them under the head of future interests or estates has, however, nothing in common with the question whether they are logically identifiable as future interests, which they seem to be.

2. The Origin of Future Interests

It has several times been emphasized that from its earliest beginnings our property law has always included both tangible and intangible things; and sei-

sin, as the fundamental medieval conception in thinking about property, was naturally extended to both. It is somewhat puzzling that the use of "seisin," originally so wide and loose, should have become so restricted and technical in application. It seems possible this is where feudal influence made over to some extent the doctrines of seisin (and therewith of divided ownership) which it took from the Germanic land law, and which were its legal basis as an economic system. Every piece of land was a feudal fieff or a part of some fieff, and the greatest need of feudalism was that all land should be in the actual seisin of someone liable for performance of the feudal services. Hence arose the fundamental rule of our feudal law that no freehold could be created to begin in the future.

But even in early centuries it was more or less clearly realized that the law really deals with rights in or title to things; hence "seisin" was extended to mean the holding of an estate, or tide, by virtue of which one had a right of present or future enjoyment (and, indeed, was once used in referring to various individual rights in no way resembling the titles that were estates). This attribution of seisin to incorporeal things, and especially to estates, tended to assimilate them in legal thinking to tangible things, and made it seem natural to do with the estate whatever could be done with land; hence, to cut it up, give to one man an estate entitling him to present enjoyment of the land, and to another an estate entitling him to subsequent enjoyment (p. 182). Both were seised of their respective estates, and in the beginning no interest of which there could not be seisin was recognized. This recognition of vested future estates in reversion and in remainder (which were at first alone recognized) only appeared superficially to violate the fundamental principle above stated, since the holders of those estates, after the holder of the particular estate upon whose termination they were expectant, would perform the feudal services successively. On the other hand, to grant an estate of future possession *without* a precedent estate of present possession, in other words across a gap (for the continuing possession of the grantor was, with complete neglect of logic, disregarded) remained impossible until 1535.

This idea that a man could hold a present "vested" right to future enjoyment was the basis of the interests discussed in the present chapter. It has been remarked (p. 182) that they are peculiar to Anglo-American law. Originally confined to the land law, they have come to exist to a large extent, rapidly expanding, in terms for years and in durable tangible chattels. All persons to whom partial interests are given, and who thereunder enjoy or may possibly enjoy possession as preceding interests end, are owners of their partial interests (the content of ownership varying with the nature of the interest), and all together hold the complete title, with which, save in rare situations, they alone, jointly, can effectively deal.

3. Common Law Future Interests

(1) REVERSIONS. A reversion is that portion left of any estate after its holder creates out of it a lesser estate in another person or persons, or several estates of total lesser quantity in several persons. It is called such because, after the termination of such subordinate estates, the land reverts (such was the language of ancient conveyances) into the possession and enjoyment of him who then holds the unexhausted portion of the estate out of which they arose. An owner m simple, therefore, has a reversion after he creates therefrom one or any number of estates for life or in tail (although in some jurisdictions only a limited number of such derivative estates following each other may be created). Likewise, an owner in fee tail who grants therefrom one or more life estates has a reversion. It is assumed in the preceding statements that lesser "estates," merely, are created. Two points require attention.

The first involves no difficulties. It is, that if the holder of any estate grants to another person an interest in the land, such as an easement, which is both non-possessory and no estate, the grantor still retains all his estate, and not merely a reversion. The right of the grantee in the land is a mere incumbrance on the grantor's title. This is equally true whether the grantor holds a freehold or a term for years (p. 284).

The second point is one of greater difficulty. It has been traditional, in defining a reversion, either to assume or explicitly to state that the lesser estate granted out. must be a freehold. But since terms for years are estates, therefore the name reversion, as above defined, should be given to what a grantor retains after creating one or more terms of years, no matter whether they be granted out of a freehold or out of a larger term. And this conforms to the constant daily speech of lawyers. In that, a termor who grants a sublease and an owner in fee simple who grants a term are equally "reversioners." The reason why many writers have not, in their formal definition of a reversion, included thereunder the interest left after giving out

a term is a medievalism. There was no reason in modern times for distinguishing in any way a reversion after a freehold from one after a tenancy less than freehold. Nevertheless the law does make distinctions of importance. In particular, a widow is allowed dower in the latter, but not in the former. She has dower in freeholds of which her husband was "actually seised" during coverture. He has no *possession* of land upon which there is a tenant throughout the time while he holds the reversion; his "seisin" can only be of a right or title, yet it is called an "actual seisin" of the land, and the widow has dower. But the reversion of which he is seised after a freehold is not called "actual," and no dower is allowed. There was some basis for this distinction five centuries ago. The feudal law required someone to be always in "actual seisin" of land, in order to perform feudal services. As the termor had only a possession which the law did not until the mid-fifteenth century even protect as property, actual seisin was attributed to the reversioner. Not so as regarded a freeholder who held under the reversioner. Today the distinction is an absurdity.

A beginner may be puzzled by the use of the term reversion when estates are created out of a fee simple, in view of the facts that a reversion is a "part" of an estate originally larger, yet is still, in the case in question, a fee simple of supposedly infinite duration. Sometimes the law's reasoning regarding the fee simple was consistent and sometimes inconsistent (p. 187) with the conception of that estate's infinite duration. However, much that passes for "the theory" of the old law has been merely succor offered it by expounders who sought to rationalize its rules. Such is apparently the conception in question. It is not essential to the theory of a fee simple, but it is an aid in understanding various old judicial doctrines.

If one grants away all his interest, certainly he can retain nothing. But whether this is equivalent to the statement that no "reversion" is possible after granting a fee simple "estate," depends upon the meaning of "reversion" and of "estate." The old law recognized a possibility of reverter and a right of entry in such a case, but not a reversion; and certainly the idea that those two interests should be called "estates" is very modern. The American Law Institute still goes no farther than to call the possibility of reverter "reversionary," but both it and the right of entry are classed as "estates."

The *law* creates the reversion simultaneously with the creation of derivative estates by their grantor. This distinction had important consequences.

The reversion is always vested "in law" while it exists. It ceases to be a reversion when it takes effect as an estate of immediate enjoyment. It is then said to vest "in possession." Being always vested, in one or the other sense, it was freely alienable, and (save by a tenant in tail holding one of the subordinate estates) indestructible.

(2) VESTED REMAINDERS. Although a reversion is that portion of his estate, if any, which remains in a grantor of other estates, it is *not* a "remainder," because such was not the language of ancient conveyances. If 0, the owner of land in fee simple, grants to A an estate for life or in tail he can also provide, in the same conveyance, that on the ending of A's estate the land shall "remain out" in B and his heirs forever. This is a remainder. If it were not given in the same conveyance with the other estate, a reversion would previously arise in 0, and the grant to B would be merely a transfer of that reversion—or; as we ordinarily speak, a conveyance of 0's title. When the two grants are simultaneously made there is no reversion or transfer of such. A. remainder can only exist when at least two estates are granted at the same time, the first an estate of present enjoyment called "the particular estate" *(particula,* part), the second the remainder. Of course, a reversion may or may not follow all the estates so granted.

In the old law the estate of the grantor was necessarily one of actual seisin, but it has earlier been stated that we have in this respect rid ourselves of medieval doctrines regarding seisin (p. 52). It is still true that the particular estate is always one of present enjoyment.

Because of old ideas regarding livery of seisin a remainder must follow upon a preceding estate with absolutely no gap between them. Neither can it overlap, and so in taking effect cut short, a preceding interest. It must take effect immediately upon the expiration, or termination otherwise (p. 183), of the preceding estates, or it will never take effect. When the particular estate ends, a later estate takes effect in possession. A remainder following it, if contingent, may take effect in possession or may fail. Even a vested remainder following it, although it will normally, need not necessarily, become an estate of present possession. It is necessary, therefore, to explain the nature of vested and of contingent remainders.

Since a remainderman must take the land when preceding estates end, he must then be a living and identified, or perfectly identifiable, person, and any other contingency upon his right to enjoy must have ended

before or must end at that moment. When there are no uncertainties of his identity, and when his right to enjoy is subject to no conditions, his remainder is vested "in law" and qualified to vest in possession. In words almost classic, he stands ready to take the land in enjoyment whensoever and howsoever the preceding estates determine. Thus, if 0 conveys to A for life, and then to B for life, B holds a remainder because the limitation is capable of taking effect immediately upon the termination of A's estate, since B may outlive A. And the remainder is vested because, although B will never enjoy if he predeceases A, yet while he lives his right to enjoy when A's estate ends is unconditional. It is not uncertainty of enjoyment, but only a condition affixed to the right of enjoyment, that makes a remainder contingent. No remainderman has possession of the land, but vested remaindermen are said to be seised or to have seisin in law.

It is remarked above that we have rid ourselves of one medievalism regarding seisin. Other medievalisms remain with us. If a grant was made to A for years certain, then to B for life, A could retain no seisin, but that required by B's freehold was supposed to pass to him through A when livery was made to the latter. And though B had no possession he was attributed "actual seisin" of the land, so that his widow had dower, as in the similar case of a reversion above referred to: On the other hand, B's interest could not under the old law be a remainder, because it was preceded and supported" by no estate of seisin; nor therefore by any "estate" in the old-time sense. Even modern writers have generally denied it the name "remainder," describing it as an estate of present seisin, subject to A's prior rights of immediate enjoyment. In fact no seisin passes today to anybody; B has no enjoyment until A's term ends; his interest must, normally, then take effect; and everybody who is not writing a book calls A's interest an estate and B's a remainder. The American Law Institute terms the interest a remainder. There is no utility in the old phraseology; it merely leads to anachronisms, like the one preceding, whose sole basis is this continued distinction in words between seisin and possession, although their original difference in fact has (save for such anachronisms) long since disappeared.

The vested remainder was always alienable by deed or (after 1540) by will, is immune to the rule against perpetuities, and (save by a preceding tenant in tail) is indestructible. It is of corresponding value to creditors, and liable to sale under execution to satisfy their claims.

(3) POSSIBILITY OF REVERTER. This interest was created by conveying a fee simple, terminable, however, upon the happening of an event certain to occur at some unpredictable time. Such would be conveyances "to A and his heirs tenants of the manor of Dale"—that is, "as" or "so long as they remain" such tenants; or, "while the Washington elm shall stand"; or, "until the Washington monument shall fall." The estate granted is a fee simple because its manner of devolution so indicates. It is a fee simple despite its termination short of an infinite duration: first, because such duration is not really a requirement, as already remarked (p. 187); second, because the time of occurrence of the event that will end the interest is wholly unpredictable; and third, because (although other estates may be similarly terminable by a conditional limitation) this estate, by its explicit limitation, cannot be classed as any other than a fee simple.

When the event happens, the estate, in accordance with tile terms of the grant specifying its ultimate duration, instantly ends. Moreover, enjoyment then reverts to the grantor or his heirs. In the old law the reason for this, doubtless, was that someone must be actually seised, to perform feudal services. No act of the grantor is necessary; the right is created by law, its operation is automatic.

The right is manifestly akin to a reversion. (The name "right of reverter" would be more correct, but the traditional name better distinguishes it from a reversion than would the mere difference between "reverter" and "reversion). Many scholars, however, have regarded it as akin to escheat, and have therefore argued that after new subinfeudations were abolished in 1290 no possibility of reverter *could* be created. The theory is none too convincing; but at all events it has no relation to actual law. Possibilities of reverter exist in great numbers. Their most usual mode of creation is by conveyances of lands to private associations or political subdivisions of the state for use as cemeteries, for church purposes, or for parks or streets.

It was long the law that the possibility of reverter could be enjoyed by the grantor or his heirs only. It descended to heirs, (apparently inseverably), but was inalienable by conveyance during life of its holder, or by will. This was an application of the general rule that mere expectancies could not be aliened, and in consequence were not "property" (p. 6). But this possibility *was* from the beginning property. Inconsistent decisions inevitably resulted both as re-

gards transferability by deed and by will. The American Law Institute states the present law as freely permitting conveyance. The right is always "vested," and therefore not subject to the rule against perpetuities.

(4) "CONDITIONAL FUTURE INTERESTS Before discussing rights of entry for breaches of conditions subsequent, it is well to point out that by no means all interests which a layman would call conditional bear that name, specifically, in the law.

It has just been seen that a fee simple granted to A and his heirs only "so long as the Washington elm stands" is not technically known as a conditional estate. Neither, very often, is the right of entry for breach of a condition subsequent, the name being shortened to "right of entry," or "right of entry following a fee simple," simply. The names of the two interests are very dissimilar, the legal characteristics likewise. Nevertheless, their confusion by careless judges is annoyingly common. It has also been seen that an estate to a woman "during widowhood," that is for life provided she does not remarry, is called simply a life estate. if land be given to A for life, and on his death to the eldest child of B, a bachelor, in fee simple, a layman might say that the right to take under the remainder is conditional; but the law actually calls it contingent. When any estate in land is given to A upon the happening of some event, or upon performance by somebody of some act, or after an absolute gift to A is given over to B upon like conditions, the technical names of such interests are different according as they are created by will or by deed, but none of the traditional names includes the term "condition" or "conditional."

It is therefore of the utmost importance to employ precise names, and preferably those approved by tradition. This is by no means an invariable judicial practice. Some courts call the fee simple determinable a "base fee" because of the infirmity that may end it, and others use the same name to designate any fee subject to a condition, notwithstanding that the term was already appropriated in older law to designate a defeasible fee created by a tenant in tail (p. 191).

(5) RIGHT OF ENTRY FOR BREACH OF A CONDITION SUBSEQUENT. This interest is created when a fee simple (or lesser estate) is conveyed with a right reserved to enter and terminate it upon breach of a certain condition, which is usually with relative explicitness described as such. The right of entry is today the most distinctive characteristic. Although the use of words of condition is less characteristic, such phrases as "on condition," "provided that," "but if," are very commonly employed in creating it, and should invariably be used.

Unlike the fee simple determinable, the estate now in question does not instantly end upon the happening of that which constitutes a breach of condition. The breach is merely cause for forfeiture, which may either be waived or enforced by entry. In early centuries this was an entry made by way of self help; for a long time, as already noted, it has been made under judgment of a court in an action to recover possession.

This interest was heritable but wholly inalienable at common law. As in the case of the possibility of reverter, in-consistent decisions resulted in recent times. The American Law Institute recognizes, of course, its descendibility, but only with reservations its severability by descent; recognizes its devisability; with qualifications, its severability by devise to different persons; and its limited transferability *inter vivos*—particularly by quitclaim among the holders of the right, or by release of the power to the owner of the fee subject thereto, made to him jointly or separately by holders of the right of entry. Attempts to convey it otherwise result in its destruction, save in a dozen states whose statutes either specifically declare it alienable or declare alienable "any interest in or claim to" land. Great differences of opinion have existed as to whether the rule against perpetuities applies to the right. The Institute declares positively that the rule is inapplicable; in other words, that the interest is vested. Since there is. no contingency attached to the right, the only uncertainty being as to when the opportunity to exercise it may arise, that conclusion seems to be inevitable. The result might nevertheless be regarded as highly undesirable, since the title is incumbered with a remote possibility of termination. But this is equally true of the possibility of reverter, and is therefore of no great weight. The American authorities fully sustain the Institute's view.

(6) CONTINGENT REMAINDERS. Although not recognized, as already noted, by the most ancient common law, the validity of contingent remainders was judicially established by 1430. Their recognition, involving a decided modification of original ideas regarding seisin, and the perfection at virtually the same time of ejectment, which gave complete protection to non-freehold interests as property, evidence as clearly as could any two events the obsolescence of feudal principles.

A contingent remainder exists when the right of the remainderman to take the land

upon the determination of all prior estates is subject to some condition that might in fact be satisfied either before, at, or after that moment. In a conveyance to A for life, then to B for life, the remainder is vested, for reasons stated above. In a conveyance to A for life, then to the eldest son of B, a bachelor, in fee simple, the remainder is contingent. There is no right in any person to take until two conditions are satisfied: B's marriage and the birth of male issue therefrom. Until then there is not even any remainderman holding a contingent right; the right becomes a vested right at the same moment that there is a remainderman to hold a right.

Suppose a grant to A of a term for years, the fee simple then to B if he outlive the term. Under old views, B could not have here any remainder for the reason, already noted in discussing vested remainders, that no freehold precedes it. There could be no contingent remainder for the additional "reason" (merely another mode of stating the same idea as the preceding) that no seisin could remain in A, nor could any be given immediately to B—for then he would have an estate expressly excluded under the words of the limitation; and since there could therefore be no seisin in either A or B, the attempted gift to B wholly failed in an age permitting the creation of freeholds solely by livery of seisin. When that requirement ceased, there was no justification for perpetuating its consequences in a conveyancing system based upon deeds. But this was done. Another means was later made available for giving B an interest identical in substance with the above, and securely—namely, by way of uses; but even that device was long made doubtful by the above ancient doctrines (p. 263).

A grantor's estate is still exhausted, in whole or in part, only to the extent that he has given out estates therefrom that we still call "vested." If it be not exhausted, therefore, by vested limitations preceding a contingent remainder in fee simple, that remainder does not lessen it, and a reversion necessarily remains in the grantor. It is impossible to assign any reason for this other than the law's old reason that only the subtraction of seisin from an estate could reduce it, and no seisin could be subtracted to clothe contingent estates. When these vest they take seisin from the reversion, and may exhaust it.

Contingent remainders, although always "property," were for centuries interests of slight value because they were imperfectly alienable and easily destroyed. The danger to them lay in the requirement that a remainder must take effect, if ever, when preceding estates end. The event whose happening removes the contingency from a contingent remainder must therefore happen before or at the moment when preceding estates end. Originally, such an attempted interest was void because a gap *might* occur between possession under the two interests; after 1430 it was not void, but failed if the gap *did* occur. The remainder above given to the eldest son of B, a bachelor, will fail if such be not born when A dies. If the limitations be to A for life, then to B's heir in fee simple, B must predecease A in order that his heir may be identified in time. But in both of these cases the contingent remainder equally fails if the son is born to B, or the heir of B identified, while A lives but *after* A's life estate has for some other reason terminated. In other words the contingency must be removed from the remainder before the termination in any manner of the preceding estate. To say that a remainder is vested is to say that the remainder-man is standing ready before the preceding estate ends to take possession upon its termination. To say that a contingent remainder fails is to say that it does not vest in time, or that the remainderman is not ready to take possession when the moment for so doing arrives.

Under these principles it was easy, and a common practice, to destroy contingent remainders by prematurely destroying the estate upon whose ending they were expectant. This could be done, whenever a reversion immediately followed the remainder, by collusion of the reversioner and particular tenant. Suppose the limitations are to A, a bachelor, for life, remainder in fee simple to A's first born son. If A and the reversioner conveyed their estates to C, their lawyer, the two merged and "squeezed out" or destroyed any contingent interest between them. The "between" is manifestly purely imaginary. No vested interest could be thus destroyed.

Since varying dates in the last century the rule of destructibility has been abolished judicially or by statute in slightly more than half of our states. The American Law Institute, in its Restatement of property law, has therefore declared indestructibility to be the present general law of the country; it has also in its proposed Uniform Law of Property Act included the abolishment of the old rule of destructibility.

Contingent remainders were originally inalienable by any legal methods. For some reason they became alienable by fine or by common recovery, but those methods could certainly have been little used. A policy favorable to their destruction led the law courts to permit their trans-

fer by release to the holder of a vested estate, possessory or future; chancery, protecting them, made their assignment good in equity, and enforced specifically contracts for their conveyance; the law then recognized an equitable estoppel as raised against a grantor by any deed with covenants purporting to convey them, and consequent automatic transfer if and when the remainders became vested (p. 443). During the last century statutes have very generally made them alienable while contingent. Consequently, the rule of transferability is stated as law by the American Law Institute. Severability by partition is also unqualifiedly recognized, subject to contrary provision by the creator of the remainder. The rights of creditors depend, of course, upon its alienability by the debtor.

The law has shown greater favors to a remainder whose contingency relates only to the event upon which possession of the land depends than to one whose contingency relates to the ascertainment of the remainderman. It tends, also, today to impose more burdens upon the former, at least as respects taxation. Evidently the former can more readily pass by descent and be more readily conveyed; but inheritance and alienation of the latter are not in all states impossible.

4. Future Interests under the Statute of Uses

Any estate heretofore discussed, of present or of future possession, could be created by way of uses; that will be seen later in discussing the conveyancing operation of the Statute of Uses (pp. *395—6).* But the Statute also made it possible to create interests unknown to the law before its passage—in particular freeholds *in futuro* and new types of conditional estates. It was necessary to name these novel interests, and because they arose by way of uses they were called *future uses.* It is very important to realize that although called "uses" they are not the equitable interests known as uses before the Statute, nor the equitable interests known as trusts after the Statute, but *legal* interests. The Statute declared that he to whose use any other person had theretofore stood seised of any lands should thenceforth "be . . . ad-judged in lawful seisin, estate and possession of and in the same" lands; and (repeating it for emphasis) "that the estate, title, right and possession" formerly in the feoffee to uses should henceforth "be" in him who was formerly entitled solely to the use. The future uses arising under the Statute were "executed" uses, upon which the foregoing provision of the Statute had operated. They were legal interests clothed by the Statute with seisin if freeholds; clothed by the Statute *and by entry* with possession if terms for years.

Inasmuch as one could not stand seised of a chattel real, no interests by way of use could be created out of it, either by a covenant to stand seised or by any other ordinary conveyances to uses. But future interests can be created in them by other methods (p. 349). And one could stand seised of a freehold to the use of another person for a term of years.

Attention must now be directed to a principle of construction which is strikingly illustrated in the law of future interests, and the only explanation of several of its most fundamental rules. It was long acted on, to be sure, before it was formulated as a rule; but so were remedies regularly granted long before the formulation of the right they came to presuppose. This principle of construction is that a statute must always be strictly construed because it is in derogation of the common (unenacted customary) law. One application of this resulted in the rule that if a future interest is so limited by way of use that it *can by possibility* take effect as does a common law interest, it *is* such an interest. For example, if it can take effect as does a remainder, immediately upon the termination of the preceding estate, it *is* a remainder; and if the right be conditional it is a contingent remainder, and subject to all the common law infirmities of that interest.

The name FUTURE USES is employed, therefore, only *(a)* to designate interests by way of use which cannot by any possibility take effect as common law interests; and *(b)* to indicate uses that are no longer uses. There are two types of future uses.

(1) *Shifting uses* arose when a second (estate by way of a) use was limited to begin upon the occurrence of an event whose happening would also necessarily terminate the preceding (estate by way of) use; so that the use shifted from the holders of the first to the grantees of the second estate. Thus, if land be granted to the use of A and his heirs, but if A die without issue him surviving, over to the use of B and his heirs, A is first given an interest that may last for centuries, and then it is made terminable upon a contingency at his own death. The taking effect of B's interest involves the cutting short of A's, It is frequently said that they "overlap," but manifestly they do not.

Various reasons may be given why such interests, could they have existed, would have been undesirable in a feudal system of society. There can be no doubt, however, that they were

impossible under the old law, and not merely because they were undesirable. That law did recognize possibilities of reverter and rights of entry after a fee simple, and those involved a taking back of the seisin by the grantor. But to have allowed seisin to shift automatically from one grantee to another, without an intermediate entry, would certainly have violated fundamental principles.

(2) *Springing uses* were equally an impossibility under the old doctrines of seisin, but for a slightly different reason. A springing use arose when a use was limited to begin on the occurrence of a future event, but in such manner that it would not begin precisely upon the ending of a preceding use. No other use *need* be granted before the springing use; no other *could* be granted to precede it, but to end when it took effect. Thus, the conveyance might be to the use of B for life beginning next Christmas; or to the use of A for life, and one year after his death to the use of B and his heirs. In both of these cases the springing use is preceded by an estate, and seisin, in the grantor; there is, strictly, no "gap" before the springing use. But the period of holding by the grantor is always referred to as such, and will therefore be so referred to in this essay. A gap, in this sense, is a period unfilled by estates granted out (p. 244). The real difficulty was that a vesting in law was a favor shown only to a few old interests of the common law; and even they enjoyed it only because preceded by an unbroken chain of estates expressly limited, and beginning with one of present seisin. Future uses could never vest at all until they vested in possession upon taking effect. Consequently, under early common law no such interests as the above could have been given to B, because livery of seisin was the sole mode of creating a freehold, and seisin must be presently delivered, not prospectively. Mere words could not automatically transfer it in the future, and nothing more is here provided to pass seisin at the future date.

The attentive reader will here remember that the preceding statements conflict with the facts regarding possibilities of reverter, and with those after 1430 regarding contingent remainders.

It has often been suggested that there was no reason, after the recognition of springing uses, why a contingent remainder should have remained destructible when the contingency was removed only after the termination of the preceding estate. The reasons that can be offered are not convincing to us today. One is the rule of construction just

referred to: a *statutory* declaration (and that not specific, but only by indirection) that a future use should be good despite a preceding "gap" was no reason to the common law courts for altering the *customary* law regarding contingent remainders. A second is only another way of stating the first. Executory limitations, creatures of statute, change freely into reversions and remainders of the common law as preceding estates take effect in possession or disappear, but the reverse process was apparently never permitted in early centuries. When the preceding estate ended before the contingent remainder vested, it was not saved by turning it into a springing use (if created by way of uses) or into an executory devise.

However, it would be mere wantonness of destruction to construe an interest as a "void remainder" or a "void contingent remainder" (a contradiction in itself) instead of construing it as a good executory limitation. In a conveyance to the use of A for ten years, then to the use of B (or use of his heir) in fee simple, the interest of B (or of his heir) was always good as a future use, or as an executory devise if created by will without uses. Today it should be good, as already seen (p. *256),* as a remainder; the difference between the different types of interest disappearing to that extent.

What has been said of the alienability of contingent remainders applies in general to executory limitations by use and by devise. It is evident, since a contingent remainder cannot vest until the contingency be removed (either as respects the person to take or his right to take), that it is subject to the rule against perpetuities.

5. Future Interests under the Statute of Wills

All of the preceding discussion of future uses is applicable to executory devises. All estates, of present and future enjoyment, known to the common law could be created by will. Every interest so created which can by possibility take effect as a common law interest *is* that common law interest. Common law interests are creatable by direct devise; and if the devise be to uses, then the interests thus created are equally common law interests if they meet the requirement just stated.

But interests could be created by will that were unknown to the common law. In this respect precisely the same novel interests that were creatable under the Statute of Uses could likewise be created under the Statute of Wills (1540). Gifts of land by will are devises; and devises whose taking effect was prospective were called "executory." *Executory devises* is there-

fore the name of future interests created by will, but this name is applied solely to those gifts by will which cannot possibly take effect as common law interests.

They may be of the same two types as are future uses, but springing executory devises and shifting executory devises are not often referred to by those names. Moreover, both devises and future uses are frequently covered by the single appellation "executory limitations."

No executory devise vests until it vests in enjoyment, and until then it is subject to the rule against perpetuities.

6. Distinctions between Various Future Interests

There are three chief distinctions between the various interests just discussed.

One is their origin: some of ancient custom, some under a statute of 1535, others under a statute of 1540. Of all parts of the property law that of future interests is most marked in its basic ideas and corresponding terminology by medievalism. One cannot really understand its principles without attempting to think with the minds of those to whom "seisin" was a living conception, not merely as "possession," but also as more mystic conceptions such as "capitalism," are living to us today. From our present day viewpoint, these diverse origins should, of course, be regarded as mere historical accidents. Nevertheless it will later appear that our creation of future interests is still considerably influenced by them. Other differences of real substance resulted from the fact that, originating as they did at different times, the attitude of courts naturally varied when questions arose regarding the characteristics of each interest.

There may very well have been a time when enjoyment of future interests was only possible after the interest became one of actual seisin of the land. But in the thirteenth century the law had passed far beyond that stage. Seisin of the "estate" had made possible the attribution to it of various property characteristics while still non-possessory. It was pointed out at the beginning of this essay that alienability is one of the most essential attributes of property (p. 6). Manifestly, indestructibility is likewise of great importance even though not indispensable. The important early history of future interests as known to us is a history of these two characteristics. Their modern history lies both in their continued development as complete property interests, and in their increasing emancipation, as respects classification and qualities, from feudal fetters. Litigation has involved in great numbers of cases their liability to the claim of creditors, the adjustment of losses and gains to the land among the holders of successive estates, the representation in litigation of some by holders of other interests, and the relations of co-owners of future interests. All these developments manifestly emphasize their *present* property aspects. The increasing importance of the subject is due to the rapidly increasing use of future interests in this country. They are constantly involved in litigation over wills, trusts, and taxation. Perhaps no other field of property law is so rapidly developing.

Tendencies toward assimilation have appeared even in the preceding brief description. Future uses and executory devises have always, save as regards their mode of creation, been almost indistinguishable. When contingent remainders following a gap became indestructible, such remainders became very much like executory limitations. Contingent remainders not in fact presenting a gap, because the event removing contingency happens before or at the moment when the preceding estate terminates, still appear as a distinct interest. Possibilities and rights of entry have become so confused in an age of relatively informal conveyancing that the courts first confused, and now frequently venture to ignore, their differences—which, nevertheless, remain quite real.

Uniform legislation will probably soon make all future interests indestructible and equally alienable. Relatively little but accidents of form due to origin at different times will then distinguish them. As a matter of fact even some of those distinctions are tending in American conveyancing toward obsolescence. So long as those remain, a careful adherence to distinguishing names is indispensable.

The above discussion of remainders has distinguished only vested and contingent remainders. As a matter of fact distinguishing attributes of great importance are clustering about subdivisions of these two forms. The American Law Institute classes remainders as of four types: those indefeasibly vested, those vested as to right but subject to opening to let in additional persons who share thereunder (in "class" gifts), those vested subject to complete defeasance, and those subject to a condition precedent (or contingency as respects the right). These distinctions cannot, in this outline be more than mentioned. The distinction between remainders contingent as to taker, and those otherwise contingent, was likewise mentioned (p. 258).

7. Adjustment of Interests of Holders of Particular and Expectant Estates

The chief liberties and rights held by the tenants of all pos-

sessory estates have been mentioned (p. 228), and likewise the restraints imposed upon their exercise by the doctrine of waste (p. 224) for the protection of persons holding estates of future possession following their own. As the complete title to the property is in the owners of all successive interests, such protection is essential. Many restraints exist that fall outside the rules of waste. They have been developed almost exclusively in litigation involving the rights and duties of life tenants as tenants of the particular estate.

The law protects the interest of all estate holders m insurance taken to protect all. It compels all to share in the payment of general incumbrances and special assessments, giving to the holder of any estate a lien on other estates for payments he makes on behalf of other estate holders. It gives the life tenant a lien on subsequent interests to secure his right to reimbursement for permanent improvements which he reasonably makes, or which he is compelled by public authority to make. The holders of subsequent interests have a lien on the life estate for the payment by them of taxes, managerial expenses, or other current charges which the tenant for life fails to pay, though receiving the "issues and profits" or, preferably, the "rents and income" from the land. The life tenant is permitted to recover from a wrongdoer who damages the land no more than damages for the harm done to his individual interest. The holder of any subsequent interest (cf. p. 184) is privileged to enter upon the land when necessary to protect his interest. The life tenant is required to account to the holders of other interests for the proceeds of any act of waste. He is even under a duty not to cause nor accelerate the termination of a later defeasible estate by neglect of any of the duties just mentioned, or otherwise.

8. Estates Held in Co-ownership

Any interest in property may be held by more than one person. This is true even of those interests which will be discussed in the following chapter. But some of these forms of co-ownership are particularly important; they are estates in land, and corresponding interests in personalty, and have peculiar characteristics. Some are surviving antiques and some are recent social products, but each is unique, and all are characterized by a casualness that is repellent and by inconsistencies which make impossible any attempt to systematize them. What is here said of them applies, particularly, to the estates of present enjoyment discussed in Chapter VII, because many of their characteristics are not in evidence while the interest held is non-possessory.

Such co-ownership exists in our law chiefly in four forms—tenancy in common, joint tenancy, tenancy by the entireties, and community property. A fifth form, very important in the older law, that of co-parceners, is nearly obsolete in this country. What might be classed as a sixth form, the interests of partners, is of great importance, but falls within the field of another volume of this series.

(1) TENANCY IN COMMON. Tenancy in common in land may arise from conveyances by deeds or by wills, and in personal property by any acts appropriate for the transfer of title; and also (in this country, since the disappearance of primogeniture and exclusion of females have long changed common law rules) by inheritance. In modern times such interests in personalty have become very common. The interests of the various tenants in common may arise at different times and by virtue of different acts of transfer, and they need not be equal, that is, one may be for life and another for years or m fee simple. Each tenant owns a distinct share (and the shares may be unequal) of an undivided whole. Of that share he may dispose as freely as of any interest held in severalty, and his transferee takes precisely the grantor's place as a tenant in common. Similarly, such a tenant can bring a separate action for protection of his interest. If undisposed of, his share passes to his heirs, or next of kin. As his property, it is always subject to the claims of his creditors. Any tenant in common is therefore entitled to possession of the whole property; no one of the tenants in common may oust another from possession; but the one m possession must account to the others for rents and profits, and is liable to them for waste. It follows that a "lease" given by one tenant to a stranger entitles him to no possession of any specific portion of the land. He is either a licensee or, with the others for the period of the lease, another tenant in common. Any tenant may demand partition of the common property, and consequent assignment to all tenants of wholly separate holdings.

(2) JOINT TENANCY. Joint tenancy may also be either in land or goods. It is similarly created by transfers of title, but the joint interests must ordinarily all arise at the same time from the same title transfer (though not necessarily if created by deeds operative by way of uses, or created by will). Also, the rights of all to take or hold possession of the joint property are equal at law; although equity might

make their beneficial interests unequal. But a joint tenant does not own a distinct and partial interest, though unsevered, in the whole property: all the tenants own it together; there is really no share in any one. So, if one joint owner dies the others continue to own all; it is usually said that they "take" all by survivorship, but most properly they retain all—from the dead co-owner they take nothing. His heirs or kin, therefore, take nothing. Nevertheless all the tenants are entitled to equal shares of rents and profits, and one in sole possession must account for them and is liable for waste. Moreover, a joint tenant can "sever the joint tenancy"-that is, end the joint title—by making a "conveyance" to a stranger. As just said, there is no conveyance of a pre-existing separate share. Neither is there a transfer of the grantor's interest *as* a joint tenant; for the grantee does not take the grantor's place as a joint tenant. If there were originally only two tenants, the grantee of one holds thenceforth as tenant in common with the other; if more than two the grantor's former co-owners continue to hold as regards themselves a joint tenancy, but together become a tenant in common of the entire property with their former fellow's grantee. However, his conveyance does defeat their right of survivorship as to a portion of the property (as to one-third if there were originally three joint tenants); does make his transferee the owner of that separate though unsevered portion; and does enable the latter to force partition and the assignment to him of a segregated holding.

The interest of a joint tenant may be taken by his trustee in bankruptcy or may be sold under execution upon a judgment secured against him, and this, like a voluntary transfer of his interest, severs the original tenancy.

When the exact nature of a co-tenancy was unclear there was under the old law a presumption of joint tenancy; but under American statutes a tenancy in common is presumed, and some have abolished joint tenancy or at least the right of survivorship. Even statutes of the latter type began in this country long ago. Those of the former and less extreme type were preceded by many decisions establishing a similar reversal of presumptions in equity courts; and law courts in this country have followed the same path, independently of statutes. More than a century ago Kent wrote that "in this country the title by joint tenancy is very much reduced in extent, and the incident of survivorship is still more extensively destroyed, except"—as remains true today—"where it is proper and necessary, as in the case of titles held by trustees."

(3) TENANCY BY THE ENTIRETIES. Tenancy by the entireties exists only when a grant or devise is made to husband and wife in terms which could be held to create a joint tenancy were the parties not married; and in some states one could add—which would clearly create no other form of co-ownership. It was conceived that they could not be joint tenants, being in old legal theory only one person; yet even the husband could not alone convey the land. Also there is the right of survivorship as in joint tenancy. Formerly, neither spouse could defeat this by an attempted conveyance to a stranger, nor could creditors defeat it by levies under judgments, while both lived; but in some states a grantee of either spouse who survives the non-conveying spouse takes all by such survivorship, and particularly in such states creditors of either spouse have gained rights of varying potency. In almost all our States, this tenancy can be created only by a personal conveyance to both from a stranger; not by inheritance. In some states the spouses may hold by this tenancy a mere share in property the title to which as a whole is owned by them and other persons in joint tenancy or tenancy in common.

Tenancy by the entireties has been abolished in a very few states because of the legal theory of marriage in which it originated; but in general it has been held unaffected by the modern statutes giving to married women equality with their husbands in property rights, and also unaffected by statutes abolishing joint tenancy or the right of survivor-ship. But the married women's property acts have almost everywhere ended the husband's common law rights to deprive his wife of the possession of, and of all income from, the land during his life.

This form of co-tenancy gives rise, for some reason, to a great amount of litigation.

Under these two forms of co-tenancy, the principles are much the same which relate to accounting for excessive profits received by one tenant, contribution for excessive outlays made by one, and the duties of good faith owed by each to his fellows.

A fourth co-tenancy under common law, that of *co-parcenary,* is very uncommon in the United States.

(4) COMMUNITY PROPERTY. Community property is a form of co-ownership, varying somewhat in details, which exists in eight states of this country. It is a system of "matrimonial gains." Property owned separately before marriage, its income and proceeds of its sale or exchange,

also property received by either spouse by way of devise or other forms of gift, or by descent, usually constitute separate property. That otherwise acquired by the spouses is community property. Its use for the community is, however, not impressive. In general, this property is controlled by and may be conveyed by the husband alone; and therefore it is disputable whether any co-ownership exists. In some states, also, if the husband survives the wife, he takes everything, and in others also unless she leave a will or descendants. Liability for debts falls in part upon the common fund and in part upon the separate estates. In general, also, all the husband's debts contracted either before or during marriage, as well as those which he contracts during marriage for common purposes are charged against the community property. Beyond that there is much variation.

This type of co-ownership applies, as indicated, to both realty and personalty. So also do the other types, including tenancy by the entireties, except coparcenary.

(5) PARTNERSHIP PROPERTY. In the case of a partnership the co-ownership is limited to personalty. A conveyance of land could not at common law be made to a partnership as such, and therefore an attempted conveyance to one operating under an impersonal name (as the Acme Printing Co.) totally failed. But title would pass to members whose names appeared in the partnership name, or it could be given to such members expressly as individuals. Although in states that have adopted the Uniform Partnership Act title can now be given to the partnership as such, whatever its name, the common law rules otherwise still apply. If title is given to individual members they are essentially trustees; and their tenancy is therefore, in most states, a joint tenancy, since that is the usual holding of trustees. With firm personalty the situation is different. The peculiarities of the situation are such that they cannot be explained either by joint tenancy or tenancy in common. The partners are declared by the Uniform Partnership Act to be simply "co-owners," but the unique character of their interests is recognized by the use of the term *tenancy in partnership.*

Part II, Chapter IX

Non-Possessory Interests Less than Estates in Land

1. Modes of Restricting a Neighbor's Rights in His Land

The complex of liberties, powers and rights which make up an owner's title may be restricted in various ways, by his private act, in favor of his neighbors. Additional restrictions are imposed by the doctrines of nuisances, of the police power, and of waste, which are general doctrines of the law. The first rests upon *all* occupants of land, and defines what are their liberties rather than restricts those which exist. The same is true of the police power (p. 164). In the case of waste (p. 224) the restrictions imposed do not inure to the benefit of neighbors, as such. We have, however, seen (p. 202) that when 0 leases or conveys any greater estate to A he may restrict the grantee's use by making the estate granted subject to a *condition* subsequent for whose breach forfeiture of the estate may be enforced by entry. The present chapter is devoted to several other types of restriction upon an owner s (that is, a rightful possessor's) liberties of user, imposed by himself or by some predecessor in title.

It has been noted (p. 241) that the ancient law conceived of various future interests, particularly of reversions and remainders, as corporeal things in the sense that they carried seisin, and were therefore estates; the effects of this upon alienation has been likewise noted (pp. 61, 63). However, because seisin is gone and its effects should go with it, and such interests do not give present possession, they have been discussed as non-possessory, although estates. Even in the thirteenth century the idea was developing that certain other interests that never conferred seisin of land were therefore only rights, and incorporeal. These "incorporeal hereditaments" are those now to be considered. Both in form and substance they bear plain evidences of ancient origin. Although known as incorporeal "hereditaments," none of them need be hereditary, whether created by deed or gained 'by adverse user. They are "incorporeal" because they never confer possession of the land in which they exist. As will later appear, their principles lack system, being characterized by inconsistencies and misleading labels.

The natural rights in one's own land which have been discussed above are pre-eminently possessory rights, yet do not of themselves *confer* possession; they are mere liberties, splinters of a title (p. 228) that does confer possession. We have seen that these rights in another's land are likewise splinters of the title to the land against which they are exercised. But, being mere splinters of the title to what, on the whole, is rightly designated as another's land, and particularly because they do not confer possession thereof, it is proper to refer to them as merely "rights in" the land of another. As such real or proprietary rights they are protected against all the world. While they exist, they reduce, or wholly suspend, the "natural rights"—the liberties of user or powers of alienation- of the owner of the land against or in which they exist. But, if not rights existing in perpetuity, such rights of the owner of the servient land are not extinguished; and on termination of the servitude (p. 284) they revive and restore his perfect title (p. 135).

2. Easements

(1) DEFINITION AND TYPES. An easement is a right held by A

[the owner of Blackacre] which entitles him to use Greenacre in a particular manner, without taking the substance of the land and without holding possession thereof [for the benefit of Blackacre], or which obliges the owner of Greenacre, B, either to use it or abstain from using it in a particular manner [for the benefit of Blackacre]. Such a right diminishes, of course, the liberties of the servient owner m using his land, since his own user must be subordinated to that of the easement holder. Unless the easement be granted, however, as an exclusive right, similar easements may be granted to other persons. Each right is subordinated to those preceding, and the landowner's right is inferior to all.

The most common type of easement, and the most ancient under that name, is the *easement appurtenant.* In it the benefit is conceived as held by one piece of *land,* and the burden as borne by the other; the two being therefore known, respectively, as the "dominant" and the "servient" tenement. The easement is held by the owner of the dominant tenement only as an incident of his ownership. The owner is anyone holding a possessory estate in the land derived from the estate of the original easement holder. If the above definition is read with the words enclosed in brackets, it describes an easement of this normal type. If the definition be read without the words in brackets it describes an *easement in gross.* Such an easement may be held by A although he owns no land, and without any requirement that it benefit land which he actually owns.

Whether the easement be appurtenant or in gross the definition covers three varieties. The normal is the so-called *positive easement,* which permits its holder to do positive acts on the servient tenement. The second (in order) is generally called a *spurious easement,* calling for positive acts by the owner of the servient land. The third is a *negative easement,* calling for inaction by the owner of the servient land.

(2) APPURTENANT AND IN GROSS. *(a) Easements appurtenant* are very ancient. It follows from their definition that the user which they legalize is restricted to acts which benefit (that is, are assumed to benefit) the owner of the dominant land directly through its occupancy. Typical of them today are rights of way for pedestrians or vehicles, the right to lay artificial drains in the land, to backflow water of a natural stream upon higher land, to drain surface water over lower land, or use in common stairways between adjoining buildings.

The dominant and servient tenements need not be adjacent. Indeed, they need not be near each other provided they are so related that the use of one may clearly benefit the possessor of the other. In the field of covenants, the requirement that they touch and concern the land as a precondition to running therewith is fundamental (pp. *297,* 305). In the case of easements this is rarely mentioned only because almost always it is clearly satisfied. If, however, one attempts to create an easement of which that is not true, the law may refuse it recognition, as an attempt to create a novel property interest.

The benefit being appurtenant to a definite piece of land (of course the burden is appurtenant in all types of easement), both benefit and burden passed at common law, unmodified by the recording acts (p. 464), with the tenements to which they were attached, without being mentioned. Mention of the burden in conveyances of the servient estate is vital to the holder of the dominant estate, who, however, cannot control such conveyances, and can only see that the instrument is recorded by which the burden is first created. Mention of the benefit in deeds transferring the dominant land is usual, by employment of the phrase "with appurtenances," or by more specific reference, and has two advantages. First, it makes easy the discovery of the grantor's intent—for his right is a property interest which he need not convey unless he so desires. Secondly, under the recording systems of some states, mention of the easement even in the transfers of the dominant tenement may afford its holder additional protection against transfers of the servient land to a purchaser for value without notice.

When the dominant estate is divided the owner of each part enjoys the benefit of the easement. When the servient land is divided, the part or parts actually used under the easement continue to be burdened therewith.

The *easement of necessity* is always (in fact) appurtenant, and exists typically in favor of one whose land is completely surrounded by that of others. It may exist even in favor of one who owned and granted away all surrounding land (notwithstanding that the rule of construing a *deed* against the grantor would make it impossible to give him the right by implied "reservation"). The cases are strict in requiring a very real necessity, not merely a great convenience; and the right terminates upon cessation of the necessity. Public policy, expressed in statutes, has, however, in various states compelled the establishment of private ways after proper compensation in cases where great hardship would otherwise exist. The courts, although really guided by the same motive, strive, when

they find the easement present, to base it upon a necessarily implied intent in conveyances by some ultimate common owner of the two tracts.

(b) Of *easements in gross* it was often stated until recent years that they could not exist. It is true that they are not recognized under that name in England nor in various of our states. Nevertheless, even in some jurisdictions banning the name as well as in others that do not, the law recognizes rights of one person in the land of others which, if they are to be classed at all under the divisions of such rights known to our law, and not treated as so many unique interests incapable of systematization, must be classified as easements in gross.

In the old law easements in gross were called "personal" because belonging to one apart from his occupancy of land, regardless of the distinction between a right existing in perpetuity and one limited to the lifetime of the holder. Today, the description "personal" ordinarily has the latter meaning, and also implies the non-assignability of the interest. Where recognized in this country easements in gross are most generally personal in both senses; and in England various en-forcible rights, really easements, exist in gross to that extent.

However, in some states they exist as heritable and transferable interests. The transfer of the burden is objectionable only as incumbering the title to the servient land. But, as regards the benefit, it is obvious that its free transferability from the original holder to his heirs or assignees may make it very difficult or impossible to locate those who alone can remove the incumbrance from the servient land by release of their right, or against whom abandonment of the right, or its destruction otherwise (p. 289), can be proved when the servient owner desires to clear his title. Such impediments to marketability have always been opposed to the policy that underlies and has shaped the property law (p. 381). It is also evident that free transferability might conceivably so increase the number of those entitled to use the easement as unduly to burden ("surcharge") the servient land.

It is sometimes difficult to classify an easement as appurtenant or in gross. In particular, it is sometimes difficult to find a dominant tenement of the traditional type. The right to lay gas or oil pipes through the land of successive owners cannot be an appurtenant easement unless the dominant tenement be the scattered tracts of land owned in fee along the way for its maintenance and operation. In reality it is the "business" of the company to which the easement is appurtenant. Precisely the same is true of most railroad rights of way (assuming them not to be owned in fee), and of the right to maintain telephone and telegraph, heat, power, and light lines; also of various parking privileges (if not contractual or mere licenses) incidental to the business of industrial establishments. In the case of restrictive covenants enforced in equity, a business has occasionally been recognized as the "dominant tenement," and even chattels have been so referred to, by courts of equity, which have unnecessarily followed the easement analogy (p. 321). Nevertheless, such rights as the preceding are clearly most properly regarded as easement in gross. Similarly, the right to advertise on buildings and bill boards, if it is in a given case an easement at all, must be an easement in gross unless a business is called the dominant tenement.

But difficulties cannot always be avoided by calling an easement one in gross. When a riparian owner grants to a non-riparian (assuming a jurisdiction where he may do so) the right to divert water through a flume for power, returning it to the stream on the grantor's land, the dominant tenement may be said to be the "land" on which the mill stands, but in reality it is the mill, in other words an industrial establishment or business. Moreover, strictly speaking the servient tenement is not the grantor's "land" but a mere splinter of his title thereto, namely his right to take water from the stream for use.

There seems to be little doubt that easements in gross, grown up in disregard of the original labels of the law, today exceed in variety and economic importance all easements appurtenant. Most of the typical easements of the latter type originated in old-time conditions of rural life, the absence of adequate public roads, water service, sewage and drainage systems, uncertain boundary lines. They tend to disappear-in other countries as well as our own that tendency seems evident.

Easements in land privately owned may be held by the public. A very large percentage of all roadways are mere easements. These are clearly held in gross, if the ordinary classification is extended to public rights.

(3) NEGATIVE AND SPURIOUS. (a) The *negative easement* is illustrated today by the mutual easements of support held by owners of a normal party wall—half standing on the land of, and owned by, each neighbor; by the right of the owner of a higher floor in a cooperative apartment house, or tenant of a suite or floor in a tall office building ("sky leases"), to have it supported by lower apartments; the right to have a building supported by adjoining land (p. 283), or, there being no party wall, by an adjoin-

ing building; and the right, very rare here although common in England, to have light and air come unimpeded across neighboring land to one's windows. The first two of these rights are implied from the act of joining in what is essentially a common enterprise. The last two may be secured by express and explicit grant, and a court might find them impliedly granted by a vague deed. But neither of them can be gained in this country by prescription (p. 362); for the claimant of the right, acting lawfully on his own land in erecting and maintaining his building, does not violate any right of his neighbor, who therefore cannot sleep upon a right of action. Nor should he be compelled to put his own land, in self protection, to undesired uses.

(b) *Spurious* easements (a most inapt name) are illustrated by a right to have the adjoining landowner maintain a partition fence. Such easements are very unusual today; but this is certainly largely owing to the fact that in perhaps all states there are fencing acts (and, indeed, drainage acts, and the like) which remove from private arrangement matters once particularly productive of easements. When a statute puts a duty upon each to fence, which one neglects, the other performing the duty of both, it has been held that the wrongdoer gains by "prescription" an easement to have the other continue to do all; and if he does not, he has no remedy if, for example, the cattle of the easement holder trespass. Although not called easements, similar rights have always been abundant in England.

(4) CREATION. Easements are either granted by deed or acquired by adverse user for the prescriptive period. In either case they may be of a duration corresponding to any estate recognized by law that is desired—in fee simple (and once in tail), for life, or for years. Since they are never possessory ("corporeal") these interests of varying duration are not technically "estates," although often so called in judicial opinions. Of course, in theory, even a tenant for years might by prescription gain an easement in perpetuity; also, in theory, he might claim it and gain it as one in gross, although it is almost inconceivable that it would be desired or claimed otherwise than to enlarge the enjoyment of his estate for years. If so claimed it would be appurtenant, yet after the end of his tenancy must continue, if it longer exists, as one in gross; and there is no authority for the proposition that an easement may be *created* to exist for a time as one appurtenant and thereafter as one in gross. It will be noted below (p. *290)* that if once created as an easement appurtenant, an attempt to *convert* it into one in gross destroys it.

In our ancient law appurtenant easements in perpetuity were creatable by mere mention, without .words of inheritance specifically applicable to them, in feoffments of the dominant land. Similarly, in a deed today of the same characteristics, a perpetual easement would certainly, by construction, be held created. In the case of easements in gross, however, words of inheritance were of course essential until statutes altered common law requirements (p. 188).

3. Scope of Easements, and Repairs of Servient Tenement

If the easement is created by deed, its scope is determined from the language as explained by the surrounding circumstances. If created by prescription, its scope is determined by the nature of the use during the prescriptive period.

Thus a grant of a "way," not exactly defined, is such a way as the past relations of the parties and their apparent purpose in creating the way, and the general circumstances of contemporary and neighborhood usage, would indicate. A "way" granted to a city factory owner would be very different from one granted by one farmer to another. If the purpose is not explicitly stated and cannot be defined, a "way" is one for all purposes; but if an easement appurtenant, those purposes are confined to uses directly beneficial to the occupant, as such, of the dominant land. The want of any such restraint upon user in the case of an easement in gross is one objection to their recognition. If a way is not definitely described, the owner of the servient tenement has a prior privilege of locating it, but the location must be reasonably convenient for both parties, and in case of disagreement courts of equity have sometimes fixed the location. The same general principle controls the width of a way. Such locations are regarded as constructions of a grant already made, not as new oral conveyances—which would be a violation of the statute of frauds. Use and acquiescence may also settle these attributes, and use for the prescriptive period or for any particular period is not essential.

A grant of an easement, clearly defined, includes by implication a grant of all rights reasonably incidental to the enjoyment of the one expressly granted. Thus, the reciprocal easements implied by law (in the absence of agreement) in favor of the owners of a party wall include the right in each landowner to strengthen the foundation, to extend the wall upward or lengthen it, when needed in connection with contemplated improvements, or to put iron anchors through it for safety, al-

though not a liberty to weaken the wall by opening windows in it, or to subject it to other uses potentially detrimental to full enjoyment by the other landowner. The right to enter upon the servient land at any time in the future and abate obstructions to the enjoyment of the easement is not subject to the rule against perpetuities, because it is only a part of the easement right.

These problems are frequently complicated by three other difficulties: first the rule that the holder of the easement bears the burden of making any repairs on the servient land that are needed for continued enjoyment of his right, but may not under the guise of repairs enlarge his right; second, that if he does exceed the use proper to his easement, some courts will and others will not hold such excessive user the means of gaining an enlarged easement by prescription; and third that if an "improvement" really involves the appropriation of an additional or a different part of the servient estate this would require a new conveyance to satisfy the statute of frauds. In the case of a party wall, when extensions or other improvements made by one party are later utilized by the other, a growing body of law finds the latter obligated to reimburse the builder for a proper share of the costs of improvement, upon theories that are both divergent and incoherent. But this is manifestly wholly different from the ordinary case, in which the expense rests wholly on one party. Of course the servient owner may voluntarily make improvements that facilitate enjoyment, but he may not by what are improvements for himself alter conditions that are obstructions to that enjoyment. On the other hand, as respects improvements by the owner of the dominant land, it must be remembered that no man need accept, much less pay for, benefits voluntarily conferred upon him by the improvement of land, or even the full title to land (p. 431). Suppose then, that the easement is a way in enjoying which its holder has long forded a stream: he may fill in depressions washed out near the banks, he may probably lay culverts, or build a solid approach to the banks, but the building of a bridge to replace the ford may appear (although in an actual case it did not so appear to a court) a convenient but an improper improvement. Similarly, if a buried pipe is substituted for an open drainage ditch. If, then, there *is* a use not properly included within the easement right, the majority of courts hold that a cause of action accrues to the servient owner and the enlarged right may arise from prescription. Indeed, probably all courts would accept that principle, but some, in applying it, have difficulty in finding a hostile intent of the wrongdoer, or are prone to find a license (p. 328) by the servient owner. As regards the statute of frauds, the law at various points, including the present, betrays a lack of consistent theory in applying it to the arrangements of neighboring landowners.

4. Protection of Easements

An unlimited conveyance of an easement is, in law, a grant of unlimited *reasonable* use only; but the case of an easement gamed by prescription, the common intent of two parties not being involved, is necessarily treated with less flexibility. No action lies against anyone for user of the servient estate which does not actually interfere with the easement holder's limited right; against anyone who so interferes there is a right of action. What is an interference is a question for a jury. A gate across a footway or a cattle drive may be not unreasonable, yet might be an intolerable interference with travel by automobiles.

Since the servient owner's estate is regarded as complete, and the easement as a mere external incumbrance thereon, they are treated as quite distinct. Hence, for example, in case of excessive use by the easement holder an action will lie in trespass, or in ejectment; the judgment in the latter case awarding the servient owner possession subject to the easement in its true extent. On the other hand, since the easement right confers no possession of the servient land, neither trespass nor ejectment is available for interferences with it. Trespass on the case, for damages, is the usual remedy. But in case of repeated interferences or other forms of violation irreparable by law, equity will give an injunction. Moreover, such interferences are often judicially discussed as nuisances. It is true that actions against nuisances cannot be brought by non-possessors; to that extent it is anomalous to allow them to an easement holder. The *reason* for that requirement, however, is that one without legal right to be on land cannot complain against unreasonable interference with his enjoyment of life thereon. The easement holder has only a bit of ownership, and no possession, but he does have a legal right to enjoy his bit of ownership. Repeated interferences with possession are a nuisance, and for over a century equity has enjoined them, both because a nuisance and to avoid a multiplicity of legal actions. For the latter reason equity can, of course, issue injunctions against repeated interferences with an easement, and it seems wholly proper to declare them, also, a nuisance and enjoin them as such.

5. Suspension & Extinction of Easements

The law's unfriendliness to easements is marked by the variety of methods in which they can be destroyed, and the servient owner's natural rights restored. (1) The easement is destroyed when its enjoyment becomes impossible through destruction of the servient tenement, as by the burning of a building in which parts enjoy rights of mutual support or by the taking of the land under eminent domain. The use of common stairways between buildings is limited to the period of their continued existence in such state as permits enjoyment of the right, neither party being obligated to abstain from improvements that end the enjoyment, or even from destruction of his own building. The mutual easements may arise by express grant, or in part by implied grants; the courts search for presumptive intent and bend theories, if necessary, to meet it. (2) The purpose of the easement may end by destruction of the dominant tenement, as when it exists in favor of a leasehold that comes to an end.

Again, one or the other party may voluntarily destroy the right. This can be done (3) by its release by the dominant to the servient owner, its independent existence thereupon ending, the right of user becoming part of the servient owner's title; or (4) by its abandonment (p. 353) by the dominant owner; or (5) by a license given to the servient by the dominant owner, which, being acted upon, the easement is held to. be extinguished. And from the other side it is held to be destroyed (6) by the servient owner's obstruction of its enjoyment for the prescriptive period.

(7) If title to the two tenement comes to be held by one person (unless by descent. or other act of law) in fee simple absolute the easement is destroyed by merger. But this does not apply to defeasible fees such as that of a mortgagee (in a title jurisdiction); nor does equity permit an easement thus to be destroyed to the detriment of the beneficiary of a trust.

(8) If tide to the servient land is taken by one who gives value, and has no actual knowledge of the easement, nor notice of it by record of deeds in his chain of title or by the condition of the premises (when user under the easement is visible on the face of the earth), he takes the tide clear of the incumbrance.

Finally, (9) if an easement is originally created as appurtenant to land, and the holder later attempts to sever it from the dominant land and either retain it for himself or grant it to another person as one in gross, it is wholly destroyed. If appurtenant in an absolute sense, any such attempt would be merely futile and the right would remain appurtenant. In fact, it does not so remain; it is destroyed by the attempt to sever. Whether the original right arises from grant or prescription makes no difference. This evidences an unfriendliness, therefore, to any type of easement. The case of an attempted change of an easement in gross into one appurtenant has perhaps never been reported, but such a transformation of a profit right has been held impossible.

Of these modes of destruction only the fourth and fifth require comment. As regards abandonment the majority doctrine requires only an intent to abandon—presently, not prospectively-unequivocally manifested. But some decisions' are exceedingly strict in applying the requirement of clear or unequivocal indication of intent; almost, if not literally, requiring the adoption of a new way or construction of a new drain, for example, before the old right is gone. The general attitude is far less tender to easements. No license to obstruct an owner's *natural* rights is effective to destroy them; the contrary result would mean that an easement is created, which it cannot be otherwise than by conveyance (or prescription)-although, of course, words of permission under seal might be construed to be *not* a mere license, but a grant. But a license, oral or by parol writing, to obstruct an easement, if acted upon (with no reference to the amount of money expended or time elapsed), destroys the easement. This is otherwise expressed by saying that "the license is irrevocable," a less correct statement. Statutes of frauds have always required a writing to "create" and to "transfer" interests in land; not to destroy one. The license operates as an abandonment.

Mere non-user, for the prescriptive period or any other length of time, does not extinguish an easement, although it may be evidence of an abandonment. Since non-user violates no right of the servient owner, talk of prescription in these cases is meaningless. Neither does excessive user destroy the easement. But excessive user may be so inseparable from legitimate user (as when the dominant tenement is a small building that becomes part of a larger building covering other land) that even the latter may be enjoined unless and until the excessive user is ended. This, like the preceding case, is suspension of enjoyment but not extinguishment of the right.

There can be no doubt whatever of a general unfriendliness in the law toward rights held by one person in the land of another. There is equally plain evidence in its development that this attitude has proved weaker than the general policy of allow-

ing owners to do what they will with their property. There has been a steady growth of the rights in question. This is equally plain as respects easements in gross, real covenants, and licenses.

6. Profits a Prendre

These interests, so called to distinguish profits taken from those rendered (profits "in render"), are ancient common law derivatives, altered, from manorial prototypes. Today, they are usually called, simply, profits.

A profit is a right to partake of some product or constituent of another's land without enjoying possession of the land. It is necessarily, unless in exceedingly rare instances, accompanied by incidental easements, usually of way, which either make possible or facilitate the profit's enjoyment. The products taken may be sand, gravel, marble, coal, standing timber, grass, water (provided it is in ponds, or otherwise property of the landowner), or other things. When severed the product becomes personalty. A right to take ice formed on ponds on another's land is properly a profit. The right of a riparian owner to take ice from a natural stream is merely a use of the water, though frozen; and he should have no more power to give non-riparians interests in the frozen water than in the unfrozen (p. 238). A right assumedly given by a riparian owner to take water from a natural stream, if permitted by the local law, cannot be a profit, by the general view, because the riparian landowner is not owner of the water; the right is therefore called an easement. But there are difficulties here, for certainly a profit may be given, by proper words, to take from land oil or gas, notwithstanding that there is no ownership of these except as personalty after confinement. The difficulty is that we have few labels under which to classify the rights now under consideration. Those just mentioned necessarily receive from the courts protection beyond that accorded to licenses; and if not mere licenses, the only alternative is to regard them as profits. Much the same must be said of so-called "profits" to take wild game on another's land or fish from a natural stream running through the same. In these cases, as in that of the oil, the owner of the locus does have a preferential position as respects their capture, although no right to prevent a neighbor from drawing away the oil or fairly intercepting the game.

As in the case of easements, a profit may be created either by grant or by prescription, and the same principles apply in determining its scope. However created, it may be one in perpetuity, for life of its holder, or for years. A profit appurtenant passes presumptively by conveyance of the dominant estate, and the recording act affects this precisely as in case of an easement. Likewise, it may be exclusive or non-exclusive, and in the latter case similar rights may be granted to a number of persons, each enjoying in subordination to rights earlier granted. But here comes into operation the chief doctrine controlling profit rights, namely that the servient land must not be subjected to the danger of exhaustion ("surcharged").

A right to *all* the profits or all the substance of land is, we have seen, a grant of title (p. 142). A grant of *all* the coal, or other single product or constituent of the physical land, under and in the same, no matter whether for a lump sum or one paid in installments, is a conveyance outright of such single product. A railroad's right to construct and maintain a tunnel through land need not, of course, be a conveyance of the land within the tunnel's bounds, and it cannot be a gift of the excavated earth, as personalty, until after excavation. No doubt in some cases grantors have required the excavated matter to be used in fillings for their benefit. But the usual practice is to treat such land as either impliedly conveyed or given, together with an easement of way; in other words, there is no profit. But a right to take coal in quantities undefined, paying so much per ton, is a profit; and even a right to take undefined quantities of a single product may exhaust the land in an economic sense notwithstanding that "land" is legally indestructible (p. 172). Consequently the law, though freely recognizing public easements, has never recognized a profit exercisable by the public. Nor has it permitted assignments of profits that tend to surcharge the servient land. An old case, a "leading" one despite its obscure brevity, laid it down that if a profit be assigned to several persons they must work it "together with one stock." To hold that an assignment to two great construction companies is therefore invalid seems to give the proper meaning to the phrase quoted. The rule, however, as generally stated, is that "a profit is indivisible"; that if granted to several it must be "worked in common." This is a very crude test: the exercise of the right by one industrial corporation would be more destructive than its exercise by a hundred individuals, whether "in common" or in severalty.

Profits have always been recognized both as appurtenant and in gross. To be appurtenant a profit must clearly conduce to the enjoyment of the dominant tenement by its occupant, and the right is measured by the needs of that tenement. If created as one appurtenant it can-

not later be made one in gross. Nor can a profit be at the same time appurtenant to the extent of the needs of the dominant land and, beyond those needs, in gross.

Profits in gross, unlike easements in gross, have always been assignable. One can only surmise what caused this inconsistency between profits and easements, the former being, from our present point of view so much more detrimental to the servient land.

If the profit is appurtenant and the dominant tenement is divided, and the profit is "admeasurable"—as, for example, a right to take manure for the dominant land—the owners of the several parts continue to take what each part required before, since it still requires the same. The profit is apportioned." But a profit to take wood for household needs (fires, repairs, and fences) is not admeasurable according to mere acreage; a division of the dominant land, and increase of households, would tend to surcharge the servient land. Such a profit (of "estovers") is not apportion-able. If the owner of the servient tenement becomes owner of a part of the dominant, thereby extinguishing the profit as to that part, the continuance of the profit, if apportion-able, in favor of the remaining dominant land is evidently unobjectionable.

If the servient tenement is divided, and title to any part thereof is acquired by the owner of the dominant tenement this extinguishes the whole profit. Likewise if a release is given by him to the owner of any part of the servient tenement. In both cases it is assumed that he would thereafter surcharge the other portions.

All the modes of destruction enumerated under easements apply equally to profits.

7. Real Covenants

(1) AT LAW. The law of real covenants is unclear and unsettled. Various aspects of it can be discussed only with hesitancy, and indeed bewilderment. The subject is habitually presented under two divisions. Not all covenants that "run," in the sense that they create real rights *(Supra,* p. 26), are known as covenants running with the land. Any real right created by covenant which is a right traditionally recognized as capable of existing as an easement, or a rent charge or profit, *is* an easement, a rent charge, or a profit; and after its creation by words of covenant runs as an easement, profit, or rent with the *land,* whereas the real rights now to be discussed, though called covenants "running with the land" really run with the estates or titles held therein.

(a) *Covenants Incidental to the Creation of Lease holds.* Covenants in leases that run with the land have already been discussed, and their peculiar nature adverted to (p. 201). In those cases the landlord may or may not have a reversion in fee simple; there is said to be "tenure" and "privity" between the parties. The requirement that a covenant must "touch or concern the land" is very generally stated as meaning that it must directly affect the nature, quality, value, or mode of enjoying "the thing demised." This is too narrow; nor does the substitution for the last words of "land," to cover the interest of both tenant and (p. 201) reversioner, suffice to remove obscurities. It is the title—leasehold or reversion—that must be affected, in the sense indicated, by the covenant to do or not do something with or on or regarding the premises demised; and the effect must result directly through or because of the landlord's or tenant's legal relationship to *that* land, not because of collateral circumstances. Finally, in the case of these leasehold covenants at least, although the covenant has often been held to run (in this country) as to both benefit and burden if it meets the test just stated as respects either one of the titles, high authority supports the view that the running of each should depend upon the presence of justificatory facts on its side of the relationship. In other words, the relation should be regarded as involving two independently possible incidents of title, each existing or not existing according as its characteristics do or do not fit our general conception of real or proprietary rights (p. 127). As yet, however, the precedents are not based upon this theory, although most of them are consistent with it.

When the tenant is the promisee, his benefit might consist either *merely* in an increased physical enjoyment of the leased premises or in some present or prospective economic advantage. The line between them is, however, not always clear. It is significant that advantages of the former type, which are scarcely conceivable, have apparently not arisen in litigation. They would be conferred by the landlord's covenant to care for the tenant's lawn and shade trees, or not to use a roadway on his unleased land passing near to the tenant's house. Benefits of the second type are conferred by covenants not to distrain for rent, not to compete with the tenant's business on the leased premises, to renew or extend the lease, to buy his removable fixtures when the term ends, to give the tenant a lien on them until payment, to reimburse him for permanent improvements, giving him a right of preemption for whatever price others may offer, or to convey the reversion to him

at a stipulated price. Both types of benefit seem necessarily involved in promises to repair a residence, or supply the tenant with water, gas, heat, or light. The burden upon the landlord who makes the preceding covenants takes the form in five cases of a pecuniary outlay; in seven it consists in a limitation upon his liberties of user or powers of disposition over the land. The restraint of mere *personal* liberty by any enforcible contract is, of course, not in question. Of course, too, having promised *as* reversioner, in a contractual sense all the covenants burden him through his relationship to the land; but of the five pecuniary burdens only one is intimately otherwise associated with his position as reversioner. Notwithstanding the very natural fact that by no means all courts and writers maintain that the above suggested covenants "touch and concern the land," it is believed that they do, and on both sides, consistently with precedents. The case is strongest for such a conclusion when not only does the tenant receive an economic benefit attached to the grant of his leasehold, and which he bargained for as such, but the landlord's reversionary title is restricted in content. As for the four cases in which the landlord's financial burden is not one which, in theory, is necessarily associated with a reversion, it can be said that they do in fact add to his legal duties as reversioner, and therefore do reduce his economic advantages as reversioner. That the covenant would generally run even in these cases is perhaps support for the view, frequently expressed, that if *either* party is benefited or burdened directly through his legal relationship to the land, that is generally regarded as sufficient.

When the landlord is the covenantee there is only his reversionary title to enjoy, and covenants by the tenant can, apparently, very rarely confer any advantage in enjoyment of the *existing* liberties, powers, or rights which constitute that title. A covenant may, however, *add to* the lessor's rights or duties; for example, one giving him a first lien for rent upon property of the tenant on the premises (where such right would not otherwise exist), or giving him a power to terminate the lease upon certain conditions, or one releasing the lessor, a railroad, from liability for destruction of the tenant's property by fires negligently set by the lessor's locomotives. If the decisions were consistent such covenants should be held to touch and concern the land; but particularly as respects the last not all dicta and decisions have accepted that view.

The benefits conferred on the landlord consist, almost always, solely in present or prospective economic advantages. If such inure to him through improvement of the land, the covenants have been held to touch and concern the land (and have been allowed to run). Examples are covenants to repair buildings and other structures on the leased premises, to improve them in a stipulated manner, to fertilize fields, to rotate crops (or fallowing with tillage), to pay taxes on the leased premises, not to employ laborers lacking proper claim to support from local poor rates to which the lessor must contribute, to buy beer for tenant's inn from the lessor only, not to compete on the demised premises with the landlord's business, not to manufacture thereon certain articles, to buy the same at an arbitrated valuation at the end of the term, not to assign or sublease (or not to do so without the landlord's consent), to live on the leased premises, or to conduct a leased creamery as an independent business. If the performance of the covenants would be equally advantageous to the landlord independently of his reversion, they have been regarded as collateral and personal.

Of the preceding thirteen covenants the first four benefit the lessor financially through maintenance or betterment of the land leased; moreover, in so far as the tenant thus assumes an obligation that transcends his general duty to return the premises in as good condition as when received, the covenants give the landlord a sole remedy (and in so far as the covenant obligation falls within the general duty, an additional remedy). The next four certainly, the following four presumably, and the last possibly, also benefit him economically in other ways (he must have bargained for them under that belief); but, save the covenants to live on the land and not to put another person in as tenant, these eight do not so benefit him directly through his relationship to the land in the sense of the test—for it matters not that his ownership enabled him to exact the promise from its would-be tenant. As regards the effect of the covenants in restricting the tenant's constituents of title, or in making more valuable those of the landlord, the last eight covenants manifestly restrict the normal liberties or powers of a tenant, and the first four have the same effect so far as they transcend his normal duty to return the premises in as good condition as when received; and the covenant to pay taxes assessed against the landlord is an abnormal increase of the tenant's legal duties. It would seem that all the covenants touch and concern the land. And most courts would permit them to run, notwithstanding that some do not, on the benefit side, satisfy the requirement that it be

conferred directly through the promisee's relation to the land.

Doubts regarding some of the above covenants have already been noted.

In indicating that most of the covenants above suggested should be held to touch and concern the land, and particularly in suggesting that they should therefore run, and in general as regards both benefit and burden, it is only meant that under the test of the covenant's effect upon the respective titles of lessor and lessee, and as a matter of logic, those should be the results. Satisfaction of the test really indicates, however, only that a covenant has such intimate connection with the land that it would have the qualities of a normal real right if made such by being allowed to run. It does not by any means follow, however, that public policy would thus be served. To this question reference will be made later. It is important to emphasize once more, here, the requirement that benefits or burdens must inure "directly" through the owner's (or possessor's) relationship to the land *as* owner. There are many covenants which benefit the covenantee or burden the covenantor, and even through his relation to land, which it may be argued, should nevertheless be regarded as personal because he is not exclusively or primarily benefited as owner of the land concerning which the covenant is made. Such are, a tenant's covenant to grind in a mill on the landlord's land all grain raised on the leased premises (although in a famous case this was held to run); a landlord's covenant to market for the tenant all grain raised or hay cut by him on the leased premises; a covenant by either not to compete on his premises with the business of the other on his premises. In the opinion of various students of the subject, these covenants should be treated as personal. Even more evidently personal would be covenants to grind the grain in a mill not on the landlord's land, or to market for the tenant grain or hay not grown by him on the leased premises, or to harvest his crops on other than that land, or to give free transportation over the railroad to the promisee who conveyed to it a right of way. A decision of such questions really depends upon one's preference for a policy of liberality or illiberality toward the creation of incumbrances upon the title to land. A conscious and systematic application of such considerations of policy is a necessary first step in removing the "doubt and confusion" which,- as Justice Holmes said, covers the entire subject, particularly that of covenants not incidental to leaseholds.

(b) *Covenants Not Incidental to the Creation of Lease-holds.* The covenants next to be considered are made between owners in fee of two pieces of land, each owner either having, before the covenant, no interest in the land of the other, or one of them holding an easement or profit in the other's land.

The question has been much discussed whether "privity" is essential for the running of covenants between two landowners in fee, and what such "privity" can be. Almost all of such covenants are made when the original owner of both tracts grants one away, and either covenants to so use land that he retains as to increase enjoyment or add to the value of the granted land, or exacts from the grantee covenants to so use the granted land as to increase the grantor's enjoyment of land that he retains, or increase its value. It is generally understood that succession in tide is in these cases the privity required, and that such succession includes both the transfer between the original parties and transfers subsequently made by each. But in a few states some continuing common interest between the two pieces of land is necessary, such as an easement.

No doubt the crucial question, in *litigation,* is always whether the plaintiff, claiming the benefit, can prove his succession to the estate of the original covenantee; which is probably why, as Justice Holmes said, it is "the only privity of which there is anything said in the ancient books."' The law's requirement does not seem to be limited, however, in most jurisdictions, to less than the triple relationship of succession as stated above,—call it "privity" or not as one will. And although the succession relationship continues to exist, as an historical fact, after the original transfer, the ungenerously strict view has been taken that no promises run except those that are made at the moment of transfer. The requirement of a continuing tie between the lands of grantor and grantee, such as an easement, is a logical analogue of the leasehold privity. Recognition of mere succession in the holding of title to granted land as constituting privity between the original parties is a laxer doctrine. It is still more lax to recognize it as existing between the covenanting owners of lands neither of which has been granted by one to the other, and between which there is also lacking the tie of an incorporeal hereditament. There can exist in the last case no privity between the covenantor and covenantee unless it is the contractual relationship indicated by those words, but between each of them and successors to his estate it can exist as succession in title. The few states whose courts have passed upon the question whether such covenants may run are about equally divided in their

holdings.

The problem is, when may covenants regarding the use of land have "real" consequences? In the first place, in the equity decisions the courts have made it clear that no covenant should run if the original parties do not intend it to run; in cases at law involving fees the point has not been wholly ignored; in leasehold cases, it has been virtually ignored. It is believed, however, that all covenants are personal to the extent that they remain personal if so intended. In the second place, although there is no reason why the running of a covenant should not be confined to benefit or burden alone, and although, as already noted, that would seem to be the desirable view, such has not been, as yet, the course of development in this country; in determining which, in this respect, both the example of covenants in leases and the general idea of mutuality in contract relations have doubtless been influential. In the third place, in England, except in the field of landlord and tenant, burdens do not run at law; in equity they run if merely restrictive of the use of land. In this country, speaking generally, both benefits and burdens run, at law and in equity, and whether the burden be negative or positive.

Assuming, then, a covenant to use or not to use land in certain ways, an intent that it shall run, and whatever privity between the parties is required in the jurisdiction concerned, still it will not run, as in the case of leaseholds, unless its performance benefits the covenantee or burdens the covenantor, or perhaps does both, rather directly (a phrase necessarily vague) through his relationship to the land. It is evident that some such requirement is indispensable if any line is to exist between purely contractual rights and real rights originating in contract. Without it, too, covenants by strangers to the title could be freely attached to land. Any covenant not satisfying the requirement is, as already said, "personal"—in other words, the right it creates is not a real right.

Examples of covenants made incidentally to the conveyance of land in fee simple by the grantee or the grantor, for himself, his heirs, and assigns, holders of the land granted or land retained, are the following: not to erect a building that cuts off light from the covenantee's windows, to build a fence or a wall, to leave an opening in a fence, to maintain an underpass beneath or a crossing over a railroad, to build and maintain a railway station for the convenience of the covenantee's family and guests, not to claim damages for harm caused to covenantor's land by construction of a railroad by the covenantee on its adjoining land, to build or maintain in repair a dam, to convey more land if required by covenantee's business, to pay half the cost of a party wall built by covenantee if and when used by the covenantor, to insure mortgaged land (in a "title" jurisdiction) for the benefit of the mortgagee, not to erect a garage or other specified structure (assumedly not a nuisance), not to use land for other than residence purposes, not to sell liquor thereon, not to convey to a person of other than Caucasian race, not to engage on the land in a certain business.

Of these fifteen covenants the first five either certainly or by fair assumption increase the promisee's physical enjoyment of his land; and, for that or other reasons, all presumptively increase the value of his title. Moreover, all except the third and fourth involve some diminution, however slight, of the covenantor's proprietary liberties of user; but the third may involve the same (if, for example, it lessens the safety of the covenantor's children or livestock), and likewise the fourth (by increasing the care needed in case of the grade crossing). Of the next five covenants all clearly add to the value of the promisee's estate; moreover, the first three of them manifestly diminish, respectively, the promisor's rights, liberties, and powers. Finally, the remaining five covenants, all reduce either the proprietary liberties or the powers of the covenantor. At the same time the last covenant presumably increases the value of the covenantee's title, while the other four presumably have that effect and also increase the enjoyment of his liberties of user.

In short, almost all of these covenants "touch and concern" the land in the very intimate sense that each alters in some respect and to some degree the title to both tracts of land, restricting or making less valuable the liberties or powers or rights of the promisor, widening or making more valuable those of the promisee. There seems to be little doubt that the covenants might properly run both as regards benefit and burden, so far as consistent with general public policy.

As in the case of covenants incidental to leases it would seem that the benefit or burden should independently run if the reasons exist for allowing it to do so. But the question has been scarcely noted judicially, doubtless because the justification for allowing the covenant to run usually exists on both sides if it exists on one, as illustrated by the examples above given.

Some aspects of the problem deserve particular emphasis. In the first place, the establishment of a consistent theory of covenants running at law has been hampered by the influence of English precedents, limited as is the English law with respect to

the running of burdens (p. 305). Some of the states have followed the English lead, although as to the refusal to allow the burden to run at law there seems to be no intelligible reason for it, while the limitation to restrictive burdens in equity embodies a view of equitable jurisdiction that has little strength in this country. In the second place, the precedents on the meaning of the requirement that a covenant must touch and concern the land, which is the same at law and in equity, are more numerous in equity. In the present confusion of legal theory, equitable jurisdiction very often depends not on the question whether legal remedies are adequate, but on the question whether there is *any* right at law, and there is always a chance that despite a denial of a legal right entitled to protection the court may find a covenant running in equity. The advantages of injunctive relief are the same, no matter what the nature of the right protected. The independent determination in equity of the issue regarding the existence or nonexistence of the legal right is presumably no special obstacle to the growth of a consistent legal theory. In the third place, it is always to be remembered that covenants which are allowed to run are thereby made true real rights and incumbrances, to the creation of which the law has supposedly not been friendly. Some of the covenants given above as examples would, unless qualified, fall under the ban of certain general rules of public policy, particularly the rule against perpetuities and the policy against restraints on alienation. But, aside from such general restraint, it does seem that the courts have shown remarkable liberalism in creating the real rights here in question.

If the law proceeds upon the theory that any covenant operating to restrict or enlarge some constituents of title of the two landowners, or make them less or more valuable, should be allowed to run, the doctrine will inevitably have a vast development. In view of such phenomena as the growth of pew-rights, party wall easements, easements in gross, and real covenants generally, it is clear that there exists no conscious and decided opposition to the creation of new property rights, even when they constitute perpetual incumbrances, and, as respects real covenants, are created by contracts of persons who merely happen, at a given moment, to be the owners of land. It is also quite clear that many of the easement rights just mentioned seem wholly desirable, and that such of the rights created by covenant as serve permanently desirable ends will be established regardless of the absence of technical formulas adequate to justify them, or the presence of concepts designed to proscribe them. But certainly there should be more evidence of judicial consideration of public policy before creating such rights.

It is, of course, only perpetual incumbrances that are particularly objectionable.. Methods are available by which some curbs could be established. The English ban upon running burdens made corresponding benefits so little desirable that no cases appeared of benefits running at law until after equity began its enforcement of both benefits and restrictive burdens. In many of our states the removal of the ban upon the running of burdens has already gone much farther than in England. But it is nowhere too late to separate benefit and burden, allowing neither to run merely because the requisites are satisfied for the running of the other. However, as evidenced by examples already considered, there is no substantial curb in the requirement that a covenant must touch and concern the land. Something more is needed.

Nothing is to be hoped for as respects the manner in which real covenants may be created. Formalism has gone: no seal is necessary as respects those incidental to leaseholds. In the case of fees, it is apparently already majority doctrine that one who accepts a deed poll which he has neither sealed nor signed is bound as much by covenants therein .as he would be by an indenture.

The only aid must lie, apparently, in limiting in some way the land in which real rights may be created by covenant. Some suggestions have been made. One scholar suggests the test: "Are the parties' interests in the real estate one of the operative facts necessary to give validity or lawful per-formability ["objective performability in fact"] to the con Another authority merely states that, "No covenant will run which ... can be performed without the obligor owning the land, or which can benefit one not owning the particular land to be benefited."[3] Such tests do not seem to go far. It is barely possible, however, that the courts could make such requirements effective curbs.

These suggested tests would have, it seems, the same sort of constrictive effect that a requirement of "privity" always serves. The retention of that word may be very undesirable, but it may prove unavoidable. At any .rate, its possible merits as a means of limiting the doctrine now under consideration have not received sufficient consideration.

There is good authority for the view that "Originally the word [privity] seems to have indicated privity in the creation of the estates with which covenants were to run. It indicated the granting of land, being an assimilation to tenure; for before the Statute of

Quia Emptores there was a privity of estate between every grantor and grantee."[4] Both the name and conception, and not in a weaker but in a more real and intensive form, persisted in the relation of landlord and tenant. The influence of the original conception once produced decisions that covenants would not run with grants of rents or easements; but, as noted above, in some of our states today they do, and the analogy between such easement privity and the privity of leaseholds is manifest.

Both the privity which exists in the case of covenants made incidentally to leases, and that created by an incorporeal hereditament connecting two pieces of land (p. 304) curb the general doctrine, by limiting the land affected by the covenant to land with respect to which the two parties are in privity in the senses indicated. The restraining influence of leasehold privity is illustrated by a case in which a lessee whose duty to repair was a covenant and condition under his lease, covenanted with his sublessee of a portion of the leased premises to perform that duty on the unleased portion. It was held that the benefit did not run to an assign of the sublessee as against an assign of the original tenant. It was a covenant to do acts on other land than that as to which privity exists in leasehold cases; the fact that its purpose was to secure the sublessee against forfeiture of his estate (which in fact resulted) for the tenant's breach of the condition did not prevent this result. Similarly, a covenant by a lessee to pay taxes assessed against other land than that leased should not run. Everybody approves of the result in the latter case, although not in the former. As regards easements, it is those in gross which have rapidly increased—many of them, it is true, to meet genuine needs of present-day economic life (p. 281). The reason why easements appurtenant have but slowly expanded has been the necessity of attaching both benefit and burden to particular lands, and requiring that the benefit serve the dominant landowner directly through the land. Of course a franchise right in the nature of an easement, for example one to cross the covenantee's right of way, should supply as well as an easement created by private grant the "privity" necessary to support the running of a covenant to repair.

When covenants are made relating to lands owned in fee there seem to be three main possibilities. The extreme of liberality is to permit the creation of running covenants relating to lands of both parties (or, apparently, either) although no land or interest in land, otherwise than by the creation of the covenant right, passes between them. No privity exists in these cases; they are precisely analogous to easement grants. In only a few states has this been permitted. An intermediate view is that which requires the lands of the two parties to be connected by an easement privity. There are, also, only a few states that require this privity. It might be employed, but apparently has not been, to carry covenants relating to other land than that in which the parties both hold interests. A third view permits, at least, the creation of real rights both in land transferred and in other land of the grantor with regard to which the covenant creates a benefit or burden correlative to that created in the granted land. This last view has been adopted in many states, and the examples given above have been presented with this form of the doctrine in mind. It is the heavily prevailing view that the privity which will enable a covenant that relates to the use of particular land to run exists, at least, when the covenantor, at the time of making the promise, receives or parts with the title to that land. If he does receive that title, his covenant may create in the grantor covenant rights in that land analogous to positive, negative, or spurious easements (p. *278).* Whether they will be valid at law will depend in part (assuming that they "touch and concern" the titles) upon whether they are analogous to easements in gross or appurtenant; and in some states, if the analogy is to the former, the covenant will run only in equity or not at all.

The foregoing statement of the orthodox doctrine is by no means exhaustive of possibilities. The test for determining whether a covenant touches and concerns the land is of no aid in these cases. Some doctrine of privity limiting the land affected can possibly be made useful. It is stated in a minimal form, in order to distinguish it from additions whose desirability seems questionable. It is more questionable, however, whether there is likelihood of limiting it, unless by legislative restraints upon the duration of covenant incumbrances on title.

(2) IN EQUITY. Almost all of the covenants given as illustrations in discussing covenants running at law would be enforced in equity were there no adequate remedy at law. Since the jurisdiction in equity, for reasons already given (p. 308), has to a considerable extent preceded that at law, and since equity rarely renounces jurisdiction gained when legal remedies were inadequate, and since its extraordinary remedies are needed for the protection equally of rights recognized by law and those recognized by equity only, it can readily be understood that the development of principles by equity courts tends to predomi-

nate because of. the much greater number of equity cases. Much confusion has resulted from this situation. Legal easements, covenants running with (titles to) land at law, and equitable servitudes originating in contract have been discussed in vast detail as respects the historical and procedural characteristics that distinguish them, and with painful efforts to explain them on an assumption that some one theory is implicit in the cases. Very little attention has been paid to their fundamental substantive unity as real rights, and practically no attention whatever to the question of public policy involved in their creation. That question has been emphasized in discussing covenants running with the land at law. Moreover, some of those who have discussed most learnedly the question whether equitable servitudes are personal or property rights have based their answer, not on the simple test of the *nature* of the rightholder's power over the land (or other *res)* but upon debates over the manner in which he *secures* the right, or exercises it. There is no general understanding of real rights (p. 127). There is a general confusion of the line between contract and property law (p. 322). A mere word misleads many into assuming that a running "covenant" must *remain* a contract right. To almost every fundamental question regarding covenants running in equity—whether a writing is necessary for their creation and transfer, whether the covenant must touch and concern the land (or substituted *res),* whether any or what "privity" is a precondition to their running, whether the benefit may be held in gross—the answers of courts and text writers are at variance.

Ignoring temporarily a few anomalous situations, these covenants "run" under the equitable principle that forbids unconscionable conduct, in the sense that first one person and then another who owns a *res* (land or personalty) is under the obligation. This, however, relates to the mode of creation of the duty, not to the nature of the corresponding right that results from thus imposing the duty. Nobody who acquires land with knowledge of a condition upon its use agreed to by contract of a former owner is allowed by equity to disregard that agreement; likewise nobody who acquires the land as a volunteer. As stated in the English case that originated the doctrine a century ago, "The question is not whether the covenant runs with the land but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased."[5] Whatever may have been the precise theory of English equity when that case was decided, it is idle to deny that the burden does run "with the land" in the sense above indicated. Indeed one famous English case has even held that an adverse possessor takes subject to the covenant, thus making the real right so created one running with the land as does an easement, and a more intense real right than any covenant running at law has yet been held to be. Aside from that case the covenant runs *when* the respondent has taken with notice or as a volunteer. Whether he has done so is in truth the essential question; the other is a mere consequence. Notice may, of course, be either actual or through the recording of the deed containing the covenant. Although in England covenant burdens do not run at law, they are enforced in equity, even there, against one who is not a b*ona fide* purchaser for value.

As already mentioned (pp. 307—8), it is much plainer in the equity cases than in the legal that a covenant runs only if intended to do so, and as intended by the parties. The right is normally created incidentally to a transfer of land, by covenant of the grantee in favor of the grantor's remaining land or by a covenant of the grantor respecting his remaining land for the benefit of the land granted. In that case the covenant may be construed to mean that the benefit created was intended to endure only while the covenantee should remain the owner, or that it was to be enjoyed by all of his subsequent grantees. There are even cases recognizing covenants whose enjoyment can be restricted to those grantees to whom the covenantee may choose to pass it by mention in their deeds. The right created in the last case is neither truly personal nor truly real; the possibility of creating it has been much criticized.

May the parties create, if they will, a benefit in favor of one who owns no land that could be benefited thereby, or one enforcible by the covenantee after he has parted with all the land which it was intended to benefit? There is very little case law to support the affirmative answer. The prevailing view limits equitable covenant rights to the analogy of easements appurtenant, of the normal and spurious types. It cannot be said that such covenants are inconsistent with the doctrines of privity (constituted either by succession in title or by an easement connecting the two pieces of land) which have been discussed in relation to covenants running at law.

On the other hand, in the creation of urban real estate developments under a general plan there seem to be permitted appurtenant interests of most anomalous forms—dominant tenements without servient tenements and servient tenements without dominant—and equally

unorthodox modes of creating interests. The promises most often involved are those not to use land for other than residence purposes, or erect houses within a certain distance from the street, or costing less than a certain sum, or of other than a stipulated architectural type, or all of these and other promises together. There is no reason why these covenants should not run at law, but of course the remedy of damages could not compel observance of the restrictions. While the preceding covenants are analogous to negative easements, covenants *to* build a house of a certain type, lay drains, grade lots, and so on, would be analogous to spurious easements. The flexibility of the equitable doctrine is illustrated by the fact that the restriction can be enforced by the holder of any lot against the holder of any other, regardless of the order in which they became purchasers, and even though both trace their titles to one of the original parties, covenantor or covenantee. This is consistent with the general intent of the developer, which is to burden every lot for the benefit of every other. The restriction is very commonly stated in each deed without indication of the beneficiaries. This may then appear from extrinsic circumstances, as when the developer makes a plan of the development, and sells lots in accordance with the plan, or also shows a plat to prospective purchasers. There are cases holding that the owner of a lot that was not part of the development, may not, although subject to similar restrictions, enforce the development restriction against development lots. On the other hand the burden has been enforced against lots not owned by the grantor at the time of making the general plan or the first sales thereunder, but later acquired by him and sold under identical restrictions; and against the original grantor himself as respects lots of which he (or his wife) later became owner, they lying within the area reasonably intended by him to participate in the plan of development. It has also been held that a mere neighboring landowner may enforce it, provided he can prove that he can reasonably be considered as an intended beneficiary, particularly if he has, in reliance upon the restriction, observed it in making his own improvements.

In these real estate developments, therefore, benefits are given to land already owned as against land not yet owned, and burdens are imposed on land already owned for the benefit of land not yet owned, and relations of dominant and servient tenements are established without any conveyance whatsoever. It seems manifest that if the introduction of zoning puts an end to the growth of such proprietary rights it will be a real service. Every objection to the creation of real rights by private contract that can be urged against covenants running at law applies with far greater force to the disorderly and unrestrained action of equity.

An attempt to create a running covenant may fail in the beginning, because of undue restraints upon alienation, or because it would create a monopoly, or is otherwise against public policy. A policy unfriendly to incumbrances is not infrequently illustrated by decisions which, of several possible constructions of a deed, choose that which least restricts the use. of land—as respects, for example, duration, disfavoring perpetual restrictions; or, in case of doubtful language, construe it against restriction at all—for example, by refusing to imply from statements of a use to be made of property covenants not to use it otherwise, or by construing the term "dwelling house" or "residence" to include an apartment house or a nunnery. A contrary and undesirable attitude is shown, however, when the general rule that a deed shall be construed against the grantor is applied to one which creates an equitable restriction.

An existing covenant right may be released. It may be destroyed by merger. Like an easement it may be abandoned, or waived, as, for example, when the holder of the benefit acquiesces in violations of a restrictive covenant by others or violates it himself. Like all equitable rights it may also be lost by laches—a finding of which is substantially a finding of abandonment. The courts have frequently refused to enforce a covenant when enforcement has become inequitable, notably when there has been such a great change in the neighborhood or in other conditions as to defeat the purpose of the covenant, or when for other reasons enforcement would unduly burden defendant with little benefit to the plaintiff. Such procedure raises various questions. The first is whether a property right can properly thus be destroyed. It may in some cases be permissible to say that the court is construing the parties' intent with respect to the interest's duration. It is also true, but no answer to the objection, that probate courts constantly do as much in dealing with a testator's "intention," and that equity courts do much less excusable things with indisputable property rights in "balancing conveniences" in nuisance cases and cases of encroachment by buildings (p. 105). Passing this difficulty, the question arises whether there is a loss of right or only of remedy. Will, for example, a bill lie to compel the release of such a covenant as a cloud on title ?—the usual meaning of which is an apparently

valid but in truth invalid title or incumbrance, and not a mere condition of fact that makes unconscionable the exercise of a technical right? Equity may, indeed, refuse its relief without enjoining actions at law for damages; but damages ought not to be given even at law under such circumstances, nor by equity in lieu of an injunction, and if neither remedy is available, or if equity would enjoin the legal remedy, then no right longer exists, practically speaking, and the bill should lie. All this should be confined, however, to an utterly clear case of which it may clearly be said that the covenant no longer touches and concerns the land in the sense already defined (p. 297*).* In other cases the refusal of equitable remedies is of extremely questionable propriety.

Marked differences between these equitable interests on one hand, and easements and covenants running at law on the other hand, have already appeared. There are still others. The most marked is that which relates to the interests to which the benefits and burdens of the covenant may be attached. There is nothing in the doctrine of equitable servitudes that restricts its application to land. It has in this country been applied to chattels. A chattel, instead of being sold outright, may be bailed ("leased") and restrictions imposed upon its use; for example, requiring it to be used with supplies and accessories of specified types in which the bailor is financially interested. Or it may be sold to wholesale dealers under restrictions regulating its distribution among retailers, and its retail price. This chapter in covenants would long since have become of vast importance were it not for the fact that merchandizing policy must be adjusted to laws against unfair trade and industrial trusts. The patent and copyright laws, which confer statutory monopolies, aid, rather than in any way discourage, such control by the owner of the patent or copyright. In addition to chattels, the doctrine has been applied to a business, the covenant being very generally one to exclude competition. The equitable title of a contract purchaser, likewise a mortgagor's equity of redemption, have been held sufficient.

But all this does not affect the *analogy* of the equitable covenant rights to those running at law. In all such cases as those just mentioned there is a dominant and a servient *res,* although the *res* is not land. Some have denied that any covenant held in gross can be enforced in equity, and as noted above, the weight of authority is with that view. Nor is there anything to prevent the application in the above cases of the requirement that a covenant, in order to run, must touch and concern the land. That requirement should invariably be made. More or less articulately, it is made when land is really involved as such. In the many equity cases in which the dominant *res* is a business—the burden being imposed upon another business, or upon a chattel whose sale is part of a business, or upon land whose forbidden use would be part of a present or potential business— the same test is almost invariably satisfied as respects both the dominant and servient *res.*

There has been much controversy over the question whether these equitable obligations are most accurately described as "covenants running in equity," or as "equitable servitudes," or as "equitable easements." Some not infrequent arguments made in favor of one or the other view have little merit. For example, the suggestion is made that such rights must be easements because the doctrine of "beneficiary" applied to them is more elastic than the *legal* doctrine of the "third party beneficiary" applied at law to a contract; or, contrariwise, it is said that the binding of a disseisor cannot be sound, because inconsistent with the covenant's character as a "contract." On the other hand, the objection has been made to the easement analogy that it is anomalous to speak of enforcing an "easement" in equity—ignoring such equitable extensions of a legal doctrine as that of equitable waste. Such criticisms miss the essential issues. Confusion reigns because of the failure to realize that a legal or equitable running covenant is just as much a real right as is an easement; the three rights have therefore never been subjected to common analysis and a common policy. The name is of relatively minor importance. Clearly the covenant does not, in equity, run with the *res,* literally, as legal easements run with the land (p. 279); nor, in the various situations arising under general real estate developments, does it run with the title to the *res,* as covenants run "with land" at law (p. 303). Moreover, an interest appurtenant to a chattel or a business is an unsatisfactory analogy to an easement. Servitude seems, therefore, to be a more accurate description than "running covenant" if one insists that the covenant must run *with* some *res* that likewise runs. But either description will serve if one realizes that the only "running" involved lies in the fact that a duty or right is first with one person and afterwards (on what theory still remains to be discussed) with another person. But in fact, the covenant does run with the land; it runs because equity imposes upon all persons save *bona Me* purchasers for value the duty to respect it; and the covenantee's right to have the restriction observed is therefore

a real right, which the recording acts make as true and intensive a proprietary right as any legal easement. Those who have advocated the name "equitable easements" have been motivated solely by a desire to emphasize the real or proprietary character of the right. Since, however, it ought to be dear that all running covenants are real rights, it should not be necessary to give the rights in question a name which, on the whole, is a misnomer. There should be no need to appeal to "the analogy of easements" in order to apply the statute of frauds, or to reach the conclusion that compensation should be given for them when destroyed in eminent domain proceedings.

To say, however, that these things *should* be evident, is not to say that courts have so regarded them. The idea that equitable rights are necessarily personal is so strong, the real character of the rights is so little appreciated, that the courts are very inconsistent in their application to them of the statute of frauds. Courts of the highest repute have enforced oral building restrictions; as noted above, where a general plan is involved the restriction may be based on oral statements to purchasers, on mere exhibition of a plat, or mere inferences from a line of conduct in successive sales. Moreover, in contrast with the practice of law during centuries, neither because a "covenant" is involved nor because a proprietary interest is created is a seal required. In other respects, too, informality prevails. No particular words are required in indicating the parties' intent.

Discussion of the theories upon which the courts have proceeded in creating equitable servitudes has equaled that regarding the nature of the resulting right. There is a general failure explicitly to enunciate the principles of decision. This results in a mass of amorphous material to explain which various theories have been advanced. (1) That of unjust enrichment—of the last buyer at a low price if the parties assumed the restriction to be binding, or of the last seller at a high price if they assumed the contrary, unless the restriction be enforced—has been abandoned by everybody. In the first place it could apply only in the situation (whichever situation) where the parties are mistaken about the law. But that supposes that there *is* a rule of law, whereas the inquiry is for the purpose of establishing one. To assume that the rule is that stated in the second situation is to offer a justification of an existing rule, but not to explain its origin. In the second place, making no such assumption, the propositions are, that to profit through a common mistake of law is a moral injustice, which is questionable; and that to prevent that supposed injustice covenants were made to run. But the fact is that the very mistake against which equity gave for centuries no relief was that of law. And it has become established only since the covenant doctrine originated that equity will relieve against a common mistake of law that is treated as a fact in entering into a legal relation. That principle, then, can hardly explain the other doctrine. (2) Another theory is simply the inadequacy of legal remedies. But they are not inadequate if a mere contract is involved, unless one assumes that a covenant to use land in a certain manner is a contract to convey an interest in land. But that is unsatisfactory as an explanation of the doctrine's *origin* (although not unsatisfactory as a justification, or working theory today); first, because there is not, in fact and in form, a contract to convey anything; secondly, because although the covenant creates a real right when made to run, not even that fact has long been realized, and is only imperfectly realized now. (3) The third party beneficiary theory does not explain cases binding the grantor himself in the use of lots that he retains, or in giving him rights against the occupants of other lots.

Finally, (4) there is the theory that the cases can be explained as the results of an equity doctrine "which is consistently applied in the law of trusts and in the law of specific performance of contracts"; namely, "that rights *in personam* ... will be given the character of rights *in rem,* and will thus be clothed with the protection of the law in so far as they are capable of being injured or interfered with by the rights of third persons."[6] In this theory the *res* is the contract between the grantor and his immediate grantees "that the use of the land, whether by the covenantor or others, shall be permanently restricted in the manner indicated in the covenant." This rests (it is understood) upon the classic equity doctrine that the assignee of the *res,* with notice of the restriction, is not liable on the contract (which avoids a conflict with the law's denial of the assignability of burdens), but merely on a distinct equitable obligation, or conscientious duty, that is personal to himself. All that is required is that he take the land with notice of an agreement affecting its use, or without the merits of a purchaser for value.

Because of its own extreme elasticity, this theory does cover with ease the vast majority of precedents. It seems, however, to be open to some objections. In the first place, most unorthodox laxity must often be permitted to find the presupposed contract between the grantor and each of his original grantees, and it is ex-

ceedingly doubtful whether equity really requires such. In the second place, "the equitable duty of noninterference with the covenantee's equitable right upon the contract" suggests difficulties. This is not (to judge by the language of the cases) the right of the original covenantee: after he parts with the land, and presumably loses all interest in the covenant, it would be absurd to talk of enforcing *his* rights (even if they could be held in gross). It is the right of the original covenantee's assign, the present owner of his land, that is enforced. He cannot, however, hold it as assignee of a contract, for there is no second party (after the covenantor has parted with his land), since the covenantor's contractual burden could not (under the legal rule above mentioned) be transferred. How, then is the benefit acquired, if not by purchase of the land? And if in that manner, is not the benefit necessarily part of the title? As respects the burden, there are other considerations. It is easy to understand that in England, where no burden could run at law against a covenantor's successors, and also where an assignment of a contract carried rights but not obligations, it was instinctive for equity, when it compelled a later holder of the covenantor's land to observe his covenant, to avoid the appearance of making him an assignee, and also instinctive to avoid the appearance of enforcing the same burden which at law could not run. Hence the classic theory, as above stated. By that theory each later owner of the covenantor's land must use it as the covenant provided, not because he is party to a contract with the covenantee's assign, but because that is conscientious conduct. And though the use of the land is thus perfectly controlled by the covenant (for the court is but an instrumentality), the title is said not to be affected. The ingrained evasiveness of the classic theory of equity jurisdiction—its feigned regard for legal rules and property rights which it in truth (usually justifiably, no doubt) controlled or nullified by indirection—were perfectly adapted to the problem before the English courts of *enforcing* burdens whose *transfer* was in no manner permissible at law. But in this country burdens do run both as spurious easements and under covenants running at law; and the non-assignability of contract burdens is authoritatively challenged. In this country, then, why should not both benefit and burden be regarded as passing with the *res* to successive holders? Why should we continue to repeat evasions by which equity once defended its jurisdiction? On the whole, no theory seems to offer a satisfactory explanation of the cases; and this is inevitable, because it is manifest to any reader of them that the courts have not proceeded on any unitary theory. For the future, some semblance of unity in doctrine and public policy might be developed if it could be agreed that what is involved is the creation of real rights.

8. Licenses

For centuries it was admittedly the law, as stated in a famous case of 1673, that a license "passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which, without it, had been unlawful." While unrevoked a license given to another, authorizing him to do acts on the licensor's land, restricts the latter's liberties of user as truly as would an easement. However, the law has always been that a license rests merely upon the landowner's permission, whereas the real *rights* heretofore discussed compel his submission. Hence, by the great weight of authority, it is revocable at the will of licensor, no matter to what inconvenience or to what expense the licensee may have gone in reliance upon it. The licensor can bring no action against anybody for interference with his enjoyment under the license; the license is not property under the requirement that compensation be given for property taken by right of eminent domain; nor is it an interest in property under the requirement of a writing for the creation of interests in land. If an interest in land at all, while unrevoked, it is certainly still a very slight one, usually not worth protecting by the processes of law, although no less so than many "expectancies" (p. 6).

That flagrant moral wrong results from revocation in exceptional cases cannot alter the fact that in the vast majority of cases none is caused. It is manifest that landowners will always be willing to allow to friends, or even to strangers, the courtesy of crossing land or taking some of its products until such time as the owner may be thereby inconvenienced, although unwilling to bind themselves legally to permit such use; in other words, unwilling to create in other persons real rights in their land of the traditional types described in the foregoing pages. As the distinction is grounded in human nature it should and certainly will remain one in the law.

It is also said to be ancient law, stated in the same old case above quoted, that a license "coupled with interest" is irrevocable: as a license to cut trees or hunt on the licensor's land and carry away the trees severed or the animals killed or trapped. In fact, however, the license given by the *landowner* is as revocable in these cases as in others; for, as respects trees not yet cut or animals not yet killed, it is terminable at any moment,

and the licensee cannot complain (unless, indeed, the license be essentially part of a contract for the cutting and sale of *all* the trees) . As respects trees already cut or animals killed, however, *the law* attaches a license to remove them, since they belong as personal property to the licensee (p. 16). Owing to the perishable nature of most property thus created, questions of the irrevocability of the license are rarely practical issues. However, if they be imperishable, as marble, a court of equity should indubitably enjoin unreasonably repeated or unreasonably delayed entries to remove them, and so compel a compromise that preserves the rights of both property owners. In no sense are they truly irrevocable.

There are some licenses which for reasons of public policy are said to be "irrevocable," particularly that given to a passenger by a public carrier and that given to a guest of an inn. This only means, however, that they may not be revoked without paying damages for breach of a duty imposed, not by contract, but by the law—namely, to accommodate any well behaved member of the public who offers pay for such accommodation. Of course the passenger has no property right in the train or of passage, and the guest has no lease of his room, nor bailment of the linen and silver which he is privileged, while a guest, to use.

The strict view of the old law has, moreover, been somewhat modified in attempts to protect the unwise, lessening the sharpness of the distinction between permissive and rightful user. If the licensee expends sufficient money in reliance upon continuance of the license it becomes, in a small number of states, irrevocable in equity. Unless created, however, by written instrument, and unless brought within the recording acts, it cannot be made fully effective as a proprietary right. No such "irrevocable license" has heretofore been recognized, apparently (although licenses may theoretically be of an infinite variety), which was not thereby made, in substance, an easement or a profit. There are only a few licenses in reliance upon which much money can or will be expended. The mode in which informal permissions are given practically precludes licenses amounting to real covenants. Although courts will differ as to how much financial loss must threaten the licensee before equity will relieve him, the principle is clear, and the name "irrevocable license is not objectionable as a description of new easements created in this manner.

Certainly, however, there are theoretical objections to such action. Equity has said for centuries that it protects only property rights. That it also protects many interests of personalty has earlier appeared (p. 33); likewise that it enforces contracts *for* the conveyance of any legal interest in land; likewise that for a century it has been protecting against interferences by strangers any contract, just as it would protect (pp. 10, 150) property, if the damages for a breach are inadequate. They are inadequate when unique personal services, unique chattels, or an interest in real property is involved. In the case of a license acted upon by expenditure of time or money a property right is created after and because equity enjoins revocation. To assume its prior existence begs the question; to assume that equity thus prevents the unconscionable use of "a legal right," equally *begs* the question. It may be suggested that unless equity enjoins there is no remedy, because there is no contract. But even when little money is expended under a license already received, there are very many cases in which a court can easily find an accompanying contract, implied in fact, not to revoke the license; and if revoked, damages are often adequate compensation for all losses reasonably to be considered as within the parties' contemplation of the consequences of a breach. The acts which one may be licensed to do on another's land are of infinite variety as respects character and contemplated duration, and the unwise will spend money for anything, and in reliance upon anything. Damages at law may be inadequate only because speculative, or because they are only collectible in a multiplicity of suits. Not only the natural *practice* of the courts but legal theory should draw a line between what is trivial and what is socially important. Instead of issuing an injunction, to protect the unwise because there was no express contract, it would be preferable to be astute in finding a contract and then give no relief unless it be for inadequacy of damages in one of the three situations above mentioned. Under those principles specific performance could be given—provided part performance can be found (but at that, too, equity courts are adept) to remove the bar of the statute of frauds—when the "contract" is for an interest in land whose recognition as such is already established, or for one that is closely akin to such an interest. This would prevent any indiscriminate creation of novel incumbrances, yet would permit courts of equity to do their part, with courts of law, in developing the character of advertising privileges and other interests pressing for legal definition. When the contemplated right is only for a limited period, as in the advertising cases, they are relatively unobjectionable. However, it is also true that in many cases they are therefore not worth protection at the cost of principle.

Consider, for example, the innumerable cases in which one purchases "a ticket" as evidence of a privilege to attend a public entertainment on private property. The confusion that may be introduced, into a field already confused, by a laudable desire to do justice when it is given expression in disregard of traditional meanings of legal words and conceptions, is illustrated by a recent English decision in which it was held that a spectator in a theater, properly dressed and well behaved, had a property right to remain. The decision rested, in part, upon a fusion of law and equity under statutes which have no counterparts in this country save in a couple of states; this may be disregarded. Some of the judges rested their decision upon the view that the license was coupled with an "interest"—namely, the "right" to witness a spectacle, and that this was received by "grant." Now "interest" has always meant in this connection a property interest; the word "right" begs the question at issue; and "grant" has for seven centuries meant the transfer of an interest that was admittedly property, and begs the question a second time. It is well established in this country that one purchases merely a license, subject to revocation, but that there is an accompanying implied contract not to revoke, with the corresponding remedy.

In all these cases there exist, under our present law, the difficulties stated in an opinion of Mr. Justice Holmes: "The ticket was not a conveyance of an interest in the race track not only because it was not under seal, but because by common understanding it did not purport to have that effect."[7] The latter reason is the fundamental difficulty referred to above, and it is unlikely that it can, or should, ever be removed. As for the other reason, licenses could always be given under seal, and were still mere revocable licenses, and so they would be today. The seal can be the basis of no distinction between a mere license and the grant of an incorporeal hereditament. Assuming the seal, all is a matter of intent. Usually, that is clear from the words and the form of the instrument. With rare exceptions it has always sufficed to say that "to give . . a sole and exclusive right even for an hour, a deed was necessary." Today, however, it is only when one thinks of the deed's form, aside from the seal, that there is any meaning in a confident judicial statement that "the distinction between a license and a grant is clear, and if you find a person affecting to grant by deed rights in respect of real property which are capable of being so granted, that is a grant and not a license"; everything being assumed in the "affecting to grant" and the "deed." Seals are disappearing, and there is increasing recognition of the most informal documents as deeds. The formal distinction between licenses and easements is consequently weakening.

9. Rent

In the feudal law there were three kinds of rent. *Rent* service—money rent, itself a service, paid in lieu of earlier non-monetary services—existed when the relationship of feudal tenure existed between the owner of the rent and the tenant of the land whence the rent issued. No new rent service could be reserved after 1290 (p. 177) upon a conveyance in fee simple; but it could be reserved upon the conveyance of any lesser estate *out of* a fee simple, being then incident to the reversion thus created. Inseparable from this reversion was the remedy of distress for the enforcement of the real obligation; rent service could be reserved to no one other than the reversioner. Even today, when the money paid by a tenant for years is made payable to a third person, though laymen call it rent, cautiously written law books avoid that term. This is because the rent paid by a tenant for years to his landlord is today *called* rent service. To be sure, there is now no feudal tenure, but the word "tenure" is applied to the relationship between the parties, and there is a reversion. Curiously enough, therefore, the rent involved in a relationship that was wholly excluded from the feudal land law is today regulated by rules once applicable to the most feudal of all rents.

A *rent charge* existed when a landowner *granted* to somebody a rent out of his land. In this case no feudal tenure could exist between the rent-holder and the tenant of the land; and in later times there was no pseudo "tenure" when the rent was separated from a true reversion of the grantor. The same was true if a rent was *reserved* on a conveyance in fee, or upon conveyance of a lesser estate that was the grantor's complete interest. There being no tenure, no reversion, there could in these cases be no remedy of distress unless expressly granted. The rent was a rent charge when the rent-holder had this right by agreement. A rent seck ("dry" rent) was a rent without right to distrain. In this country today, since there is no feudal tenure, and since, although distress has been largely abolished, ample statutory substitutes are everywhere available, there cannot properly be said to be any "dry" rent, and rent charges alone need be considered, aside from the spurious rent service of the ordinary leaseholder. The latter has already been discussed (p. 218). What was there said of rent as being normally incident to the reversion, but separable there-

from (in which case the rent service becomes a rent charge), and of apportionability of rent, need not be repeated.

The law's original notion of rent as a real obligation has been already noted (pp. 128, 143). In the present chapter that aspect of rent is the one primarily in question. Rent service, like other feudal services, bound the *land,* in whosesoever seisin it might be. It was a real obligation, though discharged through the tenant who collected its profits. If the tenant did not pay, no personal action lay against him. To compel performance of the land's obligation the lord could distrain upon any chattels on the land regardless of who owned them, and for all arrears of rent, even those accrued before the tenancy of the tenant at the time of the distress, who must therefore satisfy all. Today, with this original character of rents service scarcely showing in its present pale copy, the real obligation is more evident in the rent charge.

It is evident that that is a real right, substantially a servitude upon the land very like a profit, even though the rent be monetary instead of the medieval render in products of the land. However, rent charges are of little importance. As "ground rents" reserved on conveyances of fees simple they still exist in a very few states only (though elsewhere theoretically possible). But they exist only as survivals, since all such rents, if newly created, have long been readily redeemable, as being undesirable incumbrances upon titles.

The right to collect rent overdue is personalty. The right to rent to accrue in the future may be either realty or personalty. The character of a rent service depends upon that of the reversion to which it is incident. That reserved upon a sublease out of a term for years, being incident to a reversion for years, is personalty; but rent incident to a freehold reversion is realty—although rent reserved on a lease for years created out of a fee simple becomes, if separated from the reversion and so made a rent charge, personalty. For a rent charge is realty or personalty according to the estate, of freehold or less than freehold, that is granted in it.

When rent could be reserved in fee it could be granted out in fee, and successive estates could be created in it precisely as in land. It was regarded as a corporeal hereditament, which explains its free transferability as compared with the other real rights (themselves once possessing some characteristics of "corporeality") considered in this chapter.

Any rent can be extinguished by release, or by merger when title to rent and land come into common ownership.

(1) Norcross v. James, 140 Mass. 188, at 189 (1885).

(2) Gavit, "Covenants Running with the Land," 24 Ill. L. Rev. 786, at 794 (1930).

(3) Sims, "Covenants Which Run with the Land, Other Than Covenants for Title" (1901), 27.

(4) Sims, supra, n. 3, at 175.

(5) Tulk v. Moxhay, 2 Phillips 774 (1848).

(6) Stone, "Equitable Rights and Liabilities of Strangers to a Contract," 19 Col. L. Rev. 177, at 297, 301.

(7) Marrone v. Washington Jockey Club, 227 U.S. 633, at 636 (1912).

Interests in Personal Property

1. Their Relative Simplicity

The most marked characteristic of personal property as compared with realty has been the relative simplicity of its incidents, and the consequent simplicity of the means by which title to it is transferred or lesser rights in it created. In a general way this has always been true, whether one considers legal (p. 174) or equitable interests, possessory or non-possessory interests, rights held in one's own chattels or in those owned by others. Because of this simplicity, it has always been the ideal of law reformers to assimilate the law of realty to that of personalty, and that has been the slow tendency through centuries (p. 100).

"The further we go back, the larger seems the space which the possession of chattels fills in the eye of the law . . . An action for the recovery of chattels seems as typical of the Anglo-Saxon age as an action for the recovery of land is in the thirteenth century, or an action on a contract is of our own day." This is not because chattels were socially more important than land, for of course they were not (p. 70), but because they were movables, and their possession was therefore constantly in dispute, since possession was the admitted basis of all title.

"Seisin" was once commonly attributed to chattels as it was to land (p. 42), but it must soon have been perfectly evident that the consequences of seisin were inapplicable to chattels. Though actions to recover them might be constant, it was only a vain effort; because they were movable and destructible they never were and have never become with any certainty recoverable (p. 102). Evidently they yielded enjoyment, but it was not in the form of rents and profits by which land was exploited, and hence could not be made the basis of feudal services. They lay outside the feudal system and the feudal land law. They were not the objects of feudal tenure. For these reasons, and particularly because of their generally destructible nature, the system of estates developed in the feudal law was inapplicable to them.

The absence of estates was the primary reason why personalty was freed from the infinite refinements, substantive and procedural, that were evolved from a few basic concepts in the medieval law of land. In an essay full of a reformer's ardor, insistent upon the repudiation of tenure and the elimination of the heir at law, Maitland remarked: "You cannot create an estate tail in personal property. This is a blessed truth and full of promise:' To be sure, in very recent times it has been established in this country that interests analogous to the old estates (excepting fees tail, which likewise in land have generally disappeared,—p. 190) may be created as legal interests in chattels personal. But this is so only in the sense of a system. of estates long pruned of much of their one-time peripheral implications and consequences, except (as generally now used,—p. 181) the certainty or possibility of possessory enjoyment. One example is the freedom of chattels personal, so far as they can be subjected to restraints upon their use (p. 321), from the complexities in which are entangled covenants running with estates in the land. These complexities, as we have seen, are great as re-

spects covenants running with leaseholds, this being one of the cases in which the law that regulates chattels real loses simplicity because their subject matter is land. And the same complexities apply to covenants running in equity because of chancery's regrettable reproduction of so much of those doctrines. Another striking example of freedom from those consequences enjoyed by chattels personal—and by chattels real, but in a different way—is the fact that a contingent remainder in such a chattel, created by will or by any deed (p. 412), needs no freehold to support it (p. 257), and is immune to the feudal rule of destructibility long applicable to such a remainder in land. The same immunity was always enjoyed by a similar equitable interest. As will be noted again, below, the history of future interests in chattels, both real and personal—which is to say the history of estates in such property—is very predominantly a history of equitable interests; and their greater simplicity is evidenced by the fact that under the English Law of Property Act of 1925, which completely reformed the property law, no future interests any longer exist, in land or chattels, save by way of trusts (under which, entails are extended to personal property).

2. Divided Ownership and Estates in Chattels

Chattels were not exempted, however, from the basic Germanic doctrine of divided ownership. Common doctrines of seisin (or possession) underlay the creation' of all: of the fee by feoffment, of the leasehold by entry, of the bailment by delivery of the chattel. From the same source sprang divided ownership in every case.. Although chattels were freed from its application in the system of common law estates, other applications of it were made to them which, in effect, were extensions of that system. An absolute title to personalty corresponds to the fee simple in land. Leaseholds for years and at will have come to be fully recognized as "estates" (p. 185), although the old law gave the name to freeholds only. Bailments for a term and at will, their analogues in chattels personal, equally deserve the name of estates when feudal connotations of the word are disregarded, although to give them the name would serve no purpose.

3. Leases

In the case of the leasehold the lessee had at first only a contractual remedy against the landlord for eviction, because, his interest being wholly outside the feudal land law, that offered to him no remedy. That was altered by allowing him to recover possession from his landlord in covenant; and if that was not a new remedy devised for his special protection, at any rate ejectment—which was the final result of a development of three centuries—was such. It established the complete proprietary character of the leasehold. In modern law it has grown to enormous economic importance, certainly far exceeding any other interest except the fee simple. The simultaneous interests of lessee and lessor were of course always recognized; that was the purpose of the institution. It has been noted elsewhere that the continued employment of the words "tenant" and "tenure" in reference to the relation between the lessee and the reversioner is nowise improper, since there exists between them a tenure more real and substantial than was feudal tenure in the later medieval period when the leasehold took its rise.

The nature of a leasing instrument, and of the relationships which it creates, the modes of creating leaseholds of varying length and type, the assignment of the respective interests of tenant and reversioner, the running of covenants with each estate, and the manners in which the relationship may be terminated, are elsewhere discussed (pp. 198 *et seq.).*

4. Bailments

The situation was similar in the case of the bailment, although in details similarly obscured in its early stages by the imperfection of the common-law system of remedies or our imperfect knowledge of them. At least it is clear that a bailment, in the modern sense of a delivery of possession for a special purpose with an obligation to redeliver, was well recognized in the thirteenth century. To assume that this could be so unless the interests of both bailor and bailee were at least recognized, however poorly protected, would be an absurdity. It is certain that they were. The bailee was protected against the world generally as owner. The bailor had such imperfect remedies, originally, against the bailee that the latter was spoken of in the notes left regarding some cases (as were thieves and converters) as owner. Against third persons he was allowed for a time the action of trespass, until the development of trespass on the case gave him adequate remedies against both stranger and a bailee who exceeded his rights under the bailment agreement. But whatever the controversies regarding the development of the bailor's remedies, unquestionably the bailment was always (as of course all agree it is today) an example of divided ownership.

Bailments are ordinarily created by express delivery and with an accompanying contract, express or implied from the circumstances. But the rights and du-

ties so created in owner and bailee are in fact indistinguishable from those created in persons who otherwise come rightfully into the possession of another's chattel—as has been discussed in connection with finders. As there noted, the finder may be held guilty of larceny if he knows, or is put upon inquiry which with reasonable care would give him knowledge of, the true owner; and, of course, under like circumstances he would be a converter. But in the absence of such facts he becomes a bailee. So he does, too, if goods are mistakenly delivered to him instead of the owner, or animals stray or goods are washed upon his land, or he mistakenly takes another's chattel as his own; or even when custody is forced upon him, as when a tenant leaves goods behind him when he leaves the leased premises, or a bailor refuses to retake the chattel at the end of the bailment term. Anybody who is rightfully possessed of another's chattel is in fact treated as a contract bailee is treated, and is *called* a bailee, with, of course, varying rights and duties fixed by law instead of the parties' agreement; and bailment should accordingly be defined as covering all cases in which one person is rightfully in possession of another's chattel. Nothing is gained in such cases by insisting upon the presence of a contract "implied in" (that is, imposed by) law; it is simpler to say that the legal relationship arises under the factual circumstances by rule of law. Even when a bailment is created by actual contract, the contract by no means constitutes the complete statement of the parties' rights and duties. The law interprets or modifies them, or implements additional ones as incidents of the relationship. The duty of the finder or deliveree in cases of "involuntary bailment" (so called, but in fact he accepts possession) is to use reasonable care in preserving and in seeking to restore the chattel. Of course, he becomes, himself, the absolute owner if the former owner is not discovered or has abandoned the chattel (p. 353).

5. Pledges

The general rights of the bailee and bailor have elsewhere been sufficiently discussed. The bailment however takes many forms to which only very slight attention can here be given. The most important, perhaps, is the *pledge,* which is the bailment of a chattel (or the documents of title to in-corporeal personalty) as security for the payment of a debt or performance of an obligation, accompanied by a right in the pledgee to sell the pawn upon default by the pledgor or other person obligated. Not only past obligations, but future, may be thus secured. The transaction is one of the commonest credit devices and is of correspondingly great importance. The pledge gives to the pledgee a real right in the chattel pawned; or, as usually stated, a real obligation (of the pawn) is created, independent of the debtor's personal obligation. It differs fundamentally from a chattel mortgage in that this transfers title to the mortgagee as security.

The pledgee may bail the pawn to another person for keeping. He may repledge it to secure his own obligation, provided he does not do so for more than his own interest in it; and the subpledgee has no power of sale until the obligations of both obligors are in default. The pledgor may freely assign his title to the pawn subject to the pledge. If the pawn consists of securities which mature while pledged, the pledgee is bound to collect them and otherwise protect the pledgor's interests.

For the protection of creditors against rights held secretly in the debtor's property by third persons, a delivery of possession (unless the pledgee or a third person is already in possession) is always stated and generally required as a prerequisite to the validity of a pledge, since such possession by another than the debtor puts upon inquiry those who subsequently deal with him. But the meaning of delivery is relaxed in various circumstances, as by creating an equitable lien when crops or other future goods that have been "pledged" come into existence (p. 31), or in treating title-documents (bills of lading, warehouse receipts, bills of exchange and promissory notes, insurance policies, stock certificates, etc.) as representatives of goods or credit-claims, present or conditional, for the purposes of pledging these. Even choses in action that are not evidenced in writing may be pledged in the sense that they may by written assignment or by testimony of third persons be proved to have been made available to a particular creditor, and so placed beyond reach of subsequent creditors—certainly more effectually by a written assignment. Attempts to evade the requirement of delivery have been prolific of peculiar devices invalid against subsequent *bona fide* purchasers and judgment (or attaching, or levy) creditors, but otherwise valid between the parties.

6. Liens

In the case of many bailments the bailee has a common law lien to secure payment for his services. The common law lien is a mere right to retain possession of the chattel, with the exception that a factor has a right of sale. Liens may be freely created by agreement, and perhaps some of those habitually stated to be conferred by law may have remote contractual origins. (l) The liens of attorneys,

bankers, factors, packers, and wharfingers are commonly said to be based on custom. (2) Those given to various craftsmen who improve (or perhaps preserve) chattels by skill and labor are apparently remnants of a much larger class of liens. Liens were once allowed to all bailees for services in connection with the chattel bailed, provided they had no contract for a definite sum as payment—for then an action of debt could be brought, whereas, if the claim was for an unliquidated sum, an action of *assumpsit* was not (at the time in question) available. Ultimately, instead of denying the lien in all cases, or allowing it in all, it was conceded to any bailee who improves by skill or labor the chattel bailed; a test very difficult to apply with consistency. It will later be seen (p. *354)* that an innocent wrongdoer who by expenditure of labor or contribution of materials greatly increases the value of another's chattel may thereby gain the title to it. But this concession is not made to one who so improves another's chattel with knowledge of its ownership, and a bailee is necessarily in that position. In allowing him a lien, the law seems to give him full justice. (3) Other liens are conferred by law upon persons in public callings who cannot choose those with whom they wish to deal. Such liens are given to common carriers, innkeepers, and warehousemen. As regards the first two, another reason for allowing them this protection is that they are virtually liable absolutely for goods entrusted to them.

Liens of the last two classes mentioned are all "specific"; that is, the lien upon the chattel secures merely claims arising from the transaction as a part of which it was bailed. Liens, on the other hand, of the first class mentioned are "general"; that is, they may be exercised to secure the general balance of account between the parties. Although a bailment ordinarily presupposes a specific chattel as its object, in fact bailments (or sales) of a portion of a mass of fungible goods are possible, and ordinary actions of trover and replevin are allowed to protect the interests created.

Almost all liens exist against the bailor only. But the innkeeper is allowed to hold chattels of a stranger, brought into the inn as property for the use of the guest, provided the innkeeper had no reason to be suspicious of the lawfulness of the guest's possession. On the other hand, at least the prevailing view regarding the common carrier is, that he acts at his peril in receiving goods for carriage, although authority is much divided as to whether this applies to a second carrier receiving goods from a first carrier who violates the shipper's instructions regarding the route of shipment.

A retaining lien creates in the lienee a real right, and he may protect himself against either the lienor or third persons who interfere with the chattel or his right therein. This is merely the application of the rule applicable to all bailees.

Retaining liens are ordinarily lost if possession is lost, but this may be prevented by contract, as when the chattel bailed is an automobile constantly withdrawn for use and returned thereafter, if in a given jurisdiction the courts recognize a lien as capable of *existing* under such circumstances. They are also lost by any act of conversion, as in pledging or selling the chattel, refusing to return it upon proffer of the correct sum, either unqualifiedly or because claiming an excessive amount; likewise by voluntarily returning the chattel to its owner (but not by returning only part of a mass of goods), or accepting some other security in lieu of the lien.

The retaining liens of common law have been much altered by statutes. Some of these deal specially with garage-keepers, innkeepers, etc. Others are general in application. Very often they confer powers of public sale. Sometimes, too, equity gives the lienee a right of foreclosure and sale.

Many *other liens* than common law retaining liens may exist (against either land or chattels). Equity creates them freely; the most important being mortgages. All liens are interests, varying much in character in property. Nevertheless, aside from indicating a few of the oldest and most important they may be disregarded, since their nature and problems of priority among them pertain most properly to a discussion of creditors' rights and credit devices.

7. Other Estates in Chattels

The development of other estates in chattels real than the reversion left after a sublease, and of other estates in chattels personal than the bailor's reversionary interest following a bailment for a term (both of which were well established in the thirteenth century), was greatly obstructed by conceptual obstacles. It was said of the term for years that nothing could be left to limit by way of remainder after a life estate, since this was assumed to be greater than any term. To evade this a distinction was attempted between giving the land or an estate in the term and giving the use and occupation of the land while one should live, and then the use or the title to another. In a country in which chancery had for two centuries been acting on the theory that use and occupation were the essence of property, and in which most of England was held to uses, that distinction in the fifteenth century is not to be taken as other than specious pleading

in the court; and much more is this true of the sixteenth, after the Statute of Uses had shown that the country had learned the complete practical identity of title and enjoyment. A devise of the use and occupation was, accordingly, finally held in 1579 to be a devise of the land itself. As wills were administered in ecclesiastical courts, by judges presumably familiar with uses, the fact that the subterfuge was so long countenanced is presumably evidence of a general desire to uphold devises. Very soon afterward the same limitation, thus denied validity, was held valid as an executory bequest But the theory upon which this was done remained most doubtful. Consequently, since the validity of successive estates in the term, when equitable, was beyond question, all limitations of terms for years came to be, in England, made under trusts.

In the case of chattels personal the creation of future interests was similarly obstructed by the idea that "a gift or devise of a chattel for an hour is forever." Had this rested upon the idea that a chattel is necessarily consumable or destructible by use it would be understandable; but in fact the rule was again evaded, as in case of leaseholds, by the specious view that successive grants of use and occupation were valid, but not successive gifts of the thing or of estates in the thing. This extraordinary doctrine had much vogue until, in the latter part of the seventeenth century, the equity courts very properly pronounced identical a gift of the use and a gift of the thing. The matter would not merit mention if it were not, although inconsistent with our general principles of property, still supported by the names of two of our greatest authorities, merely as a means of overcoming an absurd bit of medieval conceptualism.

In the United States today future interests analogous to almost all the common law interests in land (with the notable exception of the fee tail) are presumably creatable in personalty. Their creation was always free of uses. They are doubtless creatable with equal freedom by deed and by will. Most of them are created by will. Very many of them are created as equitable interests. The need of a trustee for the protection of those holding the future interests, against the tenant of the particular estate, was once, however, much greater than today; for in some states statutes require the latter to give security in all cases, and perhaps in all states the same requirement will be made by the courts when deemed necessary. The development of future interests in personalty is, however, only beginning. Save for the convenience of using traditional names and descriptions of established meanings, they might perhaps be developed without any reference whatever to the common law system of estates.

The subjection of personal property to the power of eminent domain, the civil remedies available for its protection, the relation of personalty to realty under the law of fixtures, general modes of transferring title to chattels, the role played by delivery of possession in gifts and sales, the possibility of transfers of after-acquired property, the extent to which restrictions can be placed upon the use of chattels (otherwise than by the creation and protection of future interests in them), the protection of creditors under the doctrine of fraudulent conveyances, the relation of the recording acts to the problem of protecting *bona fide* purchasers for value and the general prohibition of restraints in alienation of either realty or personalty are referred to elsewhere.

Part II, Chapter XI

Modes of Creating, Destroying, Renouncing & Transferring Property Interests

1. Original Titles

It is customary in legal treatises to distinguish "original" from "derivative" titles. As regards land, in one sense no original tide is possible. Almost all land titles can be traced backward to a patent or warrant from a state or of the United States. *Occupancy* has never been possible as a source of title; hordes of squatters on government lands were made preemptioners by acts of Congress, but they took their titles by patent from the government. The nearest approach to it is the *accretion* to one's land which may result from the slow and imperceptible changes in the bank of a stream; by such changes the holdings of bordering owners are enlarged or diminished, whereas their titles are unaffected by sudden shifts in the course of the stream *(avulsion).* Somewhat similar is the acquisition by a landowner of title to chattels that are affixed to the soil, particularly by trespassers (p. 89), which is an example of *accession.*

However, an existing chain of title may be closed, and a new one opened, by the acquisition of title by *adverse possession,* or (as respects incorporeal hereditaments) by *prescription.* The titles are original in the sense that no one need thereafter go back of their consummation in tracing title, no matter what the earlier history of the land. One cannot divest one's self of tide to land ("corporeal hereditaments") otherwise than by the formal methods which the law prescribes. But other rights in land may be lost by *abandonment.* That is to say, the inchoate title of an adverse possessor in whose favor the limitation period has not yet fully run may be abandoned, and also either the perfect tide to an incorporeal hereditament or the inchoate title of a prescriptioner. In neither case, however, does such abandonment open the way to an equally summary acquisition of the abandoned right by another; it merely enables another to initiate anew the long enjoyment, hostile to the true owner, from which a perfect original title may arise.

Such unusual modes of acquiring title play a larger part in the field of personally. Title to wild animals is acquired by occupancy as an everyday occurrence; that is, by subjecting them to such substantial control as confers possession and therefore tide—since a possessory tide is good against all save one with a better right, and in the case supposed there is no such person. The acquisition of tide to gas, petroleum and other "fugitive" minerals in the earth comes properly under the same heading. As in the case of land, an existing title may be destroyed and a new one substituted, by adverse possession. Theoretically, prescription would likewise be possible; but in practice it does not occur-presumably because it is just as easy to control a chattel in all its uses, and so gain complete title by adverse possession, as to use it adversely in only one manner. Unlike title to land, an absolute tide to a chattel personal may be abandoned, thereby conferring upon him who desires it and is in a position to take possession a power to acquire perfect title summarily. This does not, however, apply to chattels real; to them the rule applies that governs estates in land.

A person whose chattel is wrongfully improved, either willfully or innocently, by another's labor upon it, or addition to it of other materials, may either bring a recuperatory action, claiming to be owner of the chattel in its improved state, or an action for its conversion in its improved state. (If he sues only for the value of his own contribution, of course no trouble arises.) Acquisition of title in this manner (accession) by the wrongdoer was once controlled by the question whether his addition had resulted in the creation of a new species of thing *(specification).* This was a crude test—for it is often difficult to say whether there is specification (for example, when silver is beaten into a mug, or lumber built into a boat, or leather cut into leggings) unless there is always such a change when a new object with a new name results. The test was made cruder when applied by inquiring whether the material contributed by the two parties could be ocularly distinguished, or physically separated. Moreover, it was unethical in disregarding the relative contributions of the two parties. The present-day tendency is, first, to replace ocular identification by ordinary evidence regarding the transaction; second, to regard any great increase in value, sufficiently great to move the particular court involved, as barring a recovery of the improved chattel—in other words, to inquire whose materials are, under all the circumstances, the principal, and whose the accessory, materials; and third, to limit this protection to an innocent wrongdoer. In an action of trespass or trover for damages the same tendency appears to assess the damages as of the time of the original wrongful act, or as of. a later time of demand and refusal after refusal to surrender the improved chattel, according as the improvement was or was not innocent. But the holdings of the courts reveal a great lack of fixed principles.

Confusion is a case of accession in which the tests of identification and severability can not, by hypothesis, apply—as where corn is made into liquor, or two masses of like goods but unequal qualities are mixed together in unknown proportions, or are similarly mixed but are of equal quality and contributed in a known ratio. In this last case there is really no confusion; even a willful wrongdoer would therefore be allowed to take his share, being liable, of course, to the other party for any special damage done to him. In the other cases, if the mixing be innocent, the parties will be treated as coowners subject to the burden of proof borne by the wrongdoer to establish his fractional contribution, and without such burden if the mixture was by consent. But if the mixture be wrongful and willful the decidedly preponderant view (notwithstanding the anomaly of making any civil action, either recuperatory or for damages, punitive) is that the wrongdoer forfeits title to his own contribution even though he might be able to prove its amount.

2. Adverse Possession

As already stated (p. 53) the theory of the law in this field is that the disseisor holds general title subject to a claim by the true owner, against which the possessory title will be "quieted" unless the higher right is asserted within the period allowed by the local statute. This is usually twenty years, rarely longer, in various states shorter; and if the adverse occupation is accompanied by payment of taxes the wrongdoer is in some states protected by a further shortening of the period.

The mere possession is constituted by effective control exercised with the intent to exclude the world generally (p. 36). It must, however, be "adverse possession" against the true owner in order to create in *him* a right of action that starts the statute against him.

Adverse possession is generally said, with some tautology, to require possession that is "open, notorious, continuous, and under a claim of right." There can scarcely be a possession that is not open and notorious; it can, for example, scarcely exist if the "control" is exercised only in the night. But the requirement of an open holding, sufficient to give to the owner notice of a hostile claim (for he is bound to have notice of what happens openly on his land) is essential to the constitution of a holding deemed adverse, or under a claim of right.

This hostility, however, is inferable by the great weight of authority from such conduct on the land as implies, objectively considered, a claim of ownership; that is, from such conduct as appears to be that of an owner. If, for example, a purchaser of land whose true boundary falls short of a fence occupies up to the fence, his possible states of mind may be three. He may be imagined to say to himself: I shall use the land up to the fence, although I know (or believe) it to be beyond the true line, and secure title to my neighbor's land if possible. Or he may say: I shall use the land up to the fence, since it has been so used, but certainly I claim nothing that is not mine, and will yield to any fair evidence that the fence should be moved back. Or he may say and think nothing about the matter, as is the usual case, merely possessing up to the fence as an owner would if he knew the true boundaries to be marked by it. A very few jurisdictions have, in the past or present, favored the evil wrongdoer, re-

quiring (as in medieval disseisin—p. 44) the first state of mind as a pre-condition to the running of the statute. No jurisdiction would, unless by inadvertence, allow the occupant in the second case to gain title. In the third case the objective acts should have weight. Since there is by hypothesis no intent covering the point, there should be no speculation regarding intent. The objective acts—the mere holding without the owner's consent; *a fortiori* that holding coupled with such use as an owner would make of the land—signify an assumption of ownership; that assumption is, under the decisions, a claim; and, precisely as in the conversion of a chattel, an assertion of right in one's self is necessarily and equally a denial of the right of any other person. Hence the possessor in the third case, although innocent, is nevertheless, in practically all of our states, an adverse possessor who gains title.

A doctrine once was prevalent that a wrongdoer "cannot qualify his wrong," and therefore an adverse possessor—not being allowed to be less evil—must claim, and so acquire, a fee simple. No doubt, adverse possessors generally claim and get the fee. But the apocryphal principle here appealed to is shocking even in a field where the doctrines seem somewhat akin to that which makes might equivalent to right. In England it has been challenged by high authority for Over a century. In this country it has been for that length of time laid to rest: one may claim what one desires, and one acquires only *what* one claims.

One may acquire title by adverse Possession through an agent. One may also acquire it by virtue of the acts and claim of another who is only by circumstances constituted an instrumentality for the purpose. This, should, for ample, on principle, be the case if one who is tenant at will of A, who conveys his title to B, continues to occupy for the statutory period under the assumption (claim) that A is his landlord; A, if anybody, must get title. It should equally be the result if a life tenant, under an ineffective will or deed (at least if its ineffectiveness is not due to defects of form, but because the would-be devisor or grantor lacked title or power to convey), claims the fee simple for the requisite time, but is estopped to deny the rights of remaindermen under the same instrument: the title should be gained for all the supposed grantees, or devisees.

Adverse possession is also required to be continuous. The statutory period must run as an unbroken period. This, of course, does not mean that the Possessor must always stay on the land. It means that he may not possess, then abandon (p. and then possess again; or, if several persons hold possession during the statutory period, that there must be no gaps between their several possessions. For the period required by the statute may be made up by tacking the successive holdings of a series of possessors who are in privity with each other. This "privity" is everywhere sufficient if constituted by the relationship of ancestor and heir, grantor and grantee by deed, or devisor and devisee. It is also satisfied, by the great weight of authority, by a mere transfer in fact of the possession from one adverse possessor to his successor, without any writing. This is not held to be an infraction of the statute of frauds. In a very few states, in the past or at the present time, either no privity is required or else it is satisfied by the mere fact of succession to the uninterrupted possessory estate of the wrongdoers, since these may be successive disseisors who oust each other from the land. The doctrine that an adverse possessor gains only the estate that he claims introduces difficulties in tacking when the claims appear to vary.

The statute begins to run when the adverse possession begins, must run in its entirety, and cannot be interrupted in its running. Allowances are made, however, for the disability, or the longest lasting of several disabilities, under which that person labors who is wronged when adverse possession begins. No supervening disabilities even of that person are allowed for. All disabilities of subsequent holders of the title are ignored; and therefore the fact that the title may, during part of the limitation period, be in infant heirs neither suspends its running nor lengthens it. The statutory period during which an action to recover the land may be brought by the original disabled owner after the ending of his disabilities, must, like the general period limiting each action, fully run. But the result of allowing the two periods may be to lengthen or not to lengthen the limitation.

Doubtless owing to frontier conditions there originated in this country the doctrine of *color of title.* This was a further application of the policy of the statutes, "for the quieting of men's estates"; that is, those of squatters. If the holder of a worthless deed which purports to convey to him a tract of land, occupies a portion of the land therein described, his adverse possession extends to the whole of it. This is not true if the true owner occupies any portion; for his possession—usually (but undesirably) called "constructive" as to portions not continuously or intensively used by him—can only be displaced to the extent of another's *actual* occupation. Similarly, if two adverse possessors with color" occupy portions of the tract, the first comer's pos-

session is only displaced to the extent of the later comer's actual possession. And resumption by the true owner of possession of any part displaces all possession of others by color. If the description in the invalid deed includes lands owned by different persons, color arises only against those of part of whose land actual adverse possession is taken; for otherwise they have no notice. Moreover, some cases have held that when part of one tract of an owner is occupied and none of another, no color arises as respects the latter, at least if the coloring instrument describes the tracts separately. But notice is equally lacking, whatever be that description; and what is a separate tract, either by conveyancing history, topography, or color-deed is another perplexity.

Where the title to the surface of land has been severed from the title to underlying minerals, adverse possession of one does not extend to the other.

The "entry" which suffices to break adverse possession has been earlier adverted to. The general nature of the adverse possessor's title—its heritability, transferability by deed or will, and proprietary character in other respects—have also been sufficiently discussed in earlier portions of this essay.

In England, under different statutes now in force for a century, an owner loses title to his land if dispossession continues for the statutory period, without inquiry regarding its "adverse" holding. It is therefore said that no doctrine of adverse possession there exists. But since there is dispossession the result seems little more than an unqualified application of the doctrine above stated that a holding of land without the owner's consent necessarily denies his title, as it does in conversion of chattels.

Inasmuch as an adverse possessor generally violates no right of the holders of future interests, the great weight of authority is that the statute cannot run against them in his favor.

All the principles just stated with respect to land apply to adverse possession of chattels, except that in the case of chattels there are no disability allowances, and there is no doctrine of color of title. The requirement of an open holding is much more important in their case inasmuch as they may be secreted or moved about. Considerable freedom in using the chattel, and therefore in moving it about if that be its nature, is allowed to the wrongdoer. But any removal from the original *locus* sufficient to amount to secretion suspends the running of the statute in his favor. The owner may sue wherever he finds the chattel in the wrongdoer's possession, the action to recover a chattel being "transitory," whereas an action to recover land must be brought in the neighborhood (usually the county) where it is located. Inasmuch as the law of any state extends only to its borders, removal of the chattel across the state line suspends (but only suspends) the running of the statute.

One question was once very important which has ceased to be so: namely, whether in the case of chattels, only remedies are barred by limitation, leaving intact the title and the right of recaption by self-help. It has been well settled in this country, with scarcely a dissent (but otherwise in England), that title is extinguished. This makes the law relating to land and personalty harmonious, and makes both consistent with its theory that a disseisor (or adverse possessor) has title, merely defeasible by claims that are cut off by the operation of a statute of limitations (p. 53).

3. Prescription

The acquisition, by adverse use of another's land, of a right therein is known as prescription. This has always been, in general, an institute of the common law, although it may now be regulated by statute. By analogy only, the courts follow, as to the time allowed the owner to bring his action (which breaks the running of the period), the local statute of limitations.

It has also elsewhere been noted that the prescriptive period can only start when such a use is made of another's land as gives him a right of action, and that negative easements can therefore not be gained by prescription (p. 283) Many of the principles stated in relation to adverse possession are applicable to prescription. The user must be adverse, or under a claim of right; permissive user (that is, under a license) can never be the basis of a prescriptive claim, however long it be continued. It is perhaps unnecessary to say that in reading cases of a century ago one senses that a great amount of user of the land of others was tolerated, and under frontier conditions, and must then have been regarded by juries as *prima facie* permissive, which could not be so regarded under present circumstances. It must also be open, to give proper notice to the owner of the land used. It need not be, literally, continuous, since that is not the nature of the use that one makes, for example, of a way across land or of a right to take wood or stone therefrom. But it must be sufficiently frequent to evidence a hostile claim, and not to appear as a number of disconnected trespasses.

The law of prescription has passed through various stages in its long development. The American law, with the possible exception of a few jurisdictions, is now in a stage characterized by the

fiction of a lost deed. Adverse user for the prescriptive period is said to raise a presumption that the user is, or has been, under a deed once given but lost. This is pure fiction. The presumption is not conclusive; it may be rebutted. It is not possible, however, to rebut it by disproving the fiction; that is, by proving that no deed was given. It can only be rebutted by showing that none could have been given. For example, no deed (which law would recognize) could have been given if from the moment when user began the title to the allegedly servient land was in infants. But here views diverge. Is the deed to be taken as given before the user began, making it lawful from the beginning ?—if so, it would suffice if the then owner was an adult. Or at the end of the user? Or must there *actually* always be a title-holder capable of giving the *fictitious* deed? Dicta differ in answering these questions. In support of the first may be cited a few dicta or apparent decisions that the prescriptive period does not begin to run (although the statutory period applicable to adverse possession does) if at the beginning of the user the servient land is owned by one under legal disabilities. In support of the third view there are decisions holding that the running of the prescriptive period is interrupted, or suspended, when the title of the servient land is held by infants; and there are decisions to the contrary. The former rest upon the idea that there must be acquiescence, which cannot be charged against infants. The latter follow the analogy of the statutes relating to adverse possession, as construed by the courts. They represent the simpler view and the weight of authority.

Because of the common law's preference for easements appurtenant, the acquisition of easements by prescription is generally required to be for the benefit of (the owners or possessors of) a dominant tenement. It has already appeared that profits were never seriously limited by this requirement.

Adverse user may be interrupted physically by the owner of the servient land, provided it be an actual interruption openly made in denial of the right to use. Some say that this result is proper because it disproves acquiescence; others, because it breaks continuity of user. On the former theory, some courts hold that oral protests or letters will interrupt the user. The authorities are very much divided, with the question settled in only about one half of the states. Legal proceedings suspend, at least, the running of the period.

4. "Voluntary" & "Involuntary" Alienation

Inasmuch as no property can be reached by creditors unless and to the extent, speaking generally, that the judgment debtor could himself alien it, it has naturally become usual to employ the phrase "involuntary alienation" to cover those situations where property is taken under judgment and execution, administered in bankruptcy proceedings, or taken by foreclosure of a lien. The phrase might logically enough be equally well applied to conveyances made *in invitum* under decrees for specific performance of contracts to convey, and to intestate devolution of property; and might once have been applied to the common law effects of marriage upon a woman's property.

But such an extension of its meaning would serve no purpose, and would impair its present utility (aside from which it has no particular significance), as a blanket designation of the different fields of creditors' remedies in discussing their common principles.

5. The Conception of Transfer

The common law conception of a conveyance or transfer is not wholly clear. The general idea of estates as the durational measure of a title to land was entirely clear. A sharp distinction was made between the assignment of all of a leasehold and the transfer of only a part, and important consequences attached to the distinction (p. 199). Likewise when A's life estate was conveyed to B, the latter received precisely that—an estate for A's life; and the creation of very long terms out of a life estate was controlled by conceptions that were equally clear, although to us unsatisfactory (p. 349). So also when, out of an estate of which A stood seised, uses were raised for other persons, the estates so created could not exceed the quantum of the estate Out of which they arose, and therefore all conveyances to uses were "innocent" (p. 259).

But when a fee simple in A, which if not aliened will descend to A's lineal or collateral heirs so long as they shall endure, is conveyed to B, it is granted to B and (as words delimiting the interest B received) his heirs. In actual fact and as a matter of enjoyment, B's interest is not at all the same as A's. To say, as we habitually do today, that they hold the same "title" or "estate" is merely to ignore the difficulty. On the other hand, the old rule governing descent of land was very sharp: it went to the heir of the person last seised, being also of the full blood of the original purchaser. With this rule and the case of the life estate in mind, it would seem that the only possible explanation of the transfer in fee simple is that every fee simple was once assumed to endure forever; therefore it made no difference whether B took while A's heirs or while B's heirs should endure.

As a result of Hohfeld's discussions of legal relations it has become a somewhat popular idea that there can be no such act as a transfer of title. The legal relations existing between A and other persons while he is owner, which constitute his title, are replaced when he "conveys" to B by similar (but not necessarily otherwise identical) relations to which B is a party; hence A's "conveyance" is really the exercise of a power that destroys A's legal relations and creates B's. It might almost as well be said that, were there a conveyance, the "grantor" would not in truth convey anything; since all legal consequences of an individual's acts result from a rule or by "operation" of law. However, these are unprofitable refinements. The law regards B's title as "derivative" and as "conveyed"; B does receive the right to hold land for the same length of time, subject to the qualification regarding the fee simple, as A could have held it, and in all cases subject to the law's rules pertaining to such estates. These are the essential matters. What the law has always called a "conveyance" is present, with certain consequences (which certainly are made clearer by the Hohfeldian analysis), and it does not appear what better name could be substituted.

6. The General Rule of Alienability

Doubtless proprietary liberties of user were the sole content of title as first conceived. Property for direct use is an older idea than the idea that alienation is also a use of the thing sold; and the conception of property for power, of such vast importance in present-day social theories, is much more modern still. But alienability is very old. Much of the known history of our property law is a history of attempts to fetter alienation, and counter attempts to free it of conditions sought to be imposed upon its exercise.

The general alienability of land is a principle whose establishment has a long history. Even the fee simple was freed from the primitive preemption rights of heirs only about 1200. Those were impediments to alienation, but not restraints upon the power to alienate. Other impediments were removed in 1290 by the Statute Quia Emptores, but at the price of total renunciation of the power of subinfeudation. Nor was it settled until perhaps in the fifteenth century that the alienation of the fee simple could not be fettered by conditions or limitations imposed upon its exercise.

Meanwhile the attempt of landed families to perpetuate their dominant position by tying up the land in entails had resulted in the creation of six forms of the entail in place of the single form of the fee simple. When the creation of the entail was first attempted the courts turned it into an alienable fee simple conditional (p. 189); the landowners then made Parliament their mouthpiece in the provisions of the Statute *De Donis* (1285), which definitely established the fee tail. That Statute made the estate indestructible by fines, and they were further protected by judicial decisions that conditions forbidding a feoffment by the tenant, or a clause of cesser upon his making a feoffment,—that is, provisions against alienation of the estate—were valid. These remained fixed rules of the law. However, the judges in 1472 held entails destructible by common recoveries, and two statutes shortly afterward made them destructible by fines. Attempts made late in the sixteenth century 'to forfeit the entail by inserting conditions against resort to the fine or recovery failed, but the landowners attained their end by the device of the strict settlement (p. 192). That, however, is no restraint upon the power to alienate. It is but a device by which the tenant in tail of any generation and his heir apparent may by self-restraint, by renouncing their power to alienate, tie the land for their lives.

It was next attempted to impede alienation by creating out of a fee simple contingent limitations to uses following a life estate, since such interests were inalienable; but it was held that if such limitations could take effect as contingent remainders they were such (p. 260), and therefore destructible by the life tenant (p. 257).

Thus, both the fee simple and fee tail were assured of alienability or destructibility. To be sure one more restraint was devised, but that has been controlled by the rule against perpetuities.

Various illustrations have earlier been given of the development of inalienable into alienable interests (pp. 27—8). Today, the general rule is that of free alienability. The exceptions to this general rule are all based upon considerations of public policy. Under the older law there were various exceptions which we would regard as caused by technical difficulties—such as the inalienability of possibilities of reverter, rights of entry, and contingent remainders. As elsewhere noted, these exceptions have in large part disappeared. Other exceptions due to one-time public policy have disappeared because of a change of policy. On the other hand policy has changed as regards other interests, once inalienable but now by statutes made freely alienable, such as the separate estates of married women, which were inalienable at law because not by it recognized as existing, and in equity (which created

them—p. 106) for their better protection. New interests have also been created and made inalienable; either completely so, as in the case of pensions, or partially, as in the case of homesteads, which may be aliened voluntarily but cannot be seized by creditors, and insurance policies. But alienability is the rule, exceptions are slight.

Property interests, even though generally alienable, may be inalienable when held by an individual. "If the owner of the interest has not yet been ascertained, the interest cannot usually be transferred [p. 2591. If the power to transfer has been lawfully withheld from the owner of the interest [p. 387] in the creation thereof, the interest is absolutely inalienable. If a penalty for alienation has been stipulated, transfer becomes practically impossible, even though there be a theoretical power to make it."[1]

The free alienability of property is today insured in two ways. The rule against perpetuities limits the time during which interests of future enjoyment can exist without that characteristic which makes them freely alienable—that is, without being "vested" (p. *375).* It is itself a restraint on alienation in the creation of future interests, imposed in order to insure full alienability of such interests at an early day. It is supplemented by a principle which bans any undue restraints upon the alienability both of vested future interests and of interests of present enjoyment. Inalienability is disliked because it acts as a deterrent to improvement of the property, and might be employed, as it was in England to concentrate wealth, and therefore power, in a favored class. To some extent, however the general policy gives way when an equitable life interest is made inalienable in order to restrict the beneficiary to enjoyment of income, perhaps at the expense of creditors ("spendthrift trusts"—p. 387).

7. When May a "Transferee" Receive More Than His Transferor Held?

Among the general truths of our property law (and of other legal systems) is the principle that nobody can convey a title or an interest greater than that which he himself holds. But, although this would be a normally proper postulate, there are in fact various exceptions to it. Very closely connected with that principle in history and in present fact is another that seems equally axiomatic; namely, that nobody can be deprived of his property without his consent. This latter is, indeed, a broader principle than the first, and some aspects of it that are quite unrelated to conveyancing have been mentioned in referring to the role of public policy in the property law (p. 165). In connection with conveyancing this second principle can only mean, however, that only an owner, or somebody acting for him by his choice, can convey his title. But this is equivalent to saying that no other person purporting to convey it can— because it is not his—successfully do so. The two propositions, being therefore in the main complementary statements when confined to the field of conveyancing, may well be discussed together.

In the modern law various direct and conscious exceptions to the principle are made in the interest of commerce—either incidentally to practices that facilitate its transactions or to give security of titles. In the old law the actual illustrations of the principle have the same explanation; but the most striking of its supposed illustrations seem to be better explained otherwise.

It is often stated, namely, that under the old law of tortious conveyances a grantee took a greater estate than that held by his grantor. That is apparently a misapprehension. These conveyances were not an exception to the principle under discussion in the form first stated; for the grantee took precisely what his grantor held. They do, however, illustrate the principle in its second form; since the grantor acquired by wrong that which, by equal wrong, he subsequently conveyed. To explain this by "public policy" would be farfetched; its true explanation is the old-time incapacity to separate possession (seisin) from title—even though a wrongful title. The old law was very familiar with the powers of wrongdoers, using other assurances than the feoffment, to cut down (to destroy as regards some of their incidents) the legal property rights of third persons; common recoveries, and only less so fines with proclamations, being particularly powerful for that purpose. Most extraordinary was the power of the former assurance when used by a tenant in tail in possession; for it barred the entail, remainderman, or reversioner, and destroyed any future uses or executory devises to which the title was subject, creating a perfect fee simple. This title the wrongdoer could give to another person or (as was usually done) to himself. This situation, also, seems therefore certainly to illustrate only the second form of the principle under discussion.

An exception to the rule in its first aspect but not its second, is the power to pass title which an owner confers upon any agent for sale; likewise all powers of appointment conferred by an owner upon the donee of the power.

Rather numerous and very important are powers that are exceptions in our present law to the rule in both its aspects, made

solely for commercial convenience. Such is the case of a thief who gives current money in payment of a debt, or passes for value negotiable instruments payable to bearer, and the case of a thief or converter who (in England) sells another's goods in market overt. The thief holds a power, conferred by law, to pass the title that is not his own. Other examples are, the sheriff's power to alienate a judgment debtor's property under an execution; the power of an agent whose actual authorization has ended, and the power of an agent with a general power but under special instructions limiting its use, to convey title under special circumstances; the statutory power of a factor to pass good title to innocent purchasers although in violation of the factor's duty to his principal; the power of one holding a voidable title to personalty to pass it clear of the defect by a sale to a *bona fide* buyer for value; the widened scope given to principles of negotiability by the Uniform Bills of Lading Act and Uniform Warehouse Receipts Act—conferring upon a holder of the document of title the power to dispose of the title irrespective of the owner's possession of the chattel, or his consent; the power of a vendor of chattels who retains possession after a first sale (valid between the parties and privies) to divest the first vendee of title by a second "sale" with delivery of possession to an innocent purchaser; the power of a grantor of land to divest a prior grantee of title, the conveyance being in fraud of subsequent purchasers but good as between parties and privies, by a later deed to subsequent purchasers without (at one time, even with) notice of the prior conveyance; and the like power of a grantor to divest his first grantee of title (good as between the parties and their privies), so long as he has not recorded his deed, in favor of a second "grantee" who first records his "conveyance."

All these cases have been instanced by various writers as showing that even legal real rights may be cut off in certain circumstances, particularly in favor of *bona fide* purchasers, and yet are not therefore regarded as less than rights *in rem;* so that equitable rights cannot properly be denied the qualities of real rights and rights *in rem* merely because subject to a like infirmity (p. 151).

Despite these various cases in which the law, for special reasons, gives fuller title to one man than existed in his predecessor, it remains true that in the vast majority of all property transactions no reasons exist for such exceptions. Equality of title in successive holders is the general rule, and manifestly corresponds to what men would regard as justice. Any other would cause social chaos.

8. The Rule against Perpetuities

It was in the cases of the late sixteenth century which struck down attempts to restrain alienation by imposing upon a tenant in tail a provision of cesser for an attempt to bar the entail (p. 171), or by creating contingent interests to uses after a life estate, that "perpetuities" first appeared in judicial arguments. It was not long before it was seen that executory limitations to uses or by devise which *could* not take effect as contingent remainders (p. 260) were not covered by those decisions. In 1620 the King's Bench held an executory devise indestructible by the holder of a fee simple on which it was imposed. Adumbrations of a doctrine against "perpetuities," in a vague sense, preceded that case, but it made clear the necessity of a restraint. It was nearly the end of the century, however, before it became clear that the perpetuity to be restrained was one caused by remoteness of the date at which an interest may vest. When it vests it becomes alienable.

The "rule against perpetuities" is a rule against restraints upon alienation in the sense that it limits the period within which alienation is rendered impossible by the contingent character of a future interest. After it vests, another principle of vague public policy, still very indefinitely formulated, regulates "restraints upon alienation," including both restraints upon the power of alienation and some mere impediments to its exercise.

The rule against perpetuities voids *ab initio* any limitation of an interest of future enjoyment in property if by any possibility its "vesting" may be postponed beyond a life in being and twenty-one years thereafter. This is the common law rule, which exists without statutory modification in at least two-thirds of the states of this country. Under five heads explanatory comments upon its foregoing brief statement are essential.

In the case of remainders the "vesting" which saves an interest under the rule is either a vesting "in law," as already explained in discussing those interests (p. 244), or a vesting in enjoyment through possession of the property. In the case of executory limitations by way of use or devise, which can vest only in the latter sense (p. 262), the rule applies to their vesting in that sense. When any interest vests in the second sense it is said to "take effect." To interests which are vested the rule has no application whatever. If a remainder has vested in law, it matters not how long its vesting in enjoyment may be postponed. Hence a remainder to B, a living person, is good although it follows life estates in A and A's children (some

of whom may be unborn when the limitations are created), and may not come into possession until long after the period allowed by the rule. A present fee simple interest, legal or equitable, although the only interest that actually approaches a "perpetuity" in nature, is wholly outside the rule. The rule is one against *unvested* perpetuities.

The certainty of vesting must appear absolutely at the moment when the limitations are created by the taking effect of the will or deed containing them. No limitation is saved .by the fact that, as events actually happen in the particular case, vesting *is* not postponed beyond the permissible period. It is the application of this principle which defeats most of the gifts that are invalidated by the rule. A testator's gift to *his* grandchildren who attain 21 is, for example, valid. The measuring lives (though unmentioned) are the children, in whose lifetimes all the grandchildren must be born. But a trust deed drawn in the lifetime of the testator in favor of the same beneficiaries would have failed, since grandchildren might include, even posthumous issue of a child later born to the creator of the trust; it could only be made good by confining the gift to grandchildren born of his children then living. For the same reason a devise by 0 to the grandchildren of A (living when 0 dies and the will takes effect) who attain 21 is invalid. Similarly, a gift by will to such of testator's grandchildren as survive both their parents is invalid —since sons or daughters of the testator may marry persons unborn at the testator's death; and in a devise to a man for life, then to his widow for life, with a contingent remainder over, this last is bad—for the widow may not have been born when the testator died. Again, suppose a gift to A for life, then to her children for life; the remainder is valid, since all children must be born in A's lifetime. But only a few American courts have had the hardihood to say, on professional advice, that a woman is past the age of childbearing. Hence, no matter what A's present state of marriage or widowhood, past history of infertility, or present age, if the above limitations be followed by a third to her grandchildren this last wholly fails. By legal possibility she may still have children; and this introduces persons not in being when the limitations were created. Moreover, of *these* children, grandchildren of A might be born more than twenty-one years after the death of persons who were living when the limitations were created. This illustrates the meaning of the statement that one must first construe the limitations as events might occur, without reference to what has actually happened; and then, to the limitations so construed, remorselessly apply the rule. With few exceptions it is so applied. It is, however, merely an illustration. Several other situations frequently occur, less fantastic but equally outside the contemplation of the ordinary draftsman of a will or trust deed, and all enforcing the necessity of using the utmost care to avoid collision with the rule.

One escape for a limited number of interests has lain in the fact that a limitation which in itself is too remote does not fail if it is destructible by the holder of a preceding vested interest. For example, while estates tail were realities, no contingent interest following an entail could fail under the rule (p. 190). In this instance it does not appear as a rule against remoteness of vesting, but as one primarily against restraints on alienation, and so, secondarily, as one against remoteness in vesting. Similarly, since a legal contingent remainder limited after an estate for life was for centuries destructible by the life tenant (p. 257), and would fail, anyway, unless it vested before the ending of that estate (p. 249), the rule was not needed in that case. But now where both of those causes of destructibility have disappeared, all legal contingent remainders are controlled solely by the rule against perpetuities—as equitable contingent remainders always were.

The life "in being" by which the time is measured must *be* in being when the instrument whose limitations are in question takes effect. Moreover, it must be a life reasonably connected with the purposes of that instrument. Since any number of lives will endure only as long as that one among them that lasts longest, postponement for any number of lives is only postponement for "a life." Lives so used, however, may be others than those of the donees under the instrument; a reasonable number of persons who are otherwise strangers to its purposes may be selected for their prospects of longevity in the hope of postponing vesting. But one may not impose improper labor upon a court by, for example, a limitation of property after the death of the last survivor of the present living residents of a city, or of any other large group of persons who are not beneficiaries.

The 21-year period need not be the minority of one of those to whom an interest is given (although it usually is). It may be "in gross"; for example, a testator may order the distribution of property twenty-one years after the death of a life beneficiary. In addition to this period, gestation periods of actual beneficiaries are allowed, since children in womb are regarded as "living" or "born" or "in being" in applying limitations containing those words. As many as three such

periods may by possibility fall within the time allowance of the rule.

Various interests to which the rule applies or does not apply have been noted in earlier portions of this essay. In general it is applicable to all of the future interests which are professionally known under that name (p. 241); and equally to interests that are legal or equitable, in real or in personal property. The rule continues to apply to contingent future interests, originally inalienable, notwithstanding their having become alienable. This is due to judicial inertia.

9. Marketable Title

When one contracts to convey land and is compelled by a court of equity to perform, one must give a deed containing the convenants for title commonly given in the jurisdiction (p. 437). When one seeks specific performance against a purchaser who refuses to accept a proffered title, equity requires this, in the preceding all important aspect and in other respects, to be "marketable." A decree will not issue if it would amount to compulsion upon the buyer to acquire a lawsuit. But the law does not impose more than a practical test, and leaves gaps where protection is needed. This has been increasingly supplied in recent decades by the development of title insurance. Many grave defects, for example, exist in the recording acts (pp. *475—77),* notably in connection with inheritance. The "reasonable purchaser" is almost a *sine qua non* in conveyancing.

Not all defects are fatal. Reasonable deficiencies in quantity, which do not affect the nature of the estate offered, are adjusted in equity, if necessary, by an abatement of the purchase price. Nor are all defects of title fatal. No matter how serious the defect, if it is cured before the time set for performance the purchaser cannot (in this country) refuse to accept the title. Again, if there are incumbrances, they are provided for by a covenant against incumbrances in a deed tendered to the purchaser, or may (if not wholly irreconcilable with the parties' agreement) be provided for as are defects of quantity in a suit for specific performance. Again, apparent defects of title may in reality prove to be nullities. They are generally so if they amount to restraints upon the proprietary power (p. 384) to alien the title, or amount to substantial practical impediments to its exercise, either because of conditions imposed upon the exercise or, possibly, because the market within which the power may be exercised is limited. In either case they then "touch and concern" the nature or value of the power (and hence the title or the "land") in the sense already indicated in discussing real covenants (pp. 297 *et seq).* Validation of the latter is inconsistent, in part, with the policy which voids restraints on alienability,—if the latter be understood to include impediments to sales, and not merely restraints upon the power (right) to convey.

10. Impediments to Marketability and Restraints on Alienation

Many impediments to the sale of property have apparently not been thought of as restraints upon alienation in the technical sense. To this class of impediments belong all credit incumbrances. Mere division of the complete title into a series of estates impedes the sale of any fraction of the title, .or the sale of all. The rule against perpetuities originated as a check upon precisely this type of inalienable "perpetuity." Apparently, that rule has been regarded as a sufficient control of this type of hindrance to marketability. Only when the power to convey an inherently alienable future interest is directly restricted, is there any talk of "restraints upon alienation."

There are other impediments to marketability which, because they restrict the owner's proprietary liberties of use, restrict *pro tanto* his ability to exercise, in fact, his powers of alienation. This is true when a possibility of reverter or a right of entry is created upon a grant in fee simple of land to be used for a particular purpose only (pp. 250, 253). The land cannot be aliened for any other use. However, doubtless because they are ancient interests of the law, everywhere recognized as valid, these restrictions have never fallen under the ban upon restraints, and are probably rarely thought of as such. The same is true of all the rights held in one man s land by other persons, which were discussed in Chapter IX. The serious nature of the impediment is most evident in the case of building restrictions incident to a general real-estate development, but its generally objectionable nature may there be often outweighed by the benefits accruing to neighboring landowners as a body. But such deterrents to alienation are not spoken of as restraints on alienation, and do not resemble in form the limitations generally known by that name, and are in fact totally different.

Both impediments to marketability and restraints upon powers of alienation are presented in many covenants running with the land, for we have seen that they frequently "touch and concern" that because of a restraint upon the powers of alienation of one or the other party. The same double aspect of restrictions upon marketability and power characterizes "pre-emptive provisions, which require that before the land may be sold it must be

offered to some particular person [at a fixed price]; provisions requiring that upon [the first, or upon each] alienation of the land a specified portion of the purchase price must be paid to a designated individual; provisions which limit the right of occupancy to particular individuals or members of a particular social group; provisions forfeiting one tract of land for alienation of another tract; and provisions which prohibit partition of land among cotenants."[2] The first of these provisions is manifestly a restraint upon the power to alienate. Preemptions at a fixed price and unlimited in time have been generally held void, either under the rule against perpetuities as options, or as restraints on alienation when treated as conditions *(i.e.,* as forfeiture restraints, to which the rule against perpetuities is inapplicable, p. 254). Preemptions at the offeror's price would violate the rule against perpetuities if not limited in time to avoid it, but would seem innocuous as a restraint on alienation. Provisions of the second, fourth, and fifth type constitute powerful deterrents to alienation. The decisions are, up to the present, hostile to the second, divided as to the fourth, tolerant of the fifth; but only on the fifth are they numerous. Provisions of the third type are substantially a restraint on the power to alienate, since only persons of the designated group are potential purchasers.

These cases, as well as those involved in the following section, evidence the lack of settled views regarding the test by which to ascertain what fetters upon marketability should be permitted. There is no virtue in a theoretically unfettered power to alienate in a non-existent or seriously limited market. The possibility of curbing market restraints would be increased if it could be definitely established that they fall within the ban upon restraints upon the *power* of alienation.

11. Invalidity of Restraints on Alienation: Of Legal and Equitable Interests

Restraints are not created by mere admonitions or expressions of preference regarding what a grantor may do. Even expressions mandatory in form may not be restraints in the proper sense, but only inexpert indications of the nature of the estate that is granted; as when land is devised to A, with statements that he is not to sell it and it shall go upon his death to his children—meaning that A is given a life estate, remainder to his children.

Restraints may be imposed by direct provisions that the one to whom property is conveyed shall not have the power to alien it. The restraint may also be imposed by a provision forfeiting the interest for an attempt to alienate it, and either giving the property over to another person upon that event or reserving a right of entry for the breach.

The former has been called a "disabling restraint." An attempt to convey is in this case simply ineffective. The holder continues to enjoy the property, and his creditors cannot subject it to their claims (pp. 32, 184). A restraint that operates as a forfeiture, if not invalidated, necessarily involves recognition of a future interest created by the forfeiture provision. When there is a gift over upon attempt to alienate, the gift takes effect upon destruction of the preceding interest. If a fee simple is conveyed subject to a "condition" which is really a limitation terminating the estate upon attempted alienation, without a gift over, this is merely a determinable fee followed by a possibility of reverter. When a right of entry is reserved, destruction is contingent upon the creator's decision to consummate the forfeiture by entry (p. 254).

In most cases a restraint of either type would be equally either void or valid. But the courts have shown less repugnance to restraints operating by way of forfeiture. Hostility to any restraint is often shown by construing as covenants words that might be conditions.

In the case of a fee simple in land or an absolute interest in personalty, a perpetual and unqualified restraint upon alienation, of either type is everywhere held void (p. 318).

A disabling restraint upon a fee simple, limited in time (during a particular life, for a term of years, until attainment of a certain age), and whether directed against voluntary or involuntary alienation, is probably void in every state; and a forfeiture restraint in all save perhaps half a dozen. But these prohibitions may be evaded by creating an equitable life estate subject to a disabling restraint *(infra),* or a legal life estate forfeitable upon attempt to alienate, with remainders over in either case. By reserving to the grantor a power of revocation, he may be enabled during his life to nullify any conveyance made by his grantee. Or the remainders after the inalienable life estates just suggested may be subject to a power of appointment reserved by the grantor or to another person.

Restraints upon alienation of a fee simple frequently take the form of a qualification as to alienees. Alienation may be declared permissible only to members of a small group—brothers and sisters of the grantee, persons bearing his family name, persons of a certain theological faith, and the like. Such restraints, of either type and whether perpetual or limited in time, are void by a very great weight of authority. Again, alienation may be allowed except to

a small group. Superficially this constitutes but a slight impediment to marketability, yet the weight of authority is probably opposed to its validity. Finally, restraints prohibiting alienation to members of a relatively large class, members of a particular race or persons of a particular color, are common. They are usually imposed for the benefit of landowners in a real estate development, and take the form of covenants (p. 318). The states are about equally divided on the policy of enforcing forfeiture restraints of this sort. The restraint sometimes takes the form of a restraint on occupancy by persons of the prohibited race or color and this has been in some states held valid where a forfeiture for alienation to such persons is held void, but in practical effect they are identical. An injunction against breach of the covenant, or a decree setting aside the deed, has the effect of a disabling restraint (without impeding levies by creditors).

Restraints also take the form of forfeiture for failure to alienate. The power to alienate while living is most important. Hence, a restraining provision, if it greatly impedes or renders impossible transfers *inter vivos,* is usually held void—as when the property is given over if the first taker in fee shall die without devising it (for then an alienee by deed would be divested). It is a question of fact whether a provision actually prohibits alienation. Even a general power to make leases (long leases would permit improvements) has generally not saved such restraints from invalidation, nor has a power to devise. Moreover, if land is given over after death of the grantee (in fee simple) "without having disposed of it during his lifetime," although this clearly restrains only the power to devise, the gift over is almost invariably held invalid. Even when the limitation over is conditioned on a failure to dispose of it by *either* deed or will, it is likewise held void. Yet in the latter case there is no restraint on alienation; and in every case the gift over would perhaps incite alienation. The law is inconsistent, and rational grounds for its rules on these situations seemingly cannot be found. Moreover, they may be evaded by granting, instead of a fee, a life estate with remainders over, and making the latter subject to a power in the life tenant to appoint the remainder by deed or will. This device accomplishes the same result as the invalid limitation except in a jurisdiction where such powers convert the supposed life estate into a fee.

With respect to life estates there do not exist the same reasons of policy for prohibiting restraints. In particular, a life estate is ordinarily given to insure the tenant's support during life, and the restraint favors that end. Nevertheless, with very few exceptions disabling restraints upon legal life estates are held void. This can be evaded by creating a spendthrift trust. On the other hand, for no very convincing reasons, forfeiture restraints upon alienation by a legal life tenant (usually with a gift over to the remainderman in event of the attempt) are generally held valid. Here again the invalidation of a restraint may be evaded by reserving a power to terminate the life estate on alienation.

Forfeiture restraints upon alienation of a term for years, usually in the form of a running covenant not to sublease or assign with a condition for reentry in case of breach (p. 300), have always and everywhere been held valid.

A restraint upon alienation of a future interest which may continue after it becomes an interest of present enjoyment is void *in toto.*

It is widely held in this country, under doctrines now just half a century old, that equity will sustain a provision making inalienable the right to receive the income from a trust fund for life. The interest is, therefore, also beyond the reach of creditors. Such trusts are called "spendthrift trusts," although the *cestui* need not be a spendthrift. Under older doctrines a creditor could always reach the interests of a *cestui que trust.* They did permit, indeed, a gift of property to A until bankruptcy, then over to B; but this did not enable A to live on income in disregard of creditors, but rather stimulated him to live within his income. Under the spendthrift doctrine the power of alienation is treated as a non-essential constituent of title. Uncertainty as to what the effect of this is on the equitable title has produced a great variety of opinions as to whether the *cestui* has any interest in, or what interest in the property;—it would seem that he must at least have a right to enforce against his trustee a claim for maintenance. Where it is denied that the *cestui* has any "vested" interest, the rule against perpetuities may enter into the problem.

In recognizing these new creations equity had the precedent of its prior creation of the separate estate by way of trusts for married women—the benefit of which was from 1600 onward increasingly assured to her alone. As respects its own creatures, it might logically recognize and enforce what restraints it was pleased to approve.

Spendthrift trusts are, in general, only valid when created in favor of another person than the settlor. The settlor who creates such a trust for his own benefit cannot, to the extent of his interest (for that may be limited to his life, with remainders over) defeat the claims of his creditors.

Although in most states recognizing such trusts the re-

straint is limited to life estates, in some it has, in a sense, been extended to fees or absolute interests. For example, a legacy may be postponed until the termination of a spendthrift trust of land, with provisions making the personalty meanwhile exempt from the claims of creditors; or, similarly, conveyance by trustees of a legal estate to the *cestuis* may be postponed after all or (p. 400) any other active duties of the trustees have ended. Substantially, however, such restraints upon fees and absolute interests have been limited to the life of the first taker.

12. The Ancient Basis: Common Law Conveyancing

Seisin is the key to an understanding of medieval conveyancing as it is to the old property law in other respects. In medieval times "the law recognized seisin as the common incident of all property in corporeal things, and tradition or the delivery of that seisin .. . as essential to the transfer of the property in that thing, whether it were land or a horse, and whether by way of sale or of gift."[3] And this was general Germanic law. The general relations of seisin, and its modern successor possession, to present-day transfers of title to real and personal property has been earlier discussed. "Common law" conveyances, as that phrase is generally used, is a name used to distinguish the law's older modes of conveyance (a dozen or so in number) as distinguished from those which resulted from the Statute of Uses (1535). A scanty knowledge of several of them is useful because of their connection with present practices.

Because of conceptions regarding seisin, freehold estates in land could not be created to *begin* in the future—i.e., could never be unvested, in some sense. A feoffment was the ceremony, performed on the land, by which (de-)livery of seisin was made from the feoffor to the feoffee, and by which in consequence the latter received the title to the fee simple—or (ignoring early special language of a "gift" in tail and a "lease" for life) other freehold. It was the standard conveyance of the middle ages, and the only means by which a present estate of freehold could be created or transferred. Incidentally to the transfer of such an estate vested remainders were likewise created (p. 248). No writing was required before 1677, but from very early centuries it was a practice, first of the great landowners and later of grantors generally, to prepare for evidential purposes a "charter of feoffment" (p. 406). In this country feoffments were used in colonial time, but how generally we do not know; they are recognized as methods of conveyancing in the statute-books of the early nineteenth century, but were then presumably nearly everywhere obsolete. It will be necessary to refer below to the question to what extent our present-day deeds operate as feoffments did, and to what extent by way of executed uses.

Fines and *common recoveries* were collusive suits, the first leading to a judgment that put an end *(finis)* to the dispute of plaintiff's title, the other to a judgment based on the theory that plaintiff already owned and should recover the land which, in fact, defendant desired to convey to him. The judgments served as conveyances entered on the records of the court. They are only mentioned here because it has been impossible to avoid references to them in connection with the history of the estate tail (p. 192). To some extent they were apparently used here in colonial times, and statutes passed in some states even later regulated or recognized them.

A *grant* had two meanings. In one sense it covered all transfers of any property from one person to another. "More strictly and properly," it was a deed, by which was effected the conveyance of reversions and remainders (coupled with the ceremony of attornment—p. 62), and of incorporeal hereditaments. A *release* was also a deed, with peculiar phraseology adjusted to its purpose. It was a conveyance of a man's "estate, interest, or right" in property of which he was not in possession to the person in possession. A *surrender* was the reverse of a release. These two conveyances have still these same meanings. An easement, for example, is "released" to the owner of the servient land. It is also generally assumed that merger necessarily follows a release or surrender. This is a usual, but not at all a necessary, consequence. Neither is it necessary that no intervening estate may exist between those whose holders are parties to a release or surrender. Finally, after the Statute of Frauds (1677) made impossible the creation of long leases by parol agreement and entry, written *leases* were employed for the purpose. Only a writing was necessary, but it was natural to employ the forms used for conveyance of free-holds. These leases were, accordingly, deeds; and so are all our leases today. Of course, although the chattel real devolves as personalty, it is treated by the law for other purposes, including conveyancing, as an interest in land.

Today, since all interests are transferred by deeds of common form, old distinctions are of no importance except as explanations of persisting verbiage (p. 406).

Surrender is of somewhat particular interest because, unlike most of the common law conveyances, it has not been wholly submerged in our ordinary deed

or in decrees of court. This is true, however, not of "express" surrender, which is made by deed, but only of surrender "by operation of law," which is exempt from the operation of the statute of frauds. A tenant of any type always has possession. A surrender is not the rescission of a contract, but the conveyance of an existing estate in the land. A mere abandonment of the premises by the tenant cannot be a conveyance; neither does such result from destruction of the leasing instrument, or merely of the seal thereon; nor from the landlord's acceptance of the keys when the tenant abandons, nor by a later request of the tenant for their return; nor from the landlord's entry thereafter merely to inspect or clean the premises, or to make improvements that may cause the tenant's return, or satisfy him if he returns—for the landlord does not thereby resume possession, and thus technically, destroy the tenancy. There is in none of these cases the tender and acceptance of a reconveyance—unless *mere* mutual intent can have that effect, which is by almost all cases denied.

But if (1) the landlord gives the tenant a new lease, in-consistent with the existing lease, it seems that they must intend a surrender of the first; nor could one take effect were the other not out of the way. Nor would it seem to be necessary that the second lease should take effect according to its terms so long as it does take effect as a tenancy inconsistent with the continued existence of the first, although in a few jurisdictions it is required to do so. (2) If the landlord actually evicts the tenant this should end the lease, since the tenant is deprived of possession; at least it should preclude the landlord from refusing acceptance of a tendered surrender. It might be artificial to find here any mutual intent; but if the landlord, under any other circumstances, for example, if there is a parol agreement acted upon, resumes possession in the technical sense, intent to surrender and to accept surrender are easily found. (3) The making of a new lease with a third person, who takes possession without the former tenant's consent, is eviction. If made with his consent, there is clearly a transfer of possession and a mutual intent to do that which is necessarily a surrender. If there is an agreement to make such a lease, which is for some reason ineffective according to its terms, but the intended new tenant enters, and is therefore a tenant at will, the result should be the same and for the same reasons. This is, with very slight divergence of authority, the law. (4) When the tenant abandons the premises, however, and the landlord, without his express assent (but usually after notifying him that it will be done), makes a new lease to a third person, the courts are greatly divided. The landlord frequently claims to act as the agent of the defaulting tenant; and various courts not only accept that view, but assume that there is a general principle of law requiring one to minimize the damage to which another's wrongful acts expose one. These are specious principles. Nevertheless, a majority of courts accept the result. An ingenious way to support it has been found in an insistence upon the two relationships, of property and of contract, in which the parties stand; the new lease, it is said, ends the tenurial, but not the contractual, relationship. This is an excellent statement of the result; the reasoning, however, is not found in the cases dealing with either this or the other situations. A clause in the lease reserving to the lessor such a power would remove difficulties.

It was stated by Baron Parke in a famous dictum that surrender by operation of law is totally independent of the intent of the parties. An existing leasehold, an estate in land, cannot possibly be terminated without the tenant's cooperation in some manner, be it assent to an eviction desired by the landlord or joinder in a surrender desired by both. In fact, their mutual intent clearly underlies the result in most cases. A few decisions can only be understood as resting upon an assumption of the parties' power to effect a surrender by the mere force of their agreement. It seems safe to say that the sharp distinction between express surrender and surrender by operation of law is weakening. A further violation of the statute of frauds, by permitting express unwritten surrenders, is a probable ultimate result.

13. Uses and Conveyances to Uses

In the twelfth century it was already common for one man to enfeoff another with land to certain "uses" That is, its rents and profits were ordered by the feoffor to be collected or held by the "feoffee to uses" for the use, benefit, or enjoyment of a person other than the feoffee, the *cestui que use.* What words were employed mattered nothing. If they showed the requisite intent they would accomplish the purpose; and this remains true today of our modern trusts. In the fourteenth century (perhaps earlier) these uses were enforced by the chancellor as binding the conscience of the feoffee, and were *equitable interests.* The feoffee was necessarily somebody whom the feoffor trusted; and the latter might himself be the *cestui que use.* Since the one enjoying the land held no legal title, uses were an easy way of evading liability for feudal services, forfeiture for treason, and dower of a

widow, and likewise a means of disposing of the *enjoyment* of one's lands after death at a time when no will disposing of legal title to lands was permitted. During the Wars of the Roses (1455—85), in particular, a very large part of all England came to be thus enjoyed by way of uses. So very usual was this arrangement that in case the feoffment charter recited no consideration as paid by the feoffee and declared no uses in favor of other persons, it was always held that there was a *resulting use* in favor of the feoffor. Indeed, this situation had apparently been reached by the beginning of the fifteenth century. After abortive attempts to curb uses had been made on a lesser scale by earlier statutes, the Statute of Uses was passed in 1535. Its preamble recited a long list of wrongs done, through their employment, to the crown and great landowners.

The object of the Statute, unquestionably, was completely to extirpate uses *as such.* But it clearly did not prohibit the creation of uses in the future, nor therefore the creation of legal interests by execution of such uses; on the contrary, its provisions explicitly applied to any use that any person "have or hereafter shall have." It was assumed that any such use would, by force of the statute, be converted into a corresponding legal interest. In this for about a century it succeeded, but thereafter the court of chancery began to enforce certain uses which were not covered by the provisions of the Statute. These new equitable interests are our modern *trusts.*

Most of the uses theretofore existing as equitable interests were turned by the Statute into *legal interests.* Its provisions have already been quoted (p. 259). Their effect was to give to a *cestui que use* a legal estate exactly corresponding to the equitable use which, but for the Statute, he would have enjoyed. The use was "executed" by the Statute; that is, turned into a legal estate. It has been seen (p. *260)* that so far as the legal interests thus created were identical in effect with common law estates theretofore existing, they were named and treated as such. They did not bear the name of uses. So far as the new interests did not thus become old common law estates they were—although now legal interests—called "future uses.

But the Statute is here in question, not with regard to the new types of property interests that owed to it their origin, but with regard to the new modes of conveyancing in whose operation it was put to service. It made possible *results* that were impossible at common law; and it furnished new conveyancing *tools.*

Of the *new results in conveyancing,* the first was secrecy. A feoffment was a public ceremony; fines and recoveries were recorded court proceedings; grants were deeds that must be delivered to the grantee. But 0 could sit in a London room, write a deed and deliver it to A as a conveyance to the use of B, and instantly the law converted the use into a legal title in B, leaving A nothing. And B need not be within a hundred miles. The second new result was a conveyance to one's self. At common law that was impossible. O could now in no way evade burdens as he could before the Statute; for if he, for example, conveyed to A and his heirs to the use of 0 and his heirs, the Statute instantly gave him the legal title, leaving it a question whether in truth it was ever out of him. It was therefore impossible, as the Statute intended it should be, any longer to practice by conveyances to uses the evasions above referred to. However, it was often desired by 0 to convey to A to the use of 0 for life, then to future uses. This made conveyancing vastly more flexible to serve the needs of landowners. A third result (with which the second novelty might be combined) was a conveyance of different pieces of land to several persons in one instrument. At common law this was impossible. But a conveyance might now be to the use of any number of persons, of whom the grantor might be one, and each instantly acquired his legal estate.

In the second place, the Statute added to conveyancing several new conveyancing instruments.

In the *bargain and sale* the mere recital of money paid raised the use. The recital of payment of anything theoretically having monetary value (for a peppercorn was sufficient) would serve equally well. The employment, however, of the phrase "for value received" (or its equivalent) has been held both sufficient and insufficient to raise a use; the "value" should, perhaps, better be left to the court to decide.

The bargain and sale was once merely a contract to convey, with the purchase price paid before conveyance, the chancery enforcing a use which was equitable. The execution of the use made the instrument a present conveyance; there was no longer anything contractual about it. Since 1535 a "bargain and sale" must be distinguished from a "contract *to* sell" and convey, of which contract specific performance must be sought.

This conveyance could, evidently, be wholly secret. To prevent this, Parliament passed an act (1536) requiring the enrollment of such conveyances. This statute was never regarded as in force in this country. However, we had our own recording acts, very generally, in colonial times, applicable to all conveyances. The result of this was that in En-

gland the lease and release was for three centuries the standard conveyance, because it was not affected by the recording requirement of the Statute of Enrollments; but in this country the bargain and sale has always been the standard conveyance—indeed, almost the exclusive conveyance aside from the quitclaim. The vast majority of our deeds currently prepared are still of this *form* (p. 411).

The use was raised in the *covenant to stand seised* by the existence between grantor and grantee of such a close relationship of blood or marriage as would raise a use from the "love and affection" inherent in such relationship. According to one of the greatest authorities on the older law, a spouse, child, brother, sister, cousin, or the wife (or, presumably, the husband) of any of these fell within the requisite relationship of "nature, kindred, blood, or marriage."

Inasmuch as this conveyance has been of particularly common use in carrying out family arrangements, the courts have been extraordinary astute to find its essential elements in instruments brought before them. However, they have not unanimously agreed that affinity by marriage implies the love and affection requisite for the covenant's operation. It is, however, only under a misapprehension that a court, because of the "covenant" should require a seal. Such was not a requirement of the old law. The promise can be construed from the baldest and least formal writing. Neither the relationship nor the consequent affection need actually be mentioned in the deed; the former can be shown by extrinsic evidence and the latter will be implied. In family litigation, when an instrument cannot be found to constitute a deed of any kind, the courts have frequently tortured acts and conversations into a contract to give a deed, and have then granted specific performance of the "contract." No doubt, however, justice has generally been done by violation of formalities in such cases.

The *lease and release* could be constituted before the Statute of Uses (1535) of those two conveyances created as at common law; that is, a leasehold created by parol agreement and entry and a release of the reversion to the lessee. The first was necessarily a public act. After the Statute of Uses either one or both of the interests could be granted by way of use. With both so created the result was a completely secret conveyance. In England the usual practice was to give to the purchaser a lease for one year, and on the next day give a release of the reversion. In this country, as above stated, the conveyance has never been much used.

As above stated, when a feoffment was made reciting no consideration and declaring no uses there was a resulting use to the feoffor. Of course, when the bargain and sale or covenant to stand seised were employed, a consideration was present; and although none was needed in the lease and release, it usually (naturally) had one. Nevertheless, there is a problem here in American conveyancing of the present day to which reference must again be made (p. 415).

Uses not executed by the Statute, and which were therefore (after a delay, as above indicated, on the part of Chancery) enforced as our modern trusts, existed in three situations. The first was when active duties were imposed upon the feoffee to uses by the terms of the grant. The second was, when uses were raised out of a term for years, since of that the lessee to uses could not stand "seised." The third was when several uses were created running simultaneously, as in a conveyance to A to the use of B to the use of C.

These last are known as "uses on uses." For the reason above indicated, the courts held that the first only was executed. An inquiry into the substance of the transaction would necessarily have led to the execution of the last use; but it was impossible for the courts of common law to make that inquiry. For centuries they had ignored uses, had not even recognized their existence; it would have been stultification for them to imitate the chancellor in scrutinizing their merits. The statute declared that the use should be executed; they required for its operation no more than a word, and the first word of the series.

Simultaneous uses must be distinguished from successive uses. In a conveyance of a fee simple by 0 to A and his heirs to the use of B for life, then to the use of B's sons successively in tail male, then to the use of C and his heirs forever, all these uses were *immediately* executed.

If legal title is given to trustees in fee or for life, with active duties for A's life which cease before the estate of the trustees terminates, the trust and the estate of the trustees end. And if, following A's life interest, other beneficiaries are indicated, whose benefits (uses) involve no active duties in the trustees, their legal interests, defined by the statement of those uses, take effect, presently or later, according to their nature.

14. Essential Character of Conveyancing before and after the Statute of Uses

The conveyancing system of the common law, although based exclusively upon seisin, was complicated by distinctions relating to that concept.

"This system of conveyancing

distinguished between transfers of the present possession and transfers of the present right of the future possession; also between the possession, or rather the seisin, of the freeholder, and the possession of the mere farmer or occupier; and again, between transfers to persons already connected, in point of tenure, with the land, and transfers to mere strangers; prescribing solemnities, differing in their nature and degree; according to the exigencies of the several cases, as livery, entry, attornment, deed; solemnities by which, in the simplicity of those times, the alienation was rendered sufficiently notorious and certain.

"Writing was necessary only where a *deed* was necessary; and though, in later times, the legislature, to prevent the mischief incident to verbal testimony, injoined writing in all transactions concerning land (except leases for a very short time, at a given *quantum* of rent), yet, as sealing was not injoined, a deed is generally necessary at this day [18401 only where it was necessary at the common law."[4]

Signing was not necessary before the passing of the Statute of Frauds (1677), and although it may be doubted whether that statute required deeds, as distinguished from written agreements, to be signed, the requirement seems to have been generally assumed; and the increased employment of the bargain and sale soon gave that construction added impetus.

The *substantive* law of property was complicated by the elaboration of uses. So far as regards mere *conveyances of legal interests,* neither marked complication nor marked simplification resulted. Possibly livery of seisin was once, in ancient times, rigorously formalistic, but surely it had ceased to be so long before the passage of the Statute of Uses. It was, with equal certainty, very much less formal than its accompanying charter of feoffment, and simpler than any deeds employed in our law until the enactment of "modern" statutory short-form conveyances. Nor were the other assurances of the common law particularly formalistic. Uses did avoid the necessity of actual livery, permitting the notional transfer of seisin in the sense of title (but not of possession—p. 260) by the execution of the use. In other words, it permitted transfer of title without publicity, which might be called a simplification, but is not one that has ever found approval in this country. Uses did not affect the other essential formality which existed in conveyances based upon seisin; namely, the necessity of an entry antecedent to an effective conveyance if the land was in adverse possession (p. 52). As for written conveyances, to create legal interests by way of a use one needed only to employ that word, and to avoid doing so it was only necessary, as Lord Hardwicke said, to add three words to a conveyance (a second "to the use"). The common law deeds and charters of feoffment were already elaborately formal documents. Doubtless the bargains and promises developed as equitable assurances while uses were administered by Chancery were, when they first became legal assurances, less formalistic, and may for a time have exercised some influence for simplicity. But it was not long before the lawyers made them over into the formidable deeds of bargain and sale and covenants to stand seised which can be found in collections of forms. In objectively considering the contribution of equity, it is not to be forgotten that although, as a result of the Statute of Uses, "the chief control over Real Property was permanently transferred to the jurisdiction of Courts of Equity," nevertheless Chancery "followed the law" by reproducing as substantive equitable interests counterparts of all the common law's creations. Not only that, but the equitable interests were created by the same limitations, by employment of the same technical words, and by subjecting them in many instances to like constructions—and this, notwithstanding that many qualities of the legal estates were not common to their equitable analogues. Even the rule in Shelley's Case[5] was applied to equitable interests, and a common recovery was used to bar an equitable entail. As for the *transfer of equitable interests,* they were necessarily incapable of transfer either by livery or by any conveyance operating by way of uses; and their alienation has always been valid without other formalities than a writing (since 1677) and a manifestation of intent. Nevertheless, equity draftsmen employed for their transfer the same deeds as were used to convey legal interests.

Two permanent gains to conveyancing resulted from uses. One was that so far as they displaced livery in transfers of freeholds, the field was narrowed within which "tortious" conveyances (of a greater estate than one rightfully held) were possible. Like the grant, all conveyances to uses were "innocent" (pp. 259, 366). The other gain was an emphasis upon intent as the all important factor in conveyancing. This is a general tendency in the development of law, but it works very slowly. There was in England no sudden substitution of intent for "prescribed formality." There was no steady decline of formalism. But the new spirit was present, and when added in our colonies to the absence of technical lawyers and

professional draftsmen, it gave us, as will be seen, a relatively sudden emancipation from old forms. Long before the era of legislative reform a tendency became visible to eliminate the necessity or effect of seals, and to lessen the potency of the technical presumptions carried by many words. But judicial conservatism was incapable of carrying out substantial improvements. In both countries, modern legislation based upon the principle of simplifying the expression of intent has carried reform much farther.

Some old presumptions of the common law have been repudiated, judicially or by legislation. New presumptions have been similarly established—for example, that a grantor shall be presumed to intend to convey property that he owns, and all his interest if his expression is unqualified. No deed or will is valid if its maker lacks mental capacity to make it. "In a few classes of cases . . . the law, as distinguished from equity, gives a special right of avoiding a transfer of title; a right which has been held to exist not simply against the first taker of title, but against any subsequent transferee irrespective of *bona fides* or value." 8 This was everywhere true until recent years of infants as respects sales of chattels, and true in some states of lunatics; but the Uniform Sales Act has altered it by making title indefeasible in the hands of *bona fide* purchasers for value. The old principle remains unchanged as to realty. If an instrument whose form indicates an intent that it should operate as a conveyance of one type cannot so operate, it will, if possible, be made effective as a conveyance of an-other kind. And everything "within the four corners" of an instrument shall be so construed as to give some effect to all if possible. Relief by cancellation or reformation of conveyances is given for the parties' common mistakes of fact; to some extent and increasingly for their common mistakes of law.

This enthronement of intent has necessarily led to much uncertainty in the application of legal principles. Possibly, also, it is not, substantively, an unmixed blessing.

15. Evolution of the Deed

The deed, as it existed through centuries, with its formal parts and redundant verbiage, was purely a product of lawyers; its form had no other authority than professional tradition. It was primarily developed from the charter of feoffment, and the charter's phraseology and other form came in part from the Anglo-Saxon landbook (which "may ... have operated as a conveyance of land")[7] and in part from Norman writ-books. But "the deed or other document which evidences the transfer became in most cases, and after the passing of the Statute of Frauds in all cases, the essential and necessary element in a conveyance. In this way a great impetus was given to the tendency, - which was proceeding all through the medieval period, to make the deed, which evidenced the intent with which livery of seisin was delivered, of more importance than the actual livery of seisin"[8] The introduction of conveyancing to uses, accompanied by the larger powers of grantors and the emphasis put, in connection with uses, upon intent, made the use of deeds absolutely necessary for the adequate statement and possibly necessary proof of the exact purposes for which conveyances were made. Lord Coke, of whom accuracy might be expected if of anybody, in describing livery of seisin speaks of the "deed" or "deed of feoffment";[9] and although "deed" might (and doubtless here did) have the meaning, merely, of a definitive act (p. 421), the language soon came to indicate the act of conveyance (p. 421). Still later, "fines, feoffments and recoveries were all made to play a part in those elaborate settlements of land [p. 192] by which its devolution to a number of limited owners was fixed, by which it was charged with sums of money in favour of other persons, by which its proper management was provided for by means of powers of appointment [p. 454]."[10]

Before 1500 the formal deed which was in general used, until recently, in England and this country was fully developed. It bore on its face evidences of its ancient origin. Its special forms—the grant, the confirmation, and the release, the express surrender (when made by deed), and deed of partition (which was ordinarily made by deeds)—were only variants. The employment of deeds to transfer title to chattels was established before 1500.

Conveyances to uses in historic times seem to have been, characteristically if not invariably, writings; and bargains and sales became ineffective in 1536 unless written and recorded (p. 398). As already noted, all these conveyances were speedily assimilated in form to the deed developed by the common lawyers. By the latter part of the seventeenth century the deed to uses had in England displaced the feoffment in all ordinary conveyances of freeholds. But feoffments, fines, and recoveries were still used for their various exceptional effects until abolished a century ago.

It is not to be overlooked that for at least well over three centuries the practice has more or less prevailed of holding a conveyance to be of whatever type its form may satisfy, in order to effect the primary intent to convey the title. In 1583 an instru-

ment in the general form of a bargain and sale deed, but without expression of a consideration, was held by the Court of King's Bench to operate as a feoffment because a letter of attorney *to* make livery of seisin was included in the body of the deed. When deeds were of numerous types this could readily be done. Their reduction to only one or two types has in later times made it impossible to *choose,* among various formal types, the one that could be made to serve intent. It has compelled courts simply to disregard entirely whatever defects of form are nonessential.

16. Uses and Deeds in This Country

There are two questions here of practical importance. The first is, are any of the conveyancing effects of seisin still realities in our conveyancing? The other is, to what extent, if any, do our deeds operate by execution of uses?

As a matter of *ordinary* conveyancing all interests in realty had come, before the end of the seventeenth century, to "lie in grant"; few were made by livery. The old common law conveyances based on seisin, and those effected by collusive court proceedings, were obsolescent when our colonies were settled. The evidences of their use here are only slight. On the other hand, deeds were employed here from the first, and recording systems were early developed. In various of the colonies statutes were passed in the seventeenth century, and most likely in all, to the general effect that conveyances by deeds fully executed and recorded should be effective without, as some put it, "any other act or ceremony" whatsoever. The purpose of these acts was to declare unnecessary, in particular, livery of seisin and attornment, one or both of which the majority of statutes explicitly mentioned, and so it was held by the courts of other states whose acts were less explicit. They did not, in general, expressly abolish those formalities, although Georgia, at least, did so. A considerable number of non-colonial states have similar provisions in their statute books today. Although today all such dispensing statutes are presumably understood to be prohibitory, this could clearly not have been the intent in colonial times. The first conclusion is, that feoffment in the original sense is wholly obsolete. But that does not mean that the incidental conveyancing effects of seisin have also, necessarily, ceased to operate. One other possible effect is dependent upon the existence of conveyances to uses, and can best be answered after discussing the question whether our present deeds actually operate by execution of uses.

This question is one of exceeding difficulty. The deeds which were declared by statutes, as above indicated, to be as fully effective as feoffments were variously designated, but among them the "deed of feoffment"—that is, the general common law deed which at first was known as the charter of feoffment—is prominent. Were the standard deeds to uses regarded as operating in colonial times by way of use? Very likely for a time they were, for the Statute of Uses was substantially reenacted in a few of the colonies. It has been declared in others to have been a part of their common law (and in some non-colonial states the courts have made the same declaration) as suitable to American conditions. But it seems that the "deed of feoffment" should inevitably become in popular understanding equivalent to a feoffment. With this evidence before their eyes that actual livery was profitless, its publicital value being more than filled by delivery and record of the deed, the colonial statutes above mentioned are readily understandable. But if a "feoffment deed" necessarily and manifestly took effect by mere execution and delivery, it would, again, seem inevitable that other deeds should be regarded as made effective by the same properly manifested expression of intent followed by delivery. The fact that in *form* deeds were such as should properly operate by way of use (particularly the recital of consideration in the bargain and sale) would have meant, even to most lawyers, no more than do the phrases, in deeds of today, whose real meaning disappeared centuries ago. It is true that in many cases of a later period courts composed of professional and trained lawyers made much of the Statute of Uses. But in colonial times almost all judges were laymen, and the number of lawyers well trained in England (or possibly at home) was very small. It seems likely that the Statute of Uses was forgotten, that we were substantially free from uses before the Revolution; that all deeds were regarded as operating as did the "feoffment deed" or the "grant." Only research in the unpublished judicial records of the time can reveal whether in fact this was the case. In various states a "deed" has been declared by post-colonial decisions to have the effect of a common law feoffment.

The survival or revival of uses following the Revolution is another matter. The crucial point is the creation of free-holds in futuro. Their creation was the only thing impossible by common law conveyances. But the most thorough researches yet made have discovered, even in the post-colonial period, only two decisions, both more than a century old, holding that deeds which in form were conveyances to uses could

not, for technical defects as such conveyances, create a future freehold. It seems, therefore, probable that researches in unpublished colonial records will support the view that the Statute of Uses was forgotten.

The question whether American deeds of today operate by way of uses is complicated by various considerations that render any answer speculative. In the first place, there was a reception of the English law on a great scale following the Revolution. That increased professional consciousness of uses; and, as already remarked, the form of almost all of our deeds was then, and has remained, that of a bargain and sale. On the other hand, the statutes of many of our states provide a short form deed which is declared to have the full effect of any other conveyance-but, unfortunately, they have been but slightly used. Those of several other states (and some of the preceding) declare that compliance with local statutes shall suffice to make effective any conveyance. There are also statutes in at least a few states not included in the foregoing classes which provide that any writing in which an intent appears to transfer title (at least if signed and containing the grantee's name) shall have that effect. Likewise in other states (and in various of the preceding) there are statutes that permit the creation of future freeholds-to create which was the only need, originally, for deeds to uses. Finally, in various other states (and some of the preceding) the *courts* have held that deeds in the form of bargains and sales operate by force of local statutes, and are valid without consideration recited or actually paid; or have held in various of the states of the preceding groups that future freeholds can be created without regard to uses (though supported in most cases by pro-visions regarding local statutes of the first two types just stated). As regards these judicial holdings, those not sup-'ported by declaration of a local statute to precisely the same effect might perhaps be supported by provisions contained in the statute books of every state which provide that the execution of all "deeds" shall satisfy stated requirements and that all deeds may be recorded, or must be recorded to have certain effects; a permissible inference being that all deeds satisfying these requirements shall effectuate any intent therein expressed. It thus appears that in at least more than three-fourths of our states there seems to be no need that deeds shall operate by way of uses, and in most of these deeds are probably not regarded as so operating. That this was the situation even years ago was the opinion of the greatest authority on American equity.[11] So far as uses are actually referred to by courts as the basis of transfers by deed, it is certain that in some cases local statutes make such resort to the doctrine unnecessary, and that in other cases such views are inconsistent with other judicial attitudes.

There is, perhaps, a general opinion that the possibility of making a deed operate by way of uses is a useful last resort for the purpose of saving conveyances. But, after all, a "use" never was anything more than an expressed intention that a certain person should have the enjoyment of property. Since the operation of any deed depends upon that intent, what is gained by raising and executing a use? The actual payment of consideration has long nowhere been necessary to support the grantor's intent that the grantee shall have the benefit of all title—that is, the use. A mere false recital of payment everywhere suffices; but, as various courts have asked, why require the false allegation? In many states it is no longer required, but why in any? A man should be able to accomplish by any deed all that he can by will, and the only hindrances are, first, this requirement of consideration (no question regarding which -should ever be raised save to protect creditors), and limitations upon the creation of future freeholds. This was the plan and the accomplishment of the New York statutory revision of 1830, and in various other states as much has been accomplished by the courts.

Suppose, then, a conveyance by bargain and sale to A to the use of B. Does B get a legal or an equitable interest, and how? Suppose, too, that active duties in favor of B appear. Then, in accordance with the views above expressed, which are supported on this point, also, by the same high authority just cited, B's interest is equitable, but A takes legal title by the deed as though it were a feoffment, not by execution of a use raised by recital or payment of consideration. It can also be said with propriety that he gets and holds the legal title because on all the facts, including the active duties owed to B, *that is the whole intent.* Nevertheless, in a few states uses are by statute recognized for the sole limited purpose of effecting conveyances by bargain and sale, lease and release, and covenants to stand seised.

Very closely connected with the question whether our deeds operate by uses is the more general question of the extent to which the Statute of Uses, or at least the doctrine of uses, has vitality in this country. It has often been declared to have such in "many" or in *"most"* of the states. It seems certain that almost all alleged instances of the existence of uses are confined to the operation of deeds or to the supposed "execution" of passive

uses, particularly after the expiration of a trust. The first of these situations has been discussed. As for the second, we have a universal rule, often declared in statutes which merely enact what is elsewhere applied without statutory aid, that a trust ends when the duties of the trustee terminate. If a deed is then required to be given by the trustee to the holder (whoever he may then be) of the beneficial interest, that is in consequence of the -latter's preexisting *right* to have the two titles united; and that right arises from our conception of the normal relationship of those two forms of title (pp. 143—47, 156). We separate them totally under trusts, partially in bailments and many other cases of divided ownership., When the division ends complete title is restored instantly and automatically. The courts which require no deed to be given by the trustee act consistently with our general principles of title, though their view is less desirable under our recording systems. It is established law that a conveyance of legal title can be made by grant in terms of complete enjoyment (p. 142). Every day the question arises whether an interest ostensibly given for life is converted into a fee simple by the completeness of the powers of user and disposition given to the tenant; and this is purely a problem of determining the whole intentor, if some prefer (the result is the same) the law's view of what constitutes title. Assume the case of a conveyance not by way of use to A (or, again, a bargain and sale to A in any state accepting the view that it operates as a feoffment), to the use of B, and that the latter is passive. Are equitable interests other than those under active trusts creatable in this country either directly, or by uses on uses, or uses raised out of personalty or terms for years? The fact seems to be that such conveyances to uses have been practically unknown in this country; so much so that in the opinion of our greatest authority on equity the question propounded is "almost entirely speculative and theoretical." In his opinion, however, the most that can be said for the creation of an express passive trust is that "where there is no hostile legislation, this result may still be possible."[12] In fifteen states, all uses, as distinguished from active trusts, have been abolished outright. In three others it has been declared that they never existed. In at least eight states the holder of the beneficial interest takes the legal title, in the case just assumed, by statutory declaration. But it would seem entirely proper for the court of any state to say, as equity has always said of uses (p. 400), that under all the limitations in the instrument the intent appears that A should not acquire legal title, and that B should.

For the same reasons, it should be entirely unnecessary, when a conveyance is made to A, to declare that it is made unto A and to his use, in order by this declaration to rebut a resulting use (p. *399)* to the grantor. Likewise, there should be no difficulty in permitting the creation of future freeholds, by deeds of bargain and sale operating as "feoffment deeds," or, particularly, conveyances thereby to persons not yet *in esse.*

So much for the operation of deeds. As for their actual effect, speaking generally, all legal interests in land are today alienable *inter vivos* by deed only (including title by estoppel —p. 443), with technical requirements of wording and form greatly relaxed as compared with the requirements of the older law. This is so no matter whether the conveyance be to a private grantee or (but in this case not as an exclusive method) to the public, to a person already holding an interest in the land or to a person holding none,—whether a conveyance of a freehold or of a term for years, of a corporeal or an incorporeal hereditament, of an estate of present or of possible or certain future enjoyment. Legal interests in chattels are alienable by gift—that is, by spoken or written words indicating a donative intent accompanied by the establishment of substantial control in the donee; by sale without writing if of relatively small value (p. 87); by written memorandum of sale if of greater value; or by deed.

In the great majority of the states of this country equitable interests in personalty are transferable (and the trust creatable) without writing. In only a few states can a trust of land be transferred (or created) without writing.

Transfers by will are today, with scarcely any exceptions, regulated by identical requirements for realty —and personalty, legal and equitable interests.

17. Contents of a Deed

The indispensable parts of a deed are the names of the parties, the description of the property the title to which is transferred, the statement of the interest therein that is transferred, and "execution." A further requisite to its operation is delivery; and some courts or statutes add acceptance.

(1) PARTIES. It is normally a fact that a grantee is definite. However, it has been seen that for centuries conveyances have been possible by contingent remainders to unascertained persons (p. 255); and likewise, they may be by dedication to the public (or by deed to their proper representatives). The statutes of uses and of wills added to the

contingent remainder other modes of conveyance to unascertained persons, and it has been above indicated (p. 412) that all of our present-day deeds should be equally effective for that purpose.

(2) DESCRIPTION OF PROPERTY. The description of the property is normally (but *cf.* 142) by "courses and distances"; that is, by statement of the directions, fixed by references to angles and points of the compass, in which the boundary lines run, and of their lengths. The area is also generally added, frequently with the qualification "more or less." Particularly in the original states the starting point and other guides were, in old deeds, trees or stone markers of unofficial character. In the younger states, where practically all titles rest for their description upon government surveys, the descriptions even in conveyances of rural lands, as well as those of urban tracts, are more accurate and with some official basis. However, from a scientific standpoint, or as compared with conveyances in some foreign countries, the best possible present descriptions (and only those of extremely valuable property approach that quality) are very crude. A movement has begun to redescribe all properties, basing the descriptions upon the triangulation stations of the Geodetic Survey.

Natural or artificial markers, railroads, highways, streets, the adjoining land of another owner, and the like, are "monuments," and in case of inconsistencies in the description of land conveyed the general rule is that monuments, directions and distances, and area have evidential weight in that order. Nevertheless, this order is not an absolute rule, and it may be varied for good reason; the only matter positively controlling is the intent of the parties. It is also a general rule that a deed shall be construed, in cases of doubt, against the grantor, or (in other words) in favor of the grantee. But this, also, is not an absolute rule.

In giving specific performance of land contracts, courts of equity allow for a deficiency in the amount of land available for conveyance (but very rarely for an excess) by altering the purchase price (p. 380). This is done with such freedom (when as much as a third, or a half, for example, is lacking) that it frequently amounts to the simultaneous making and enforcement of a new contract by the court.

Equity courts sometimes settle boundaries incidentally to suits arising in equity under ordinary grounds of equitable jurisdiction, such as fraud in obliterating a boundary; but apparently only a few states provide routine judicial establishment of uncertain or disputed lines. Private boundary adjustments between neighbors are therefore treated with liberality. If adjoining landowners settle a boundary dispute by locating a line up to which both thereafter occupy, *it* becomes the true boundary; and they are not regarded as violating the statute of frauds even though it be proved that in fact the settlement involved the transfer of title to land by one or both. Rather, this is treated by the courts as a construction of the deed or private survey based on its description. It involves no question of adverse possession, no occupation of the new holding, or mutual acquiescence therein, for any particular length of time being required. These theories seem to be just as applicable to agreements that are not made in settlement of disputes, although in theory the statute is then violated. In fact, however, the settlement is sometimes upheld when it is difficult to discover a dispute. A location of a line that is based on a mere mistake as to where the true line lies has been held in some states not to bind the parties.

Boundaries "to" or "along" (etc.) a road or stream are generally so construed as will not leave *merely* a road or half road in the grantor's ownership, perhaps from a sense of public policy. A line "beginning at" or running "to" a party wall or stone marker ordinarily carries to the center, but not if the monument be one not properly partible, such as a house.

(3) STATEMENT OF THE INTEREST CONVEYED A proper statement of the interest conveyed is manifestly a necessity. In this country, no matter what deficiency may exist, at the moment of contract, in a contract vendor's holdings, or defect in his existing title as compared with that which he undertakes to convey, the contract purchaser must give him until the performance date to cure them. This was a natural rule in a country where land has always been abundant and an object of speculative trading. It is different when a defect of title exists at the moment for conveyance. Of course, a life estate will not be forced upon one whose contract entitles him to a fee simple by any abatement in the purchase price. On the other hand, as already noted (p. 380), allowance may be made for creditors' incumbrances and even for such speculative incumbrances as dower in suits for specific performance.

Reformation may be had in equity of a deed that fails to express the parties' intent because of a "mutual" (common) mistake of fact; under which heading the courts classify a mistake of law (such as one regarding the nature of the grantor's title) which is taken as a fact in the parties' negotiations. But reformation is

affected by the intervening rights of third persons.

18. The Execution of a Deed: in Particular, Delivery

By tradition a deed was for centuries required to be sealed. Very generally today this is not essential, but signing is everywhere required. If the instrument is signed by both parties it is. an "indenture"; if by only one, it is a deed poll. Acknowledgment adds nothing to the validity and effect of a deed as between the parties and their privies. It is, however, universally a pre-condition to the recording of the instrument, and only recording protects the grantee against defeat of his title by that of a subsequent purchaser for value who, in the absence of recording, might be a purchaser in good faith.

The word "execution" is sometimes used as including, but more generally as not including, "delivery," which is the last, and everywhere an indispensable, prerequisite to the effectiveness of a deed as a conveyance. Once delivery exists, title has passed. The subsequent destruction of the instrument, or changes in its custody are of no importance. Very few, if any, other topics of property law are characterized by an equal confusion of language. A few propositions are clear enough.

(1) Delivery in the legal sense does not mean physical delivery of the instrument. If, for example, it is handed by the maker to the intended grantee merely for inspection, this is not delivery. Mere incompleteness of the instrument in non-essentials (such as date or acknowledgment) is of no importance except as bearing on the maker's intent. On the other hand, although retention of the instrument by its maker would, as an isolated fact, support an inference of nondelivery, nevertheless it is well agreed that there may be delivery in the legal sense notwithstanding that the maker retains the instrument, provided it is retained at the disposal of the grantee and by his will. As in many other cases of bailment, the maker is constituted bailee for the grantee without manual tradition of the instrument to him and back to the grantor. In short delivery exists when there is an intent that an instrument shall be presently operative as a "deed." As often stated, delivery may be effected by acts without words, or by words without other acts, or, as usually, by both. "As soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient" to make it his deed. But these statements conceal under the word "deed" the greatest single cause of confusion on the subject of delivery. A "deed" has three meanings, of which two must here be distinguished. One is that of an act done; hence—a seal being once peculiarly solemn evidence that a document bearing it was in truth the considered and definitive act of him whose seal it bore—any sealed instrument. Another is that variety of definitive act and sealed instrument by which an interest in land is transferred. In many judicial opinions the writers shift from one to the other of these meanings with lamentable results.

(2) It is equally clear that there is generally no delivery (and should never be) except one so intended by the maker; and that, consequently, if possession be taken by the grantee by force or fraud or stealth or by merely picking up the instrument from a place where the maker leaves it after its formal execution, it does not become an effective deed. The difficulty lies in the application of these vague words. For example, it was agreed in one case that the purchaser should pay $1,000 upon receiving his deed and give a purchase money mortgage for the balance. The two parties went to a notary's office for the preparation of the deed and mortgage, and after complete execution of the first, and while the notary was preparing the second, the grantee picked up the deed from the table, stepped out of the office and into another building, and there secured a loan and gave a mortgage on the land (of which the deed showed him to be, apparently, the owner), then returned to the first office, paid the $1,000. and executed the purchase money mortgage. The other mortgage was recorded first, but the purchase money mortgage was given priority. The former was worthless unless there was a title to mortgage, and the court held that there was none, since there had been no delivery of the deed. In this case the instrument was taken in the presence of the intended grantor, but he might perhaps reasonably assume that the instrument was taken merely for inspection. Besides, the maker was old and infirm. In many situations equity protects the aged, inexperienced, forgetful, inadvertent, careless, gullible, and unsuspicious, even against mere sharp practice, let alone against such fraud as here existed.

(3) It has been law for centuries that if the maker hands a writing, in the form of a deed, to the person named therein as grantee, he cannot prevent or postpone its operation as a deed of present conveyance by an attempt to impose extrinsic parol conditions whose satisfaction shall be a prerequisite to such operation. Despite the absence of actual intent (the overt act of

transfer prevailing over contradictory words), the writing becomes a deed. This is perhaps a survival of an idea that manual tradition of the instrument must simulate the livery of seisin in a feoffment. It has been often and strongly criticized because inconsistent with the treatment of bonds and negotiable paper, but that seems to be beside the point. Land was the chief form of wealth, and otherwise of unique importance, and particular solemnities might well attend its transfer. Today, perhaps the rule is unnecessary or undesirable, but it is well established.

(4) This brings us to the difficult cases in which an instrument that is in the form of a deed purporting to convey land presently to B is handed by its maker, A, to a depositary who receives parol instructions to "deliver" it (meaning, physically) to B when a certain condition shall be satisfied. The question presented in these cases, is, When is there a deed? The answer depends upon what is meant by a "deed."

It is clear that there must be a deed in the sense of a definitive act before that act can be a deed of conveyance. As respects the first it is almost always assumed that it cannot exist unless A has irrevocably parted with control over the instrument. Inasmuch as there may be legal delivery although the instrument is actually retained by its maker, it is certainly illogical, and apparently erroneous, to hold that delivery is impossible if any control over the depositary can be exercised by A. Apparently, what is indispensable in both cases is an intent to make the instrument operative as a conveyance (presently in the first case and in some others, *in futuro* and conditionally in the second) without further interference by A. Control over it, or over its custodian, might properly exist, it would seem, if for reasons which do not qualify that intent. Subject to this understanding, evidence is therefore pertinent which tends to show that the depositary is, on one hand, the agent of A, or, on the other hand, the agent of B. The depositary will naturally be a person in whom A has confidence, perhaps his lawyer or broker; but that he is such need not prevent his acting, as depositary, free from any control by A that could affect the character of the instrument. What is A's intent, and whether definitive, are questions of fact.

Of a deed in the sense of a definitive act, particularly his sealed obligation, it may well be said that "delivery to a third person, for use of the party in whose favor a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery"; [13]-and, indeed, as much might be said of any deed of conveyance, provided "for use" can be made to mean "for present and unconditional use." There is no doubt, also, that to a certain extent a potential deed of conveyance is "effectual" or "operative" from the moment of its definitive delivery to the depositary. In the interval between that moment and the moment when stipulated conditions are satisfied, B has a property interest of some kind which most courts regard as unaffected by the death of A (that is, as enforcible against A's heirs), is heritable by B's heirs, and is good, as will be seen below, against other intervening claims than those of *bona fide* purchasers for value. This interest is similar to other weak contingent interests which for centuries, like 'it, could not be aliened *inter vivos.* Their alienability has become established, and that may be its future history. Some were destructible; and courts and text-writers are not wholly agreed whether this interest of B is destructible when the conditional delivery is not in performance of a written contract for the conveyance of the land in question. Moreover, when the condition upon which title is to pass to B is one whose fulfillment depends upon his will, he holds a power (p. 19) to acquire title. However, no court has ever recognized that as the possible object of a conveyance.

Finally, it has been true for more than three centuries that instruments have, under certain circumstances, been held to be completely effective as conveyances from the moment of delivery to the depositary. Such cases were when a single woman made conditional delivery of a deed, and her marriage before satisfaction of the conditions made its operation as of the later date impossible; or when the instrument was made by one who died or became insane before satisfaction of the conditions. These cases were merely examples of the policy of making intended deeds effective, if possible, when circumstances did not make it unjust to treat the conditional delivery of the instrument as the consummative delivery of the deed; that is, when no intervening rights prevented. They have always been regarded as exceptions.

In the law of property a deed is an instrument that conveys title presently—although, of course, according to the nature of the interest granted. Those who say that the "escrow instrument" is operative or effective as soon as handed to the depositary, agree that "title" or "complete title" passes only when conditions are satisfied. Should it nevertheless be said that A's instrument is presently "operative" as a conveyance because B acquires the inchoate interests above indicated? Some academic

authority supports an affirmative answer. But, after all it is A's conveyance that is in question, and A's intent is the indispensable basis of any conveyance by him, and A desires his instrument to be operative as a conveyance only after the stipulated conditions are satisfied. Until then there is no deed, but only a definitive act from which may result the conveyance that A intends.

(a) The condition upon which ultimate delivery to the intended grantee depends is very often the death of the grantor. This is not truly a condition, for the event must occur; "if I die" (without qualification, as "of this illness") can only mean "when I die." The instrument can, therefore, by possibility operate as a present conveyance. A few courts hold that it is an attempt to dispose of property after death, and consequently cannot be a deed, and is totally ineffective unless its form happens to satisfy the requirements for the execution of a will. The great majority of courts give the instrument effect as a deed. The most common holding is that B is granted a fee remainder after a life estate in A, notwithstanding that nothing to that effect is stated in the instrument. Another theory is that B is granted presently an interest equivalent in its effect (but not otherwise analogous) to a springing use following A's fee simple (p. 261), taking effect in enjoyment when A dies. Both theories are consistent in a general way with A's intent to enjoy the land during life. The second theory is somewhat more nearly consistent with the description in the instrument of the estate granted to B. Such an interest as B's should be creatable by any ordinary American deed (p. 412), but the instrument does not so read. The parol instructions cannot themselves create interests in land consistently with the statute of frauds, unless they are written and the jurisdiction is of the most extraordinary liberalism in recognizing informal documents as conveyances; and then A's original instrument would be removed from the problem. Although that effect has never been attributed to the instructions, they are given the substantially equivalent effect of postponing the operation of what is stated as a present and absolute conveyance. Directions regarding a will, but *dehors* the testament, have no effect whatever, because the will operates automatically when death occurs. It is otherwise in case of a deed only because delivery is a matter extrinsic to the deed, yet essential to its operation, and evidence of instructions is allowed to show the nature of the delivery. The prevailing view—although of doubtful soundness, ancient and thoroughly established—is that such evidence does not contradict "the deed," since it serves to show that there is no deed except as created by the instructions and so consistent therewith.

(b) The condition upon which effective delivery is made dependent may, again, be an act performable by B. In this case a power is conferred upon B to gain complete title by satisfying the condition. Upon this situation the following was written in a book published slightly more than four centuries ago.

"And if I make my deed and deliver it to a stranger as an escrowl, to keep until such a day, *&c.* upon condition, that if before that day he to whom the escrowl is made shall pay to me ten pounds, give me a horse, enfeoff me of a manor, or perform any other condition, then the stranger shall deliver this escrowl to him as my deed: in this case, if he deliver the same to him as my deed before the conditions or condition fulfilled, it is not my deed *simpliciter.* But if the conditions or condition be fulfilled, and the escrowl delivered to him (after the conditions performed) as my deed, then it is my deed and shall bind me; and then begins to be my deed, and shall not have relation to the first delivery. But, *quaere,* if it shall have relation to the time of the condition or conditions; but it seems not, &c."[14]

In four centuries we have added very little to this except in-consistent decisions on each of its points. To the basic distinction between mere writing ("escrowl," scroll) and deed, laymen of course, have never attended: every maker of such an instrument as is here in question calls it a deed (and so too, today, does almost every judicial opinion dealing with the question whether it *is* a deed). As for a wrongful delivery by the depositary before satisfaction of the condition, we are as rigorous as Perkins when no rights of third parties intervene, but when they do intervene our judgments vary, as will appear below. On the last we are similarly less extreme than Perkins. Rarely do claims antagonistic to the grantee's rights intervene between satisfaction of conditions and receipt of the instrument. When they do his title dates, by better opinion, from the former moment, in accordance with the intent of the grantor.

(c) It is also possible that the delivery by the depositary to the intended grantee is the happening of an event independent of the latter's will—such as, for example, "if a Democrat be elected President in 1940." Such cases are relatively rare. The same principles are applicable to them that have already been discussed.

The entire literature of deliv-

ery is, as said at the beginning, a welter of double meanings, contradictions, and special pleading for desired ends. In one sense an instrument is a deed at the moment of conditional delivery to the depositary, and in another it is only a deed when intended to operate as a conveyance, namely, when stipulated conditions are satisfied. In one sense it "takes effect" or is "operative" at the earlier date because it then becomes "potentially" a conveyance or an "inchoate" conveyance or has "vitality," or because "it does create a change in the legal relations" of the maker and the intended grantee, or because the maker cannot (it is too easily assumed) retreat, or because the intended grantee does from then onward hold some interests that are more or less protected by the law. So unqualifiedly do some accept the view that the deposit date is that of the document's vitality that they deny any place for the operation of the doctrine of relation. To many courts and writers of authority it has, on the other hand, been a reality for centuries. Most of them have regarded its application as very exceptional, for purposes of effecting intent when no injustice is thereby worked. Others seem to regard it as properly present in all cases of conditional delivery, treating the deposit as creating in the intended grantee "equitable" rights to have a conveyance as of that date, which operate by relation when conditions are performed unless rights intervene between the two dates which in equity enjoy priority; or, at least, that the results are just as if such equities were present and so operative.

Except when claims of third parties so intervene there is no difference, in practical effect, between a deed of the deposit date and one created by satisfaction of the maker's conditions. If the deposit date were, literally, that at which a deed is created, no intervening interests arising under the grantor could thereafter arise. But nobody contends that this is so, despite abundant talk of the instruments "taking effect" as of that date. But if the view, here preferred, be accepted that there is no deed until the conditioned date, then the "rights" of the intended grantee are subordinate to any interests arising under the instrument's maker in the interval, *unless* the deposit be in pursuance of a contract good under the Statute of Frauds. Such a contract would create in the intended grantee a true equity to have a deed at the conditioned date, and permit the application of the theory just stated *;—without,* however, any need of attention to the doctrine of relation. That is the great advantage of a statute requiring all escrow instructions regarding conditional deliveries to be written, or of a judicial theory that emphasizes the equity theory wherever possible. This must, it is true, be done at the expense of the intended grantee under deeds of gift, which would then be left unprotected both at law and in equity. But it is a failure to distinguish between the two types of conditional delivery which prevents any clarification of doctrine. There is no reason for protecting a mere donee against those whose greater claims to protection, in our general judgment of what is just, have been crystallized in the priority rules of technical equity and in the principles of our recording acts.

In jurisdictions where the view prevails that title passes only at the conditional date, the case may arise that the depositary wrongfully gives the instrument to the intended grantee before the conditions are satisfied, and the latter purports to mortgage the land to creditors who act in good faith, or they gain a judgment which would be a lien upon the land if his. The very great weight of authority is that the maker's title is not impaired by the instrument's wrongful delivery. But some decisions are *contra,* and if the maker gives possession of the land to the intended grantee, still other courts find that act to be a misrepresentation to the creditors which estops the maker from asserting his title.

19. Acceptance of a Deed

Delivery has been above defined as what remains, after formal execution, before an instrument can be fully operative as a deed of conveyance. There is implicit in this statement the assumption that acceptance by a grantee is not an essential. The idea that it is such comes from a misapprehension that a conveyance is a contract. Other traces of this misconception have been noted in discussing surrender (p. 392). A conveyance is not a contract, and acceptance of the same is not essential to its consummation; but statutes in some states have made it so. But a donee of land either by deed or by will is not compelled (as is an heir, the law giving him his ancestor's title) to retain what another person has given to him. Very commonly it is said, assuming acceptance to be necessary, that this is "presumed" until disproved, a gift of land being generally beneficial. The question, however, is not one of economic benefit or burden, but of will. The donee may "disclaim" if he desires. If he does, no liabilities generally attach to him during the period preceding disclaimer; although he may doubtless be estopped to deny acceptance if delay in disclaiming and other circumstances are construable as representations which mislead third persons into acting to their detriment as creditors on the assumption that he holds title.

20. Creation and Conveyance of Incorporeal Hereditaments

It has been already seen that easements have always been created by deed (p. 284); that only easements in gross are independently assignable after creation (p. 280), easements appurtenant being conveyed along with the dominant tenements to which they pertain; and that the attempt to convert an easement appurtenant into one in gross destroys it (p. 290). The treatment of profits in these respects has been likewise referred to (p. 295). It remains to consider just how these interests are creatable by deed.

In the older law sharp distinctions were maintained between "exceptions" and "reservations" and between deeds poll and indentures. To some extent these are still adhered to, and therefore their effect must be stated.

By an exception, a grantor excluded from the operation of his deed a physical portion of the land included within the general description of the instrument, as when he conveyed "Blackacre, except one-half acre in the northwest corner within a fence." A "reservation," on the other hand, existed when the grantor, in conveying title to Blackacre, desired to "retain" an isolated right (an incorporeal hereditament) that is a constituent of the title granted. Really there could be no reservation or retention; title to the land, in the form of such definite estate, was granted, and it was considered a contradiction of the grant if particular liberties of user which were constituent portions of the title given, were withheld by the grantor. There is no such contradiction present when full title to certain land (of whatever estate be involved) is given, but no title to other land .that is excepted from the general description in the deed. In other words, what purported to be a reservation must in fact, on strict principle, be an interest granted back by the grantee of the general title. Consequently, at common law no reservation could be effective in a deed poll; the instrument must be an indenture—in which case the grantor's words of reservation operated as the grantee's words of grant.

However, even in colonial times the distinction between the two types of deed was weakening, and a deed signed by the grantor only (though habitually called "this indenture" in its premises) has long been almost exclusively the conveyance employed in this country. At the present day the act of accepting a deed poll containing a reservation amounts at least to a covenant by the grantee to permit the intended user, for breach of which he is suable for damages. As there is no signature by him, specific performance of a promise to convey the interest is technically unavailable. However, the tendency is, simply to treat the deed poll as an indenture for the purpose of effectuating intent, notwithstanding what were once regarded as technical obstacles to that result. This being so, the distinction between exceptions and reservations has likewise become unimportant, and tends to disappear.

Incorporeal hereditaments may also be created by what is known as "implied grant." This only means that they are not explicitly mentioned as created. If. the grantor of land, while owner thereof, has used one part for the benefit of another (for example, by using regularly a way from his house to a spring to secure water), he is said to have had a quasi easement, and the two portions of his land are referred to as the quasi-dominant and quasi-servient portions. If, then, he conveys the former, the marks of the way being visible on the ground, the deed is construed against him, and the grantee acquires a true easement in the land retained by the grantor. On the other hand, if he retains the quasi-dominant portion, again construing the deed against him, he does not receive an easement over the land granted. But this view is also losing authority.. The grant being, by the general view, found by construction of the deed, there is no violation of the statute of frauds. A very real objection is that such easements do not appear in the recorded deed. However, not appearing, there should be no constructive notice to purchasers of the servient tenement.

The requirements in these cases are generally stated as being that the user by the common owner must have been "apparent, continuous, and necessary." The first requirement is a reality; and any user is apparent if a reasonably careful buyer would notice it in his inspection of the premises—such as a water supply indicated by a pump, or undercover drains by any surface openings. Of course a merely occasional use of land is not a quasi—easement, whereas a reasonably "continuous" user would be. And the fact that a use is clearly beneficial is evidence tending to show that such user was not merely casual. Beyond this the requirements of a "continuous" and "necessary" character seem to have no meaning.

Easements "of necessity" have been elsewhere discussed (p. 279).

It has also been noted that an easement appurtenant passes with a transfer of the dominant tenement to which it pertains under the reference, "with appurtenances"; and likewise, the various manners in which easements are lost or destroyed (p. 289).

21. Covenants for Title

In feudal England a feoffee of land was assured of receiving and retaining full title by an ex-

press or implied warranty which assured him of the substitution of other lands of equal value if the title failed, for which reason it is known as a "real" warranty. This warranty bound the warrantor's heir only if he was named in the warranty, and then only to the extent that he received by descent from such ancestor assets sufficient to meet the demand. No distinction existed at common law between his liability on warranties, covenants for title, or other sealed obligations ("specialties") in this respect. Nearly four centuries ago, however, this warranty was already supplemented by covenants for title made by the grantor which were purely contract obligations. As damages had in 1276 become a remedy for breach of the old warranty (namely, the value of the land at the time of the feoffment) it had no advantages in this respect over covenants, and it did have procedural disadvantages. When conveyances by deed increasingly displaced feoffments after the passing of the Statute of Uses (p. 406), express covenants for title in the deed increased in the same measure. This country was settled at the time when this change in conveyancing was being consummated. Moreover feoffments apparently became obsolete here long before primogeniture, and without both the old warranty was unworkable. Thus, we have never known the latter except, in the earliest colonial records, in the form of a covenant clause of ostensible warranty, to which words of covenant came to be added, and which perforce came to be a mere covenant for title. But this covenant of warranty is altogether personal.

The burden of a covenant is personal, and after the covenantor's death is enforced, like any other liability, against his personal representative; that is, against his estate. The executor is bound although not named, and equally as respects breaches before or after the covenantor's death. The heir of the covenantor was not bound, at common law, on a covenant unless named. His present liability (like that of a devisee or assignee) depends very largely upon the statutory provisions for making a decedent's real estate liable for his debts. The benefit of the covenant passes to the personal representative of the covenantee if a breach occurs during his life, and otherwise to his heirs or devisee (as was also true of the ancient warranty).

It has been remarked before that warranties are implied in the sale of chattels, but none, at law, in the conveyance of realty (p. 202) except in leases for years. If one takes a quitclaim deed (an American product grown from the old release) there are generally no covenants. If one accepts any other form of deed one is limited to the covenants which it actually contains. But if there be a contract to convey land, simply, and a deed proffered be refused, equity interprets the contract, in giving specific performance, as an undertaking to convey by a deed containing the express covenants for title which are customarily given in the locality. As covenants are mere contracts, special covenants of any character may be framed by the parties if they desire, but the covenants in relatively general use are six in number. The imperfections of the recording system (pp. 475—77) leave much room for, and give value to, the personal liability of a grantor which is thus secured.

(1) The *covenant of seisin* (that the grantor "is lawfully seised," or "has good and sufficient seisin") has been more or less construed as meaning seisin merely in the sense of possession. In that sense it was formerly equivalent to an assertion of right to convey, but since an owner out of possession long since acquired power to convey his title, such a (2) *covenant of right to convey* has become of practically no meaning so far as possession is concerned. It continues to be somewhat used, but has little value, for in accordance with a general employment of "seisin" to mean title, the covenant of seisin has been interpreted in England for nearly three centuries, and is with rare exceptions construed in this country, as a covenant of title and right to convey. It is evident that this covenant specifically refers to the moment of conveyance, and might naturally be construed, as broken then. It has, unfortunately, generally been construed as broken only then. Such a covenant, so construed, is called one *in praesenti*.

(3) The covenant against incumbrances (that the title "is free from all incumbrances except" as specified) is another covenant traditionally construed as limited in operation to the moment of conveyance. An incumbrance is any real right in the land (a mortgage, easement, tax lien, running covenant, etc.) held by another than the general owner; it makes impossible the transfers of an absolutely complete title, and necessarily diminishes the value of any estate conveyed, but tradition holds it consistent with the conveyance of a fee simple, and apparently with the grant of any of the older estates (p. 381).

(4) A covenant for further assurances means that the grantor, should the title given prove imperfect, will perfect it by additional conveyances. Its operation is therefore prospective. Unlike all other covenants for tide, for breach of which dam-

ages are given, this one is enforcible (being a contract for conveyance of an interest in land) by specific performance, and by it the grantor may be compelled to buy in and convey outstanding interests of any kind in order to perfect the title already granted. Properly speaking, it is therefore a real covenant. Nevertheless, the covenant is little used.

(5) A covenant for quiet enjoyment is treated in most jurisdictions as equivalent in meaning to the (6) covenant of warranty. The former is regularly implied in all leases. Both are manifestly prospective in character. The former is an undertaking that the grantee shall "quietly possess and enjoy" the land; the latter is perhaps usually worded as an undertaking to "warrant and forever defend the said premises against the lawful claims of all persons whomsoever," and is then a covenant of "general warranty." It may, however, be limited, and in some states almost always is, to one against the acts of the warrantor and his privies, and is then a covenant of "special warranty." Any acts by the grantor or privies interfering with the grantee's possession and enjoyment of the premises give a cause of action upon the undertaking. The most common and most important of claims of third persons giving rise to rights under the covenant is the successful assertion of an outstanding title paramount to the covenantee's. In other words there must be an eviction, or what may be reasonably considered as equivalent thereto; that is to say, either an actual deprivation of possession, including its reasonable surrender to the claimant, or a retention of possession at the cost of a reasonable recognition of the paramount claim and its purchase. The covenantee must act reasonably, but he may judge for himself, and need not call upon his covenantor either to settle a dispute or to defend an action.

In England the old law has been changed, and various covenants for title are implied in every conveyance, when some are not expressly made, unless the language plainly excludes this implication. In this country the quitclaim deed is used when a grantor is unwilling to give any covenants, and it would seem that they might be properly implied in other cases. The old rule, however, excluding implications, remains generally prevailing in the absence of statutes to the contrary, and these are both few in number and of limited scope. In some states statutes expressly bar implied covenants in conveyances of real estate. In others any statutory short-form deed, when used (p. 411), implies various of the standard covenants. In still others, certain words employed in any deed (such as "grant, bargain, and sell") are made by statute to carry such covenants by implication.

The damages recoverable for breach of the foregoing covenants vary with their nature and with the circumstances. When incumbrances exist the covenantee is entitled to be indemnified for the title's loss of value. He has a similar claim under the covenants of seisin or of warranty if he buys in a paramount title. Ordinarily his damages for breach of either of these covenants are the value of the land when conveyed; that is, generally, his purchase price (plus interest), without regard to improvements made or special losses incidentally suffered; although, if he loses the land, a local statute may give him a claim for improvements against the holder of the paramount title. But there are many variations, and existing rules seem by no means to insure perfect justice.

In the above statements no reference has been made to other persons than the original covenantor, his personal representative and heirs, and the original covenantees. It has been the general rule that since covenants in praesenti can be broken only at the time of the conveyance, the covenant disappears when broken and is replaced by a right of action. This, under the old law, was unassignable (pp. 52, 55)—that is, it could not run. This made all covenants in praesenti personal to the original parties to the conveyance. Moreover, its assertion is restricted to the period (usually a few years) allowed by a statute of limitation. Yet the ultimate damage may very likely only be suffered years later, and may be the total loss of the land, and the true breach should be regarded as occurring at that time. That, however, requires a court to ignore tradition and hold that all covenants operate prospectively. A minority of courts allow only nominal damages for breach of a covenant of seisin unless there has been an eviction, and if eviction occurs after recovery of such damages some courts hold that a second action for the eviction is barred. It is clear that these historical and procedural anomalies may totally deprive of remedy the original covenantee's successor who actually suffers loss. As for non-assignability of rights of action, that has disappeared from the law; though courts should not be compelled to rely upon this change in order to do justice, for the policy of permitting transfers of rights to bring lawsuits might again come into disfavor. A better solution of the problem is to repudiate the classification of some covenants as in praesenti and declare all to be continuing obligations, available to protect any subsequent grantee when he suffers the actual consequences

of the covenantor's original, but at the time harmless, breach of covenant. Had the true nature of covenants for title not been lost sight of, this reform would never have been necessary. Some courts have accomplished it, and only the force of mistaken precedents delays others in following.

It is even clearer that the covenants of prospective operation are of little value if unavailable to remote grantees. The law has here fallen into another fundamental confusion. It seems scarcely doubtful that Justice Holmes was correct in insisting that covenants for title are "pure contracts"—although not like ordinary contracts, because their benefits and burdens run to other persons than the original parties, and should have run in accord with the needs they are designed to meet; and that they should never have been confused with those other contracts dealing with land, the benefits and burdens of which likewise run to others than the original parties, which are known as covenants running with the land. But confusion was inevitable because both do, ordinarily, run with the estate in the land.

Hence, as regards covenants for title, the idea originated, and gained regrettable establishment, that there must be an estate with which the covenant can run. Since a mere possessory estate is good against the world generally, a transfer of possession has been generally held sufficient, and some courts have held the condition satisfied if the covenantee takes possession because of a worthless deed, or otherwise acquires possession, even after the grant and covenant, although it is not "transferred" in the literal sense. On the other hand, if the grantor has not even a wrongful possession to transfer, so that there is an utter failure of title (covenant "by a stranger to the title"), there is no recourse against him by a subsequent "grantee" who needs the protection of the covenant of warranty or of quiet enjoyment (or of seisin, if its classification as in praesenti could be overcome). To refuse him relief in these cases while giving it in those above mentioned is to make the covenantor most secure, as critics of the doctrine have often said, when he is most at fault.

By allowing a subsequent grantee to sue because rights of action have become assignable, or because a code of procedure requires actions to be brought by "the real party in interest," or by allowing a damaged grantee to sue in the name of his grantor (and so ultimately back to the name of the original covenantee), something has been done to declassify covenants as in praesenti. The great weakness of these devices is that the viability of the original cause of action endures only for the limitation period. A few statutes cure the evil by specific provision. The only adequate cure, otherwise, is a judicial declaration that all covenants for title are made to protect subsequent grantees in their right to have the title supposedly conveyed, and should be available to them whensoever or howsoever needed.

In this country certain of the covenants for title (particularly that of warranty, but also to a lesser extent the covenants for quiet enjoyment, for further assurances, and of seisin) were given a peculiar effect—or at least it is the theory of the cases that the effect flows from the covenants. If one gives a warranty deed purporting to convey land that one does not own, and afterward acquires the title, this is held to pass immediately to the original intended grantee. In about a third of the states this is now statutory law.

Discussions of the principle apparently confound several distinct doctrines. It is not at all a matter of estoppel by deed. It probably originated in two doctrines of the ancient law. One was a personal rebutter raised by feudal warranty, which prevented the warrantor or his heirs from setting up the after-acquired title against those to whom he had earlier purported to convey it with warranty. But this was not a conveyance; such an effect the ancient warranty never had. It did, however, go far beyond imposing upon the heir mere liability in damages for breach of his ancestor's covenant. The other was the fact that feoffments, fines, and recoveries did at common law actually pass an after-acquired title by direct operation of law, and the same was true of leases. But even though these rules may be the source of the doctrine, the covenants for title do not suffice to explain its present operation. In England the original intended grantee merely holds an equity to have the estate when later acquired by his grantor. In a suit for specific performance a personal rebutter raised by the covenants would be useful; and, independently of that, the covenants are evidence of the intent of the deed. In fact, the doctrine of title by estoppel is applied in this country "not only where all remedies growing out of warranty or of covenant are wanting, but where, in the absence of covenants, it is made to depend upon intention, indicated by recital or otherwise." Such cases are numerous. In short, the doctrine seems to be, as in England, that of an equity to have an effective conveyance, which attaches to the newly acquired title, and the courts of law are administrating equitable principles which here, as elsewhere, have infiltrated into the body of the non-equity law. The doctrine is really not one of es-

toppel or of covenants.

If an equitable doctrine, however, it is marked by inequities. The new title is put into the grantee regardless of intervening claims of bona fide purchasers-on the theory that they cannot be "purchasers," the title passing instantly from the grantor, who has therefore nothing to convey; or, in some states and under special circumstances, a court of equity forces it upon him, enjoining the alternative remedy of damages.

22. Wills and Intestacy

A will is an instrument by which an owner of property disposes of it by provisions that take effect upon his death. Reference has already been made (p. 163) to the fact that only public policy permits this; a policy which has varied in the past and may change in the future. A man may dispose of all his property by will or only of a part. Although the statutory provisions by which the law distributes an intestate's property are believed to represent sound public policy, nevertheless the courts, m construing a will, constantly assume (with very important results) that its maker intended thereby to dispose of all his property. This is probably a just appraisal of human nature, and an attribution to testators of the judges' own sentiments.

A will passes both real and personal property. The testator frequently refers to it as his "last will and testament," because an instrument disposing solely of personalty was long known as a testament, and one disposing of realty— which, as earlier noted, became possible only in 1540, and then to a limited extent (p. 163)—was known as a will. Testamentary gifts of personalty are "bequests" or "legacies," and gifts of land are "devises."

Today, a will speaks as of the moment of death. Consequently, its general provisions (that is, gifts of "all" the testator's land or personalty, or "all the rest and residue" of his estate) as distinguished from gifts of specific property, pass both property owned at the moment the instrument is executed and property acquired thereafter. In a fourth of our states statutes declare that it passes property to which the testator is entitled at death; but the same is doubtless true in other states as a matter of construction. In an equal number of states statutes declare that the intent to pass after-acquired property must affirmatively appear; but this, likewise, is apparently only an affirmation of the unenacted law's requirement. A will did not at one time pass after-acquired property, and the rule that it does was established for personalty and realty at different times. Problems still remain in the law that originated in these distinctions.

The line between wills, operating at death, and deeds, operating during life, is one that is not always easy to draw (p. 426). The effectiveness of each depends upon intent, and this requires mental capacity to perform the particular act of conveyance or testation in question, the expression of free volition (uncontrolled by duress, fraud, or undue influence), and its expression in such manner that the court called upon to give it effect can do so with reasonable regard to legal rules. At least until very recent times, however, courts have been much less technical in dealing with a testator's language than in dealing with the language of deeds. Each, likewise, may fail in whole or part if the property is needed to satisfy creditors, and the transfer of the property is executed under circumstances which are regarded as making it a fraudulent attempt to evade their claims.

These brief generalities cover a multitude of difficulties. Countless wills are contested by aggrieved relatives who allege that the testator was mentally incompetent. Foolish statements have been made by courts that it requires more or less competence to make a will than to make a contract or commit a crime, to which acts mental capacity is likewise a prerequisite. That depends upon the nature of the contract, crime, or will in question. A particular will of a particular individual is to be considered. It may be only the words, "Everything I have to Mary." It may dispose of a great estate, according to a complicated plan of present and future gifts, absolute or conditional in nature, with many specific legacies or devises. The competence required must depend upon these circumstances. The general requirement is that the testator must have had the power to recall to mind (not proof that he did) the "natural" objects of his bounty, in particular his children and other near relations (or possibly others who have lived with or specially befriended him), whom he may disregard but ordinarily does not, and must have had a reasonably intelligent grasp of the task confronting him. Proof of true general insanity is a disproof of testamentary capacity. On the other hand a valid will may perfectly well be made by one who is eccentric in various ways, holds queer beliefs on many subjects, or is even the victim of delusions, provided the last do not directly relate to his acts as a testator—as, for example, when he wills money for the maintenance of cats because he believes them to be the reincarnation of the souls of his dead sisters.

Many wills are also contested on the ground that the maker was subject to undue influence. This is very difficult to prove or disprove, but the instrument, if

properly executed, will stand unless the undue influence be proved. Admonitions, entreaties, continual reminders of moral duties, such as are naturally made by those who hope for gifts constitute neither duress nor undue influence. Even if a will is made to satisfy them (it may be changed), and for the sake of peace, it is valid if voluntarily and deliberately made for that end. Undue influence and fraud run together; either may be regarded as a form of the other. Neither has here any other meaning than that neither is present so long as the testator's own volition can be regarded as operative. If, for example, a man lives with a woman as his wife, though in fact the marriage ceremony was ineffective, and wills his property to her as "my beloved wife," the intimacy of cohabitation is not fraud or undue influence if the gift is made because he loves her, not merely out of a sense of obligation to her as supposedly his wife, even though she knows the truth of their relationship.

In order to exclude "fraud upon the testator" through parol evidence of testamentary gifts, all wills, save for exceptions noted below, are required to be in writing, and to be executed with the formalities required by statute. The statutes of our various states differ infinitely in details, and a brief statement of their requirements is impossible. In almost all states they are identical for gifts of realty and of personalty. It may safely be said that a will executed as follows in the state of the testator's legal residence would almost everywhere be valid. The will should be written, if possible, on a single sheet of paper, folded if necessary, and if folded the pages should be used in their physical order. This avoids possibilities of substituted sheets, and the difficulty of integrating into one instrument separate papers, which cannot be fastened inseparably together and whose history as a whole may not be provable. But in almost all our states extrinsic documents may be incorporated into the will if then in existence and if referred to with sufficient particularity to identify them satisfactorily, and if their history (like that of the will) excludes substantial danger of alteration or substitution. The testator then should declare that he is executing his will ("publication"), and request attention to his acts. He should then sign at the end, which will be both the place where his act of composition and writing cease and also the point farthest removed from the beginning of the composition. He should sign in the presence of his witnesses or acknowledge his signature to them. If he cannot write, another must sign for him, in his presence and by his express direction; and preferably his name, although a mark (and therefore any other substitute which they can testify was used to identify him as the signer) is sufficient. The person signing for the testator should sign as an additional witness. The witnesses should then sign in the presence of each other, three (though required by only a sixth of the states) being safer than two. No person who is a donee under the will or whose spouse is a donee should be a witness. In various states not all the foregoing acts are necessary. But if performed they avoid various questions constantly arising in litigation. Some of these are: Must the witnesses know the nature of the instrument?— publication or acknowledgment of the instrument as a will is required in about a third of the states. What is the end of the will, at which, in a third of our states, he must sign?— it does not matter if the physical and the literary end coincide. Do the witnesses "attest" the testator's act of signing his handwriting, or the general progress of the transaction?—they can testify to all if they identify the instrument as one that they saw prepared. Do they attest by taking mental note or by subscribing ?—in any event, in more than five sixths of the states they must subscribe, and thus they identify the document.

At common law a will disposing of realty was not effective unless it satisfied the requirements of the state wherein the land was located; whereas a will disposing of personalty was required to satisfy the requirements of the law of the testator's domicile at the moment of his death. These requirements are codified in the statutes of, apparently, only nine states. In the other states these rules have been greatly modified by statute. There is, in them, a good chance that either realty or personalty therein located will pass by a will which satisfies the law of the place of execution. And half of all the states will give effect to a will that satisfies the requirements of either the state where executed or the state of the maker's legal residence.

A codicil implies an existing will, to which it is a supplement. In general it has the effect of redating the will to which it refers as of the codicil's date; so that it validates an ineffectively executed will, or, if extrinsic documents referred to in a valid will were not successfully incorporated because not then in existence, they are successfully incorporated if in existence when the codicil is executed. However, the redating is not applied for all purposes. In general an instrument is not a will unless it contains provisions disposing of property (and the same is true of a deed), for such is the intended nature of a will. In general, too, a codicil is a will, though merely ancillary to and in aid of another. But a codicil

that merely names an executor has been held to be a will; it would seem, properly.

No court of probate or equity has an admitted power, aside from statutes, to correct mistakes in wills, and statutes conferring such jurisdiction exist in only an eighth of our states. However, without statutory authority very many mistakes are corrected by indirection under the guise of constructions of the language used.

In more than a third of the states (southern and far-western) most of the ordinary requirements for the execution of wills are inapplicable to one which is wholly in the testator's handwriting ("holographic"). Oral wills of personalty (but in all save one state of personalty only) are also possible in two-thirds of our states, and in others as respects soldiers and sailors, for the disposition of small amounts. Such gifts must be declared to several witnesses who commit them to writing shortly thereafter ("nuncupative wills").

Properly speaking, no instrument is a will until its maker is dead, leaving it as the last expression of his volition respecting the disposition of his property after death. Had it been possible to confine the word to this meaning, there would be no revocation of wills, merely destruction of drafts; and no question whatever of revoking and then reviving a will. But the courts, like laymen, give the name will to anything formally prepared as a will

Hence, a will may be revoked, by destroying it, or by acts falling short of destruction but suggesting, and supported by adequate evidence of accompaniment by, the withdrawal of testamentary volition, as by incomplete burning, partial tearing, or by writing across its face "cancelled" or words of equivalent meaning. It may also be revoked by a later will or codicil with a clause revoking earlier wills, or by one without such a clause but whose provisions are wholly inconsistent with those of the first. If not wholly inconsistent, the two instruments are treated as constituting, together, one will, and effect is given to both so far as possible, the later instrument prevailing when they conflict. In five sixths of our states a will can also be revoked by a later writing; even though not a will (for lack of dispositive provisions), which is executed as a will is executed and declares the revocation. In an equal number of states it is necessary to revoke a will and codicils separately—that is, revocation of the former does not necessarily revoke the latter; and the same is true of duplicate copies—it is unsafe to leave any one in existence.

Once revoked, a will can only be revived, in a score of states, by formal re-execution. In the others there is a welter of contradictory views as to whether the revocation of a revoking instrument restores testamentary intent and validity to the one that had been by it revoked. The only safe way for a testator lies in re-execution. It is the cases in which he fails to do so that come before the courts.

Wills are often revoked, or their operation curtailed, by law because of changes in the circumstances of their makers after their execution. The will of either a man or a woman is "revoked," under statutes, by mere subsequent marriage, or at least defeated to the extent necessary to provide for the other spouse, in over half of the states; and under common law principles both are voided (under slightly different circumstances as respects the man's) in other states. Children born before the will but unmentioned in it, children born thereafter, and children born posthumously are protected by statutes in many cases; the will being modified to the extent which provision for them requires.

In nearly two-thirds of the states revocation of individual clauses or words of a will is allowable by any of the methods by which the whole will is revocable. This power is generally based upon interpretation of statutes which in terms merely forbid partial revocation otherwise than in the manner indicated. In other states partial revocation by subsequent instrument is allowed, but not by mere physical change of the original instrument.

Women, single or married, have the same testamentary capacity as men. Testamentary age varies from the age of fourteen to twenty-one; it is different in many states for men and for women, in some it is different for realty and for personalty, and in a few it varies for single and for married persons.

The rules referred to above regarding children, and the recent great increase in inheritance taxation, indicate a plain tendency to restrict freedom of testation. However, the above statutes regarding children do not apply if the will evidences by mention or otherwise an intent not to provide for them, unless possibly in twelve states (including Louisiana, where the civil law there prevailing makes this a certainty) some actual provision must be made for the after-born child. In general a father may disinherit his children.

Wills are used only by persons whose property is of considerable value. Only a very small fraction indeed of the population die testate. The average of estates left by intestates is also very small.

Statutes in every state regulate the devolution of property whose owner dies intestate. In a third of our states separate stat-

utes regulate the "descent" of realty to the heirs, and the "distribution" of personalty among the next of kin, of the decedent. Since primogeniture and distinctions between males and females disappeared, there has been little distinction between heirs and kin as beneficiaries, and little reason for separate statutes regarding them, or for such differences as the statutes preserve. Such differences, and also such antiquities as ancestral property still remain, however, in some states. An infinitude of distinctions exists as respects the fractional shares given to identical beneficiaries in standardized family situations, the ascendants who are allowed to share, the treatment of mother and father, of relatives of the half-blood, of adopted and illegitimate children.. As regards such children, special statutes provide in some states that they shall be understood as included, or prima facie included, when testamentary provisions are made to "children."

Not much has been done toward modernizing the law of intestacy. Abundant legislation, and rather generous treatment thereunder, of husband and wife as statutory heirs, and a plain tendency somewhat to limit (but as yet not greatly) the power to disinherit children, have been the two most notable trends in recent decades.

23. Powers of Appointment

A person may, in disposing of his property by deed or will, give to another person by proper words in the instrument an authority later to alter or to supplement the dispositions which he himself provisionally or partially makes. This authority is a power of appointment. Its existence is evidently dependent upon our law's unique provisions for the division of ownership among the holders of a series of estates (p. 182). The exercise of such powers involves the creation of estates *in futuro,* or the cutting short of existing fees simple in land or absolute titles to personalty, which (as regards land) could not be done before the passage of the statutes of uses (1535) and of wills (1540); and the idea is consequently prevalent that powers only became possible after their passage. In fact, however, powers existed much earlier. The scope of their operation was merely vastly enlarged by those acts in making possible appointments operative by way of executory limitations; and it has already been seen that, as regards deeds (for as respects wills there has never been a doubt), any dispositions of property effected by way of uses should in this country be possible by employing deeds operating independently of uses (p. 412).

Their exercise is no more objectionable, as regards the interests thus cut off or modified, than are executory limitations otherwise created. On the other hand they have the very great advantage to the donor of the power who may (in particular) wish to provide for children and grandchildren, of permitting him to choose a person in his confidence (the donee of the power) who can in the future, usually after his death, make such alterations of the original dispositions or such provisions supplementary thereto, as births or deaths, marriages, financial gains or reverses affecting the objects of his bounty, or further evidences of their aptitudes or character, may dictate. Although the desirability of powers has sometimes been denied, their employment in this country, until recently slight, is rapidly increasing. One enthusiast has declared, justifiably it would seem, that "the power of appointment is the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out . . . the answer to more of the problems that face the draftsman of wills and trusts than any other device."[15] On the other hand, more than a century ago, the revisers of the New York statutes declared of the abstruse common law doctrine of powers (displaced in only a few of our states by simpler statutory systems) that it was "probably the most intricate labyrinth in all our jurisprudence."[16]

Nothing of its intricacies can here be referred to.

A power is "general" if the donee may appoint to anyone, including himself. It is "special" if appointees must be members of a particular class (such as "children"). The power may be unqualified as respects the estates that may be given to appointees, or it may be conditioned; and the appointments may be conditioned or unconditioned as respects the estates actually given. Thus, extraordinary flexibility is possible in schemes by which property is disposed of.

A power may be exercised (and of course best) expressly. It may be exercisable by deed only, by will only, or by either. It may be exercised, if so intended by its creator, by an instrument executed earlier than that which creates the power. It may be exercised by implication. This very easily gives rise to litigation. The commonest question is whether a general power has been exercised, without specific reference, by a general bequest or devise, or by a residuary clause of the donee's will. In various states this is, by statutory declaration, an exercise. The majority rule in the absence of such a statute, though with much division of opinion, is that there is no exercise unless intent affirmatively appears to exercise it. Since the statutes mentioned are reactions

against this view, the tendency is evidently against its maintenance.

Equity has played an important part in litigation concerning the exercise of powers. Although, as above noted, conditional appointments may be permissible, in general a power is only exercisable unconditionally and strictly according to its terms; moreover, the confidence reposed in the donee of a special power is of a fiduciary character. Consequently, courts of equity rather closely control the acts of the donee. Thus, if the appointment is merely "excessive"—that is, transcends the power conferred (as when a power is to appoint among children and an appointment is made to the issue of dead children)—the excess is void. But if the appointment is made under a bargain for the donee's own economic benefit (as upon condition that his debts be paid by the appointee), or otherwise essentially for his own ulterior purposes, it is voided as being "a fraud on the power." If the donee holds a special power (as, for example, to appoint the remainder following his own life-estate) and the donor fails to limit the remainder in default of appointment, the class of possible appointees are said to be entitled to have the power exercised (or a trust is said to exist in their favor), and if the donee dies without appointing, a court of equity will exercise the power.

It has been noted as a rule sustained by the great weight of authority that powers to dispose of property, given to a person holding a limited estate therein, do not enlarge that estate. The power is not property. Nevertheless, property subject to a general power may be property of the donee for purposes of taxation, and assets for his creditors. On strict theory, under the older law, even property subject to a general power was not the donee's assets even when he exercised it, if he appointed to a stranger, for he had no title either before or after he made an appointment. But the pressure of the taxing power, and a general policy in favor of compelling a man to pay his debts (notwithstanding the increase of spendthrift trusts—p. 387), coupled with the fact that the holder of a general power can appoint to himself and is therefore morally obligated to do so in order to satisfy creditors, have repudiated that theory and led to results, both as respects taxes and insolvency, which ignore the theoretical nature of the power. Under most of the state taxation statutes such property is taxed as though it were owned outright by the donee. Under most of them, also, it is included in a decedent's estate, for purposes of inheritance taxation, regardless of whether it passes as a result of exercising the power or because the donee fails to exercise it. Likewise, even the special nature of the power is more or less ignored. The Federal estate tax statute, however, applies only if the power is general and has been exercised. The Federal principle applies to any testamentary exercise of a general power, and to any exercise by deed under which the appointor retains a life enjoyment for himself or for another person whom he reserves the right to name. Moreover, the principle applicable to general powers, whatever it be in a given jurisdiction, may be held applicable to a power under which possible appointees are not clearly a definitely limited class. Such inclusive words as "relatives" or "charities" are dangerous.

Aside from possible exceptions in the foregoing special cases of taxation and creditors' claims, upon the exercise of a power the appointee (unless statutes have altered the common law) takes title from the donor, not from the donee. Thus if A devises to B in fee for such persons or purposes as he shall appoint, and in default of appointment to B and his heirs, and B by will appoints to C for life, remainder to C's children, these are read as the provisions of A's will. B's wife has no dower, because of B's relation to the property. If the donee appoints by will, and this is done as a stranger to the title (the power collateral), in favor of another stranger, the appointment is not a devise or legacy of the appointor and is not taxable as such, since it is a gift to the appointee from the donor of the power. And if property is located in state X, where its owner is domiciled, and he by will gives the power to a resident of state Y, the latter state cannot tax the property upon his exercise of the power, even though he subjects it to the payment of his own debts; for X controls the property within its borders, and by its law the donee's appointment is read as a provision of the donor's will made in X.

Validity under the rule against perpetuities (except, apparently, in one state) is likewise determined by reference to postponement of vesting from the moment of A's death—that is, from the time of the power's creation, and not the time of its exercise. But, first, a gift "in default of appointment" is (by long holding) a vested gift, free from the rule; and the actual appointments above supposed are also valid if C was living when A died. There is a doctrine that performance of a power given by A to B may be delegated by B to C, and so on. Suppose, then, that A leaves property to his son B for life, remainder to such of B's children as B shall appoint, and gives authority to B to delegate the power—and B appoints similarly to C and his children—and so on

with C and D. It is then apparent: first, that no Federal transfer tax is paid except the first time, the successive powers being all special; second, that the estate is tied up more tightly than by a strict settlement (p. 192). Moreover, it is authoritatively estimated that if the successive donees choose astutely (but perhaps also very luckily) the lives by which to satisfy the rule against perpetuities (all of which must have been *in esse* when A died) the limitations under A's will can be stretched over a period of more than a century. After that, a fresh start must be made.

Powers may be employed to turn many hard corners in the law. Their future probably holds a large measure of control or curtailment.

24. Fraudulent Conveyances

Reference has earlier been made (p. 74) to the growth of creditors' rights against the property of their debtors, and the remedies by which those rights are made effective.

Creditors also have rights in some cases to proceed against property of which their debtor is no longer owner. Title transfers of both land and personal property are subject to cancellation on behalf of creditors under doctrines regulating fraudulent conveyances. They originated, substantially, in two statutes of 1570 and 1584—which protected, respectively, existing and subsequent creditors—that were part of the common law of our colonies. Independent legislation on the subject began in this country in colonial times and exists in all the states. Moreover, a Uniform Fraudulent Conveyances Act prepared by the Commissioners on Uniform State Laws has been adopted in twenty-one states.

A conveyance is not fraudulent unless made gratuitously or for inadequate consideration and with an intent to delay, hinder or defraud creditors. The intent is a question of fact, determinable from the circumstances, except in certain cases in which, at least under the Uniform Act, the conveyance is inherently or necessarily fraudulent. Under that Act, also, "conveyance," "creditor," and "debt" have very broad meanings.

The statutes, following that of Elizabeth, generally declare a fraudulent conveyance "void." In fact it is valid between the parties, and until it is annulled by action of a creditor (or perhaps until notice is had of the initiation of a creditor's suit for that purpose) it binds third persons, such as warehouse-men, whose position is one of privity and subordination to the principals. By the weight of authority, also, a creditor's judgment secured after the conveyance is not a lien on the land. By the weight of authority neither legal nor equitable remedies are allowed, however, for enforcement of executory portions of the transaction of which the conveyance is a part.

The conveyance is merely voidable by creditors. A creditor may be estopped to attack the conveyance if he has recognized it by some unequivocal act upon which others have relied or may still rely. Otherwise he may attack it, but it stands unless attacked; and the right to avoid it is not one that can be assigned. The creditors of the fraudulent grantor are protected if they act. But if, while no such creditor attacks the conveyance, creditors of the grantee secure a hold upon the property by attachment, levy, or in bankruptcy proceedings, such actual seizure gives them priority over the inactive creditors of the grantor. This, however, is not because of estoppel, but because they have gained a real or substantive right in the property prior in date to any move by the grantor's creditors to acquire such.

It is general creditors who are protected; that is, (subject to slight qualification below) those who have 'no lien upon the debtor's property otherwise than through a judgment based upon his personal liability, or, in addition, an execution issued pursuant thereto. But a secured creditor, though disqualified to attack a fraudulent conveyance so long as his lien upon specific property of the debtor presumptively does secure him, becomes a general creditor after exhaustion of that security, and with the right to share as such in general assets. The creditors of the fraudulent grantor who are protected, may be either present or subsequent creditors. They are "present" creditors if their rights had matured before the conveyance; "subsequent," if their rights mature thereafter. The Uniform Act explicitly recognizes the former as having the privilege of enforcing their rights against the property by remedies either legal or equitable in nature; and the latter as having equitable remedies immediately available. The legal remedy is to levy directly upon the property as an available asset (or—which is very rarely done—sue the transferee for damages if he acted collusively with the debtor). It is evidently possible to say that such procedure assumes the "voidness" of the conveyance, but it is equally possible to say that the levy is merely the means by which an "avoidable" transfer is avoided. If the property is land in one of the very few states where an execution against land is not allowed, a creditor holding a judgment secured after the fraudulent transfer resorts to equity to have the conveyance nullified, and forecloses the lien then acquired; whereas, if his judgment lien antedated the transfer he merely forecloses his lien. If the property

is intangible personalty the remedy will necessarily be equitable in nature, unless under a statute. The equitable remedies allowed the subsequent creditor by the Uniform Act are to restrain disposition of the property (and have a receivership if necessary), and to have the conveyance annulled.

The Uniform Act does not require the attacking creditor to have secured a judgment. Where that Act is not in effect the states are divided as to whether there must be a judgment only, or also execution issued, or even execution returned as unsatisfied. At least a judgment is required by the great majority. By traditional view, mere creditors have never been regarded as holding a legal real right, or substantive interest, in their debtor's property, and equity has never in this field done more than aid in the enforcement of the legal right which a judgment creates. Today, a judgment seems essential in a Federal Court sitting in a state requiring it. But this is perhaps inconsistent with the allowance of attachment or injunction to prevent the consummation of a fraudulent conveyance, or to prevent a possible second transfer to a *bona fide* purchaser during suit against the debtor *(pendente lite),* and probably in consequence of this inconsistency ten states do not require that the creditor shall have reduced his claim to judgment.

The object of all proceedings in aid of creditors is to put them in the place of the debtor, and therefore any property that he could transfer is included in the assets available to them (p. 184), provided it be not (like the homestead, tools, etc.—p. 76) exempt from liability for debts. Although choses in action were not originally subject to levy, they have been so for a century or more, and come within the fraudulent conveyance acts of most jurisdictions.

25. The Recording System

It is a mistaken idea, occasionally encountered, that the recording system is some sort of an expansion of the doctrine of fraudulent conveyancing, or originated in the doctrine of Elizabeth's statutes above referred to (p. 461). Without any doubt it was realized from the beginning that the recording of conveyances was a substitute for feoffments (p. 408); that is, was a new method of eliminating secret conveyances. It must from the outset have been realized, since the fact was patent, that it was a vastly improved substitute for livery in its publicital aspect, long before the passage of the English Statute of Frauds in 1677 made the charter of feoffment a feoffment *deed* that displaced livery of seisin (pp. 406-07). Our developed recording system of today protects in some jurisdictions, and in others does not protect, creditors of one or another class, but this was not all an object of our earliest statutes. The object was to protect a subsequent grantee against a dishonest grantor and his earlier grantee to whom he had given title by an unrecorded and secret conveyance. This second would-be acquirer of the title is called, as laymen would call him, a "purchaser"; but it is clear that in law his position was very near that of a creditor from whom a debtor wrongly withholds a definite sum of money, the purchase price paid for a title that fails. Even if the law had not very early, by the remedies conceded to him, accepted that theory, he must have come to be generally thought of as a creditor. For that reason, among others, it was from the beginning a certainty that in time the protection given to "purchasers" should be extended to creditors. Although, incidentally, creditors have been given considerable protection under the recording acts, they receive it on a totally different theory than that which underlies the doctrine of fraudulent conveyances, having nothing to do with an intent to hinder or defraud them. The ancillary consequences of the two doctrines are therefore different.

They differ also in that the recording system, unlike the doctrine of fraudulent conveyances, is very largely confined to land. In the case of an *ordinary sale* unaccompanied by transfer of possession the common law made the separation of title and possession evidence of presumptive fraud. Legislation making such sales invalid against subsequent purchasers or creditors unless the bill of sale was recorded began a century ago. Except in a few states, however, there was still no such specific legislation before the introduction of the Uniform Sales Act thirty years ago, although in some other states, by statute or judicial decision, the common law rule had been altered by making the presumption of fraud conclusive when delivery was feasible. There is no need to record *true pledges,* because in them the possession of the pledgee gives notice. But by abundant legislation, much of it old, unrecorded conditional sales or chattel mortgages were made ineffective against subsequent purchasers and creditors. This was generally true of both, but not always, since the statutes sometimes dealt differently with them, either because legislation was of different dates or because in some states the former is a conveyance of title, and the latter creates merely a lien. Under the Uniform Conditional Sales Act the distinction disappears, since either instrument is ineffective unless recorded; unless, indeed, that result is avoided when notice is given by the actual transfer of possession to the vendee or mortgagee. An anomalous

"pledge," without transfer of possession, is similarly treated. The creditors protected under all this legislation are judgment or attaching creditors. It is, in general, limited in application to corporeal chattels, but the tendency in recent decades has been to include *choses in action* within its scope; *Bailments* are almost nowhere included.

The recording system is the product of three centuries of experience. All the colonies had recording acts before the Revolution, and perhaps half of them before 1700. Public land records, probate and other judicial records showing transfers by devise or descent (the few that *are* revealed by public records—p. 476) or by decree of court, and recorded conveyances of title constitute together a vast mass of undigested, unsummarized, relatively inaccessible materials for the history of titles. It has been seen that recording is not essential to the effectiveness of a deed as such, and but for its special effects now in question the deeds recorded would be no more than a collection of private documents in official custody. Under the recording acts a deed still binds the parties to it and their privies (heirs, devisees, and assigns), and also such persons as are not protected by the policy of the recording acts. But by that policy, and by the official character of its recording and custody, it acquires qualities of a document partly private, partly public. By their combination, proofs of land titles and their conveyance are made to depend, virtually without exception, upon what is discoverable by searches in the record office.

The statutes vary greatly in details, but with respect, primarily, to three matters. The first is the *time of filing.* In some states the grantee is given a limited time to record before which his title cannot be cut off by a second transfer to a *bona fide* purchaser for value. In most states such a purchaser is protected immediately against the first conveyance unless recorded. The second is the nature of the *instruments that are recordable.* The omissions under this head will be noted below as a defect of the existing system. Positively speaking, there seems to be a very general agreement in permitting or requiring the record of "practically all instruments by which either a legal or an equitable title may be conveyed or incumbered; also, instruments modifying, assigning or releasing mortgages thereon."[17]

This indication of the general nature of instruments which are regarded as needing the protection of the acts likewise indicates the *persons who are protected.* In the earliest American statute, the Massachusetts Act of 1640, it was provided that the unrecorded instrument should be ineffective "against any other person," and this or similar language was formerly more common in the statutes than it is today. At an early date, however, it became a settled policy to construe all acts, however worded, in the absence of a broader meaning expressly stated (that is, if *possible),* as protecting "purchasers" only: also, though the broad phrases above quoted would cover prior purchasers, only subsequent purchasers; and again, purchasers who give value, and give it in innocence of the prior unrecorded instrument. For an original protection of all persons there was substituted protection of equity's favorite, the *bona fide* purchaser for value. These were manifestly changes of the most fundamental character, and possibly they originated in judicial legislation; we do not know enough of colonial legislation to be certain. At all events, later statutes adopted them. Still other characteristic limitations of the system resulted from interpretations of the word "purchasers." All creditors were necessarily excluded (unless included explicitly in addition to "purchasers") because they hold no real rights in their debtor's lands; for even the so-called judgment "lien" of a creditor is not one that gives a claim to specific property. Assignees for creditors stood on the same footing. Nor could persons taking property by devise or inheritance be classed as purchasers *(cf.* p. III). Finally, the subsequent purchasers who are protected are purchasers *from A,* and they are protected only against unrecorded transfers made earlier *by A,* but only *after* he became the record owner of the land. In other words, nobody can claim protection as a purchaser of the land from one who is a stranger to the title by or through which A claims it, whether that be good or bad; nor as a purchaser from somebody who appears on the record actually to hold the very title claimed, and assumedly conveyed, by A. The law provides other facilities for the trial of such rival claims. The recording acts are not concerned with them.

Purchasers include, of course, the transferees of any estate in the land, from leasehold to fee simple, possessory or nonpossessory; also, very generally, mortgagees and assignees of mortgages; persons who by redemption from such or other incumbrances are subrogated to the rights of the former holders of those interests; and buyers at execution and judicial sales. In only a third of the states are those protected "purchasers" to the exclusion of creditors, the latter being protected in two thirds. But their protection is subject in some states to their first recording their judgments or execution; or to the requirement that the judgment debtor

be the record owner of the land. In practically all save three or four of the states protecting creditors, also, they must be without notice, either by statutory requirement or (where that requirement exists as regards "purchasers") by judicial holding and on the question whether possession of the land by the grantee under the debtor's unrecorded conveyance is notice there is much division of authority. A creditor who buys at his own execution sale is generally treated as a purchaser, and for value. Creditors may also sometimes be protected against prior deeds that are withheld from record with fraudulent intent; but this protection is not due to the recording acts.

The *operation of the statutes* also varies. The general principle is that an unrecorded deed is void as against certain persons. But this is applied in three distinct ways. In three or four states the second instrument, if first recorded, gives priority regardless of good faith. This view, which is that with which our statutes started, was generally nullified or deflected long ago by equity, which made him who thus gained title a trustee for the grantee under the later recorded instrument of which he had notice at the time of his own earlier recording. In another small group of states it is held, at the other extreme, that the subsequent purchaser (etc.) who is protected must both have taken his claim without notice and must have first recorded it. In the very great majority of states protection is accorded only to one who had no notice, but priority in recording is not required. As between the last two classes, therefore, the difference is that in the third the grantee by the first conveyance prevails only if he records before the subsequent purchaser consummates the *purchase* (or other act entitling him to protection), whereas, in the second group of states, he need only record before the subsequent innocent purchaser *records.*

Something more may be said of the conceptions of "notice" and of "priority."

The former (or its equivalent, "good faith") is, as above noted, a general requirement, either statutory or judicial. Many forms of notice have been important both in the equity and the non-equity law. "Constructive" notice, as ordinarily used, means the notice which arises from such a hint of adverse claims as puts the noticee upon inquiry, and holds him by irrebuttable presumption to have acquired *(i.e.,* he is treated as if possessed of) the actual knowledge which reasonable inquiry would have gained. Such notice is received, for example, by seeing someone in possession of land who should not *prima facie* be there. But this notice must operate varyingly upon other persons in proportion to their familiarity with the land and its normal occupants, as is very manifest in cases of adverse possession. Constructive notice is also given by pending litigation *(lis pendens);* and through the dispositive provisions, and to some extent the recitals, of one's chain of title-deeds. These principles of notice generally continue to apply in addition to those that rest upon recordation; so that, for example, the purchaser must not only search the record but make sure who is in possession of the land—the holder of the unrecorded deed being secure against divestment, in states taking this view, if in possession.

"Priority" is used in several senses. When 0 gives a deed to A and afterward gives another deed to B, there is no question of priority. That word assumes two existent competitive interests; but B simply has nothing, since 0 had nothing left to give him. In courts of chancery the application of the principle "prior in time is stronger in right" to several existing equitable interests of the same rank (for if of different rank, of course the higher prevailed) was likewise common. Notice had nothing to do with this situation any more than with the legal one just stated. In one sense, no question of *priority* of title is involved in similar facts under the recording acts; for B, if a purchaser for value in good faith (because he lacks constructive notice in that the first deed is not recorded, and also lacks actual notice) gets the title because A is simultaneously divested of his actual earlier title. However, since this happens because under the law B is conceded a better or a prior claim *to* the title, this preference is naturally called a priority.

A complication of recording doctrines by the above doctrines has naturally resulted when taken in conjunction with the fact that chancery subordinated a mere *equity* to a legal title taken in good faith and for value. For since a later claim to the legal title is preferred under the recording acts to the earlier actual title-in other words, the latter treated as no better than an equitable interest—courts have constantly spoken as if it *were* only an equity. In addition, some old doctrines of notice are preserved intact in the recording system. For example, the constructive notice derived from dispositive provisions and recitals in one's chain of title deeds; likewise the equitable principle that a transferee of any interest, legal or equitable, even for valuable consideration, with notice of a prior equity of any rank outstanding in a third person and qualifying the title in the transferor's hands, takes subject to it since, having notice, he can honestly take only what his transferor could honestly convey.

Nevertheless, the doctrines of notice under the recording system are *sui generis.* The great novelty is the introduction of notice by record, as a new and much the most important form of constructive notice. Purchase for value and purchase in good faith were creations of chancery; but their combination in the recording system and the determination of *bona fides* by that system's test of notice opened a vastly greater field for the application of the equitable doctrines. The questions of title which arise under the recording acts are questions of law, and are tried in a law court. As just stated, the first deed creates no equity, but a legal title.

The statutes, speaking generally, either declare or are construed to mean that proper recording of the deed gives constructive notice of its contents to subsequent purchasers (etc.), who therefore cannot be *bona fide* purchasers for value. However, as above noted, the record is constructive notice of only those matters of which actual notice can be gained by reasonable examination of the record. The subsequent purchaser who is protected against an earlier unregistered grantee is, therefore, one who claims with him under a common grantor. Necessarily so, since it is only the latter who, in favor of the later grantee, can divest the title of the earlier. And justly so, since the requirement is thus satisfied that the deed of which constructive notice is alleged must be reasonably discoverable by the subsequent purchaser when he traces the links in his chain of title. There is notice only of instruments needed to prove his title; not of the independent and adverse title-chains of others shown by the record—since, unless there is some grantor common to the two chains, a searcher will not pass (assuming that there is no tract-index) from one to the other. For the same reason the purchaser is not generally held bound by recorded deeds of a grantor in his own title-chain that were *given* before the date at which the record shows him to have become the owner. The contrary view violates the general equities of the recording system. To adopt it is to sacrifice one who reasonably searches to one who, without such search, took a deed from another who had no title. That is, the purchaser traces backward to an original title, usually a government patent; but, as respects each grantor in his title-chain, is bound to discover all conflicting conveyances made by each while actually holder of the legal title.

Subject to the preceding statements, the chief characteristics of the present recording system are six. (1) The. instruments recorded are, primarily, deeds. (2) They are recorded as instruments which have already transferred the legal title (although the fact of recording sometimes is evidence of the earlier delivery by which the conveyance was consummated, p. 420). (3) The instrument presented for recording must, in order to give rise to the peculiar effects of recordation, satisfy all statutory prerequisites for recording, and in particular, it must be acknowledged. But if entitled to recordation and recorded, two consequences follow. First, (4) the record acquires exceeding importance as evidence, taking the place of the original instruments, which therefore cease in this country, barring destruction of the registry, to have importance. Secondly, (5) which is the active principle of the recording acts, the mere fact of recordation gives a later prospective purchaser (etc.) of land "constructive notice" of the legal effect of any earlier deeds, inconsistent with the title offered to him, whose makers are included in the chain of grantors through whom he must trace his title; and, to a lesser extent, of the legal effect, likewise, of other deeds whose purport is recited or which are referred to in his chain-of-title deeds. And finally, (6) the result of such notice is to prevent a later "deed" from passing title if a prior inconsistent conveyance stands already on the record, unless (in five-sixths of the states) the taker of the second instrument, when he *took* it (or secured the judgment, or levy, etc.), was without actual notice of the earlier conveyance and it was not *then* recorded. Once a *bona fide* purchaser for value acquires the title it is clear, and passes as such to his alienee, notwithstanding notice had by the latter of earlier unrecorded deeds.

As already stated, prior recording by a subsequent innocent purchaser for value is generally not required; but if he does not record, his own title may in turn be divested. The effect of the statutes is to penalize a prior grantee who fails to record his deed by conferring upon the grantor (or his heir or devisee) a power to divest the unrecorded title by giving title to one who buys for value and without actual notice. If the statute gives the first grantee a period within which to record, recording within that interval prevents divestment, notwithstanding that a second grantee can have no record-notice of the first deed prior to the actual recording thereof.

As respects the character of documents to be recorded there is great diversity in the systems of different states. Almost nowhere is there even an approximation to the ideal of including all instruments—much less of including an official statement regarding any other events and acts—which affect the title to

land under law and equity. Few statutes are mandatory. Few enumerate the documents that may be recorded. All permit the recording of "deeds" or "conveyances," or both. Hence, in practice everywhere included are deeds; including, of course, those creating only incorporeal hereditaments, also quitclaim deeds, and also mortgages—which were originally in fact and are still in form transfers of the title for security, although in most states they convey today only an equitable lien. Wills are not included, and although those probated are available in the probate office an unprobated will apparently retains its validity indefinitely. Posting in the recorder's office of notices of pending litigation affecting land may or may not be required. As with wills, the docket of decrees and judgments—which not only constitute liens but may under statutes directly transfer titles—is, save rarely, a thing apart. Records of descent are never recorded, a gap in the record thus resulting whenever an owner dies intestate; nor are dower rights recorded; nor authentic facts of marriage, divorce, and remarriage; nor titles acquired by adverse possession and prescription; nor the parol acts followed by expenditure of money which may in various states create easements ("irrevocable licenses"), nor the parol acts that extinguish easements; nor those that constitute surrender of a leasehold by operation of law; nor the fact that particular land is at a particular time a homestead. As respects assignments for creditors, assignments of mortgages, contracts for the conveyance of land, contracts that result in covenants binding the land at law or in restrictions enforceable by equity, short leases, United States patents and certificates, the sheriff's temporary certificate to an execution purchaser, tax certificates, caveats, and many other matters, practice varies. Sound policy dictates the utmost possible extension of the system. A few states permit the recording of thirty or forty types of interests. In such cases only can the system possibly approach in its operation the ideal of showing a complete history of the title and of thereby giving security to those who rely upon it.

Moreover, in addition to all defects of omitted interests, there are the ever-present dangers of the grantor's mental incapacity, because of insanity or infancy; of the invalidity of acknowledgments, by alleged wives who in truth are not such, or before notaries who are for some reason incompetent; and of forgery—and it is to be remembered that the original instruments do not remain in public custody.

Again the indexes are the only key to the records, and they are of two types. Normally, indexes are of the names, alphabetically arranged, of grantors and grantees (sometimes separately for each type of document recorded); and the title-abstracter searches backward from the name of the grantor from whom the prospective purchaser proposes to take a conveyance through successive grantee-grantors to what is relied upon as an original title. Very few indexes are what all should be—that is, tract indexes; for the indexing of all recorded matter under the parcel affected thereby would vastly simplify record searching. Professional title abstracters throughout the country have habitually developed such tract indexes for their private use; and some cities and states use this system. When a deed is received for recording it should be indexed first, notice then arising of the contents of the deed, and the index remaining part of the record until the deed is copied. Unfortunately, it has often been held that notice exists from the moment that the recorder receives the deed *to be* recorded.

In the vast majority of cases transfer of title, even with little scrutiny thereof, is doubtless safe. But the defects of the system, above noted, must make minor errors very numerous. One authority has declared that "the only thing that makes our old system of instrument registration endurable is the . . . statute of limitations," and that registration "drags a lengthening chain of expense, obscurity, doubt, and danger with every transfer."[18] When errors actually occur in the record, there is no single, simple answer to the question who should suffer thereby. It is sometimes the first and sometimes the subsequent grantee, and the reasons given by the courts are sometimes merely technical, although they are usually based on considerations of relative neglect that do substantial justice.

The system of recording *title-instruments* should be replaced by that of recording *title*—the state undertaking to determine the true title up to date, issue a certificate of title, and thereafter simply note on the certificate later transfers and incumbrances. In at least nineteen states experiments with this system (the Torrens System) have been proceeding since 1897; as yet with very slow, although accelerating, progress.

(1) Schnebly, "Restraints upon the Alienation of Legal Interests," *44 Yale L. J.* 961, at 961, n. 3 (1935).

(2) Schnebly, *op. cit.*, at 1390.

(3) Fry, L. J., in Cochrane v. Moore, L.R. 25 *Q.B.D. 57* (1890).

(4) Hayes, "Introduction to Conveyancing" (5th ed., 1840), 1, 26.

(5) Problems of construction are not dealt with in this essay. The Rule in Shelley's Case is, properly speaking, a "rule of law," not one dependent on the intent or desire of him whose expressions in a deed or will bring it into play. The rule is, that when a freehold is given to an ancestor (A), and in the same instrument a remainder is thereafter given to the "heirs" (general, or of the body) of A, the two estates being either both legal or both equitable, and "heirs" being used in the technical sense of persons who generation after generation take the land by inheritance, the Rule operates upon the remainder (not upon A's freehold) and converts it into one to *A and* such heirs.

(6) Williston, "Sales" (2d ed., 1924), 348.

(7) Holdsworth, "History" (3d ed., [923), III, 223.

(8) Holdsworth, *op. cit.,* VII (2d ed., 1937), 354—55.

(9) Coke on Littleton (19th ed., 1832), 48a.

(10) Holdsworth, *op. cit.,* VII, 355.

(11) Pomeroy, "Equity Jurisprudence" (4th ed., 1918), III, Sec. 986 n. (1), at p. 2140.

(12) Pomeroy, *op. cit.,* at p. 2139.

(13) Xenos v. Wickham, L.R. 2E. & I. Ap. 296, at 312 (1867), *per* Lord Blackburn. The case was one of an insurance policy.

(14) Perkins, "Profitable Book" (15th ed. 1827), at par. 138.

(15) Leach, "Powers of Appointment," 24 Amer. *Bar Assoc.* Journal 807 (1938).

(16) In 1828; quoted by Professor Simes, "The Devolution of Title to Appointed Property," 22 *Ill.. L. Rev.* 480 (1928).

(17) Patton, "Land Titles" (1938), 30.

(18) Rood, "Registration of Land Titles," 12 *Mich. L. Rev.* 379, at 392, 393 (1914).

Volume V. Property

Finis