1953

Retroactive Legislation Affecting Interests in Land

John Scurlock
University of Kansas City

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RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND

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RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND

by

JOHN SCURLOCK

Associate Professor of Law, University of Kansas City

Foreword

by

LEWIS M. SIMES

Ann Arbor

University of Michigan Law School

1953
To my Wife
FOREWORD

PROFESSOR SCURLOCK'S monograph covers an area of the law which is commonly by-passed in treatises and in classroom instruction. If we could merely tear Maitland's "seamless web" of the law and retain all the shreds, no part of the legal system would escape us. What we actually do, however, is to set up, in a more or less arbitrary fashion, numerous centers of legal classification, such as contracts, torts, property and constitutional law, to which closely related legal materials are attracted as to a magnet. But those legal materials which stand midway between two centers of attraction are likely to be subjected to equal magnetic pulls in opposite directions and to be drawn to neither.

These observations are particularly applicable to legal doctrines concerning the subject of retroactive legislation affecting interests in land. The constitutional law expert has left it for the property expert. The property expert has left it for the constitutional law expert. Thus, no one has given it adequate treatment.

But the practitioner, the judge and the legislator cannot limit the field of their activities to the law which clusters about certain arbitrarily selected centers. They must deal equally with the borderline areas, because to them law is an aspect of life. The scores of reported cases in the law books dealing with retroactive statutes concerning land bear silent witness to the importance of the subject of this monograph and the frequency with which its problems arise.

The statute books are full of retroactive legislation which modifies traditional incidents of property institutions. No
lawyer can safely advise his client concerning the effect of such statutes, without some basic notions of their validity under state and federal constitutions. Yet up to this time there has been no adequate treatment of this problem as a unit. Indeed, far from finding any guiding principles in standard textbooks, the lawyer may even have serious difficulty in locating all the reported decisions which deal with the precise question of constitutionality with which he is confronted. Professor Scurlock’s monograph will aid the lawyer in both particulars. It will give him guiding principles, and it will furnish him with an adequate picture of the case law dealing with his own peculiar problem.

Moreover, this monograph will supply a long felt want of the legislator. Everyone who has drafted legislation modifying the law of real property has been confronted at the outset with the question: Shall I make this applicable to interests in property already created? Or shall I limit its operation to interests arising under deeds and wills which take effect after the legislation is enacted? Professor Scurlock’s book throws a flood of light upon this question, such as will be found in no other treatise or article.

For the legal philosopher, as well as the practical man of affairs, this monograph has its contribution. While it deals with a subject matter involving both constitutional law and the law of real property, the questions discussed commonly turn on the nature of property interests. To the person who asks the question what is property, or who is confused by the chameleon-hued concept of “vested interests in property,” this book has something to offer.

In short, for the lawyer, the judge, the legislator and the legal philosopher, this monograph constitutes a valuable contribution to the science of law.

Lewis M. Simes
I have discussed in the Introduction the method of approach and arrangement of materials, to which the reader is referred.

This study was begun while I was a graduate fellow at the University of Michigan Law School. It is a great pleasure for me to express my appreciation for the guidance given by my thesis committee, Mr. Burke Shartel, Mr. Paul G. Kauper and Mr. Allan F. Smith, and for the helpful criticisms of Mr. Lewis M. Simes.

John Scurlock

School of Law
University of Kansas City
February, 1953
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CHAPTER 1

Introduction

THE Common Law of real property as it was inherited from the English system by the states in the eighteenth and early nineteenth centuries has undergone much statutory modification. Legal institutions which had their origin in an altogether different milieu have proved unsatisfactory, or have seemed not to be satisfactorily adaptable, and have been abolished or altered. New concepts find their way into statutes to replace the Common Law. Statutes are repealed, amended, and modified.

The constitutional difficulties would be minimal if legislatures always designed statutes so that they would operate only as to interests thereafter to be created. As to future dispositions and acquisitions of interests in land, the sole restriction on the power of the legislature to amend the law is that the liberty of individuals to enjoy and to dispose of their property shall not be unreasonably restricted. Although the courts will strive wherever possible to give a prospective interpretation to a statute, the wording may leave no doubt but that the legislature for one reason or the other designed the statute to apply to existing interests. In such instances expectations may be destroyed in a manner deemed to be forbidden by the constitutional guarantees.

The term retroactive when applied to legislation has been used to suggest a variety of meanings, but the sense in which the term is employed here is that a statute is retroactive when it extinguishes or impairs interests acquired under the previously existing law. The problem to be dealt with is that of
the constitutional limitations on the power of the legislature to effect changes in the institutions of real property law and to make those changes applicable as to interests arising out of these institutions and in existence at the effective date of the statute.

Concern over the validity of a retroactive statute is not always confined to those whose interests are immediately affected upon enactment. It is erroneous to assume categorically that the constitutionality of the statute is of practical interest for only a short time after its enactment. If a statute is unconstitutional, it confers no rights, and acts done under its supposed authority are rendered nugatory, yet a line of title may rest upon the assumed validity of the statute. The defect may some day come to light and cause misfortune to those who did not properly evaluate the validity of the statute in their search of title. Unusual circumstances, such as the longevity of a life tenant, may postpone for half a century or more the day of reckoning when the persons whose interests the statute purportedly extinguished make their appearance to claim their property. Although throughout our discussion we shall be talking about the rights of the owners of interests, it must not be forgotten that the vindication of one man's rights can be to another a denial of rights.

**Scope**

The legislation to be dealt with is that which affects interests in land by modification or abolition of legal institutions. Legislation regulating land *use* will be touched upon only incidentally and in those areas where differentiation between the regulation of use and the impairment of *static* interests cannot be made. Although legislation regulating use of land is invariably retroactive in the sense that it extinguishes rights and privileges acquired under previous law
(for the legislature cannot suspend the operation of a regulatory statute until all persons owning or possessing land at the date of enactment have transferred their interests), there are good reasons for not undertaking a consideration of regulatory legislation along with other aspects of retroactive legislation. The constitutionality of regulatory legislation has been widely explored and abundantly written upon, whereas the constitutionality of retroactive legislation affecting interests in land has rarely received treatment. To include all phases of retroactivity would be to stake out a field of investigation which would be too huge to treat adequately. Moreover, treatment of legislation affecting static interests as a matter separate and distinct from regulatory legislation finds considerable justification in the attitude of the courts. The courts do not as a general rule conceive of regulatory legislation as being retroactive at all, but rather prospective in the sense that conduct which was previously privileged on the part of the owner of the land is thereafter forbidden by the statute. This conception prevails even when the court determines that the application of the statute is unconstitutional. The courts simply do not think of the privilege of using one's land as a static property interest. If they did, then no doubt regulatory statutes such as zoning laws would always be considered to be retroactive.

Only legislation affecting private interests is to be considered; hence legislation relating to public corporations and bodies is excluded. In the field of private interests exclusions have been made of areas wherein arise special problems meriting separate and extensive treatment: statutes relating to mortgages and security interests, statutes introducing procedural changes, taxation statutes and eminent domain statutes. Curative statutes have been considered only incidentally.
The subject matter has been broken down in accordance with the type of interest or legal institution affected. Hence the headings refer to specific interests or institutions and the discussion thereunder to the various statutes enacted in the several jurisdictions which affect these specific interests. Division of subject according to interest involved is eminently justified. Whether a statute may constitutionally be applied in a retroactive manner can be determined only in the light of the substantiality of the interest. This entails differentiation and classification.

Treatment according to the interest involved is possible because of the common legal heritage of the United States. The doctrine of fixed interests excludes innovation and unorthodoxy. Similar relations are similarly analyzed by different courts. Legal institutions have a continuing existence; consequently past decisions may be looked to as some guide for the present. The evolution of an institution tends to occur simultaneously in all the jurisdictions where the institution is recognized so that similarity in approach by the courts in the various jurisdictions is not prevented by the development of the institution. Although a legal institution may be recognized in only one jurisdiction, it is far more common for a legal institution to be recognized in a number of jurisdictions, or even in all jurisdictions; hence determinations made by the courts of one jurisdiction will have significance in other jurisdictions.

In many instances the writer had to rely upon constitutional decisions of thirty to one hundred years ago for they are the only authorities relating to the particular points. These older cases unquestionably represent a more protective attitude toward property rights than prevails today, and therefore are not to be relied upon explicitly as indicating how the courts would decide now.
Appraisals of the results reached by the courts necessitates adequate analysis of the nature of the interest involved. For this purpose excellent tools are provided in the concepts of legal relations popularized by Hohfeld. Certain of the Hohfeldian concepts are used throughout: "right" in the sense of a claim; "privilege" in the sense of a freedom to act; "power" in the sense of an ability to affect legal relations; "immunity" in the sense of an absence of liability to have one's legal relation changed; "duty" in the sense of an obligation. Purism in the use of these concepts is not necessary and has not been attempted. In fact, if purism were made a goal, it would defeat the very purpose for which Hohfeldian terminology has been employed by the writer, that is, the achievement of clarity and accuracy. By making reasonable use of these several Hohfeldian terms, one can avoid the morasses in which the courts have often floundered. Many a case has been decided by the name which the court applied to the particular interest. One of the worst impediments to proper analysis is the word "right," which practically invites fallacy. Since the proposition that "vested rights may not be impaired" is more or less in the mind of a court whenever the contention is made that the legislature has unconstitutionally deprived someone of property, the court can easily fall into a closed circuit of reasoning and conclude that since the interest is a "right" it necessarily is immune from legislative impairment. This has occurred a great many times. Avoidance of such pitfalls has been uppermost in the mind of the writer.

A term which is often instrumental in producing obscurity is "property." The assertion is frequently made that the legislature may not destroy or confiscate property rights. As the statement stands it has no particular meaning, for unfortunately "property" is used commonly in at least four
different senses. Sometimes the term refers to the physical object itself, sometimes to ownership of the object (i.e., to the bundle of rights, duties, powers, and privileges which constitute the legal relation called ownership), sometimes to any legally protected interest, and sometimes to any constitutionally protected interest. So far as "property" is used in this last sense, the statement that the legislature may not destroy property rights has no meaning except as a statement of a conclusion reached upon the particular set of facts. Where the word "property" is used hereafter in this and following chapters it is in reference to the physical object itself, real or personal.

The expression "vested rights" has been avoided as much as possible. A "vested right" is an interest which in the opinion of the court is constitutionally protected against impairment. "Vested right" is a label which is attached after analysis and weighing of public and private interests. It is a conclusion and not a point of departure.

CONSTRUCTION OF STATUTE AND DETERMINATION OF EXISTENCE OF INTEREST

It is a matter of legislative intent whether a statute is to operate retroactively or only prospectively. The intention that it should apply retroactively must be made clear, for generally the courts indulge in the presumption that the legislature intended the statute to have prospective effect only. It is a general rule of construction that statutes are to be construed to operate prospectively wherever they are susceptible of such interpretation. However, when the legislature clearly and unmistakably shows an intention to make the statute retroactive, it is the duty of the court to apply it thus even though the consequence may be that the statute is rendered unconstitutional as applied.
As a preliminary to the determination of the constitutional question, the court must, of course, ascertain whether the alleged interest actually exists. In real property law this is usually a matter of construing instruments. Construction problems are more or less outside the scope of this treatment. For the most part the cases will be taken up at the point where the interest has been identified and only the constitutional question remains. Usually there is no doubt about the identity of the interest; the controversy centers about the true nature or characteristics of the interest.

It is apparent that a court may avoid the constitutional question by refusing to acknowledge the existence of an alleged interest. However, there is probably a limit to the extent to which a court may do this. The decision of the court, it would seem, must rest on a fair basis. If it does not, there may be a deprivation of property without due process.¹

CHAPTER 2

The Constitutional Guarantees

The conservatism of the courts when passing upon the constitutionality of legislation which has an adverse effect upon static interests in property is in remarkable contrast to the liberality of the courts when passing upon the constitutionality of legislation restricting the use of land. Since *Euclid v. Ambler Realty Co.* the contemplated use of property, even when the use is not harmful in itself or immoral, is subject to restriction in the public interest. A small number of cases have even held that a present use which is neither immoral nor harmful may be prohibited. To the owner who purchased in anticipation of a certain use which is now forbidden, it is as though some of his land were taken from him, yet he is not entitled to compensation for the diminution in value which is the consequence of a reasonable regulatory measure. However, when the legislature in the exercise of its police power makes a change in the static real property law, the courts are inclined to hold that there has been an unconstitutional deprivation of property if any interest is extinguished or impaired. In contrast to the readiness with which the courts sustain legislation regulating land use, one finds a marked conservatism in the cases concerned with the impingement of legislation on static interests. One finds in these cases an inclination to concentrate on the private property aspects with little or no attempt to balance private and public interests. Of course,

it must be admitted that when the legislature modifies or abolishes the institutions of real property law, it ordinarily does not do so under the pressure of public need for immediate action. Nor is there usually an irreconcilable conflict between private and public interests (as so often is the case when the legislature undertakes to regulate a private use) which calls for immediate modification and consequent sacrifice of private interest for the public good.

The bias against retroactive legislation is more than an aversion to the destruction of private interests having economic value. It is a bias deeply rooted in Anglo-American law. Coke established the maxim that "Nova constitutio futuris formam imponere debet non praeteritis." Blackstone declared it to be a matter of justice that statutes should be made to operate in the future. The American decisions abound with condemnations of retroactive legislation. Retroactive statutes seem to do violence to one's sense of justice in a variety of ways. For one thing, they destroy one's feeling of security. Often they are enacted with the knowledge and intention that they will affect particular persons in a specific manner and thus are personal rather than impersonal as legislation is supposed to be. Moreover, a retroactive statute gives the person affected no opportunity to avoid the consequences by rearranging his affairs.

The courts do not always indicate the constitutional provision which they suppose to be applicable when they declare a statute valid or invalid; but it cannot be assumed that a court does not have in mind a specific constitutional provision merely because it does not say so. It is now almost universally held that a court has no power to declare a statute in-

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4 2 Inst. 292.

5 1 Blackstone, Commentaries, 46.
valid unless the statute conflicts with some provision of the state or federal Constitution. The nineteenth century “Vested Rights Doctrine” with the concomitant overtones of natural law and natural rights has been pretty much relegated to the past. Only now and then does one find a modern case in which a court professes the view that the legislature is limited by principles of natural law. And when all is said and done, there have really been exceedingly few cases in which a statute was actually declared invalid on natural law grounds, notwithstanding the many discussions in the earlier cases concerning natural rights, the social compact, and the inherent incapacity of an American government to take away life, liberty, or property except when necessary for the general good.

A suggestion of the Doctrine of Vested Rights in modern cases is the equivocal proposition that the legislature is powerless to divest “vested rights.” But usually when a court speaks of “vested rights” it has no intention of reverting to the nineteenth century Doctrine. It means only that in its opinion the legislature has attempted to disturb property interests in a manner forbidden by express constitutional guarantees.


8 Matter of Estate of Leslie, 129 Wis. 190, 108 N. W. 627 (1906).

9 Prof. Thayer stated that there is but one such case: Bowman v. Middleton, 1 Bay (1 S. C. L.) 252 (1792); 1 Thayer, Cases on Constitutional Law, p. 53 (1895). Another writer cites four cases in which he states that statutes were declared void on the ground that they violated the dictates of natural law: Gardner v. Newburgh, 2 Johns. Ch. 162 (N. Y. 1816); People v. Platt, 17 Johns. Rep. 195 (N. Y. 1819); Bradshaw v. Rodgers, 20 Johns. Rep. 103 (N. Y. 1822); Parham v. The Justices, 9 Ga. 341 (1851).
In the same order as "vested rights" is the idea expressed in some cases that a statute is unconstitutional because it operates to take the property of one person and transfer it to another. Probably no legislature has ever literally taken one man's property to bestow it on another. The court is stating in a roundabout manner that the statute confers on one person rights and powers in respect to another's property in a manner or degree forbidden by the Constitution.

While few modern courts would think of expressly basing a decision upon the Doctrine of Natural or Vested Rights (partly because the Doctrine has so often been renounced, and partly because the broad interpretation given to the constitutional provisions makes recourse to a Natural Rights Doctrine uncalled for), the Doctrine of Vested Rights continues to play a not unimportant role in a metamorphosed state. The Doctrine to a large extent has been incorporated into the language of the constitution by judicial interpretation and is flourishing under the disguise of "due process." The courts today are building on a concept of limitations on legislative power laid down in the Era of Vested Rights, with the qualification, of course, that the courts today harbor fewer fears and prejudices against the legislature and are more willing, for the most part, to allow some degree of latitude to the legislature. The concern of a court in respect to an arbitrary or unreasonable act of legislation is very much the same, whether it professes to be bound to look only to the written constitution (as today), or whether it professes to find natural limitations to the power of the legislature (as was once the vogue).

In the cases arising prior to the Fourteenth Amendment, if the given legislative act was held to be constitutionally


11 Howe, The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment, 18 Calif. L. Rev. 583 (1930).
forbidden, the prohibition necessarily had to be found in the state constitution, except where the impairment of the obligation of a contract was involved. It was some time after the adoption of the Fourteenth Amendment before the courts ceased to rely exclusively on the state constitutions in cases not involving an impairment of the obligation of contract. At present the due process clause of the Fourteenth Amendment is the favored resort against legislative excesses and has greatly overshadowed the Bill of Rights of the state constitutions as a protection against deprivation of property. However, the guarantees of the state constitutions have by no means been supplanted.

A provision similar to the due process clause of the Fourteenth Amendment is to be found in a number of state constitutions; 12 in others the due process concept is stated more elaborately. 13 The privilege of possessing and acquiring property is expressly guaranteed in many states. 14 The provision in some constitutions that the “property of no person shall be taken for public use without just compensation therefor” has been taken to signify that private property may not be taken for private uses even if compensation is paid and that the legislature may not arbitrarily or unreasonably interfere with property rights. 15 In the Pennsylvania Constitution it is provided:

“In all criminal prosecutions the accused hath a right to be heard by himself and his counsel . . . ; he cannot be

12 E.g., Okla. Const., Art. II, sec. 7: “No person shall be deprived of life, liberty, or property, without due process of law.”
13 E.g., Tenn. Const., Art. I, sec. 8: “That no man shall be taken or imprisoned, or dispossessed of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land.”
14 E.g., Me. Const., Art. I, sec. 1: “All men are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.”
compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.”

It has been held that if the property of criminals is protected in this way, surely everyone’s property must be likewise protected.

In spite of the diversity of phraseology, the provisions cited above appear to have an identity of meaning. If the particular phraseology is significant to the outcome, the significance which the courts attach to the precise wording of the constitutional provision is certainly not articulated. The courts treat the provision, whatever the specific wording, as a guarantee against deprivation of property without due process, and each case resolves itself into a question of whether the legislature has acted arbitrarily and unreasonably.

The constitutions of Georgia, Missouri, Ohio, Texas, Colorado, Louisiana, New Hampshire, and Tennessee contain prohibitions against the enactment of retroactive legislation. The Ohio Constitution, as an example, provides that “the general assembly shall have no power to pass retroactive laws or laws impairing the obligation of contracts.” Such prohibitions are not taken literally to prevent the application of any legislation to existing interests. It was said by the Missouri Supreme Court:

“The constitutional inhibition against laws retrospective in operation (section 15, article 2, Constitution of Missouri) does not mean that no statute relating to past transactions can be constitutionally passed, but rather that none can be al-

18 Ohio Const., Art. 2, sec. 28.
allowed to operate retrospectively so as to affect such past transactions to the substantial prejudice of parties interested. A law must not give to something already done a different effect from that which it had when it transpired.” 20

The definition of retrospective statutes customarily given by courts in the jurisdictions having this type of constitutional provision is that laid down by Justice Story in Society for the Propagation, etc. v. Wheeler et al.:

“Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities.” 21

On the whole the courts seem to come out with about the same result whether they apply a provision against retrospective laws or whether they refer to a “due process” clause. However, the Missouri Supreme Court has indicated that in close cases where the court can go either way on the constitutional issue, the express prohibition in the constitution of that state against retrospective legislation requires the court to hold that the statute is invalid, whereas if a “due process” clause were applicable the court might sustain the statute. 22

Retroactive statutes have been declared unconstitutional on the ground that they impair the obligation of contracts. Impairment of the obligation of contract is likely to be the basis of decision where the statute affects an inter vivos trust, a leasehold estate, or a mortgage, since the legal relations here are contractual in nature or have contractual aspects. On


22 Leete v. State Bank, 115 Mo. 184, 202, 21 S. W. 789, 792 (1893). See also in this regard Mellinger v. City of Houston, 68 Tex. 37, 3 S. W. 249 (1887).
the theory that a deed is a contract, or an instrument sounding in contract, it is sometimes held that the interests created by a deed are contract obligations within the meaning of the contracts clause of the federal Constitution. A will, however, is said not to be within the purview of that clause.

The view that interests created by deed are necessarily contract obligations is an unwarranted extension of *Fletcher v. Peck* wherein it was held that a grant from a state is a contract which is immune, by virtue of the contracts clause of the federal Constitution, from subsequent revocation by the legislature. The holding in *Fletcher v. Peck* probably went beyond what was intended to be the scope of the contracts clause, for it is doubtful whether the framers of the Constitution were thinking of contracts in any other than the usual legal sense of an agreement between two or more parties. Certainly the holding in *Fletcher v. Peck* should not be extended beyond the issue in the case. The principle laid down is applicable when a legislature is seeking, without justification, to reinvest the state with title to land which it previously granted or patented. Apparently the contracts clause also would be invocable where a statute purports to extinguish the effect of a conveyance between private parties by divesting the title of the grantee in whole or in part and restoring it to the grantor, or by re-establishing privileges, rights, or powers in the grantor which he had relinquished by the conveyance. Justice Marshall said so in *Fletcher v. Peck*. Also he remarked that:

23 *Inter alia* Cress v. Hamnet, 144 Kan. 128, 58 P. 2d 61 (1936); Evans v. Cropp, 141 Ky. 514, 133 S. W. 221 (1911); Berdan v. Van Riper, 16 N. J. L. 7 (Sup. Ct. 1837); Gilmore v. Bright, 101 N. C. 313, 7 S. E. 751 (1888).


25 6 Cranch 87 (U. S. 1809).

"A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant." 27

Naturally, the contracts clause is applicable when there is an impairment of an actual contract subsisting between grantor and grantee. The clause is no less applicable because the terms of the contract happen to be stated in the deed.

However, when a statute modifies or abolishes a legal institution under which an interest exists, there is ordinarily no impairment of the legal effect of the deed between the grantor and grantee nor a restoring to the grantor of something which he is estopped to claim. If the grantor has in no manner gained by the grantee's loss of an interest, can it be logically and reasonably said that a contract has been impaired? If any constitutional guarantee is infringed, it would seem to be that against deprivation of property without due process. Even in regard to those interests which can be classified either as interests in land or as contract relations, depending on one's viewpoint, such as easements, real covenants, restrictive covenants, it is submitted that the contracts clause is only applicable when the statute purports to affect the legal relations flowing out of the grant or agreement as between grantor (promisor) and grantee (promisee) or third party beneficiary. Be this as it may, legal relations which are recognized to be interests in land have characteristics which set them off from legal relations which are purely contractual. Interests in land are relations in rem; they exist not only as to the immediate parties to their creation but as to all persons. Contract relations involve the making of a promise. They are relations in personam; third parties are not affected except as to the general duty not to interfere

27 6 Cranch 87, 137 (U. S. 1809).
with the relations between the contracting parties. It is contrary to common understanding of what is an interest in land to impart to such an interest a contractual quality.

Possibly what has led some courts to hold that interests created by deed are contractual is the ambiguous and inaccurate reference to the deed itself as a contract. This confusing designation completely obscures the fact that the use of a deed in the creation of interests is purely a formalistic requirement. The conveyance is perfected through the execution and delivery of the deed; after these acts the deed is spent.

In the past where the courts have resorted to the contracts clause, they have tended not to want to allow any interference with property interests whatever, apparently on the theory that the prohibition against impairment is not one of degree but that any impairment is within the prohibition. But the Supreme Court of the United States in *Home Building & Loan Ass'n v. Blaisdell* made it clear that the police power enters into every contract to a degree once not generally admitted. A completely new concept of the contracts clause is evoked by that case; a contract may be impaired if there are reasonable grounds. Therefore, even if we are willing to accept the contracts clause as a tenable ground on which to determine the constitutionality of a retroactive statute affecting interests in land we must reconsider the older cases applying the contracts clause in the impingement of legislation on interests in land. The restrictive determinations once thought to be necessary are no longer deemed to be

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28 It has been said (in cases not involving deeds, however) that the prohibition against impairment is commonly not a question of degree for any impairment is within the prohibition. Bank of Minden v. Clement, 256 U. S. 126 (1921); Norfolk & W. R. Ry. Co. v. Boyle, 12 Fed. Supp. 522 (N. D. Ohio 1935); Rorick v. Board of Com'rs, 57 F. 2d 1048 (N. D. Fla. 1932); Green v. City of Asheville, 199 N. C. 516, 154 S. E. 852 (1930).
29 290 U. S. 398 (1934).
required, although perhaps the contracts clause is still more inhibitive than the due process clauses.

Occasionally a statute modifying the existing property law will be held to deny equal protection of the laws. But it is rather exceptional to find a statute of the type to be discussed which operates unequally, however unreasonable it may be.

In some cases it has been contended (and occasionally held) that a retroactive statute entails a forbidden intrusion of the legislature into the province of the judiciary. This argument is based upon the theory that a retroactive statute necessarily declares the law for existing cases, which is a judicial and not a legislative function. Most of these cases appeared in the early nineteenth century and none, apparently, in the last seventy-five years. 80

80 See Cooley's Constitutional Limitations, p. 131 et seq. (7th ed. 1903) for a discussion of the earlier cases.
CHAPTER 3

Acquisition and Disposition of Interests
In Land

I. Inter Vivos Transfers
THE POWER OF ALIENATION

"The right to sell and convey is a property right, and one of the highest privileges and dearest rights connected with ownership. In fact it is the one right which gives the thing owned its greatest value." ¹

It is of course within the power of the legislature to prescribe the mode of conveying property. There is a difference between impairing the power of alienation and prescribing the manner in which the power must be exercised. The distinction becomes difficult of ascertainment at times, yet on the whole the difference is apparent enough. A prescription relates to form or mode of conveying when the owner of an interest is free at any time to alienate that interest, provided only that in order to accomplish his purpose he must do certain acts which are within his ability. ² There is an impairment of the power of alienation when the owner of

¹ Crump v. Guyer, 60 Okla. 222, 224, 157 Pac. 321, 323 (1916).
² During the nineteenth century there were statutes in a number of states which provided that a married woman could not convey any interest in her separate property except by an instrument which she acknowledged upon examination separate and apart from her husband. These statutes did not prohibit a married woman from disposing of or encumbering all or any part of her separate estate upon such terms as she thought proper. Their purpose was to throw up a safeguard against undue influence, threats, or fraud, without in any degree impairing the power of disposition. Such statutes, it was held, could be applied even where the land was acquired before the passage of the statute. Marclay v. Love, 25 Cal. 367 (1864); Williamson v. Williamson, 57 Ky. (18 B. Mon.) 329 (1857).
an interest is deprived of the ability to perform the formal acts which are prescribed for the alienation of interests in land—as, for example, where the concurrence of another person is required, whose consent cannot legally be compelled by the owner of the interest. 3

The *jus disponendi* may be restrained in the interest of the public welfare. A California statute 4 which gave the real estate commissioner power to prohibit the sale or lease of subdivided land, if he should find that the sale or lease “would constitute misrepresentation to or deceit or fraud of the purchasers of lots or parcels in such subdivision,” was upheld. The court concluded that the statute must be sustained for the same reasons which give validity to Securities Acts: the prevention of fraud and sharp practices in a type

3 In Johnson v. Sanger, 49 W. Va. 405, 38 S. E. 645 (1901), the statute provided that where land is held in trust for the use of a married woman, while the property “remains in the hands or under the control of such trustee, no contract relating to, or conveyance of, any such property by such married woman shall be of any force to bind or affect the same, unless her trustee join in.” W. Va. Code 1891, c. 66, sec. 4. Prior to the enactment of this statute a married woman could by deed from herself and her husband convey the land held by a trustee and compel the trustee to pass the legal title to her aliee by uniting in the deed, or by separate deed. It was held that the power of disposition could not thus be taken away or impaired without violation of the Fourteenth Amendment. However, as to land acquired subsequent to the adoption of Art. VI, sec. 49, of the Constitution in 1872, the court found reason to permit the retroactive application of the Act of 1891. This constitutional provision gave the legislature power to “pass such laws as may be necessary to protect the property of married women from the debts, liabilities and control of their husbands.” It was held that the Act of 1891 was vindicated by this constitutional provision, as the necessity of the trustee’s consent would be a hindrance in the way of improvident acts of the wife instigated by the undue influence of her husband.

But see Warfield v. Ravesies and Wife, 38 Ala. 518 (1863) in which a statute conferring ownership upon the husband of the rents, income, and profits of the wife’s estate and providing that the wife’s property could be conveyed only by joint deed of husband and wife, was sustained as a reasonable prescription of the mode of conveying the wife’s land! In five states a contract to sell, a deed, a mortgage, or even a lease of lands owned by the wife may require joinder of the husband: Ala., Fla., Ind., N. C., and Pa. 1 Powell, *Real Property*, ¶ 118.

4 Cal. Gen. Laws 1937, Act 112, § 20a et seq. The vendor was obligated to deliver title to each parcel free of encumbrance. Violation of the statute was made a criminal offense.
of transaction particularly open to such abuses.\(^5\) The sale of residential lots having an area less than a prescribed minimum may be prohibited.\(^6\) Statutes have been sustained

\(^5\) In re Sidebotham, 12 Cal. 2d 434, 85 P. 2d 453 (1938), cert. den., 307 U. S. 634 (1938). "The assertion that this is not valid police power legislation because it benefits only a special class, the purchasers and lessees of subdivided real estate, and not the whole public, is without substance. The police power may be, and usually is, exercised for the purpose of protecting particular classes of the public in need of such protection, and it is rare indeed that a single law includes everyone in the scope of its regulations. The object of the present law, prevention of fraud and sharp practices in a type of real estate transaction peculiarly open to such abuses, is obviously legitimate, and the method, including investigation and disclosure of certain essential facts, and a protection for the innocent purchaser against loss of his land by foreclosure of the underlying mortgage is perfectly reasonable. A safeguard against arbitrary action is provided in the requirement of a public report of the commissioner's investigation and a public hearing on any contemplated prohibitory order. The decisions sustaining regulatory legislation to prevent fraud are numerous, and they fully support the law herein attacked." (12 Cal. 2d 434, 436, 85 P. 2d 453, 454.)

In a vigorous dissent (p. 456), Edmonds, J., said: "... [T]he sale of a security created by an individual stands in a different category from a sale of tangible property and the regulations of the sale of securities rests upon the principle that it is within the power of government to prevent deception concerning them because their value consists in what they represent." The dissenting judge believed that the statute deprived the owner of the inalienable right of "acquiring, possessing, and protecting property" which is guaranteed by Article I, section 1 of the California Constitution. Police power regulations are upheld only where they are reasonably related to the health, morals or safety of the public. Even a purpose to protect people from their own folly will not overcome constitutional rights, he wrote. The police power may not be invoked under the guise of the general welfare "to interfere with the sale by an individual of his own property when the acquiring and possession of such property is not contrary to law" (p. 457).

\(^6\) Clemons v. City of Los Angeles, 222 P. 2d 439 (Cal. 1950). The ordinance in question provided that no lot "held under separate ownership" at the law's effective date and "used ... for dwelling purposes" shall be "reduced in any manner below the minimum lot area, size or dimensions" prescribed—"a minimum average width of fifty (50) feet and a minimum area of five thousand (5000) square feet." Another ordinance, however, permitted the construction of rental units with a lot area of 800 feet per dwelling unit on 5000 square foot lots under single ownership. The majority found that the ordinance in question had a sufficient relation to the health and welfare of the public in that it was designed inter alia to avoid overcrowding and congestion. A dissenting judge strongly attacked the position of the majority as a mere subservience to the whims of a city council. He pointed out that when the plaintiff purchased the property in question there were nine bungalows thereon, which had been built many years before the ordinance went into effect. The plaintiff subdivided the property into nine parcels and sold them to individual purchasers; these lots averaged 925
which prohibit the sale or lease of agricultural lands to aliens ineligible for United States citizenship. A reasonable zoning ordinance which promotes the general welfare is not rendered unconstitutional because it has the effect of prohibiting an investor from selling the land for a particular use even though he bought the land intending to sell it for this use.

The legislature may curtail the power of alienation of persons who need to be protected against their own indiscretesquare feet. Since the ordinance in question applied to the ownership of lots of a certain size and not to the use, plaintiff could rent the bungalows and lots but could not convey them! The dissenting opinion charged the majority with failure to make it clear just how, under these circumstances, the ordinance could accomplish any of the supposed results.

Zoning ordinance prescribing minimum area of lots and minimum frontage have been sustained in other jurisdictions. Simon v. Town of Needham, 311 Mass. 560, 42 N. E. 2d 516 (1942); Greenway Homes v. Borough of River Edge, 137 N. J. L. 453, 60 A. 2d 811 (Sup. Ct. 1948).

7 People v. Oyama, 29 Cal. 2d 164, 173 P. 2d 794 (1946); Cockrill v. People of State of California, 268 U. S. 258 (1925); State v. Hirabayashi, 133 Wash. 462, 233 Pac. 948 (1925), aff'd White River Gardens, Inc. v. State, 277 U. S. 572 (1928). The rationalization of these decisions is that aliens ineligible for United States citizenship (Chinese and Japanese are primarily concerned) are so unlikely to practice good husbandry that the legislature, acting for the preservation of agricultural lands, may deny to such persons the privilege of owning or leasing farm land and may deny to owners of land the privilege of conveying or leasing to such ineligible aliens. In Terrace v. Thompson, 263 U. S. 197 (1923), the United States Supreme Court held that it was not a denial of equal protection of the laws for a state to adopt a classification, which Congress has set up to determine who may become a citizen, for the purpose of ascertaining who may not acquire title to land. Recently, however, there has been a change of judicial opinion as to the validity of such legislation. In Oyama v. State of California, 332 U. S. 633 (1948), the United States Supreme Court raised conjecture whether it will continue to follow Terrace v. Thompson. In two states the alien land laws have been declared to be in violation of the Fourteenth Amendment. Fujii v. State, 242 P. 2d 617 (Cal. 1952); Kenji Namba v. McCourt, 185 Ore. 579, 204 P. 2d 569 (1949).

California was the first state to bar ineligible aliens from owning or leasing agricultural lands. Following the lead of California a number of states adopted legislation restricting the ownership of land by “ineligible aliens”:

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...tions. Statutes authorizing the appointment of a guardian for persons who have been shown to the satisfaction of a court to be incapable of managing their own affairs (whether because of senility, alcoholism, idiocy, or other cause) have been declared not to deprive the incompetent of his property without due process. It has been held that where the power of alienation has been conferred upon minors, the power may be taken away again at any time by a statute changing the age of majority, provided that such modification is reasonable and that rights of others have not intervened as a consequence of the exercise of the power invested in the minor while such power was in existence. An Oklahoma case, however, holds that a minor's power to convey is a vested right which once conferred cannot be taken away by the legislature.

9 Shapter v. Pillar, 28 Colo. 209, 63 Pac. 302 (1900); Kutzner v. Meyers, 182 Ind. 669, 108 N. E. 115 (1915); Flewwellin v. Jeter, 138 Fla. 540, 189 So. 651 (1939).

10 Coleman v. Coleman, 51 Ohio App. 221, 200 N. E. 197 (1935). The court set aside deeds which the plaintiffs made when they were over 18 but less than 21. The deeds were executed after the statute changing the age of majority of women from 18 to 21.

In a number of states the disabilities of infancy are by statute removed in whole or in part with respect to married infants. 1 Powell, Real Property, § 122.

11 Crump v. Guyer, 60 Okla. 222, 157 Pac. 321 (1916). Irene Steward inherited a tract of land while she was a minor. In 1908 she married. Laws 1897, c. 8, § 1, provided that all persons who have been legally married of whatever age may convey or make any contract relating to real estate or any interest therein. Acting under the authority of this act, she, as a married woman, although a minor, conveyed this land in 1909 to plaintiff in error, but Sess. Laws 1909, p. 166, had at that time become operative, and that act limited the real estate that a married minor might convey to real estate "acquired after marriage." Irene subsequently hired the plaintiffs as attorneys to recover the land. She did not offer to return the purchase money; she said she didn't have it. Thereafter Irene settled with the plaintiff in error for a nominal sum and dismissed the action. This was without the consent of the plaintiffs, her attorneys. They then sought to enforce a lien on the land for the amount of the fees which they were promised by Irene. Their ability to recover depended upon whether Irene could have recovered the land. Held: Irene's power to sell and convey was a vested right which the legislature could not take away; hence all her interest in the land passed to the plaintiff in error and she could not have recovered.
On the ground that the legislature cannot impair the power of alienation, the courts have held that statutes enhancing the marital interests of spouses in each other's property cannot be applied in case of land acquired by a spouse before the effective date of the act and even that such legislation cannot be applied to marriages contracted prior to its passage. It has been said to be immaterial that the interest given the nonowning spouse during coverture is inchoate and is not to be presently enjoyed. It is enough that after the statute the owning spouse's opportunities for conveying without the other spouse's consent are fractionally diminished by the prospect facing any purchaser that if his grantor fails to outlive the other spouse, the share which that spouse will be able to claim in the conveyed property will be greater than it previously would have been. There must be all the more a taking of property without due process, if, before the statute, the owning spouse could convey absolutely free of any marital right.

12 Gerhardt v. Sullivan, 107 N. J. Eq. 374, 152 Atl. 663 (Ch. 1930); Sutton v. Askew, 66 N. C. 172 (1872); Harris v. Whiteley, 98 Md. 430, 56 Atl. 823 (1904).

The trend of legislation has been to free both spouses from restrictions for the protection of each other's expectations. Powell, Real Property, ¶ 119.


14 The New Jersey legislature by amendment to the Dower Act, in 1927, increased dower from a life estate in one-third to a life estate in one-half of the lands of which the husband is seized during coverture. Laws 1927, c. 68; N. J. Rev. Stat. 1937, 3:37-1. It was held in Gerhardt v. Sullivan, 107 N. J. Eq. 374, 152 Atl. 663 (Ch. 1930) that the amendment could apply only to land acquired by the husband after the effective date of the act. "That the amendment takes from the husband and gives to the wife an additional present and valuable interest in his land permits of no debate. That the inchoate dower during coverture is a mere right without enjoyment is beside the point. The right taken from the husband is of such a substantial nature as to preclude him, during coverture, from conveying the estate he had before the enactment. If the legislature has the power to increase the inchoate right by fractions it has the authority to increase it so that when consummate it will develop into a fee and altogether deprive the husband of his right of alienation." (107 N. J. Eq. 374, 378, 152 Atl. 663, 665.)

15 The New Jersey Curtesy Act of 1927, while diminishing the extent of curtesy from a life estate in the whole of the wife's land to a life estate in one-half of her lands, also gave to the husband a present interest to a degree
A dissenting judge in one case involving a statutory enlargement of dower saw in the act a proper exercise of the legislative function to enact general municipal regulations, carrying out the moral obligations of the marriage, and making suitable provision for the support and comfort of the widow after her husband's death, which would justify the impairment of the husband's *jus disponendi*. This appears to be a sensible opinion and may very well find acceptance in future cases. The decided cases, after all, are

he did not have before and imposed an additional burden upon the wife's land by removing the common-law requirement of issue born alive. Laws 1927, c. 71; as amended, N. J. Rev. Stat. 1937, 3:37-2. It was held that the Curtesy Act could operate only on land acquired after its passage, since to make it applicable to land previously acquired would be contrary to constitutional inhibition. Stabel v. Gertel, 11 N. J. Misc. 247, 165 Atl. 876 (Sup. Ct. 1933), aff'd 111 N. J. L. 296, 168 Atl. 645 (Err. and App.); Brasko v. Duchek, 127 N. J. Eq. 567, 14 A. 2d 477 (Prerog. 1940).

N. C. Acts 1868-69, c. 93, sec. 51, restored to widows their common-law right of dower. Under the pre-existing law the husband was free to sell his land without his wife having any claim or interest therein; a widow was entitled to dower only in the land of which her husband died seized and possessed. In Sutton v. Askew, 66 N. C. 172 (1872), it was held that to apply the Act of 1868-69 to land acquired before the act would deprive the owner of vested rights. Sutton v. Askew was approved in Jenkins v. Jenkins, 82 N. C. 208 (1880) and in Bruce v. Strickland, 81 N. C. 267 (1879). In Fortune v. Watkins, 94 N. C. 304 (1886), it was held that where a vendee made a contract to buy land, bearing date before the passage of the Dower Act, but the deed was not made until after the passage, the vendor's wife was not entitled to dower in such land. Accord, Outlaw v. Barnes, 108 S. C. 451, 94 S. E. 868 (1917).

Md. Laws 1898, c. 457 provided: "Every husband shall acquire by virtue of his marriage an estate for his life in one-third of the lands held or owned by his wife at any time during the marriage, whether by legal or equitable title, or whether held by her at the time of her death or not . . ." Prior to this statute the husband had only an expectant or inchoate life interest in his wife's land, which would become consummate only in case she died intestate and he survived her. It was held in Harris v. Whiteley, 98 Md. 430, 56 Atl. 823 (1904), that the Act of 1898 could not be given a retroactive operation because to do so would cause it to divest vested rights; that to convert the inchoate interest of the husband into a present vested life estate subject to claims of his creditors would be an interference with or impairment of the vested right of property acquired by the wife in her real estate prior to the date of the passage of the statute. The question in the case was whether the husband had such an interest in the real estate of his wife as could be attached or reached by creditors.

for the most part old and reflect a nineteenth century point of view.

If the owning spouse has already exercised his or her *jus disponendi* prior to the statute enlarging the marital estate, then it is quite apparent that the statute cannot be given effect as to the conveyed land for this would be a taking of the property of the grantee (or mortgagee).  

The cases cited in this note are old, but there is no reason to believe that the same result would not be reached today.

It has been held that a statute purporting to increase the interest of the wife cannot be applied to a prior conveyance of the husband in which the wife did not join so as to affect the interest of the grantee. Morrison v. Rice, 35 Minn. 436, 29 N.W. 168 (1886) (dower abolished and widow given one-third in fee); Strong v. Clem, 12 Ind. 37 (1859) (dower abolished and widow given one-third in fee). That it would impair the obligation of the grantee's deed. Young v. Wolcott, 1 Iowa 174 (1855) (widow given one-third in fee instead of a life estate). That it would deprive the grantee of natural rights. Davis v. O'Ferrall, 4 G. Greene 168 (Iowa 1853) (dower abolished and widow given one-third in fee).

In McCafferty v. McCafferty, 8 Blackf. 218 (Ind. 1846), it was held that a title procured from the husband could not be affected by a subsequently enacted statute which provided that whenever a divorce shall be decreed on account of the misconduct of the husband, the wife shall be entitled to dower in his lands the same as if he were dead. Ind. Rev. Stat. 1843, p. 604. To apply the statute, it was held, would destroy vested rights and impair the obligation of a contract.

In Wiseman v. Beckwith, 90 Ind. 185 (1883), a contract of purchase was made with Mr. Wiseman before, and the conveyance was made after, a statute which abolished common-law dower and gave the widow one-third in fee of the land of which her husband was seized during coverture. Mrs. Wiseman did not join in the conveyance. Held: The statute could not enlarge Mrs. Wiseman's inchoate interest in the conveyed property. By the contract of purchase Wiseman was bound to transfer to the purchaser all his interest in the land. Any subsequent legislation which attempted to take from Wiseman the title which he had at the time of the contract and give it to another, thereby disabling him from performing the contract, impaired its obligation; for the law existing at the time of the making of a contract silently enters into it and constitutes one of the terms and by this law the measure of the obligation is determined.

Also, it has been held that a subsequently enacted statute cannot diminish the interest of a judgment purchaser. Taylor v. Sample, 51 Ind. 423 (1875) (dower abolished and widow given one-third in fee). Or diminish the interest of an adverse possessor who has acquired by dispossess in the same title which he would have acquired by a conveyance from the husband without the wife joining. Bowen v. Preston, 48 Ind. 367 (1874).

It appears, however, that the husband's grantee would not be deprived of any constitutional rights by the repeal before the death of the husband of a statute under which the wife's dowable capacity is temporarily suspended.
The power and privilege of disposing of one's property at death, unlike the power of making an *inter vivos* transfer of title, has never been deemed to be a vested interest.\textsuperscript{18} Thus husband and wife may be deprived of the privilege of disinheriting each other. If the *inter vivos* power of disposition is unaffected, there can be no doubt that a statute enlarging the share which the surviving spouse shall take as heir may be applied to previously acquired property.\textsuperscript{19}

Heirs apparent and presumptive of the owning spouse do not have an interest in his land sufficient to prevent the giving of effect to a statute which enlarges the marital interest of the other spouse, even though the land was acquired previous to the statute.\textsuperscript{20} Of course such statute must be in effect before the death of the owning spouse, since the inter-

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\textsuperscript{18} See infra this Chapter, p. 90, \textit{et seq.}


\textsuperscript{20} Noel v. Ewing, 9 Ind. 37 (1857). See discussion infra p. 111 \textit{et seq.}
est of an heir vests at the moment of the death of the ancestor.  

The courts have disagreed as to whether the legislature may retroactively curtail the power of one spouse to alienate a homestead without the concurrence of the other spouse. In *Gladney v. Sydnor* the Supreme Court of Missouri ruled, on the ground that the Missouri Constitution prohibits retroactive legislation which impairs vested rights, that a statute restricting the power of the husband to sell or encumber the homestead without his wife's joinder could not be applied where the homestead had been acquired prior to the statute.

"To us it seems as one of the highest privileges and dearest rights that can be bestowed upon the citizen. The law that creates the right to deal with your property without being compelled to have someone unite with you in the conveyance truly confers an inestimable privilege."  


22 The statutes now in force almost universally provide that the sale or mortgage of a homestead may not be accomplished unless both spouses join in the instrument. 1 Powell, *Real Property*, § 121. If either spouse could alienate or mortgage without the other's consent, the purpose of the statutes, which is to preserve a home for the family, would be largely defeated.

23 172 Mo. 318, 72 S. W. 554 (1903). This was a suit brought by husband and wife to enjoin a sale under a deed of trust executed by the husband alone and to have the deed of trust cancelled.

24 Const. 1875, Art. 2, sec. 15: "That no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly." Now with modifications, Const. 1945, Art. 1, sec. 13. See *supra* Chapter 2, p. 13, for a discussion of the significance of this provision.

25 Mo. Laws 1895, p. 185: "The husband shall be debarred from and incapable of selling, mortgaging, or alienating the homestead in any manner whatever, and every such sale, mortgage, or alienation is hereby declared null and void." Now, Mo. Rev. Stat. 1949, sec. 513.475.

26 172 Mo. 318, 327, 72 S. W. 554, 557.

The diminution in the power of the husband to alienate was in fact not very extensive. Prior to Laws 1895, only where the wife had not filed her claim could the husband sell or encumber the homestead (subject to the wife's inchoate dower) without the wife joining with him. Rev. Stat. 1889, sec. 5435. After Laws 1895, the joinder of the wife was necessary without any
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But *Gladney v. Sydnor* was overruled by *Bushnell v. Loomis.*

"We think that the Gladney Case is wrong for a further and better reason than the mere voluntary surrender of an absolute right as discussed by the North Carolina court. To our mind the State has the right to pass exemption laws limiting the right of alienation. If no other source of power could be found the police power of the State would justify a reasonable interference with a so-called absolute right. Governments cannot be maintained without some limitations upon absolute rights. The general welfare of the State and of its citizens demand at times the cutting off of a portion of the so-called absolute rights of the individual. Homestead exemptions are granted in the interest of the general welfare of our citizens. In such welfare the State has an interest. Public policy is opposed to pauperized widows and children.

need for her to file a claim. Yet it was declared that the husband's power was a vested interest, even though in the particular case the husband did not avail himself of the power until after Laws 1895. "Vested rights may be created, either by the common law, by statute, or by contract. And it makes no difference as to the method of their creation; they are entitled to the same protection." (172 Mo. 318, 326, 72 S. W. 554, 556.)

A rather recent Oklahoma case, *Barnett v. Sanders,* 121 Okla. 14, 247 Pac. 55 (1926), follows *Gladney v. Sydnor.* However this was a situation in which a grantor was seeking to recover land he had conveyed. The plaintiff's argument was that the deed was void because the land conveyed consisted of a homestead and his wife had not joined him in the deed. The sympathy of the court was no doubt with the grantee. Moreover, there was considerable evidence that the homestead had been abandoned at the time of the conveyance. This was one case in which the owner of a "vested right" did not want it to be declared vested.

27 234 Mo. 371, 137 S. W. 257 (1911). The plaintiffs, Mr. and Mrs. Bushnell, sought to have a deed of trust annulled. There was evidence that the wife's signature had been obtained by duress. It was necessary to determine whether Laws 1895 debarred the husband from alienating the homestead without the wife joining. The land in question was acquired by Mr. Bushnell in 1869 and he married his co-plaintiff in 1871. From the date of the marriage up to the date of the deed of trust, August 26, 1905, the land in question had been used as a homestead. Held: The wife's signature was necessary.

The Mississippi Supreme Court with reasoning similar to that of the Bushnell case sustained, as applied to a homestead previously acquired, a statute which took away the power given the husband under the earlier statute to sell the homestead without his wife's consent. *Massey v. Womble,* 69 Miss. 347, 11 So. 188 (1891).
Pursuant to such public policy the State withdraws from creditors certain portions of the debtor's property—this upon the theory that such laws better promote the welfare of all. Of course such laws do not benefit the creditor, but they do subserve a good purpose and tend to promote the general welfare of our citizenship as a whole. The whole tenor and spirit of free governments endorse such laws.”

“To foster such beneficent purpose the State can within reasonable grounds curtail some of the rights of the individual. We know of no constitutional inhibition to the exercise of this power by the State, when exercised for the general welfare of its citizenship.”

The reasoning of the North Carolina court referred to in Bushnell v. Loomis is that when the owner of land has his homestead allotted as provided in the statute he must be deemed to have made a voluntary surrender of his absolute power of alienation.

28 234 Mo. 371, 391, 137 S. W. 257, 262.
29 234 Mo. 371, 392, 137 S. W. 257, 263.
30 It was held in Castlebury v. Maynard, 95 N. C. 281 (1886) that as soon as the homestead is allotted to the husband on his petition, there is a dedication by him of the land to all the uses, privileges, and restrictions of a homestead, no matter when the land was acquired; consequently inhibition attaches to the land and the husband cannot convey it without the wife joining in the deed. This was an action on a promissory note given in payment for certain land. The defendant set up as a defense that the homestead was still a charge on the land and that the plaintiff could not therefore give a good title. The plaintiff was married in 1844. He acquired the land prior to the adoption of Const. 1868, Art. X, sec. 8, which provided that no deed made by the owner of a homestead shall be valid without the voluntary signature of the wife. The land in question was allotted to plaintiff as his homestead in 1869. Held: Defendant's defense is good. Accord, Gaar, Scott & Co. v. Collins, 15 N. D. 622, 110 N. W. 81 (1907).

The North Carolina court would perhaps not have gone along with the Missouri court on the broad ground on which the Bushnell case was decided. In Gilmore v. Bright, 101 N. C. 382, 7 S. E. 751 (1881) it was held that an owner might surrender his power of alienation by having the land allotted and set apart as a homestead, or by acquiescing in such an allotment, but that to apply a homestead law requiring the signature of the wife to a conveyance of the homestead where the marriage and acquisition of the land were prior to the statute would violate the contracts clause of the federal Constitution.
Another class of persons who also may have reason to object to a modification of the homestead statute are the creditors of the owner. It is universally held that a homestead statute which substantially impairs the remedy of a creditor, whose debt was contracted prior to the statute, by withdrawing the property of the debtor from his reach is in conflict with the contracts clause of the federal Constitution.31 On the other hand, heirs and devisees of the deceased

31 Edwards v. Kearzey, 96 U. S. 595 (1877); Wilson v. Brown, 58 Ala. 62 (1877); Daniel v. Thigpen, 194 La. 522, 194 So. 6 (1940); Lessley v. Phipps, 49 Miss. 790 (1874); Gheen v. Summey, 80 N. C. 187 (1879).

"The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore, void." Edwards v. Kearzey, 96 U. S. 595, 607 (1877).

The legislature cannot deprive a mortgagee or judgment creditor of his lien on the homestead premises after the right is perfected. Kener v. La Grange Mills, 231 U. S. 215 (1913); Edwards v. Kearzey, 96 U. S. 595 (1877); Van Sandt v. Alvis, 109 Cal. 165 (1895); Herrington v. Godbee, 157 Ga. 343, 121 S. E. 312 (1924); Board of Com'trs, etc. v. Sperling, 8 So. 2d 380 (La. 1942); Dunn v. Stevens, 62 Minn. 380, 64 N. W. 924 (1895).

The obligation of the contract is not impaired, however, if there still remains a substantial and reasonable mode of enforcing it. Edwards v. Kearzey, 96 U. S. 595 (1877).

The dictum of Taney, C. J., in Bronson v. Kinzie, 1 How. 311 (U. S. 1843) led a number of courts to hold that homestead statutes, retroactive in effect and withdrawing the property from the reach of creditors whose debts were contracted before the passage of the statutes, are not in conflict with the contracts clause, on the ground that the remedy only and not the obligation is affected. Cusic v. Douglas, 3 Kan. 123 (1865); In re Kennedy, 2 S. C. 216 (1870); Hardeman v. Downer, 39 Ga. 425 (1869). The Supreme Court of the United States laid down the rule which is now universally followed in Gunn v. Barry, 15 Wall. 610 (U. S. 1872). Taney's statement is as follows: "For undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that necessary implements of agriculture or the tools of the mechanic, or articles of necessity in household furniture shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every state to enable it to secure its own citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And, although a new remedy may be
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Owner are not deprived of property without due process by a modification of the homestead statute in the lifetime of their ancestor which makes the interest which they received from him less beneficial to them than it would have been under the previous law. Heirs and devisees take property subject to the burdens which the legislature has seen fit to impose on it. The owner’s power of testamentary disposition may be curtailed by a homestead statute enacted in his lifetime.

Serious constitutional questions in respect to the extent to which the legislature may increase the interest of the nonowning spouse in the owning spouse’s property arose when several states, which had heretofore known only the common-law marital estates or statutory estates evolved from the common law, enacted community property laws in the 1930’s and ’40’s. The motivation was the possibility of federal income tax savings for married persons. These deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is protected by the Constitution.” (1 How. 311, 315 (U. S. 1843).)

Bretun v. Fox, 100 Mass. 234 (1868); Estate of Bump, 152 Cal. 274, 92 Pac. 643 (1907). As to the rights of heirs and devisees in general, see infra this Chapter, p. 111 et seq.

Bretun v. Fox, 100 Mass. 234 (1868). This was a petition by a widow to have an estate of homestead set off to her in a dwelling house. Defendant was an assignee of a devisee. The homestead statute under which the widow claimed a privilege to remain in possession during her lifetime was enacted after the marriage. The house was owned by the husband prior to marriage. Held for petitioner. “The power to dispose of property by will is neither a natural nor a constitutional right but depends wholly upon statute, and may be conferred, taken away, or limited and regulated, in whole or in part, by the legislature. . .;” (Ibid. at 235).

As to the power of the legislature to curtail the owner’s power of testamentary disposition, see infra this Chapter, p. 96 et seq.

The desire to adopt the community system was induced by the decision in Poe v. Seaborn, 282 U. S. 101 (1930), in which it was held that a husband and wife, domiciled in a community property state, where both had
ACQUISITION OF INTERESTS IN LAND

community property statutes would have been on firm constitutional ground if it had been optional with married couples whether they would come under the statutes, but an elective provision was held by the Supreme Court of the United States to make a community property statute ineffective for federal tax purposes. In order for a community property statute to accomplish fully its purpose of reducing the tax burden of married persons, it had to apply to income accruing to the spouses from property which each had owned as separate property prior to the date of the statute. But thus applied a statute could not stand the test of constitutionality for under the community property concept income acquired by either spouse would become the property of both.

In Willcox v. Penn Mutual Life Insurance Co. the Pennsylvania Supreme Court held that the Community equal vested interests from the moment the community property was acquired, could file separate tax returns in which each could return one-half of the community income. Five states enacted community property statutes after the Poe decision: Mich., Neb., Okla., Ore., and Pa. Commissioner of Internal Revenue v. Harmon, 323 U. S. 44 and 817 (1944). It was held that a husband and wife who elected to have the optional Oklahoma community property statute apply to them were not entitled to divide the community income equally between them for the purpose of federal income tax. "The important fact is that the community system of Oklahoma is not a system, dictated by State policy, as an incident of matrimony." (323 U. S. 44, 48 (1944).)


357 Pa. 581, 55 A. 2d 521 (1947). In 1934 a policy of life insurance was issued to one Lewis, with the privilege on his part of changing the beneficiary. He was married at that time to Mary Lewis and this marriage was still in effect when this suit was brought. After the Community Property Law went into effect on September 1, 1947, Lewis paid a premium on the policy. Part of the money for the premium came from dividends on stock which Lewis had owned since 1943, and part was obtained by Lewis on September 30, 1947, as life tenant of a trust created many years previously.
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Property Law, when applied to the income of a husband from property which he had owned previous to the effective date of the statute, deprived him of property without due process. (It is beyond the power of the legislature to take the husband's property and give it to the wife.)

In support of its decision, the Pennsylvania court might have cited several cases wherein courts had to decide whether separate property acquired by either spouse in a common-law state is converted to common property by the act of bringing it into a community property state and establishing a domicile there. The California Supreme Court has held that such a conversion would be a taking of property in violation of the due process clause of the Fourteenth Amendment.

under the will of his grandfather. Lewis then assigned the policy to Willcox without consideration. Willcox applied to the insurance company for the issuance of a paid-up policy based on the cash surrender value of the assigned policy. The company refused the request on the ground that since part of the previous premium consisted of community property, Mrs. Lewis had an interest therein and consequently her consent was needed. The suit was a friendly one to test the constitutionality of the statute.

And also that it violated the Pennsylvania Constitution which provides that "all men . . . have certain inherent and indefeasible rights, among which are those . . . of acquiring, possessing and protecting property . . ." Pa. Const., Art. 1, sec. 1.

The court did not consider the validity of the statute so far as it applied to income from property acquired subsequent to the enactment or as it applied to salaried income arising after the statute went into effect. Since the object of the statute was to reduce the tax burden, which purpose was thwarted by the invalidity of the portion of the statute in issue, the court concluded that the entire statute was unconstitutional.

In addition to the constitutional objections, the court found that the Community Property Law was inoperative and impossible of execution by reason of its inconsistent failure to give to the wife any real interest in the community property under the husband's management and control, although it purported to give her a vested interest therein. The statute gave to the husband (similarly to the wife) the management and control of the community property of which he (or she) would have remained the unrestricted and exclusive owner as theretofore had the Community Property Law not been enacted. Apparently the legislature had feared judicial lightning would strike; or perhaps it wanted to give the taxpayers the benefits of the community property system without any of the burdens.

Thornton's Estate, 1 Cal. 2d 1, 33 P. 2d 1 (1934). The personal property involved was acquired while the husband and wife were domiciled in Montana, and under the laws of that state it was the husband's separate property, subject
Likewise in Washington it has been held that personalty which is the separate property of one of the spouses will only to the wife’s dower rights. The husband returned to California in 1919, bringing the property with him, and was there domiciled until his death in 1929. His widow petitioned for distribution of one-half of his estate to her on the theory that the property was converted into community property when it was brought into this state. Sec. 164 of the Civil Code as amended in 1923 (Stats. 1923, p. 746) provided: “All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property . . . .” [Substantially the same provision was in effect when the property was brought into the state. See succeeding paragraph.] Sec. 164 was held to be unconstitutional. The court refused to accept the doctrine that a change of domicile to this state, accompanied by an importation of personality is an implied consent to a submission to requirements of the statute, on the ground that this would be nothing but a subterfuge to get around the constitution. Beside the due process aspect of the statute, the court found that there would be an abridgement of the privileges and immunities of the citizen. Langdon, J., dissenting, expressed agreement with the proposition that absolutely owned property brought into the state by the husband cannot be taken from him but that this was not the issue in this case. The husband here was dead and could have no property rights. The real issue was whether California may require that, upon the death of a decedent, certain property owned by him and brought into this state shall be subject to the same rules of testamentary disposition and succession as community property acquired in this state. In Langdon’s opinion there was no doubt that it can.

Prior to 1917 the Supreme Court of California had repeatedly held that separate property acquired by either spouse in a common-law state is not converted into community property by the mere act of bringing it into a community property state and establishing domicile therein. Kraemer v. Kraemer, 52 Cal. 302 (1877); Estate of Burrows, 136 Cal. 113, 68 Pac. 488 (1902); In re Estate of Niccolls, 164 Cal. 368, 129 Pac. 278 (1912). In 1917 the legislature adopted the following statute: “All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property . . . .” (Stats. 1917, p. 827.) It was held in In re Frees’ Estate, 187 Cal. 150, 201 Pac. 112 (1921) that this statute was inapplicable to personal property acquired in a common-law state while the couple were domiciled there and brought to California prior to the taking effect of the statute. Following this decision, the legislature amended the Statute of 1917 by inserting the words “heretofore or hereafter” before the words “acquired while domiciled elsewhere” in an apparent attempt to give retroactive effect to the statute. (Stats. 1923, p. 746.) It has been held in a number of cases that the amendment of 1923, if applicable to personal property brought into the state prior to the date of the amendment, would deprive the owning spouse of his or her property without due process. In re Drishaus’ Estate, 199 Cal. 369, 249 Pac. 515 (1926); In re Bruggemeyer’s Estate, 115 Cal. App. 525, 2 P. 2d 534 (1931).
continue to be his or her property when brought into the state, as will real estate purchased there with it, notwithstanding the terminology of the community property statute, since a contrary construction would destroy vested rights. 40

The problem considered in Willcox v. Penn Mutual Life Insurance Co. is not likely to recur. The rash of community property statutes subsided after the Willcox case and after Congress did away with the need for state legislation by extending the “income-splitting” privilege to spouses in noncommunity property states. 41 The states which adopted community property statutes repealed them. 42 The problems which arose as a result of the repeal of community property statutes will be discussed in Chapter 6.

ADVERSE POSSESSION—STATUTES OF LIMITATIONS

An interest in land may be acquired by adverse use or possession for the period of the statute of limitations. 43 It

40 Brookman v. Durkee, 46 Wash. 578, 90 Pac. 914, 915 (1907): “If it were the intent of the statute that property acquired in another jurisdiction and brought within the state should become community property, its legality might be seriously questioned. It would destroy vested rights. It would take from one of the spouses property over which he or she had sole and absolute dominion and ownership, and vest an interest therein in the other; and, if the spouse should be the wife, it would not only take away her absolute title, but would take away from her her right to control and manage the property, and make it subject to the separate debts of the husband, whether or not she derived any benefit from their contracting, or had any legal or moral obligation to pay them.” A statute then in effect provided: “The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.” Ballinger's Ann. Code, sec. 4490.


Infra p. 39. “The period of limitation varies greatly among the states. The period of 20 years... has been adopted... in a number of the states; while in a few the lapse of a greater period is required...; and in some a much less period.” 4 Tiffany, Real Property, sec. 1133 (3d ed.). In a number of states there are what is known as “short limitations,” considerably reducing the period where the adverse possession is by one claiming
was suggested in an early case that a title acquired by adverse possession is not a constitutionally protected interest. But the law is well settled that after a cause of action to recover real (or personal) property has been barred by the running of the statute of limitations, the legislature cannot remove the bar without depriving the adverse claimant of his property without due process or extinguishing his vested rights, because by operation of law the property has become his. Whether the adverse claimant entered bona fide is of no importance.

A singular distinction is made by many courts between property cases and nonproperty cases. There is much authority that the legislature may raise the bar to tort actions and actions to recover debts without violating any constitutional

under "color of title" or by one who is a purchaser at a judicial sale or a tax sale, or where the one in possession shall have paid all taxes and assessments levied on the land. A summary of American limitation statutes may be found in Taylor, “Titles to Land by Adverse Possession,” 20 Iowa L. Rev. 551 (1935).

44 Stuber’s Road, 28 Pa. 199 (1857).


But the repeal of the statute after the original owner's remedy has been barred should under no circumstances be held to impair the obligation of a contract. The right of the adverse claimant is not founded on contract but derives its force from legislation, usages of government, or from custom. Stuber’s Road, 28 Pa. 199 (1857).

Nonpossessory interests may be acquired by adverse user, or, as it is commonly termed, by prescription. The concept of prescription antedates the appearance of statutes of limitations but with the passage of time the effect of the statutes has continuously increased. In this country the courts have usually followed the analogy of the statute of limitations applicable to actions for the recovery of land, with the effect that one who has exercised as of right a user in another's land for the statutory period, is regarded as having acquired a privilege of user to that extent, the length of the period of prescription changing as the statutory period is changed. 4 Tiffany, Real Property, sec. 1191 (3d ed.). Easements acquired in this manner are as fully protected under the constitutions as easements acquired by grant. Woolever v. Stewart, 36 Ohio St. 146 (1880) (privilege to maintain dam without fishway); Attorney General v. Revere Copper Co., 152 Mass. 444, 25 N. E. 605 (1890) (privilege to control level of water in fish ponds); Christenson v. Wikan, 254 Wis. 141, 35 N. W. 2d 329 (1948) (right of way).
prohibitions.\textsuperscript{46} Now, if the defendant in a tort or contract action cannot claim an invasion of constitutional rights in the loss of a defense to an action against him, how can there be any meritorious quality in a property interest asserted to have been acquired by lapse of time? Of course, if a statute of limitations should explicitly provide that possession for the period would vest the adverse possessor with title, there would be apparent merit in the proposition that vested interests had been acquired. However, the typical statute of limitations purports merely to bar the owner's right to recover possession.\textsuperscript{47} Adverse possession for the period of limitation does not directly confer an interest upon the adverse claimant, but only indirectly by the limitation of the remedy of the rightful owner. The courts have declared that a loss of title through the loss of the most essential attribute of ownership—the right to recover possession—is a necessary logical consequence of the policy underlying the limitations statutes.\textsuperscript{48}

\textsuperscript{46} Campbell v. Holt, 115 U. S. 620; Chase Securities Corp. v. Donaldson, 325 U. S. 304 (1945); Mulligan v. Hilton, 305 Mass. 5, 24 N. E. 2d 676 (1940); Gallewski v. H. Hentz and Co., 301 N. Y. 164, 93 N. E. 2d 620 (1950); Orman v. Van Arsdell, 12 N. M. 344, 78 Pac. 48 (1904); McEldowney v. Wyatt, 44 W. Va. 711, 30 S. E. 239 (1898). However, many state courts hold that even as to actions not involving title to property, the due process clause of the Fourteenth Amendment and similar provisions in the state constitutions prevent the lifting of the bar which the statute of limitations imposes. State v. Standard Oil Co., 5 N. J. 281, 74 A. 2d 565 (Sup. Ct. 1950); Board of Education v. Blodgett, 155 Ill. 441, 40 N. E. 1025 (1895); Ireland v. Mackintosh, 22 Utah 296, 61 Pac. 901 (1900). See Annotation, Power of Legislature to revive a right of action barred by limitation, 36 A. L. R. 1316 (1925) and supp. Ann., 133 A. L. R. 384 (1941).

\textsuperscript{47} Walsh, \textit{Title by Adverse Possession}, 16 N. Y. U. L. Q. Rev. 532, 534 (1939). But it is almost invariably held that the effect of the statute is not only to bar the remedy of ejectment, but also to take away all other remedy, right, and title of the former owner. United States v. Chandler-Dunbar Water Power Co., 209 U. S. 447, 450 (1908); Steinberg v. Salzman, 139 Wis. 118, 124, 120 N. W. 1005, 1008 (1909); Ballantine, \textit{Title by Adverse Possession}, 32 Harv. L. Rev. 135, 139 (1918). See also note 54 infra.

\textsuperscript{48} The theory by which an adverse possessor acquires title was explained by Ames as follows: True property or ownership consists of possession coupled with the unlimited right of possession, and when one person is dispossessed by another, only the right of possession remains vested in the former, and the
Statutes of limitations have been enacted for the public good, it is said, so that after the owner is allowed sufficient time in which to pursue and establish his claim, the title to property shall not remain forever doubtful and uncertain.\textsuperscript{49} Since the matter is one of policy it would seem that within reasonable limits the legislature should be free, if it so desired, to raise the bar to the bringing of an action after the original period has expired. The judicial rationalization, however, is that after the lapse of the period, without assertion of a right by the owner, claims are presumed to have been released or title conveyed.\textsuperscript{50} Title is not transferred by the statute, but by a joint operation of the statute and the common law. The statute speaks of procedure, but the courts have shifted the emphasis to substantive law.\textsuperscript{51} In short, dispossessor has complete ownership except for this outstanding right of possession. "When the period of limitation has run, the statute, by forbidding the exercise of the right, virtually annihilates it, and the imperfect title thereupon becomes perfect." Ames, \textit{The Disseisin of Chattels}, 3 Harv. L. Rev. 313, 318 (1890).

\textsuperscript{49} Knox v. Cleveland, 13 Wis. 245 (1860).

\textsuperscript{50} "If one who is dispossessed be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance to recover the possession merely, both to punish his neglect, and also because it is presumed that the supposed wrongdoer has in such a length of time procured a legal title, otherwise he would sooner have been sued. Statutes of limitation are passed which fix upon a reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establish a legal presumption against him that he has no rights in the premises. Such a statute is a statute of repose. Every government is under obligation to its citizens to afford them all needful legal remedies; but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time." Wilson v. Iseminger, 185 U. S. 55, 62 (1901), quoting Cooley, \textit{Constitutional Limitations}, p. 447 (6th ed.).

\textsuperscript{51} This is particularly evident in the requirement in many jurisdictions that the possession of the adverse claimant must be under claim of title. If acquisition of title by adverse possession were based entirely upon the theory that the true owner's action to recover the land is barred after the lapse of the statutory period, a claim of title by the adverse claimant would not be necessary. The thought is apparently that since adverse possession operates to confer title and not merely to bar stale claims, unless a possessor claims title there is no reason why title should be conferred upon him. 4 Tiffany, \textit{Real Property}, sec. 1147 (3d ed.).
neglect on the part of the owner to assert his title and acquiescence in the adverse possession and claim of another is a recognized method by which he may lose his title and another gain it. It is a method which is legally as effective as a transfer by deed.

An inarticulate premise in the historical development of the concept of acquisition of title by adverse possession was the encouragement of the development of unused land and the enhancement of productivity. But the fact of the disappearance of unused land does not mean that the doctrine of acquisition of title by adverse possession no longer performs a desirable service. On the contrary, there are considerations greatly in favor of the doctrine. Whatever may have been the situation in pioneer days, most adverse possessors today are not "land robbers" but persons who enter into possession in good faith without knowledge of defect in their titles.52 Public policy is promoted by protecting such persons. The need in the present age to promote marketability of titles will probably lead legislatures to expedite the acquisition of title by adverse possession rather than to place limitations. The trend seems to be to enhance the effectiveness of statutes of limitations to bar claims.53

Since the total effect of the operation of the statute and the common law is the transfer of title, it would seem unquestionable that the legislature can directly declare this result. Some statutes of limitations do expressly provide that a failure to re-enter or to bring an action to recover the land within the statutory period operates to transfer the title to the adverse possessor.54 There is an old case holding that a

52 Ballantine, Title by Adverse Possession, 32 Harv. L. Rev. 135 (1918); Basye, Streamlining Conveyancing Procedure, 47 Mich. L. Rev. 1097 (1949).
54 States with statutes so providing are listed by Walsh, Title by Adverse Possession, 16 N. Y. U. L. Q. Rev. 532, 534 n. 6 (1939); Cal., Colo., Ga., Ky., Miss., Mont., N. J., N. C., N. D., Okla., Pa., R. I., Tenn. and Texas.
statute of limitations is void if it purports to confer title on the adverse possessor and not merely to bar the remedy of the owner. But this idea is not likely to be accepted by a modern court.

There is no such thing as a vested interest in a statute of limitations. At any time before a cause of action is barred, the legislature may amend or repeal the statute or suspend its operation, thus defeating the expectations of the adverse claimant.

56 In Schauble v. Schultz, 137 Fed. 389 (8th Cir. 1905), the court held that the Fourteenth Amendment was not violated by a retroactive limitations statute which read: "All titles to real property vested in any person or persons who have been or hereafter may be in the actual open adverse and undisputed possession of the land under such title for a period of ten years and shall have paid all taxes and assessments legally levied thereon, shall be and the same are declared good and valid in law, any law to the contrary notwithstanding." N. D. Laws 1899, c. 158, p. 230.  
57 Paragould v. Lawson, 88 Ark. 478, 115 S. W. 379 (1908); Lambert v. Slingerland, 25 Minn. 457 (1879); Billings v. Hall, 7 Cal. 1 (1857); Cox v. Berry, 13 Ga. 306 (1853); Keith v. Keith, 26 Kan. 26 (1881); Cole v. Van Ostrand, 131 Wis. 454, 110 N. W. 884 (1907).  
In Cox v. Berry the statute provided: "That whenever any case now or hereafter pending in any of the Courts of this State, either at law or in equity, commenced within the time limited by law, shall be discontinued, dismissed, or the plaintiff therein become non-suited, and the plaintiff's claim may be barred during the pendancy thereof by any law now of force in this State, the plaintiff may, at any time within six months from such termination of the case, and not after, renew or re-commence the same..." (Laws 1847, p. 217.) Plaintiff brought suit in 1849, just six days before the possession of the defendants would have protected them under the statute of limitations. Plaintiff's case was dismissed. Within six months he commenced the present action for the same land against the persons who were in possession. Held: Act applicable. No vested rights interfered with.  
In United States v. Nebo Oil Co., 90 F. Supp. 73 (W. D. La. 1950), the person who granted the lands in question to the United States reserved the mineral rights. Prior to this conveyance the Louisiana courts had held that a mineral conveyance created only an incorporeal interest in the nature of a servitude and that such mineral rights were subject to prescription by ten years nonuser. La. Acts 1940, No. 315, declared that when the United States acquires land subject to the prior sale of oil, gas, or other mineral rights, the mineral rights so previously sold are imprescriptible. Held: The United States had no vested interest in the prescriptive period. At most its claim to the minerals was based on a mere expectation that the period of prescription would not be interrupted, which could hardly be considered a vested right. Aff'd, United States v. Nebo Oil Co., 190 F. 2d 1003 (5th Cir. 1951).
"Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expediency, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." 58

Likewise the owner has no constitutionally protected right that the particular statute of limitations in effect when his cause of action first arose should remain in effect. The period of limitation for the recovery of land may be shortened retroactively, provided a reasonable time is allowed after the statute goes into effect to bring actions not yet barred under the old period. 59

"It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity

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59 Atchafalaya Land Co., Ltd. v. F. B. Williams Cypress Co., 258 U. S. 190 (1921); Heath v. Hazelip, 159 Ky. 555, 167 S. W. 905 (1914); Beal v. Nason, 14 Me. 344 (1837); Baumeister v. Silver, 98 Md. 418, 56 Atl. 825 (1904); Price v. Hopkin, 13 Mich. 318 (1865); Hartvedt v. Maurer, 359 Mo. 16, 220 S. W. 2d 55 (1949); Horbach v. Miller, 4 Neb. 31 (1875); McAuliff v. Parker, 10 Wash. 141, 38 Pac. 744 (1894); Schauble v. Schultz, 137 Fed. 389 (8th Cir. 1905). See Annotation, Reasonableness of period allowed for existing causes of action by statute reducing period of limitation, 49 A. L. R. 1264 (1927) and supp. Ann., 120 A. L. R. 758 (1939).

The court must judge whether the period allowed is reasonable, but if the legislature fails to prescribe a period, the court will not do so. Ludwig v. Stewart, 32 Mich. 27 (1875).
afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suit upon existing causes of action; though what shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice.”

The exceptions frequently found in statutes of limitations in favor of infants, incompetents, and other persons under disabilities can be repealed without violating any constitutional rights, provided ample opportunity is given persons under disability at the time of repeal to assert their claims through guardians, friends, or relatives. While there may be instances in which a person under disability might lose his interest for want of someone to champion it, such instances are likely to be rare. The public has an interest that titles shall not remain in uncertainty for indefinite periods.

Ordinarily, the statutes of limitations impose no requirement as to the character of the conduct of the adverse claimant necessary to make the bar effective, and it is by judicial


61 There are no cases directly in point, but it has been held that the absence of an exception in a statute of limitations in favor of persons non sui juris does not affect its validity. Such persons are not deprived of their property without due process of law; they can be represented by guardians. Vance v. Vance, 108 U. S. 514 (1883); Collier v. Smaltz, 149 Iowa 230, 128 N. W. 396 (1910). Generally it is held that where a statute of limitations contains no exception in favor of persons under disability, the statute runs against such persons. Vance v. Vance, 108 U. S. 514 (1883); Cox v. Von Ahlefeldt, 105 La. 543, 30 So. 175 (1900); Ames v. Department of Labor and Industries, 176 Wash. 509, 30 P. 2d 239 (1934).

62 The policy of excepting persons under disability from the operation of statutes of limitation is criticized by Basye, Streamlining Conveyancing
legislation that certain requirements have become established. Neither the Fourteenth Amendment nor any concept of vested rights hinders the legislature from modifying the common law by providing that under other sets of circumstances the owner's remedies may be barred. The time preceding the enactment of such legislation can be counted in the period required under the act to bar the action for recovery, provided always that the owner is given a reasonable length of time and an opportunity to bring his action.

Procedure, 47 Mich. L. Rev. 935, 1097, at 947 and 1099 (1949). He states at page 1100 that statutes of limitations providing a maximum period of time for those under disabilities have been adopted in some twenty states: Ala., Cal., Colo., Fla., Mich., Minn., Miss., Mo., Neb., N. D., Ore., Pa., S. D., Tenn., Tex., Va., Wash., W. Va., Wis.

The courts are agreed that the adverse claimant must be in possession. The primary requirements, as evolved at common law, are that this possession must be hostile and under claim of title, actual and exclusive, open and notorious and continuous. Tiffany, Real Property, sec. 1137 et seq. (3d ed.).


In Towson v. Denson the statute provided that unimproved and unenclosed land shall be in possession of the one who pays taxes thereon, if he have color to title thereto. The statute in Soper v. Lawrence, which was on the same order as that in the Towson case, was held not to be unconstitutional although the fifteen years preceding the enactment were counted in the twenty years allowed the owner to bring his action.

In Miller v. Town of Corinna, 42 Minn. 391, 44 N. W. 127 (1890), it was held that a statute which gives the effect of a dedication to continuous
The result is the same as though a new statute of limitations had been enacted allowing a shorter period for the recovery of land. But if no time is allowed for bringing an action so that the owner’s title is automatically barred, the legislation is unconstitutional. It is unjust and confiscatory to take away from the owner the protection of the former law upon which he may have relied and on account of which he took no steps, as he might otherwise have done, to defeat a result which he could not have foreseen under the law as it stood previous to the new rule. The injustice is particularly palpable where the possession now declared to have been adverse was with the owner’s express permission. This is public use over a period of years prior to the adoption of the statute does not take property without due process if a reasonable time is afforded for the assertion of rights.

66 Soper v. Lawrence Bros. Co., 201 U. S. 359 (1906) (due process); Thistle v. Frostburg Coal Co., 10 Md. 129 (1856) (taking of one man’s property and giving it to another); Kennebec Purchase, etc. v. Laboree, 2 Greenl. 275 (Me. 1823) (Me. Const., Art. 1, sec. 1, securing to each citizen the right of “acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness,” and Art. 1, sec. 21, providing that “private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it”); Mooney v. Miller, 119 Misc. Rep. 134, 195 N. Y. S. 437 (1922) (due process); Webster v. Cooper, 14 How. 488 (U. S. 1852).

67 Mooney v. Miller, 119 Misc. Rep. 134, 195 N. Y. S. 437 (1922). Plaintiff sued in equity for permission to redeem from a mortgage. Defendant’s answer was that he was a mortgagee in possession and that plaintiff was barred of the right of redemption by reason of defendant’s continuous occupancy for over twenty years. In 1878 or 1879, when foreclosure proceedings were pending, defendant entered into possession with plaintiff’s permission as a mortgagee in possession. He remained in possession until 1914 when he assigned the mortgage to his wife, plaintiff’s sister, who remained in possession until her death in 1918. Defendant was her son and legatee. Prior to the amendment made by N. Y. Laws 1919, c. 281, Code of Civil Procedure, sec. 379 read: “An action to redeem real property from a mortgage may be maintained by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises, for twenty years after the breach of a condition of the mortgage, or the nonfulfillment of a covenant therein contained.” The amendment deleted the words “an adverse” before the words “possession of the mortgaged premises.” Held: The legislature had no power to cut off plaintiff’s right of redemption and transfer title to defendant. The court said that to give the statute the
not a mere change in rules of evidence, in which field the legislature necessarily has considerable latitude of action, but is an alteration of substantive rules of property which establish the operative facts by which an owner may lose his title. 68

It would be perhaps well to add at this point the admonition that we are here concerned with the arbitrary obliteration of a possessory interest in fee simple. The extinguishment of nonpossessory interests presents unique problems, varying with the kind of interest involved. Such problems, so far as they fall within the scope of this treatment, are discussed in succeeding chapters. 69

effect claimed would be to make it a statute for the encouragement of fraud—a statute to enable one man to steal the title of another by professing to hold under it.

68 It was suggested in an early case that since it is within the province of the legislature to alter rules of evidence and remedies, the legislature has some power to declare retroactively what acts shall constitute a disseisin even though title is thereby barred at the date of the statute. It was surmised, as an example, that a statute would be constitutional which merely declares that evidence which is sufficient to support a claim to title in equity shall be available for the same purpose at law. Thistle v. Frostburg Coal Co., 10 Md. 129 (1856). The provision in question read: "... actual enclosure shall not be necessary to prove possession, but acts of user and ownership, other than enclosure, may be given in evidence to the jury to prove possession." Md. Laws 1852, c. 177, sec. 2.

It is submitted, however, that this theory may be legitimately resorted to only where the change is inconsequential or where it can be said that the owner should reasonably have anticipated that a change might be made in the law or where (as suggested) the change in the law has merely the effect of making available to the adverse claimant in an action brought against him at law a rule of evidence which was always available to him in equity if he cared to take the initiative by bringing suit to quiet title. Otherwise the legislature would be permitted by a circumlocution to do indirectly what is forbidden to be done by direct action.

69 Extinguishment of future interests by retroactive operation of statutes of limitations and marketable title statutes is discussed Chapter 4, p. 227.

Dower, curtesy, statutory marital rights, and homestead rights are subject to broad powers of modification by the legislature. Generally speaking the courts have held that the marital interest of the nonowning spouse may be extinguished at any time before this interest becomes vested by the death of the owning spouse. See Chapter 6 infra. If a marital interest can be extinguished outright, there should be no question but that it can be extinguished by the retroactive operation of a statute of limitations or by the retroactive modification of the law of adverse possession. There is one area in which this particular problem
Whether a statute of limitations operates prospectively or retroactively to bar a title, it must appear that the owner had means of knowing that another was claiming rights inconsistent with his own; otherwise the statute would be little more than an instrument for the confiscation of title. It is well established at common law that the statutes of limitations will not run in favor of a claimant unless he is in actual possession of the premises. This requirement is justified by two considerations. One is that unless there is someone in possession, the owner can have no action for recovery on which the statute is to operate. The other consideration is that if no one is in possession there is nothing to suggest to the owner that he must assert his rights. The requirement of possession is not only a matter of judicial construction but has been declared to be constitutionally

has arisen. A number of legislatures have undertaken to eliminate the uncertainty in titles which arises from the possibility that there may be outstanding interests of spouses who have not joined in conveyances or have done so imperfectly. See Basye, "Streamlining Conveyancing Procedure," 47 Mich. L. Rev. 1097, 1102 (1949). Ordinarily the statute of limitations does not begin to run against the dower, curtesy, or statutory right of the nonjoining spouse until the death of the conveying spouse. The consequence is that land may be rendered unmarketable for a generation and in the great majority of cases the nonjoining spouse will die without ever making a claim to the land. The legislature could probably be quite arbitrary if it so desired and declare that as to all past conveyances (where the marital interest had not already matured) the grantee should be deemed to have acquired an indefeasible title notwithstanding the nonjoinder of the grantor's spouse. In Skelly Oil Co. v. Murphy, 180 Ark. 1023, 24 S. W. 2d 314 (1930), discussed infra Chapter 6, note 41, it was held that inchoate dower could be so extinguished. But any legislature which feared that such an arbitrary statute would be unconstitutional could insure the constitutionality by allowing for the preservation of existing interests by recordation within a specified period of time. The statutes in a number of states provide that the interest of a nonjoining spouse shall be extinguished unless he or she files a notice within the time allotted. E.g., Mich. Comp. Laws 1948, sec. 558.81 et seq.

Statutes of limitations barring ancient transactional interests (e.g., mortgages) are discussed in Basye, "Streamlining Conveyancing Procedure," 47 Mich. L. Rev. 1097, 1103 (1949).

4 Tiffany, Real Property, sec. 1137 (3d ed.). What is sufficient to constitute actual possession of the land depends upon the character of the land and all the circumstances of the case. 4 Tiffany, op. cit. sec. 1138.
indispensable. A statute of limitations is very likely to be pronounced invalid if under it a person’s title may be barred without any acts of disseisin or some sort of possession on the part of the adverse claimant, even though the owner is aware of such adverse claims. A statute of limitations cannot create a cause of action, it is said, and impose upon the owner in fee simple, who is in actual or constructive possession, an affirmative duty to take active steps against opposing claims.\textsuperscript{71} While there are a few cases in which it is surmised that a requirement of possession is not essential to the validity of limitation statutes,\textsuperscript{72} there are numerous other cases which declare that the owner of land who holds by a fee-simple title cannot constitutionally be compelled to pay attention

\textsuperscript{71} Bowman v. Cockrill, 6 Kan. 311 (1870). In Leavenworth v. Claughton, 197 Miss. 606, 617, 19 So. 2d 815, 20 So. 2d 821, 822 (1944) it was said: “... it is not within legislative power to divest an owner of his land, when he holds by a fee simple title with nobody else in possession, and transfer it to another; and as this may not be done directly, it may not be done indirectly by an enactment the effect of which is to cut down the ownership to a mere right of action, and that even that shall be lost unless asserted within the grace of a prescribed period.” (197 Miss. 606, 617, 19 So. 2d 815, 816.) “There is a wide distinction between that legislation which requires one having a mere right to sue, to pursue the right speedily, and that which creates the necessity for suit by converting an estate in possession into a mere right of action, and then limits the time in which the suit may be brought.” “It [the legislature] cannot by legislative fiat set up, Don Quixote-like, an imaginary windmill and command the property owner to charge and demolish it by legal proceedings within a stated time.” (197 Miss. 606, 621, 20 So. 2d 821, 823.)

\textsuperscript{72} Pilkington v. Ford, 18 Ill. 503 (1857); Stearns v. Gittings, 23 Ill. 387 (1860): “Whilst it is usual in framing limitation acts, which bar the entry or the right of recovery, to make possession the most important requirement in the creation of the bar, yet no decision of which we are aware, has ever held that possession is essential to the constitutional validity of such enactments. That the act should afford reasonable time and opportunity for the assertion of the right, and barring the remedy for \textit{laches}, and the nonassertion of the right, within the limited period, is believed to be all the constitution requires. The terms and conditions upon which the bar may become complete, in other respects, must necessarily be left to the discretion of the legislature. The circumstances demanding the legislative interposition in such enactments, must always have a controlling influence in their adoption. While the time and opportunity for the assertion of the right must be reasonable, and while the act cannot transfer title, yet the constitution has not prescribed, nor can the courts prescribe, the provisions which such an act must contain.” (23 Ill. 332, 335.)
to adverse claims unless those claims are asserted by suit or by possession. This principle has been enunciated most frequently in tax cases wherein a purchaser at a tax sale who has never been in possession seeks to set up the bar of a statute of limitations against the right of the owner, who has never been out of possession, to contest the validity of the sale. The courts have held that the statute of limitations cannot be made to run in favor of the purchaser until after he enters into possession. Charbonnet v. State Realty Co., 155 La. 1044, 99 So. 865 (1923); Baker v. Kelley, 11 Minn. 480 (1865); Groesbeck v. Seeley, 13 Mich. 329 (1865); Leavenworth v. Claughton, 197 Miss. 606, 19 So. 2d 815, 20 So. 2d 821 (1944); Buty v. Goldfinch, 74 Wash. 532, 133 Pac. 1057 (1913). See also Shaw v. Robinson, 111 Ky. 715, 64 S. W. 620 (1901) holding invalid a statute which precluded action for the recovery of land unless the plaintiff could show he had paid taxes on the land for at least twenty years preceding the bringing of the action.

Leavenworth v. Claughton arose out of a controversy concerning certain lands which had been sold for delinquent taxes in 1931. The sale was void. The plaintiff in this suit, who held a forfeited land patent from the state, relied upon a statute enacted three years after the sale, which was to the effect that the owner or other persons interested in land sold or forfeited to the state for delinquent taxes might bring suit or action to cancel the title of the state, or its patentees, “within two years after the date this act becomes effective as to lands heretofore sold or forfeited to the state for delinquent taxes, and within two years after the period of redemption shall have expired, as to lands hereafter sold or forfeited to the state for delinquent taxes, and not thereafter.” Miss. Laws 1934, c. 196, Miss. Code 1942, sec. 717. Sec. 3 of the act provided: “The completion of the limitation herein prescribed to bar any action shall defeat and extinguish all the right, title and interest, including the right of possession in and to such land, of any and all persons whatsoever, except the state of Mississippi and its patentees, and it shall vest in the state, and its patentees, a fee simple title to such lands.” The plaintiff had been in actual possession for less than two years before the filing of the cross bill. It was held that to bring this statute within constitutional limitations, it must be held that the statute does not begin to run until the possession of the true owner is invaded or disturbed by or through a claimant under the alleged tax sale, and this by an invasion which amounts to an actual, adverse possession of the kind required under the ten years’ adverse possession statute. The statute was declared to be an effort at forced conveyance by legislative fiat, which is not due process of law.

The significance of the principle that title cannot be barred without suit or adverse possession is emphasized by the fact that it has been enunciated in tax cases, where usually the overriding necessity of expediting the collection of public revenues causes the courts to accept a sizeable degree of arbitrariness when the statute leaves them no choice. However, the basis of decision in some of the cases seems to have been really that the only procedure then recognized by which the owner could contest the validity of a tax sale was by bringing an action in ejectment; that being impossible under the circumstances, the effect would have been to bar the owner without allowing him any remedy at all. Baker v. Kelley supra. In an old case, Robb v. Bowen,
possession, that the courts have allowed the legislatures to do away with possession altogether as a basis for the running of the statute. 74

74 The courts have sustained statutes which provide that if a person, having color of title, shall pay the taxes on unimproved and unenclosed land for a specified number of years, he shall be deemed owner thereof. Towson v. Denson, 74 Ark. 302, 86 S. W. 661 (1905); Stearns v. Gittings, 23 Ill. 387 (1860) supra note 72. In Saranac Land and Timber Co. v. Comptroller of New York, 177 U. S. 318 (1899), it was held that a statute, which provided that deeds from the state comptroller for lands in the forest preserve sold for nonpayment of taxes shall, after having been recorded for two years, and in any action brought more than six months after the act took effect,
The concept that the owner of land cannot be compelled to pay attention to adverse claims unless those claims are asserted by suit or by possession is also of significance to the constitutionality of the marketable title statutes recently enacted in a number of jurisdictions. The constitutionality of these statutes is discussed subsequently.\(^75\)

The rule that an owner’s title cannot be divested by operation of the statute of limitations so long as he is not ousted from possession by the adverse claimant appears on the whole to be salutary. It prevents inadvisable legislation under which titles could be surreptitiously barred. But it is clear that the principle is properly applied only where the effect of the statute is to put an affirmative duty on the owner in possession to assert his rights periodically or run the grave risk of losing his title. The situation is obviously altogether different where the person in possession, alleging himself to be the owner, has been made a party to a public or private proceeding involving the title and a determination has been made against him. The legislature may prescribe the period within which the validity of a judgment or determination may be attacked.\(^76\) Also, it is clear that the situation is altogether different where the legislature imposes a duty upon owners of nonpossessory interests to assert their claims if they do not wish to forfeit them at the expiration of a fixed period. Such a duty may be justifiably imposed for the sake of promoting certainty in titles.\(^77\)

\(^75\) Page 80 et seq.
\(^76\) Whitney v. Wegler, 54 Minn. 235, 55 N. W. 927 (1893); Merchants’ Nat. Bank of Bismarck v. Braithwaite, 7 N. D. 358, 75 N. W. 244 (1898).
\(^77\) See the discussion of marketable title statutes infra p. 80. See the discussion of the application to future interests of retroactive statutes of limitations and marketable title statutes infra Chapter 4, p. 227. See also note 69 supra
The adverse possessor does not have a vested interest in the law determining the acts which will cause the running of the statute through which his possession may ripen into ownership. Before the title of the rightful owner is barred by the running of the period of limitation, the legislature may require additional acts to acquire title by adverse possession and may make these additional requirements applicable to holdings begun before the change in law. It would this Chapter, commenting inter alia on the extinction of interests arising from the marital relationship.

It would certainly not seem a deprivation of property without due process to require the owner of an easement to rebut the inference of an intent to abandon arising from his nonuser for a long period of time even though the servient owner has committed no acts inconsistent with the existence of the easement. A possessory interest in land cannot be lost by mere abandonment but an easement can be. Nonuse is one of the facts from which abandonment may be inferred. 3 Tiffany, Real Property, sec. 825 (3d ed.). See Sheets v. Walsh, 217 N. C. 32, 6 S. E. 2d 817 (1940), in which streets laid out in recorded plats of the premises were held not to constitute an encumbrance on title in view of a statute enacted long after the plats were recorded, which provided that any land dedicated to public use as a street or road which shall not have been actually opened and used by the public within twenty years after the dedication thereof, shall be conclusively presumed to have been abandoned by the public for street or road purposes, and no person shall have any cause of action to enforce any public or private easement therein, unless such right shall have been asserted within two years after the passage of the act.

Hardy v. Dunlap, 7 Tex. Civ. App. 339, 26 S. W. 852 (1894). The statute reduced the benefits of naked possession without color of title from 640 acres, as prescribed by the former statute, to 160 acres. It was held that since the defendant had not been in possession for the requisite period to entitle him to 640 acres, he was necessarily restricted to 160 acres, unless his possession could be referred to a deed or written memorandum of title, and thus include all of the land.

Snider v. Brown, 48 S. W. 377 (Tenn. 1898). This was a bill to enjoin judgment creditors of one Byars from selling land under execution. Plaintiff relied on a statute which provided that a party holding adversely for seven years under a grant purporting to convey an estate in fee is vested with a good and indefeasible title. Plaintiff claimed under a grant and he had been in possession for over seven years. However, before plaintiff had been in possession for the full seven years the statute was amended to provide that no title shall be vested by such adverse possession unless the grant shall have been registered during the full term of seven years of adverse possession. Plaintiff's deed was not registered. Held: Amendment applies.

Scales v. Otts, 127 Ala. 582, 29 So. 63 (1900). Defendants relied on adverse possession for ten years. Their possession was of less than eight years' duration when a statute was approved which required parties claiming adverse possession of land to give notice. No notice was given by defendants. Held: Statute applicable.
ACQUISITION OF INTERESTS IN LAND

seem, however, that after the cause of action of the rightful owner has been barred, the legislature could not re-establish his cause of action against the adverse possessor by retroactively imposing new requirements for the acquisition of title by adverse possession. This would be a logical deduction from the cases that hold the legislature may not suspend the operation of the statute of limitations after the owner's cause of action is barred because by that barring the adverse possessor acquires title. It has been held in the case of an easement acquired by prescription that after the cause of action of the owner of the possessory estate has become barred, the legislature cannot destroy the easement by retroactively altering the law relating to the evidence necessary to establish adverse user.\textsuperscript{79}

**OCCUPYING CLAIMANTS ACTS**

Erections or improvements made on land are fixtures, and become the property of the land owner, even though annexed by another in the \textit{bona fide} belief that he owned the land.\textsuperscript{80} Under the common law, the landowner may recover possession without any obligation to pay the \textit{bona fide} occupant for improvements made in good faith.\textsuperscript{81}

\textsuperscript{79} Christenson v. Wikan, 254 Wis. 141, 35 N. W. 2d 329 (1948). This was a suit to quiet title. The defendants claimed a right of way by prescription. They had used a portion of the land in question as a driveway continuously for a period of over thirty years. There never was any objection to the use of the driveway until this dispute arose. The court held that this was a case of an unexplained use for over twenty years and that under Wisconsin decisions an unexplained use of an easement for twenty years will be presumed to have been under a claim of right and adverse, and will be sufficient to establish a right by prescription. It was argued that Laws 1941, c. 94 (Wis. Stats. 1951, sec. 330.12 (2)) changed this rule. The statute provides: "The mere use of a way over unenclosed land shall be presumed to be permissive and not adverse." Held: Statute was not meant to apply in a case like this; furthermore it could not affect vested rights acquired by an adverse user prior to its enactment.

\textsuperscript{80} 2 Tiffany, \textit{Real Property}, sec. 625 (3d ed.).

injustice of the common law was particularly apparent in the pioneer period of our country when titles were frequently in a state of confusion and settlers often made valuable and lasting improvements on land which they fully believed was theirs. But the harshness of the strict common law was often relieved by equity. It is within a well-established sphere of equity jurisprudence to allow an innocent occupant to assert a claim for permanent improvements as a means of preventing unjust enrichment to the owner of the land. Even courts of law have applied the equitable practice of protecting an innocent occupant to the extent that when the owner has recovered in ejectment and then seeks to recover mesne profits, he is allowed to recover only the excess of the rents and profits over the value of improvements, the action for mesne profits being deemed equitable in nature.

Many of the states now have occupying claimant statutes. The general effect of these statutes (there is considerable variation) is to compel the owner of the land to pay to the

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82 Some of the earlier cases are: Bright v. Boyd, 4 Fed. Cas. 127, No. 1,875 (C. C. D. Me. 1841); Valle's Heirs v. Fleming's Heirs, 29 Mo. 152 (1859); Davis v. Smith, 5 Ga. 274 (1848); Jones' Heirs v. Perry, 10 Yerg. 59 (Tenn. 1836).

83 2 Pomeroy, Equality Jurisprudence, sec. 390 (5th ed.).

There is a divergence of authority as to whether a court of equity may allow the occupying claimant to obtain relief as a plaintiff. According to one line of authority, even in the absence of fraud, acquiescence with knowledge, or other inequitable conduct on the part of the owner of land, one who, mistakenly believing himself to be the owner, in good faith makes improvements on premises, may, as plaintiff, recover therefor, by way of lien or otherwise, where the circumstances render such relief just and equitable. Other cases lay down the proposition that an equitable claim on account of the making of improvements can only be asserted against one who himself comes into equity for relief, the claim being, at most, allowable as a condition attached to the granting of relief to the opposite party, and imposed on the principle that he who asks equity must do equity. See Annotation, 104 A. L. R. 577, 580, 588 (1936), “Action to recover for improvements made on land, etc., by one who mistakenly believed himself the owner.”

84 Green v. Biddle, 8 Wheat. 1 (U. S. 1823); Kerr v. Nicholas, 88 Ala. 346, 6 So. 698 (1889); Wernke v. Hazen, 32 Ind. 431 (1869); Fenwick v. Gill, 38 Mo. 510 (1886); Dawson v. Grow, 29 W. Va. 333, 1 S. E. 564 (1887); Huebschman v. Von Cotzhausen, 107 Wis. 64, 82 N. W. 720 (1900).

85 2 Tiffany, Real Property, sec. 625 (3d ed.).
bona fide occupant the value of permanent improvements placed on the land (by the occupant) as a condition to the owner’s recovery of possession, or as a condition to his recovery in a suit against the occupant for removing the improvements.

While the occupying claimant statutes are not necessarily mere codifications of equitable jurisprudence, they have as a common basis the same maxim which guides the courts of equity in these matters: that he who seeks equity must do equity. The statutes do not deny the right of the owner to possession. Possession is withheld only until the owner performs the equitable obligation of paying for the improvement to the extent that he is enriched by it. It is true that the statutes make a man pay for improvements which he did not ask to be made and it may be that he prefers the land without improvements. On the other hand, if he is not required to pay, the innocent claimant can well assert that he has been deprived of the fruits of his labor without due process. The parties cannot be placed in statu quo, but justice will be nearly accomplished if the value of the improvements is correctly estimated. After all, the owner is often largely responsible for the improvements having

86 It is usually held that actual notice is the test of the good faith of the occupant—that is, either knowledge of an outstanding paramount title or of some circumstance from which the court or jury may fairly infer that he had cause to suspect the invalidity of his own title. Beard v. Dansty, 48 Ark. 183, 2 S. W. 701 (1886); Johns v. Gillian, 134 Fla. 575, 184 So. 140 (1938); Loeb v. Conley, 160 Ky. 91, 169 S. W. 575 (1914); Ross v. Irving, 14 Ill. 171 (1852); Richmond v. Ashcraft, 137 Mo. App. 191, 117 S. W. 689 (1909).

87 Ross v. Irving, Pryor v. Irving, 14 Ill. 171 (1852).

88 The amount of compensation allowed for improvements is ordinarily the amount by which the value of the land is enhanced by the improvements, and not the amount which the improvements cost the occupant. Crowell v. Seelbinder, 185 Ark. 769, 49 S. W. 2d 389 (1932); Pakulski v. Ludwiczewski, 291 Mich. 502, 289 N. W. 231 (1939); Pritchett v. Hibbler, 126 Miss. 379, 88 So. 882 (1921); Rains v. Moulder, 338 Mo. 275, 90 S. W. 2d 81 (1936); Mercy v. Miller, 25 Tenn. App. 621, 166 S. W. 2d 628 (1942); Hardgrove v. Bowman, 10 Wash. 2d 136, 116 P. 2d 336 (1941).
been built by not promptly asserting his claim. If the legislature may enact a statute of limitations barring the recovery of lands after a given time of adverse possession—and the length of that time is at the discretion of the legislature—why cannot the legislature say that if the owner is guilty of laches and neglects to assert his right until the bona fide occupant makes valuable improvements (which will usually be a considerable period of time) his right of recovery is conditioned?

It is well settled that the mere allowance of payment for improvements does not deprive the owner of any constitutional rights when the statute is applied prospectively. But some statutes have been declared unconstitutional because they seemed to favor unduly the adverse claimant. Under one statute, which was held to be unreasonable, the owner who was successful in the ejectment action and who was willing to pay for the improvements could nevertheless be compelled to give up the land to the occupant at its appraised value. Another invalidated statute gave the occu-

89 Griswold v. Bragg, 48 Fed. 519, 48 Conn. 577 (1880) (held: statute does not impair obligation of contract nor deprive the owner of property without due process); Leighton v. Young, 52 Fed. 439 (3d Cir. 1892); Fee v. Cowdry, 45 Ark. 410 (1885) (owner not deprived of vested rights); Ross v. Irving, Pryor v. Irving, 14 Ill. 171 (1852); Armstrong v. Jackson, 1 Blackf. 374 (Ind. 1825); Barker v. Owen, 93 N. C. 198 (1885); Van Valkenburg v. Ruby, 68 Tex. 139, 3 S. W. 746 (1887); Scott v. Mather, 14 Tex. 235 (1855) (held: no impairment of contract—this was the law before the first title to land was issued in the now state of Texas); Saunders v. Wilson, 19 Tex. 194 (1857); Cahill v. Benson, 19 Tex. Civ. App. 30, 46 S. W. 888 (1898); Brown v. Storm, 4 Vt. 37 (1831).

90 McCoy v. Grandy, 3 Ohio St. 463 (1854). The statute gave the unsuccessful occupying claimant the option of demanding from the owner payment of the value of the permanent improvements, or of paying to the owner the value of the land without improvements. This, declared the court, was a violation of the provision of the Ohio Constitution which declares that "private property shall ever be held inviolate, but subservient to the public welfare." Accord, Stump v. Hornback, 94 Mo. 26 (1887) (held: the plaintiff in an ejectment suit must consent to the occupying claimant's keeping the land. The only relief the law gives the occupying claimant is negative).

The statutes frequently provide that the successful owner shall have the option of recovering the premises, subject to the obligation of paying for
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pying claimant the power to cause an execution to be issued against the general property of the owner for the value of the improvements.\(^1\) It has also been held that the legislature transcends constitutional limitations when it obliges the owner to reimburse the occupant for the purchase money he paid to some other person,\(^2\) or when it compels the

the improvements, or of requiring the occupying claimant to take the land at its ascertained value aside from improvements. This sort of provision is designed to assist the owner who may be financially unable to pay the value of the improvements or who may feel that the recovery of the land is not worth the effort if improvements must be paid for. There is no deprivation of property without due process in requiring the owner to exercise his option within a reasonable time. Mills v. Geer, 111 Ga. 275, 36 S. E. 673 (1900); Bacon v. Callender, 6 Mass. 303 (1810); Flynn v. Lemieux, 46 Minn. 458, 49 N. W. 238 (1891); Craig v. Dunn, 47 Minn. 59, 49 N. W. 396 (1891).

It is permissible for the legislature to prescribe that if the owner does not pay within a stated time the amount awarded to the occupant for improvements, title to the land shall vest in the occupant. Flynn v. Lemieux, Craig v. Dunn supra.

A Georgia statute provides that if the plaintiff owner shall fail to exercise his option within the time allotted, then the claimant shall have the privilege of paying the owner the value of the land and mesne profits due, whereupon the court shall either require the plaintiff to convey title to the claimant or have the land sold and the proceeds divided between the parties in proportion to their respective interests in the property. Ga. Code 1933, sec. 33-108. This statute has been held not to entail a deprivation of the property of either party but to be a reasonable method devised by the legislature to adjust as nearly as possible the rights of the respective parties, holding in view the fact that both have interests in the property in gross which cannot be separated in kind. Ayer v. Chapman, 147 Ga. 715, 95 S. E. 257 (1918).

\(^1\) Childs v. Shower, 18 Iowa 261 (1865). The court said that this statute had neither reason, necessity, nor precedent to support it.

But it is competent for the legislature to make the value of the improvements a lien on the land itself and to authorize a sale of the specific property to pay for such improvements in case the owner fails to pay within the time allotted him. Ayer v. Chapman, 147 Ga. 715, 95 S. E. 257 (1918); Leighton v. Young, 52 Fed. 439 (3d Cir. 1892).

\(^2\) Madland v. Benland, 24 Minn. 372 (1878). But unquestionably it is proper to require the owner to repay all taxes and assessments on the land paid by the occupying claimant.

The statute in the Madland case must be distinguished from the statute sustained in Claypoole v. King, 21 Kan. 434 (1879) which provided that: "Whenever any land, sold by an executor, administrator, guardian, sheriff or commissioner of courts, is afterwards recovered in the proper action by any person originally liable, or in whose hands the land would be liable to pay the demand or judgment for which, or for whose benefit the land was sold, or any one claiming under such person, the plaintiff shall not be entitled to the possession of the land until he has refunded the purchase money, with interest,
owner to submit the question of payment for improvements to arbitrators prior to the institution of action to recover possession. 93

The decisions are about evenly divided as to whether the improvement statutes can be applied where the improvements were made before the statute. The courts which have allowed a retroactive effect did so on the premise that the statutes merely give a remedy which already existed in equity and good conscience, but which the law previously provided no means of enforcing. 94 The premise of the courts opposed to permitting a retroactive application of the statute is that prior to the statute the owner was under no obligation to pay for the improvements erected without his consent by a trespasser; to exclude him now from the enjoy-

deducting therefrom the value of the use, rents and profits, and injury done by waste and cultivation. . . .” Kan. Gen. Stats. 1868, c. 80, sec. 613. The plaintiff in the Claypoole case, who was seeking to recover the land, was an heir. The purchase price which defendants paid discharged the land from the lien of the debts of the plaintiff’s ancestor. The court felt that if the sale was void, the heir ought not to obtain the property in any better condition than it was left by his ancestor. The statute, it was held, did not take any property from the plaintiff; it allowed him to take only that which was justly his.

93 Hearn v. Camp, 18 Tex. 545 (1857). The statute also required that in case an award was rendered in favor of the defendant, the amount be tendered to the defendant previous to the institution of the suit.

94 Beard v. Dansty, 48 Ark. 183, 2 S. W. 701 (1886); Fee v. Cowdry, 45 Ark. 410 (1885); Mills v. Geer, 111 Ga. 275, 36 S. E. 673 (1900); Bracket v. Norcross, 1 Greenl. 89 (Me. 1820); Bacon v. Callender, 6 Mass. 303 (1810). See also Albee v. May, 1 Fed. Cas. 296, No. 134 (C. C. D. Vt. 1834).

In Mills v. Geer it was held that the application of the improvement statute to improvements made prior to the effective date of the statute did not violate the provision in the Georgia Constitution prohibiting retrospective law. “It is a matter that may be regarded now as almost an elementary principle in the construction of constitutional law upon the subject of retroactive legislation, that it does not refer to those remedies adopted by a legislative body for the purpose of providing a rule to secure for its citizens the enjoyment of some natural right, equitable and just in itself, but which they were not able to enforce on account of defects in the law or its omission to provide the relief necessary to secure such right.” (111 Ga. 275, 282, 36 S. E. 673, 676.) See also Chapter 2, p. 13.
ment of his property, unless he pays for such improvements, deprives him of his property as effectively as though he were forced to sell. 95

It is to be noted, however, that there were defects in some of the statutes which may have greatly influenced the courts in holding that the statute could not be applied retroactively. One statute was not limited to improvements in the form of structures on the land; the improvements could be in the soil and might even be such as would have been deemed waste in case of rightful tenancy. 96 Other statutes made no distinction between improvements made by a trespasser who

95 Society for Propagation of the Gospel v. Wheeler, 22 Fed. Cas. 756, No. 13,156 (C. C. D. N. H. 1814) (held: would violate the 23d article of the New Hampshire Constitution which declares: "Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes or the punishment of offenses"); Billings v. Hall, 7 Cal. 1 (1857) (not permissible on grounds of "natural justice"); Newton v. Thornton, 3 N. M. (Gild) 287, 5 Pac. 257 (1885) (interference with vested rights); Wilson v. Red Wing School District, 22 Minn. 488 (1876); Townsend v. Shipp's Heirs, Cooke 294 (Tenn. 1813) (would violate the constitution and the sacred rights of freemen); Investment Co. v. Hambach, 37 Wash. 629, 80 Pac. 190 (1905) (held: that if the statute were intended to affect established and vested rights, it would be "opposed to those principles of jurisprudence which have been universally recognized as sound").

It is a mistake, said Justice Story in Society v. Wheeler supra, to suppose that the demandant has no vested right in the improvements prior to his action. All improvements, whether in the form of an amelioration of the soil or in the form of structures permanently attached to the soil pass with the title to the land and vest with it; they are not acquired but merely reduced to possession by the suit. The statute, then, not merely extinguishes a vested right in all the improvements on the land, but it also impairs the value of the vested right of the party in the land itself, inasmuch as it subjects the remedy to burdens, which might render the right not worth pursuing.

It was in Society v. Wheeler (p. 767) that Story gave his famous definition of a retroactive statute: "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . ." See Chapter 2, p. 14.

96 Society v. Wheeler supra. Story admitted that the argument that there are moral or equitable obligations which should compel the plaintiff to pay for the improvements might have been more persuasive if the statute had been limited to improvements in the form of structures on the land.
made unlawful and violent entry upon lands of another and improvements made by a good faith occupant.\textsuperscript{97}

**TITLE BY ACCRETION**

“Except as private rights have been acquired by express grant or prescription or by relinquishment under local statutes . . . ,” it is well settled in the United States that the title to land under navigable waters (as defined by each state) is in the sovereign.\textsuperscript{98} Where the line between water and shore of land bounded by a navigable body of water gradually changes either by the accumulation of material or by the gradual recession of the water, the owner of the land becomes the owner of the new land formed.\textsuperscript{99} Acquisition of land by either process is commonly called accretion.\textsuperscript{100}

\textsuperscript{97} Billings v. Hall (Calif. Stats. 1856, c. XLVII); Newton v. Thornton (N. M. Laws 1878, Prince’s Stat. 486).

\textsuperscript{98} Patton, Titles, sec. 83.

\textsuperscript{99} 4 Tiffany, Real Property, sec. 1219 (3d ed.).

The doctrine of accretion is only applicable where title to the bed of the body of water or stream is in the state. If the riparian proprietor is owner of the bed, any land forming within the area of the bed belonging to him is his, and not by virtue of accretion but because his ownership extends upwards as well as downwards, as it does in case of land completely dissociated from water.

A governing principle which is sometimes confused with the doctrine of accretion is that which obtains when land is bounded on the center of a non-navigable stream as a monument. The center of the stream is still the boundary, although the location thereof is substantially changed by the gradual change of the bed of the stream. 4 Tiffany, Real Property, sec. 1221 (3d ed.). If the stream changes its course by a gradual process, the persons who own the bed of the stream acquire the bed in its new location. This new acquisition being of land covered by water cannot be based upon any doctrine of accretion. The rule that the boundary moves with the stream is apparently based upon the presumed intent of the parties. 2 Walsh, Real Property, sec. 227. The rule does not apply if the boundary is fixed independently of the stream.

The rules to the effect that ownership follows changes in the location of water do not apply in case of sudden and perceptible changes and such changes do not bring about a change in the ownership of the status quo. The distinction between a sudden and perceptible change on one hand and an imperceptible and gradual change on the other is often very hard to apply.

\textsuperscript{100} Technically “accretion” applies only to the acquisition of additional land by deposit of soil. When land is formed by recession of water, the process is properly termed “reliction.” However the term “accretion” is frequently
Conversely, where land bordering on navigable water is gradually washed away (erosion), the sovereign ordinarily acquires title to the land thus encroached upon.\textsuperscript{101}

The cases do not discuss whether the legislature might abolish or modify the rule that title may be lost by erosion. Of course, the owner whose land is being eroded will not object to a change which is to his benefit. Attention has naturally been directed, where alleged constitutional rights are impinged upon, to the loss of the right to accretion rather than to modifications of the erosion rule. Thus we shall confine our discussion to the problem of whether the owner of littoral or riparian land has a vested interest in the rule that title may be acquired by accretion.

At the outset it may be acknowledged that after land has formed by accretion, the courts will not allow the legislature to divest title out of the owner of the bank or shore or to substitute a mere preference to claim title in place of an unconditional claim.\textsuperscript{102} A Minnesota statute\textsuperscript{103} was held to

\textsuperscript{101} 4 Tiffany, \textit{Real Property}, sec. 1219 (3d ed.).
\textsuperscript{102} Anderson-Tully Co. v. Murphree, 153 F. 2d 874 (8th Cir. 1946). Ark. Acts 1901, p. 197, sec. 1 provided that "all lands [sic] which has formed or may hereafter form, in the navigable waters of this state and within the original boundaries of a former owner of land upon such stream, shall belong to and the title thereto shall vest in such former owner, his heirs or assigns, or in whoever may have lawfully succeeded to the right of such former owner therein." The land in question was an island which reappeared in the Mississippi River within the bounds of a former tract of land. The plaintiffs claimed the title by virtue of the Act of 1901 and also by virtue of their having paid taxes for fifteen years. The defendant argued that any rights the plaintiffs may have had under the Act of 1901 were lost by failure to assert their rights as provided by a statute enacted in 1917. Ark. Acts 1917, p. 1468, Act 282, sec. 5: "All bona fide claimants of lands of the character described in sec. 1 hereof, [islands] shall have a preference right of one year after passage of this Act to apply for the survey and purchase of lands claimed by them, etc." Held: The Act of 1917 was not intended to apply to a situation like this and if it were it would not satisfy the requirements of due process. A state cannot take away a right which it has previously granted unconditionally and give a mere preference in its place.

\textsuperscript{103} Laws 1897, c. 257. The statute provided that all lakes of less than one hundred and sixty acres, and such as are not capable of any beneficial use to
be unconstitutional because it declared that the bed of a dried-up lake belonged to the abutting owners as tenants in common. Since under the common-law rule of that state the boundary of the shore owner on a lake of this sort extended from the shore or meander line on lines converging to a point in the center of the lake bed (thus creating a pie-shaped piece of land), the court felt that the legislature had made an undisguised attempt to sever fixed and vested interests by turning ownership in severalty into ownership in common.

There is some conflict in the decisions as to the right of the riparian owner to future accretions. It was held in an old case that the right to future alluvial formations is inherent in the riparian property itself and forms an essential attribute of it, resulting from natural law in consequence of the local situation of the land, just as much as the natural the public are declared private waters. The lake in question, under this definition, was a private water. Sec. 2 of the statute declared that the bed of a private water which has been meandered shall belong to the abutting owners as owners in common, and in case of partition the rights of the respective shore owners shall be in proportion to the length of the meander line upon the tract or tracts owned by each.

104 Shell v. Matteson, 81 Minn. 38, 83 N.W. 491 (1900). This was an action brought under Laws 1897 to have a lake bed subdivided into tracts, as provided for by the statute. The complaint set up ownership of the plaintiffs and defendants of lands adjoining a lake, which in recent years had so dried up that it was no longer of sufficient depth to be of any beneficial use.

105 "When the legislature interferes with the title to one's property, or with his independent enjoyment thereof, its action is to be judged by those principles of civil liberty and constitutional protection which are guaranteed in our system of laws." 81 Minn. 38, 41, 83 N.W. 491, 492 (1900).

"The act in question is not confined to a method or course of procedure for the settlement or adjustment of the boundary lines between the different owners of such lake beds, but is an attempt to fix and determine the rights of property therein; declaring, contrary to the settled law of the land, that the shore owners are owners in common of the bed of the lake. Instead of providing a method for establishing and locating the boundary lines between such owners, the act cuts the matter short by declaring a joint ownership, and providing for a subdivision thereof on lines at variance with the legal and vested rights of the parties." (Ibid.)

"The most that the legislature can do in the matter of such lakes is to provide a procedure or method for determining the boundary line between the shore owners." (Ibid.)
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fruits of a tree belong to the owner of the land. Consequently, an attempt to deprive the owner of future increase by alluvion, would be as legally absurd as if the government should confiscate the fruits of all the private orchards within its jurisdiction. On the other hand, a more recent decision, in which the court was obviously less influenced by

106 Municipality No. 2 v. Orleans Cotton Press, 18 La. 122 (1841). The City of New Orleans claimed certain alluvial lands upon which the defendants had erected buildings. The alluvion had formed after the land in question was laid out in suburbs. Prior to 1805 the land was a part of a plantation abutting upon the Mississippi River. In that year in pursuance of a statute the land comprising the plantation was incorporated into the city. It was contended by the city that the right to alluvion pertains only to rural land and not to urban land, that consequently when the plantation was incorporated into the city the right to future alluvion was lost to the owners of the fast land and became the property of the city. Held: The legislature could not shear the land of its legal attributes by putting it into a new classification without the consent of the owner.

A number of courts have stated by way of dictum that the right to future accretion is a vested interest. See inter alia St. Clair County v. Lovington, 23 Wall. 46 (U. S. 1874); Stevens v. Arnold, 262 U. S. 266 (1923); Brundage v. Knox, 279 Ill. 450, 117 N. E. 123 (1917).

107 Western Pacific R. R. Co. v. Southern Pacific Co., 151 Fed. 376 (9th Cir. 1907). Appellee owned land bounded by the low-tide line of 1842. It claimed that land added by accretion became its property. The accretion consisted of land dredged from the channel at various times since 1882, which the ebb and flow of the tide had evenly distributed. Cal. Civil Code, adopted in 1873, defined in sec. 1014 the right to alluvion as follows: "Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank." It was contended by the appellee that if the section quoted were construed to exclude the right to alluvion in this instance, it would be unconstitutional. It was argued that the predecessors in interest of the appellee had a vested right to future alluvion, a right to all alluvion that might be deposited upon its shore land in all time to come. The court held that no vested rights would be impaired in the application of the statute and also expressed some doubt whether under the facts of the case there was alluvion in the proper sense.

In Eisenbach v. Hatfield, 2 Wash. 256, 26 Pac. 539 (1891) the court, in speaking of the right to future alluvion, expressed its inability to see how anyone could have a present vested interest in something which does not exist and which may never exist.

In Humble Oil and Refining Co. v. Sun Oil Co., 190 F. 2d 191 (5th Cir. 1951), there is dictum to the effect that no riparian owner has a vested interest in the general law of accretion, except as to land formed while the law is in effect.

The California and Washington cases were criticized as being unsound in Manry v. Robison, 122 Tex. 213, 56 S. W. 2d 438 (1932) infra note 115.
natural analogies, holds that there is no unconstitutional deprivation of property in applying a statutory modification of the right to alluvion in case of tide land acquired from the state before the enactment of the statute. The court said that if the purchaser of tide land from the state were held to acquire therewith a vested right to all possible future accretion, this would impose a restriction on the power of the state to occupy or improve for the public benefit the adjacent submerged land. The right to future accretion was held to be clearly expectant within Cooley’s definition of vested and contingent rights:

“Rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.” 108

It is stated by one writer that the doctrine of acquisition of title by accretion is a rule of law premised upon the policy of preserving the adjoining owner’s access to the navigable water and justified by the corollary rule that the owner loses title to land when the water encroaches. 109 Another writer maintains that the doctrine should more appropriately be considered a general rule for the ascertainment of boundaries, a rule of construction, in effect, that if the boundary of land is determinable with reference to the sea or any body or stream of water, the boundary is presumably intended to

109 2 Walsh, Real Property, sec. 227.
varies as the particular physical feature referred to may vary, provided that the variation is gradual.\textsuperscript{110}

If the doctrine is in fact a rule of construction, then it is indeed difficult to conceive of anyone’s having a vested interest in the doctrine’s continued existence, for rules of construction are merely legal crutches to aid the courts in arriving at decisions. Calling the doctrine a rule of law may appear at first blush to give substantiality to the view that the riparian or littoral owner has a vested interest in future accretions, yet it is well established that one cannot have a vested interest in a rule of law, but only in interests acquired while such rule is in existence. Since, moreover, acquisition of title by accretion is the legal effect given to a natural phenomenon which is not certain to occur, how, before this phenomenon has actually taken place, can there be said to be a vested interest?

It has been held that the riparian owner’s right to accretion is lost when the state reclaims the submerged land in front of his land, or when the submerged land is reclaimed by another individual under a grant from the state.\textsuperscript{111} Also, it has been held that when a railroad constructs its road upon the bed of a navigable river under authority from the state, the riparian owners are precluded from acquiring title by accretion to land formed between the land appropriated by the railroad and the new highwater mark of the river.\textsuperscript{112} If the legislature may destroy the right to future accretion by these means, why may it not accomplish the result directly through statutory declaration?

\textsuperscript{110} Tiffany, \textit{Real Property}, sec. 1220 (3d ed.). Tiffany’s theory would seem to be contradicted by those cases which held that one whose nonriparian land has become riparian by the gradual encroachment of water may claim land subsequently formed by the action of the water. For an extreme case of this sort see Welles v. Bailey, 55 Conn. 292, 10 Atl. 565 (1887).


\textsuperscript{112} Chicago, B. & Q. R. Co. v. Porter, 72 Iowa 426, 34 N. W. 286 (1887).
While there seems little justification for holding that the riparian owner has a constitutional right to future accretion, this does not preclude the possibility that the riparian owner may suffer an economic loss for which he is constitutionally entitled to compensation, as a result of the abolition of the rule that a proprietor of land bounded by navigable water becomes owner of accreted land. The real issue might not be at all whether the riparian owner has a vested interest in future accretions as such, but whether by fiat the legislature can in effect destroy his easement of access to navigable water without which his land may be substantially diminished in value. It is well to bear in mind the often affirmed thesis that the premise of the rule relating to accreted land is the necessity of preserving the riparian owner's access to the navigable water. The riparian owner's easement of access has been held in eminent domain cases to be a property interest which is secured by constitutional provisions for the protection of private property. This would seem to indicate that the legislature cannot arbitrarily deny to the erstwhile riparian owner access over the accreted land to navigable water without compensating him for loss actually suffered by loss of access to the water. But, on the other hand, it is also well settled by the eminent domain cases that the riparian owner is not entitled to compensation for loss of egress and ingress caused by the erection on behalf of the state or the federal government of improvements for navigation. Thus we may assume that to the extent at least that

113 Brickell v. Trammell, 77 Fla. 544, 82 So. 221 (1919).

In support of this view it was said in Peck v. Alfred Olsen Construction Co. supra: "... it would seem reasonable to say that, if a state assume a trusteeship for the public, which carries no proprietary rights of property, and which brings no emoluments and promises no future revenues, the performance of such trusteeship by the state should not ordinarily be barred or impeded
legislation abolishing the doctrine of accretion has some reasonable relation to a program for the regulation or improvement of navigation, no compensation need be paid to the erstwhile riparian owner for his loss of ingress and egress.

If the legislature abolishes the rule of acquisition of title by accretion but retains the rule that the riparian owner loses his title as his land is encroached upon by the water, an undesirable situation may result. The consequence will be that the state does not lose title to land which was once part of the bed of a watercourse yet will acquire title to additional land as it is eroded away. If the watercourse has a propensity for shifting its bed (as many of our streams do), the state can conceivably acquire title to large tracts of land without having to pay for them. This might very well be a taking of property without due process.115

by constructive property rights, which are mere incidents of abutting land. If plaintiff's rights are paramount, they were such in the beginning, and they necessarily operated as a bar to the performance of the very trust imposed upon the state. Why impose upon the state the duty to promote navigation if such duty cannot be performed without invading the rights of the riparian owner? On the one hand, the state is called upon to promote navigation by appropriate improvements in fulfillment of its duty as a trustee; on the other hand, it is charged with damages at the suit of the riparian owner for the doing of that very duty. The argument in support of the claim for compensation by the riparian owner in such case is that his incidental right of ingress and egress is property within the meaning of the law; that, because it is property, it cannot be taken even for a public use without compensation. The argument has its fallacy. Let it be conceded that the right of ingress and egress is property. That mere fact does not render it immune from subordination to other rights of property. . . . If the right of ingress and egress of a riparian owner be deemed subordinate to the interests of navigation and to the right and duty of the state to promote the same, that fact does not necessarily destroy its value. It is still property, be it worth more or less. To say, therefore, that this right of access is property, furnishes no reason for saying that it cannot be subordinate to any paramount right.9 (216 Iowa 519, 527, 245 N. W. 131, 135.)

115 The difficulty which would be faced by a court in such an event was essentially that which was presented in Manry v. Robison, 122 Tex. 213, 56 S. W. 2d 438 (1932). This case involved a controversy over the ownership of the bed of a Texas river, which the river had abandoned in an avulsive change. The question was whether the title to the land formerly occupied by the river was in the state or whether title reverted to the persons whose lands were riparian before the stream changed its course. The river bed belonged
Accretions Due to Shifting of Non-Navigable Streams

It is to be observed that title may also be gained or lost by the movement of the water line of a non-navigable stream, the bed of which is owned by private persons. As the edge of the water moves with the shifting of the stream, the boundary of the tract moves with it. Here, unlike the situation where the state is the owner of the bed, the shifting of the stream doesn’t initiate title but merely changes the water boundary. No contention can be made that the process is the result of a rule of law designed to preserve the riparian owner’s easement of access to the water. The boundary is deemed to move with the edge of the water, either because the parties expressly stipulated that the edge is to be the boundary wherever it might in the future be situated, or because of the presumption customarily applied that when

to the state before the avulsion. The lands which were riparian before the avulsion had been originally granted by Mexico prior to the independence of Texas. According to Mexican law at the time of the grants, when a river abandoned its channel, the abandoned bed became the property of the riparian owners. It was urged that the adoption of the Common Law in 1840 made a different rule of decision applicable. It was alleged that under the common law, beds of abandoned rivers belong to the sovereign, and that since the river bed in question was not abandoned until 1914, the rule of the common law should apply and not that of the Mexican law. It was maintained that the right of the riparians to succeed to the title of a river bed upon its abandonment by the river is not an interest within the protection of the Constitution but a mere rule of law under which a property right will not vest until the river has actually abandoned its bed. The court disagreed that the adoption of the Common Law had introduced a new rule and criticized those cases which expound the proposition that right to soil uncovered by reliction is not a vested property interest and may be taken away by legislative enactment (see note 107 supra). The court pointed out that if the rule contended for were adopted, the state would acquire property from individuals without having to make compensation if a river changed its channel.

The court attributed to the title of the riparian owners the quality of a base fee, determinable upon the occupancy of the soil by the river. From this it followed that the title of the state to the river bed was also a determinable fee, determinable in favor of the riparian owners upon abandonment by the river of its bed. There existed, therefore, a mutuality of burdens and benefits between the riparians and the state. The court did not believe that by the adoption of the Common Law in 1840, the legislature intended to convert the state’s determinable fee into a fee absolute.

116 Patton, Titles, sec. 173. See note 99 supra.
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a boundary is set in reference to the edge or other feature of a stream the parties intend that this feature shall remain the boundary in spite of future deviations by the stream. The writer found no cases dealing with retroactive legislation at this point. He would surmise, however, on the basis of the cases concerning accretion on navigable streams, that the courts might well sustain a statute which in the interest of certainty of boundaries would declare that as to future conveyances, when a feature of a stream is made a boundary, the boundary line shall remain in the same location in spite of changes in the location of the feature. On the other hand, a legislative declaration of similar import, if applied to past conveyances so as to effect an extinguishment of title to accretions formed prior to the effective date of the statute, would undoubtedly be held to deprive the individual, against whose land the accretions had formed, of property without due process.

Definitions of Navigability

Since title to the beds of watercourses is determined with reference to navigability, as also is the location of water lines as boundaries, the courts have recognized that the riparian owner has a vested interest in the definition of navigability obtaining and applied at the origin of his title. The question of navigability has two totally diverse aspects. One has to do with the regulation of commerce by Congress. The other has to do with the location of water boundaries. A given stream may be navigable for one purpose and non-navigable for other purposes. The federal courts hold that a watercourse is navigable within the constitutional sense when it is susceptible in its natural condition of being used for commerce conducted in the ordinary mode, or could be made suitable for commerce by a reasonable expenditure of money. United States v. Appalachian Electric Power Co., 311 U. S. 377 (1940). The state courts apply various tests of navigability for the purpose of fixing riparian boundaries and the title to the beds of watercourses. Some follow the English rule that only tidal waters are navigable. The fact that as a part of the government survey a meander line was run along the bank raises a presumption in some states of navigability. The general rule, however, is
lature may not adopt a retroactive definition of navigability which will destroy the title of the riparian owners to the bed of the watercourse and transfer it to the state or will alter the rights of the riparian owners inter sese.

The legislature may regulate non-navigable waters in the interest of the health, welfare, and safety of the public; all property is held subject to the police power. But in comparison with the power of the legislature over navigable streams and bodies of water, the power of the legislature in respect that water is navigable in law if it is navigable in fact. The main test of navigability in fact is whether the watercourse is capable of being used for navigation by usual and ordinary methods. Patton, *Titles*, sec. 79.

118 Coover v. O'Conner, 8 Watts 470 (Pa. 1839); United States v. Champlin Refining Co., 156 F. 2d 769 (10th Cir. 1946).

State v. Brace, 36 N. W. 2d 330 (N. D. 1949) was an action by the state of North Dakota to obtain title by eminent domain to land surrounding a small lake. As a basis for the exercise of the power of eminent domain, the state alleged that it was owner of the lake. The defendant, as riparian owner of the land around the lake, claimed title to the bed under the lake. The state relied *inter alia* on a statute providing: "A navigable lake shall include any lake which shall have been meandered and its metes and bounds established by the government of the United States in the survey of public lands." In a United States government survey in 1872 meander lines were run around the lake. The statute in question came into the law of the state in 1935. Laws 1935, c. 229. Held: The legislature may not adopt a retroactive definition of navigability which will destroy a title already vested under a federal grant or transfer to the state a property right in a body of water or the bed thereof that had been previously acquired by a private owner. A legislative declaration that all meandered lakes are navigable will not make them so if they are not navigable in fact, as against the pre-existing rights of riparian owners, unless compensation is made to such owners for the property thus injured or taken by the state. The state may not assert title, on the ground of navigability, to lands lying beneath non-navigable waters unless those waters were in fact navigable at the time of statehood, in the absence of subsequent conveyances to the state. Where patents were issued to riparian owners prior to statehood, rights thereunder with reference to navigable or non-navigable waters will be determined as of the date of the patent.

119 Allen v. Weber, 80 Wis. 531, 50 N. W. 514 (1891). Held: Where the grantees from owners of a mill dam and pond and of the land on one side thereof have acquired title only to low water mark of the stream, a subsequent act of the legislature declaring the stream to be navigable cannot affect the rights of the owners in the pond, or vest such grantees with title to the middle thread of the stream.

In Wisconsin at this time the presumption prevailed that as to lands which extended to and covered the banks of navigable streams, it was the intention of the grantor to convey title to the center of the stream.
to non-navigable waters is limited. The rights and privileges of a riparian owner on a navigable body of water are subject to the paramount right of the state to make whatever improvements are necessary for the public good in promoting better navigation. Yates v. Milwaukee, 10 Wall. 497 (U. S. 1870); Leitch v. Sanitary District of Chicago, 369 Ill. 469, 17 N. E. 2d 34 (1939); State ex rel. Squire v. City of Cleveland, 80 Ohio App. 83, 74 N. E. 2d 438 (1947); Home for Aged Women v. Commonwealth, 202 Mass. 422, 89 N. E. 124 (1909).

The power of the states is circumscribed to the extent that a state may not interfere with the federal regulatory power. The regulation of navigable streams and bodies of water has to a large extent been taken over by the federal government, leaving a comparatively narrow area in which the states' regulatory power may operate. All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individuals, it is always subject to the servitude in respect to navigation created in favor of the federal government by the constitution. Scranton v. Wheeler, 179 U. S. 141 (1900). Riparian ownership is subject to the obligation to suffer without compensation the consequences of the improvement of navigation. United States v. Commodore Park, Inc., 324 U. S. 386 (1945). "Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation." Scranton v. Wheeler, 179 U. S. 141, 163 (1900). But Congress may not arbitrarily destroy or impair the rights and privileges of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end. United States v. River Rouge Improvement Co., 269 U. S. 411 (1926). Of course, where fast land is taken or rendered useless by inundation, compensation must be paid. United States v. Kansas City Life Ins. Co., 339 U. S. 799 (1950).

Congress has never had any need to attempt to modify the definition of navigability which the Supreme Court has laid down to delimit the federal regulatory power over navigable waters, because the commerce power and the navigation power are held to clothe Congress with the power to take action in regard to non-navigable streams in order to promote commerce and navigation on navigable streams and bodies of water. State of Oklahoma v. Guy F. Atkinson Co., 313 U. S. 508 (1941).

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not navigable by the definition of the court.\textsuperscript{122} This principle has been used as a ground for holding in favor of a riparian owner in a suit brought by a state to enjoin the erection of a dam\textsuperscript{123} and as a ground for invalidation of statutes authorizing the floating of logs\textsuperscript{124} and of statutes requiring owners of dams to maintain boat locks and fishways.\textsuperscript{125} The purported effect of such statutes is to create a public easement without the exercise of the power of eminent domain.\textsuperscript{126} While some of the cases cited below would today be decided differently because the statute would now be thought permissible under the police power, the principle expressed therein is no doubt still very much the law. The legislature

\textsuperscript{122} Olive v. State, 86 Ala. 88, 5 So. 653 (1888); Middleton v. Flat River Booming Co., 27 Mich. 533 (1873); People ex rel. Western New York & P. Ry. Co. v. State Tax Commission, 244 N. Y. 596, 155 N. E. 911 (1927); Walker v. The Board of Public Works, 16 Ohio 540 (1847).

\textsuperscript{123} People v. Economy Light and Power Co., 241 Ill. 290, 89 N. E. 760 (1909), appeal dismissed 234 U. S. 497 (1914). It was argued that due to the diversion of large amounts of water through canals and other artificial waterways the river had become navigable in fact. Held: The state cannot take private property without compensation by rendering a stream which is not navigable in nature, navigable through artificial means.

\textsuperscript{124} De Camp v. Dix, 159 N. Y. 436, 54 N. E. 53 (1899); Allison v. Davidson, 39 S. W. 905 (Tenn. 1896); Morgan v. King, 35 N. Y. 454 (1866).

\textsuperscript{125} State v. Glen, 52 N. C. 321 (1859) (fishway); People v. Platt, 17 Johns. 195 (N. Y. 1819) (fishway); Crenshaw v. Slate River Co., 6 Rand. 245 (27 Va. 1828) (boat locks). The majority of courts, however, who have passed upon the validity of statutes which require dams across non-navigable streams to be equipped with fishways, have held that persons erecting and maintaining dams do so with the implied obligation to maintain adequate fishways for the passage of fish from the lower to the higher levels and that consequently the application of the statutes to existing dams does not deprive the owners of property without due process. State v. Beardsley, 108 Iowa 396, 79 N. W. 138 (1899); West Point Water Power and Land Improvement Co. v. State, 49 Neb. 218, 66 N. W. 6 (1896); In re Delaware River at Stiles­ville, 131 App. Div. 403, 115 N. Y. S. 745 (1909).

\textsuperscript{126} That the legislature cannot create a public easement in a non-navigable stream and thus effectively deprive the owner of a dam of its use without compensating him, that is, without exercising the power of eminent domain, would seem obvious. But there would seem to be no reason why the legislature cannot create a public easement if the owners of dams are assured of adequate compensation for injuries to their dams.
cannot add to its police power by a convenient redefinition of navigability.

RECORDING ACTS

At common law, an owner who has transferred an interest to one person, cannot affect that interest by a subsequent purported transfer of the same interest to another person.\footnote{Aigler, "The Operation of the Recording Acts," 22 Mich. L. Rev. 405 (1924).} By his first transfer the transferor has divested himself completely of the interest; there is nothing left for him to transfer. Priority of title is determined by priority in time. The common-law rule, however, has been vitally affected by the recording acts. The first transferee must record in order to retain his priority against a subsequent conflicting purchaser without notice.\footnote{Under some statutes the prior grantee can protect his interest by recording his conveyance any time prior to the recording of a conveyance resulting from a later conflicting purchase. Under other statutes the earlier purchaser can protect himself against a subsequent purchaser without notice only by recording his conveyance before the later conflicting purchase occurs. Patton, Titles, sec. 9 (1938).}

Since the decision in \textit{Jackson ex dem. Hart v. Lamphire}, the leading case on retroactive recording statutes, the courts have rarely doubted the power of the legislature to pass recording acts by which a prior alienee is postponed to a later alienee if the prior instrument is not recorded within the time limit. This power is not affected by the fact that the instrument was executed before the passage of the recording act. The cases are almost entirely in accord that recording statutes which subordinate or render unrecorded instruments invalid as to designated persons may apply to pre-existing instruments without violating any constitutional provision, provided that a reasonable time is given the hold-

\footnote{127 Aigler, "The Operation of the Recording Acts," 22 Mich. L. Rev. 405 (1924).}
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\footnote{129 3 Pet. 280 (U. S. 1830).}
ers of such instruments to comply with the provisions of the statute.  

A very few early judges thought that a recording statute must be given prospective operation. But most courts have not been greatly impressed with the thought that vesting the alienor with the power to realienate is something like

130 Vance v. Vance, 108 U. S. 514 (1883); Stafford v. Lick, 7 Cal. 479 (1857); Boston and Gunby v. Cummins, 16 Ga. 102 (1854), 60 Am. Dec. 717; Payne v. Buena Vista Extract Co., 124 Va. 296, 98 S. E. 34 (1919). Moore v. Chalmers-Galloway Live Stock Co., 90 Colo. 548, 10 P. 2d 950 (1932). It was held that there was no violation of the provision of the Colorado constitution which reads: “That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation . . . shall be passed by the general assembly” (Art. 2, sec. 11), and no deprivation of property without due process (Fourteenth Amendment; Colo. Const., Art. 2, sec. 25). In this case the question was whether a prior unrecorded deed took precedence over a subsequent tax deed.

Connecticut Mutual Life Ins. Co. v. Talbot, 113 Ind. 373, 14 N. E. 586 (1887). The question was whether an unrecorded assignment of a mortgage was subordinate to a subsequent mortgage.

Hopping v. Burnam, 2 Greene 39 (Iowa 1849). This case held that a judgment lien took precedence over a prior unrecorded deed.

Farmer's Nat. Bank & Trust Co. v. Berks County R. E. Co., 333 Pa. 390, 5 A. 2d 94 (1939). It was held that a statute declaring unrecorded deeds to be invalid as against subsequent judgment creditors, did not apply to a deed executed prior to the statute; that to give the statute a retroactive interpretation would cause it to violate the Fourteenth Amendment and Article 1, sec. 9 of the Pennsylvania Constitution, inasmuch as it would deprive holders of unrecorded deeds of vested rights in real estate without due process of law. However, said the court, it is clear that recording and filing statutes which retroact upon pre-existing instruments do not violate any constitutional provision, provided that a reasonable time is given the holders of such instruments to comply with the provisions of the statute.

131 The following dictum appears in Varick's Ex'rs v. Briggs, 22 Wend. 543, 546 (N. Y. 1839): “Deeds valid and perfect at the time of their execution, and not then requiring for their full legal effect, any further legal sanction, such as recording, are complete and valid executed contracts. Now the effect of a subsequent statute enacting that such valid contracts shall be adjudged fraudulent and void as against certain persons unless a further legal sanction be added, must be in direct hostility to the very words of the constitutional inhibition. The contracts themselves are impaired by being adjudged void. If a law enacts that any class of contracts now fair and valid against the whole world shall hereafter be adjudged fraudulent and void against some particular persons, can this be any other than a law impairing the obligation of those contracts?”

See also the opinion of Burnett, J., in Stafford v. Lick, 7 Cal. 479 (1857), wherein he points out that the application of the recording statute has the effect of reinvesting the grantor with title so he can make another conveyance.
throwing the blame on the injured party. The reason why recording acts may retroact is variously explained by the courts: nondisclosure of claims to land aids and abets fraud;\(^{132}\) the reason and policy of the statute applies with as much force to conveyances and assignments made before as those made after it took effect;\(^{133}\) the purchasers who are protected by the statute are future purchasers, so that the statute cannot really be said to be retroactive in its operation;\(^{134}\) the statute merely changes a rule of evidence in which no one has a vested interest;\(^{135}\) the statute must apply to all alienations, for a contrary holding would produce a state of uncertainty and confusion;\(^{136}\) a statute cannot be said to impair an interest if an additional opportunity is afforded the owner to protect effectively his interest and it is left to him whether he will pursue this opportunity;\(^{137}\) the statute does not really retroact if it does not require deeds

\(^{132}\) Hopping v. Burnam, 2 Greene 39 (Iowa 1849).
\(^{133}\) Connecticut Mutual Life Ins. Co. v. Talbot, 113 Ind. 373, 14 N. E. 586 (1887).

The Payne case was a suit to quiet title. Plaintiff's title rested upon a deed from one Fitzgerald who was in possession under an executory contract in writing for the purchase of the land. By the law as it stood when Fitzgerald entered into possession, such possession was constructive notice to subsequent purchasers. However, this was changed by statute which declared that possession without notice or other evidence of title should not be notice to subsequent purchasers. It was argued that under the existing law Fitzgerald acquired a vested right of property and that this vested right continued to inhere in Fitzgerald until he transmitted it to plaintiff and that Fitzgerald could not be deprived of this right by the recording act. Held: Since Fitzgerald had seven years after the passing of the act within which to record his contract before defendant acquired any rights, the act was not unreasonable as applied to him. Fitzgerald elected to rely on the continued existence of a rule of evidence that possession gives notice of the existence of a contract of purchase. He assumed the risk of a subsequent change of law which might abolish such rule of evidence.

\(^{136}\) Connecticut Mutual Life Ins. Co. v. Talbot, 113 Ind. 373, 14 N. E. 586 (1887).
\(^{137}\) Connecticut Mutual Life Ins. Co. v. Talbot, 113 Ind. 373, 14 N. E. 586 (1887). Prior to the maturity of the notes, the mortgage was assigned. The assignment was not recorded. Indeed, it does not appear that there was
to have been recorded before it took effect, but only assumes a regulation over them from and after that event.\textsuperscript{138} In one case, the court allowed retroactive effect to a recording statute in part because of the inequitable position of the party contending that the statute could not be applied to his deed.\textsuperscript{139}

A statute requiring that instruments must be re-recorded after the destruction of the first registry, and within a specified time if they are to operate as constructive notice, is to be sustained upon the same grounds which sustain a statute requiring the initial registration of conveyances executed previous to the exercise of such legislative power.\textsuperscript{140}

Recording of a deed or other instrument of title is not ordinarily required in order to make the instrument legally effective between the immediate parties, the alienor and any provision for recording assignments at this time. In 1881, without the knowledge or consent of the assignee, the administrator of the mortgagee released the mortgage as of record. The debt was not paid. A recording statute enacted in 1877 provided for the recording of mortgage assignments. Held: Statute was applicable and assignee's rights were subordinate to that of a subsequent mortgagee who relied on the record.

\textsuperscript{138} Hopping v. Burnam, 2 Greene 39 (Iowa 1849).

\textsuperscript{139} Moore v. Chalmers-Galloway Live Stock Co., 90 Colo. 548, 10 P. 2d 950 (1932). This was a quiet title suit. The party resisting application of the recording statute was a receiver of a company which had held its deed unrecorded, and apparently in strict secrecy, or with the utmost indifference, fourteen years, while numerous other persons, with no intimation of the existence of such a deed and with every reason for faith in the legality of their claims, dealt with this title or litigated concerning it. When the statute became operative the company had already held its deed unrecorded for more than eight years. The existence of the unrecorded deed was disclosed when the receiver moved to reopen the judgment in this quiet title suit, almost two years after the passage of the statute. The court assumed, without deciding, that the company could have protected its deed had it recorded it at any time prior to the trial. The company was thus in the position of one who says: "We can easily protect our deed and our rights thereunder by the simple act of recordation, but we refuse." The statute in question provided that no deeds "shall be valid as against any class of persons with any kind of rights, except between the parties thereto, and such as have notice thereof, until the same shall be deposited with such recordor" for record. Laws 1927, c. 150, p. 590, sec. 8. The Colorado Constitution contains a provision forbidding retroactive legislation. See \textit{supra} note 130.

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alienee, but the instances in which instruments of title are not recorded must be rare. The legislature undoubtedly has the power to prescribe recordation as one of the acts necessary to make the instrument legally effective, as the modes of conveyancing are always subject to modification and control by the legislature. Even a recording statute which would retroactively negative, as to the immediate parties, the legal effect of existing instruments for failure to record would probably stand the test of constitutionality, provided a reasonable time were given in which to perform the additional acts necessary to the effectiveness of the instruments. A reasonable addition to the requirements for conveyancing should not be held unconstitutional merely because the acts of the parties constituted a completed conveyance under the previous law. Yet some courts might be disinclined to allow the retroactive operation for the apparent operation of such legislation would be to take the property away from the alienee and give it back to the alienor because of the non-action of the alienee.

The legislature may legitimately use a recording statute as a means of getting rid of stale claims, just as a statute of limitations might be used for the same purpose. The after-

141 Tiffany, Real Property, sec. 1262 (3d ed.).
142 See Cummings v. Wildman, 116 Md. 307, 81 Atl. 610 (1911), sustaining a statute which required trustees in certain instances to file a bond as a condition to passing title.
143 Myers v. Wheelock, 60 Kan. 747, 57 Pac. 956 (1899). A statute, which provided that no assignment of a mortgage should be received against the mortgagor, his heirs, personal representatives, or assigns, in any court of the state, unless the same should have been recorded within six months after the statute went into effect, was sustained as applied to an existing assignment. The court looked upon the statute as merely rendering the assignment inadmissible in evidence but without affecting the validity of the mortgage lien. The act was therefore deemed to be valid for the same reason that a retroactive limitation statute can be sustained when a reasonable time is given the party to pursue his remedy. This hardly seems a logical analogy, however, because a statute of limitations does not impose an affirmative obligation. The argumentation of the court tacitly presupposes a power in the legislature to extinguish an owner's right because he does not record.
math of worthless contracts for the purchase of land, which was left by the collapse of the Florida real estate boom of the 1920's, was held to justify a statute under the terms of which persons who had contracted to purchase land prior to a certain date but had not placed a deed on record or obtained a decree and were not in possession, were declared to have no interest in the land unless they should have given notoriety to their claims in one of several specified ways within six months after the adoption of the statute.145

145 Mahood v. Bessemer Properties, Inc., 154 Fla. 710, 18 So. 2d 775 (1944). Gen. Acts Fla. 1941, c. 20235 (Fla. Stat. 1951, sec. 695.20) provides: "Whenever any one shall have contracted to purchase real estate in the State of Florida, prior to January 1, 1930, by written agreement requiring all payments to be made within ten years from the date of the contract, or has accepted an assignment of such an agreement, and the fact of the existence of such a contract of purchase, or assignment, appears of record from the instrument itself or by reference in some other recorded instrument, and shall not have obtained and placed of record a deed to the property or a decree of a court of competent jurisdiction recognizing his rights thereunto, and is not in actual possession of the property covered by the contract or by the assignment, . . . he, his widow, heirs, personal representatives, successors and assigns, shall have no further interest in the property described in the contract, or the assignment, by virtue thereof, and the record of such contract, assignment or other record reference thereto, shall no longer constitute either actual or constructive notice to a purchaser, mortgagee, or other person acquiring an interest in the property, unless within six months after this law shall take effect (approved April 26, 1941), he or some one claiming under him shall: (1) Place on record a deed or other conveyance of the property from the holder of the record title; or (2) Place on record a written instrument executed by the holder of the record title evidencing an extension or modification of the original contract and showing that the original contract remains in force and effect; or (3) Institute, or have pending, in a court of competent jurisdiction a suit for the enforcement of his rights under such contract."

The defendant in Mahood v. Bessemer Properties, Inc., which was a specific performance suit, refused to accept the deed offered because of an alleged cloud in the form of an agreement to sell made by a former owner in 1925. The court held that the agreement was simply an unperformed contract which was cancelled by the act, and that the act could not be held to be unreasonable because applied retroactively; after all, the contractee had seventeen years in which to record a deed. The court also surmised that an abandonment of the agreement could be inferred from the long period which had intervened since the last payment without a bona fide effort to perform the contract. A dissenting judge thought that the act deprived the contractee of 1925 of his property without due process. This was true, he thought, because a person who contracted to purchase real estate before Jan. 1, 1930, fully performed his contract, and received a good and sufficient deed, but
The legislature may unquestionably impose additional conditions for the recordation of an instrument and may require adherence to these conditions in the case of instruments executed, but not recorded, at the date of the enactment. However, the newly imposed condition must be reasonable; it must not be so imposed that a conveyance previously valid is rendered ineffective because it is no longer within the ability of the alienee to have his instrument recorded. Thus a statute forbidding recordation of deeds unless the vendor has platted his lands and the plat has been approved by a planning commission, it has been held, would be in violation of vested contract rights if applied to a contract to purchase entered into before there was any such restriction on the vendee's privilege of having his deed recorded.\textsuperscript{146}

Statutes requiring, as a condition precedent to recording, the presentation of a certificate showing that taxes have been paid on the land for a designated period have been sustained when applied to instruments executed subsequent to the statute.\textsuperscript{147} The compelling objection, of course, is that the tax payment requirement is not a regulation of the manner of recording but the imposition of an independent, distinct burden upon the privilege and protection afforded by the recording act, which may even amount to a prohibition. The reasoning of the courts here has been that there is no unwarrantable interference with property rights since the deed is effective to pass title without recordation and that at any rate it is within the power of the legislature to impose

failed to record and thereafter lost his deed, would be deprived of his property without having had his day in court, and without any notice other than the enactment of the statute.


\textsuperscript{147} Van Husen v. Heames, 96 Mich. 504, 56 N. W. 22 (1893); State v. Register of Deeds, 26 Minn. 521, 6 N. W. 337 (1880).
stringent measures for the collection of taxes. However, where the tax record is made conclusive evidence of non-payment of taxes so that the interested party is obligated to pay the tax shown to be due in order to get his instrument recorded, even if, in fact, the tax has been paid or is void, it has been held that the requirement is unconstitutional whether applied retroactively or prospectively.\footnote{148}

**MARKETABLE TITLE ACTS**

As the years go by, the task of tracing titles back to their sources becomes more and more difficult. The resultant multiplication of title defects which hinder the marketability of land has induced the enactment in several states of marketable title statutes.\footnote{149} While the details vary somewhat,

\footnote{148}{State ex rel. Baldwin v. Moore, 7 Wash. 173, 34 Pac. 461 (1893). The court also held that the statute was rather judicial than legislative in character since it in effect declared all taxes shown by the records as a charge upon real estate to be lawful and practically authorized the state to compel payment of illegal demands.}


The Michigan statute provides in part: "Sec. 1. Any person, having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for 40 years, shall at the end of such period be deemed to have a marketable record title to such interest, subject only to such claims thereto and defects of title as are not extinguished or barred by application of the provisions of succeeding sections of this act and subject also to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed and which have been recorded during said 40 year period: Provided, however, That no one shall be deemed to have such a marketable record title by reason of the terms of this act, if the land in which such interest exists is in the hostile possession of another.

"Sec. 3. Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all interests, claims, and charges whatsoever the existence of which depends in whole or in part
the object of all of these statutes is to extinguish old claims and interests which do not appear on the public records within a specified period and which have not been revived on the records so as to call them to the attention of prospective purchasers and mortgagors. The effect is to relieve the searcher of title from the necessity of going back more than a specified number of years. Marketable title statutes have some aspects of the ordinary statute of limitations; both are directed to the same objective, the achievement of certainty in titles. But the idea underlying the ordinary statute of limitations is not the same as that underlying a marketable title statute. Statutes of limitations are based upon

upon any act, transaction, event, or omission that occurred prior to such 40 year period, and all such interest, claims, and charges are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, That any such interest, claim, or charge may be preserved and kept effective by filing for record during such 40 year period, a notice in writing, duly verified by oath, setting forth the nature of the claims. No disability or lack of knowledge of any kind on the part of anyone shall suspend the running of said 40 year period. For the purpose of recording notices of claim for homestead interests the date from which the 40 year period shall run shall be the date of recording of the instrument, non-joinder in which is the basis for such claim. Such notice may be filed for record by the claimant or by any other person acting on behalf of any claimant who is:

(a) Under a disability,
(b) Unable to assert a claim on his own behalf,
(c) One of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

"Sec. 6. This act shall be construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons dealing with the record title owner, as defined herein, to rely on the record title covering a period of not more than 40 years prior to the date of such dealing and to that end to extinguish all claims that affect or may affect the interest thus dealt with, the existence of which claims arises out of or depends upon any act, transaction, event or omission antedating such 40 year period, unless within such 40 year period a notice of claim as provided in section 3 hereof shall have been duly filed for record. The claims thereby extinguished shall mean any and all interests of any nature whatever, however denominated, and whether such claims are asserted by a person sui juris or under disability, whether such person is within or without the state, and whether such person is natural or corporate, or private or governmental."

The Minnesota and Wisconsin statutes are framed as statutes of limitations. The statutes of Indiana, Michigan, Nebraska, North Dakota, and South Dakota define what shall constitute a marketable title.
the concept that rights of action should be seasonably pursued. The concept behind the marketable title statutes is that land titles should be made more freely marketable by simplifying title search and thereby making the record title safer for the prospective purchaser or mortgagee to rely upon. The policy of this legislation is to realize more fully the public interest which originally induced the recording acts.

When the marketable title statute goes into effect, ancient claims and interests within the purview of the statute will be faced with possible extinction. The owners may contend that they are being deprived of property without due process. Most of the serious constitutional challenges can be avoided at the outset if a reasonably remote date or time has been selected by the legislature, for then the number of subsisting valid claims will be small. But some valid interests there may be. In spite of the highly commendable object of the statute, it is really very doubtful whether the courts would be willing to allow the extinction of substantial interests for the sake of promoting marketability. It has been the assumption of the framers of the existing marketable title statutes that existing claims cannot be arbitrarily wiped out, even if they are ancient, but that owners of ancient claims and interests must be afforded means of preserving them and given a reasonable period within which to take the necessary steps.\(^{151}\)

Most of the statutes enacted to date provide for the preservation of existing old interests by recordation. This is simple and easy. If the owner fails to take this step, he has only himself to blame if his interest is extinguished. The constitutionality of imposing this duty would seem to have been

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\(^{151}\) One year is the time allotted under most of the existing statutes. The problem of what is a reasonable time to preserve an interest under a marketable title statute is much the same problem as arises when a period of limitations is retroactively shortened. See p. 42 *supra*. 


settled beyond question by the decisions sustaining retroactive recording statutes.\textsuperscript{152} At least one statute, however, requires the commencing of an action to preserve an existing claim which would be extinguished by the statute.\textsuperscript{153} As to owners who presently have a mature cause of action, there would seem to be no valid objection to this sort of requirement. It is like shortening the period of limitations, which offends no constitutional rights if a reasonable time is allowed for the bringing of the action.\textsuperscript{154} But if the interest has not become possessory, there may not be available any action which the owner can bring, with the result that the interest is extinguished without the owner’s ever having a real opportunity to preserve it. This is likely to be held to offend constitutional principles.

The application of marketable title statutes to future interests is discussed subsequently in Chapter 4.\textsuperscript{155}

As pointed out previously, there is a considerable body of authority holding that an owner of a fee-simple title is constitutionally entitled to ignore assertions to title not in the form of a suit or adverse possession.\textsuperscript{156} This principle, it is true, can have little relevancy to most of the existing marketable title statutes for, generally speaking, they operate only in favor of persons in actual or constructive possession\textsuperscript{157} who can show a connected chain of record title, or in favor of purchasers or mortgagees from such persons. In other words, only persons not in possession are required to take steps to save their interests. But if any legislature should undertake

\begin{itemize}
\item \textsuperscript{152} \textit{Supra} p. 73.
\item \textsuperscript{154} \textit{Supra} p. 42.
\item \textsuperscript{155} P. 227 et seq. The comments in note 69 \textit{supra} this Chapter in respect to extinction of marital interests by retroactive statutes of limitations are also apropos to marketable title statutes.
\item \textsuperscript{156} \textit{Supra} p. 47.
\item \textsuperscript{157} The Michigan statute quoted above \textit{supra} note 149 does not require an affirmative showing of possession. It requires only the negative showing of no one in hostile possession.
\end{itemize}
to make the record title conclusive evidence of ownership, especially if the period beyond which search need not be made is relatively short, there could conceivably be instances in which the actual owner in possession but who was not the record title holder (e.g., one who had acquired his title by adverse possession) would find himself about to be divested of ownership in favor of the record title holder. Thus the above constitutional principle would come directly into play. It was upon this very principle that the Supreme Court of Kansas \(^{158}\) held to be in violation of the Fourteenth Amendment a statute \(^{159}\) which provided that where plats and deeds from the plattors, conveying lots or blocks, had been on record for more than 25 years prior to the effective date of the statute, such deeds should be conclusively presumed to have conveyed perfect title notwithstanding any defect in the title of the grantor or the failure of the grantor’s spouse to join in the conveyance. The statute further provided that the presumption should not be applied in any action brought within one year from the date that the statute took effect. The court was constrained to hold that the statute was unconstitutional because it had the effect of divesting one person of his title and transferring it to another without regard to the possession and occupancy of the owner whose title had never been alienated, unless his title and ownership were asserted in an action within the year allowed by the statute. Said the court:

\(^{158}\) Murrison v. Fenstermacher, 166 Kan. 568, 203 P. 2d 160 (1949). This was a suit to compel defendant to furnish plaintiff with a merchantable title and thus perform a contract for the purchase and sale of land between plaintiff and defendant. Defendant’s abstract showed that a patent had been issued by the United States to one Lennon in 1865 but did not show any conveyance from Lennon to any one from whom defendant claimed. The land in question was shown to have been platted by one Sheeran in 1893 and recorded Dec. 23, 1893. The plattor conveyed the lots in question to defendant’s ancestor by warranty deed dated Dec. 5, 1895. This deed was recorded.

“In effect they [the words of the statute] simply provide that as between two parties, neither of whose rights to a tract of real estate have been adjudicated, one person is the owner and the other is not.”

"... [T]he statute does not purport to run in favor of one in possession under deeds such as are described therein against one who may be out of possession but is nevertheless the holder of a title which so far as the record shows has never been alienated. Under its terms such deeds are conclusively presumed to convey perfect title irrespective of possession and occupancy by the owner of the prior unalienated title and even though he may actually have been in possession thereunder he is required to come in and defend it in order to avoid the presumption and establish his title.”

PROCEEDINGS TO QUIET TITLE AND TO REGISTER TITLE

The legislature has power to provide for special proceedings, in the nature of proceedings in rem, to fix the status of land, and to declare the nature of the titles and interests therein and the person or persons in whom such titles and interests are at the time vested. It has been contended unsuccessfully in numerous cases that statutory proceedings for quieting title and proceedings for the registration of title under the Torrens Acts deprive the owner of his interests without due process. When a statute has been declared invalid, this was not done because there was a deprivation of substantive rights, but because there was a failure to provide adequate procedural due process, which may be a matter of not assuring adequate notice or of delegating judicial

162 Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129 (1907).
163 State v. Guilbert, 56 Ohio St. 575, 47 N. E. 551 (1897).

It is universally held that notice by publication as to unknown and nonresident persons satisfies the requirement of due process. Jacob v. Roberts, 223 U. S. 261 (1912); American Land Co. v. Zeiss, 219 U. S. 47 (1911); Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129 (1907); Loring v. Hildreth,
functions to administrative officers. If the purpose and effect of proceedings for quieting title and registration of land were to give the petitioner an absolute title, clear of all encumbrances, there would manifestly be a taking of property forbidden by the Fourteenth Amendment, but the purpose of such proceedings is merely to empower the court or administrative agency to determine the actual status of the title.

If notice by publication did not satisfy the constitutional requirement of due process, "a judicial proceeding to clear titles against all the world hardly is possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claims,—indeed, certainty against the unknown may be said to be its chief end,—and unknown claims cannot be dealt with by personal service upon the claimant." Tyler v. Judges of Court of Registration, 175 Mass. 71, 73, 55 N. E. 812, 813 (1900). The problem of adequate notice is also discussed Chapter 4, p. 132 et seq.

Notice by publication does result occasionally in what appears to be a deprivation of substantive rights. The owner of an interest fails to see the notice, does not appear, and a judgment is awarded which extinguishes his interest. See McFadin v. Simms, 309 Mo. 312, 273 S. W. 1050 (1925), discussed Chapter 4, p. 152.

164 The early Illinois and Ohio Torrens Acts were held unconstitutional on the ground that they violated the constitutional mandate of separation of powers in that they conferred judicial powers upon registers and examiners of title by empowering these officials to make the primary determination of the status of the title. People v. Chase, 165 Ill. 527, 46 N. E. 454 (1895); State v. Guilbert, 56 Ohio St. 575, 47 N. E. 551 (1897). Probably few courts today would be willing to go along completely with this view. Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129 (1907). In Illinois subsequent legislation of the same general character has been sustained. People v. Simon, 176 Ill. 165, 52 N. E. 910 (1898); Eliason v. Wilburn, 335 Ill. 352, 167 N. E. 101 (1929).

The conferment of final and conclusive power upon administrative officers or quasi-administrative bodies to determine title would probably be held to deprive the parties concerned of procedural due process. However, there is no constitutional objection if initial determination is confided to an administrative officer or agency provided that final determination is entrusted to a regularly constituted court. Tyler v. Judges of Court of Registration, 175 Mass. 71, 55 N. E. 812 (1900); Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129 (1907); Crowell v. Akin, 152 Ga. 126, 108 S. E. 791 (1921).

It has been held not to be a denial of due process, nor an unwarranted invasion of the property rights of a land owner, to provide by statute that the register of titles shall constitute prima facie proof of ownership. Johnson, Inc. v. Warden, 173 P. 2d 838 (Cal. 1946). There is a presumption that a public official has regularly performed his duty.
to the land in question and no more.\textsuperscript{165} It is, therefore, point-
less to contend that the statute fails to provide adequate

\textsuperscript{165} White v. Ainsworth, 62 Colo. 513, 163 Pac. 959 (1917) (Torrens Act); McFadin v. Simms, 309 Mo. 312, 273 S. W. 1050 (1925) (quieting title); Sederquist v. Brown, 225 Mass. 217, 114 N. E. 365 (1916) (land registration); McCarthy v. Lane, 301 Mass. 125, 16 N. E. 2d 683 (1938) (land registration); Petition of Sherman, 106 Misc. Rep. 244, 175 N. Y. S. 627 (1919) (said that Torrens Acts are passed to allow the registration of good titles and not for the purpose of making bad titles good).

A qualification of the statement made in the text above that registration proceedings and proceedings for quieting title are not intended to clear the title of valid encumbrances must be made in respect to a Massachusetts Land Registration Act which authorized the Land Court to register land free of equitable restrictions if the court shall find that such restrictions, though they are valid and have not become inoperative, illegal, or void because contrary to law or injurious to the public interest, ought, nevertheless, not to be enforced. A petitioner for registration was required by the act to pay such damages as were found would be caused by the nonenforcement of the restriction to persons entitled to the benefits of the restriction. Mass. Stat. 1915, c. 112, secs. 1 & 2. In Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N. E. 244 (1917) the Supreme Judicial Court declared the act to be in violation of the Declaration of Rights. The Land Court had found that it would be inequitable to enforce the restrictions in question because the original plan to develop the area for expensive residences was no longer practicable, but it also had found that removal of the restrictions would cause money damages to property owners and render their homes less desirable as residences. The Supreme Judicial Court declared that the respondent property owners had a property right in the equitable servitude, which, if the act were given effect, they would be obliged to surrender and to accept damages in place thereof, not because demanded by the public interests, but because a neighbor so desired for his private aims.

The Chadwick case does not seem to have been decided correctly, inasmuch as the respondent property owners appeared to be no worse off under the act than they would have had the doctrine of changed conditions been invoked as a defense in a suit brought by them to enforce the restrictions. The chief difference appears to have been that the servient owners were permitted to take the initiative instead of having to wait to be sued by the property owners. When a court refuses equitable relief on the ground of changed conditions, the result is to compel the dominant owner to sell his right to the servient owner for such sum as may be assessed for damages, if any. Of course, had the doctrine of changed conditions never been recognized by the Massachusetts courts, the restrictions would have been deprived of vitality by the act, and unless there were some cogent public interest involved, a deprivation of property without due process might seem to be manifest. Also, to the extent that the act permitted removal of restrictions beyond where the courts would have allowed the defense of changed conditions, the constitutionality of the act would be in serious question.

Under the circumstances in the Chadwick case, it was incorrect for the court to say that the public had no interest in the matter. If the restrictions had
compensation for property taken.\textsuperscript{166} Nor is there any unconstitutional taking of property in that the owner may be compelled to spend money to defend his interests against adverse claims.\textsuperscript{167}

When these considerations are borne in mind, it is apparent that it cannot be material whether the interests which are adjudicated in the statutory proceeding have their inception prior to the statute or whether they arose after the statute.

In the states having the Torrens System or other system of land registration, registration is entirely voluntary. Because of the great cost of having the status of title adjudicated so that the title may be registered, it is doubtful that the legislature could compel present owners of property to register their titles.\textsuperscript{168} Only in case of unusual circumstances would ceased to be useful for the purpose for which they were created, it was in the public interest that they be extinguished so that the erection of apartment houses or buildings for business purposes might be allowed.

See Note, \textit{Effect of Changed Conditions Upon Equitable Servitudes}, 31 \textit{Harv. L. Rev.} 876 (1918), expressing approval of the decision in the Chadwick case.

\textsuperscript{166}White v. Ainsworth, 62 Colo. 513, 163 Pac. 959 (1917).

\textsuperscript{167}Pacific Live Stock Co. v. Lewis, 241 U. S. 440 (1916).

\textsuperscript{168} The precise point has apparently never been determined by the courts. However in Anderson v. Shepard, 285 Ill. 544, 121 N. E. 215 (1918) the following statute was held unconstitutional: “It shall be the duty of all executors and administrators, appointed after the adoption of this act and trustees holding title or power of sale under wills admitted to probate after that date, to apply within six months after their appointment, to have registered the titles to all nonregistered estates and interests in land (situated in any county in which this act at the time is in force), which the several decedents they represent might have registered in their lifetime in their own right. . . .” Laws of Ill. 1903, p. 121. It was held that the statute deprived the heirs of property without due process in that it sought to invest the administrator or executor with the power to register the title to the land against the wishes of the heirs who were the owners. Personal property falling to the heirs might be expended for the payment of the costs of the proceeding. There might be void tax claims or other invalid charges against the land, and against which the owner could rest in security because they could not be enforced against his property, but upon an application to register title the applicant might be compelled by the court to reimburse the claimant.
such interference with property rights probably be tolerated.\textsuperscript{169}

On several occasions in American history, emergencies have prompted the enactment of legislation authorizing proceedings for the determination of title. The Burnt Record Acts enacted as a result of the Chicago fire and the San Francisco fire were specifically designed to remedy the confusion caused by destruction of public records in those holocausts. Both the Illinois and the California statutes were sustained.\textsuperscript{170} The Illinois statute limited the time for opening a decree made under the statute to one year after its entry. This, however, was only a limitation of actions and quite within the legislative power. Another example of emergency legislation was the legislation adopted in New York shortly following the Revolutionary War, which provided for the appointment of commissioners with full power to determine all controversies respecting titles and claims in a certain county (which arose as a result of conflicting patents to war

\textsuperscript{169} Compulsory adjudication of water rights has been upheld in the arid states on the ground that the welfare of the state is dependent upon certainty as to water titles. Pacific Live Stock Co. v. Lewis, 241 U. S. 440 (1916); Eden Irrig. Co. v. District Court, 61 Utah 103, 211 Pac. 957 (1922).

\textsuperscript{170} Bertrand v. Taylor, 87 Ill. 235 (1877); American Land Co. v. Zeiss, 219 U. S. 47 (1910).

The California statute provides: "Whenever the public records in the office of the county recorder have been, or shall hereafter be, lost or destroyed, in whole or in any material part, by flood, fire, earthquake . . . , any person who claims an estate of inheritance, or for life in, and who is by himself or his tenant, or other person, holding under him, in the actual and peaceable possession of any real property in such county, may bring and maintain an action \textit{in rem} against all the world . . . , in the superior court for the county in which such real property is situate, to establish his title to such property and to determine all adverse claims thereto. Any number of separate parcels of land claimed by the plaintiff may be included in the same action." Stats., Ex. Sess. 1906, p. 78; as amended, Gen. Laws 1944, Act 1026, sec. 1 (Deering). This statute was upheld in American Land Co. v. Zeiss. Most of the emphasis of the court, however, was placed upon the procedural aspects of the statute.

veterans) and limited the time within which an appeal could be taken.\textsuperscript{171}

However, even in these occasions of emergency, the proceedings were not compulsory in the sense that an affirmative duty was explicitly imposed by the statutes on each property owner to assert or register his title if he did not want to lose it, but only mandatory in that the property owner would probably deem taking of affirmative steps to be the only wise course of action lest some other claimant be adjudged to have the title in a proceeding in which he failed to assert his rights.

Although no one is required under the Torrens Acts to register his land unless he sees fit to do so, when an owner does bring his land under the act, he presumptively does so with knowledge of all its provisions and requirements, including its obligations. He consequently cannot be heard to complain that he is deprived of property without due process if he loses his title to a \textit{bona fide} purchaser through the fraud of an agent to whom the certificate of title had been entrusted.\textsuperscript{172}

\textbf{II. Transfers at Death}

Could the legislature repeal the statute of descents and distributions, entirely abrogate the power of testamentary disposition, and do away altogether with the right to inherit property? Obviously the question is academic, but the courts have from time to time gratuitously offered their opinions.

\textquotedblleft... \textit{[T]he} owner has no right, other than that created by statute, to transfer his property at death, either by will or intestate succession—no \textquoteleft right\textquoteright{} in that respect, therefore,

\textsuperscript{171} Jackson ex dem. Hart v. Lamphire, 3 Pet. 280 (U. S. 1830). The statute was held not to impair the obligation of the deeds.

\textsuperscript{172} Eliason v. Wilborn, 335 Ill. 352, 167 N. E. 101 (1929), aff'd 281 U. S. 457 (1930).
which is not subject to change by the Legislature at any time." 173

The Supreme Court of the United States has said that the power to dispose of property at death "has always been considered purely a creature of statute and within legislative control." 174

"Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance." 175

The Supreme Court of Iowa tells us that:

"The legislature may restrict the succession of estates of decedents in any manner, and, if it pleased, could absolutely repeal the statute of wills and of descent and distribution. It could, in the exercise of sovereignty, take any or all property, upon the death of the owner, for the payment of decedent's debts, and apply the residue to public uses." 176

In answer to the argument that the privilege of the citizen to dispose of his property by will is a constitutional right which the legislature cannot destroy or abridge, the Supreme Court of Ohio replied:

"We concede that the right to acquire property implies the right to dispose of it. But the inalienable rights here de-


174 United States v. Perkins, 163 U. S. 625, 627 (1896). The question was whether personal property bequeathed to the United States was subject to an inheritance tax under state law.

175 Irving Trust Co. v. Day, 314 U. S. 556, 562 (1941). This case had to do with a New York statute which extended to the surviving spouse the privilege of electing to take in lieu of the provision under the deceased spouse's will a share in the estate as in intestacy. See infra notes 195, 208, 209.

176 In re Emerson's Estate, 191 Iowa 900, 905, 183 N. W. 327, 329 (1921). The question was as to the power of the legislature to deprive one of the right to inherit from the person whom he has killed. Also in In re Evan's Will, 193 Iowa 1240, 1243, 188 N. W. 774, 775 (1922) there is dictum to the effect that the legislature can if it wishes abolish the power of testamentary disposition in toto. This case involved the question of whether a soldier under lawful age while in actual service can make a valid will.
clared, as well as those implied, are possessed by living, not by dead men." 177

Similar language may be found in other cases. 178

With such broad statements the Wisconsin courts have taken issue (also in dictum merely):

177 Patton v. Patton, 39 Ohio St. 590, 597 (1883). Statute provided that a bequest to any benevolent, religious, educational or charitable purpose shall be invalid and void if the testator dies within twelve calendar months from the execution of the will, leaving issue of his body living or their legal representatives.

178 In Ostrander v. Preece, 129 Ohio St. 625, 631, 196 N. E. 670, 673 (1935), appeal dismissed 269 U. S. 543 (1935), it was said: "The right to transmit or inherit property is not an inherent or natural right . . . but is purely a statutory right and subject to legislative control and restriction." This case deals with the constitutionality of a statute prescribing the disposition of the property of a decedent when there is no evidence of the order of the death of the decedent and the death of the heir or devisee. See footnotes 212, 216, 219, 222 infra.

In Brettun v. Fox, 100 Mass. 234, 235 (1868) the Supreme Judicial Court of Massachusetts declared: "The power to dispose of property by will is neither a natural nor a constitutional right, but depends wholly upon a statute, and may be conferred, taken away, or limited and regulated, in whole or in part, by the legislature . . ." This case held that an estate of homestead created by statute could not be affected by the will of the householder.

Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615, 617 (1944): "The right to receive or dispose of property by last will and testament is not an inherent right, nor is it one that is guaranteed by the fundamental law. Nowhere in the federal Constitution is there any attempt to treat of the matter of disposition of property by will, no reference being made to the subject of testamentary alienation of property, either directly or by implication. . . Therefore, the right of testamentary disposition of property does not emanate from the organic law, as contended by counsel, but is a creature of the law derived solely from statute without constitutional limitation. Accordingly, the right is at all times subject to regulation and control by the legislative authority which creates it. The authority which confers the right may impose conditions thereon, such as limiting disposition to a particular class or fixing the time which must ensue subsequent to the execution of the will before gifts to a particular class shall be deemed valid; or the right to dispose of property by will may be taken away altogether, if deemed necessary, without private or constitutional rights of the citizen being thereby violated." The statute involved provided that where testator is survived by issue or spouse, a devise or bequest for charitable purposes is void unless the will is duly executed at least six months prior to the death of the testator.

Further quotations would be pointless. Other cases listed according to the issues involved are:

Estate and inheritance tax cases: State ex rel. McClintock v. Guinotte, 275 Mo. 298, 204 S. W. 806 (1918); Dillard v. New Mexico State Tax
“It [the testamentary power] is not a mere privilege which legislatures can directly or unreasonably regulate to destroy. It is not an incident of the possession of property which courts can deal with in any spirit of mere discretion. It is a right, absolute, which every person of mature mind and disposing memory may exercise subject to some regulations to prevent abuse of it and to safeguard it, as he sees fit.”

In *Nunnemacher v. State* the court flatly rejected the proposition put forth by courts of other jurisdictions that the right to take property by devise or descent is purely the creature of the law, a benefice, merely, which the state has kindly bestowed upon persons and consequently which it may take away when and as it pleases. This theory, said the court, proceeds from the false assumption that rights flow from

Comm., 53 N. M. 12, 201 P. 2d 345 (1949); Renwick v. Martin, 126 N. J. Eq. 564, 10 A. 2d 293 (Ch. 1940); Matter of Del Drago's Estate, 287 N. Y. 61, 38 N. E. 2d 131 (1941); In re Inman’s Estate, 101 Ore. 182, 199 Pac. 615 (1921); In re Knowles' Estate, 295 Pa. 571, 145 Atl. 797 (1929); In re Tack’s Estate, 325 Pa. 545, 191 Atl. 155 (1937); In re Clark’s Estate, 100 Vt. 217, 136 Atl. 389 (1927); In re Sherwood’s Estate, 122 Wash. 648, 211 Pac. 734 (1922).

Cases involving construction problems: Phillips v. Phillips, 213 Ala. 27, 104 So. 234 (1925); Porter v. Union Trust Co. of Indianapolis, 182 Ind. 637, 108 N. E. 117 (1915).

Cases involving testamentary capacity: In re Sharp’s Estate, 133 Fla. 802, 183 So. 470 (1938); Woodville v. Pizzati, 119 Miss. 442, 81 So. 127 (1919).

Cases involving defectively executed wills: In re Tyrell’s Estate, 17 Ariz. 418, 153 Pac. 767 (1915); In re Wilkins’ Estate, 54 Ariz. 218, 94 P. 2d 774 (1939); Pfaffenberger v. Pfaffenberger, 189 Ind. 507, 127 N. E. 766 (1920); In re Noyes’ Estate, 40 Mont. 178, 105 Pac. 1013 (1909).

Illegal conditions in wills: Girard Trust Co. v. Schmitz, 129 N. J. Eq. 444, 20 A. 2d 21 (Ch. 1941); Vestal v. Pickering, 125 Ore. 553, 267 Pac. 821 (1928).

Further cases are cited in Page, *Wills*, sec. 25 (Lifetime ed.).

179 Ball v. Boston, 153 Wis. 27, 31, 141 N. W. 8, 10 (1913). The court made these observations in pointing out that courts ought to be very hesitant to overrule the expressed desires of the testator and should not let themselves be carried away by an exaggerated idea of the rights of disappointed relatives.

180 129 Wis. 190, 108 N. W. 627 (1906). The question actually involved was the validity of an inheritance tax statute, which the court sustained.

The Wisconsin courts agree, however, that reasonable restrictions on the testamentary power and the right to inherit are permissible. Hood's Estate, 206 Wis. 227, 239 N. W. 448 (1931) *infra* note 221. The results reached in Wisconsin do not actually differ from those reached in other states.
the government. While this theory had great vogue in Europe, it has never had any place in America. The Declaration of Independence recognizes that rights emanate from the people, and that governments are formed, not to give rights, but to secure rights which are already inherent in the people. The privilege to leave property by will and the right of descendants to succeed to the ownership of property has been recognized from the dawn of human history:

“So clear does it seem to us from the historical point of view that the right to take property by inheritance or will has existed in some form among civilized nations from the time when the memory of man runneth not to the contrary, and so conclusive seems the argument that these rights are a part of the inherent rights which governments, under our conception, are established to conserve, that we feel entirely justified in rejecting the dictum so frequently asserted by such a vast array of courts that these rights are purely statutory and may be wholly taken away by the Legislature.”

A middle view, which would not leave the power of the legislature untrammeled and yet not surround the power to dispose of property or the right to inherit with a kind of sanctity, is that expressed by the United States Supreme Court in Campbell v. California wherein it was said:

181 129 Wis. 190, 202, 108 N. W. 627, 629. This language was approved in Estate of Wilkins, 192 Wis. 111, 113, 211 N. W. 652, 653 (1927). The point in the latter case was whether a beneficiary under a will could take if he murdered the testator. See also Beals v. State, 139 Wis. 544, 555, 121 N. W. 347, 350 (1909), where it is said that the right to inherit and power to dispose of property by will are natural rights which cannot be entirely abrogated by the legislature, but that this does not prevent the legislature from imposing an inheritance tax. Taxes are frequently levied upon transactions or occupations which are matters of inherent and natural rights.

182 200 U. S. 87 (1906). This case involved the validity of a California inheritance tax statute imposing a charge on collateral inheritances and on bequests and devises. The contention was that the statute was repugnant to the Fourteenth Amendment because it subjected brothers and sisters of a decedent to the burdens of the tax and did not subject to any burden such strangers to the blood as the wife or widow of a son or the husband of a daughter of a decedent.
The Fourteenth Amendment does not deprive a State of the power to regulate and burden the right to inherit, but at the most can only be held to restrain the conception of judgment and discretion, and which would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority. 183

The courts have been able to make extravagant assertions concerning the power of the legislature because the extent of the power has never really been put to test. While changes in the law of inheritance and testamentary disposition often seem to be unnecessary and without particular purpose, they rarely offend our sense of justice. Furthermore, a generous portion of the statements about unlimited legislative power has come from cases where such pronouncements were in no way germane to the situations concerned, as, for example, cases dealing with construction problems, with wills alleged to be defectively executed or with inheritance and estate taxes. The tax cases, to be sure, come very close to presenting what might appear to be an appropriate occasion for the delineation of the legislative power over disposition of property at death. Taxes may leave little or nothing to dispose of or to inherit. But the fact that the government may absorb most or all of an estate in taxes does not necessarily mean that it may confiscate or appropriate the estate. 184

183 200 U. S. 87, 95 (1906).
184 This was pointed out in Nunnemacher v. State, 129 Wis. 190, 203, 108 N. W. 627, 630.

However, some courts have taken the view that an inheritance tax is not a tax at all but simply a taking by the state of a share of the estate. In Strauss v. State, 36 N. D. 594, 601, 162 N. W. 908, 908 (1917) it was said: "The so-called inheritance tax, indeed, is, strictly speaking, not a tax at all. It is rather a permission on the part of the state that the heirs and legatees may take the bequests which are made to them less certain sums which are retained by it. In other words, it is a declaration that the state, instead of claiming all of the estate of a decedent, will only retain a certain portion thereof and will allow the legatees to receive the remainder and according to the wishes of the testator, but less certain sums which it itself reserves. It says, This property is ours, but we will allow you certain legatees to take a certain portion thereof and under certain conditions."
power to tax, after all, is plenary and admits of few limitations other than that the exaction must be for the purpose of raising public revenues. It is submitted that if a state were actually to engage in a program of abolishing private ownership by taking away absolutely the power to dispose of property at death and the right to inherit, or were to enact unjust and unreasonable statutes, the courts, so long as they remained free and independent, would refuse to apply such statutes.

But whether the dicta are truly hyperboles or not, the writer has assumed that all constitutional doubts cannot be dispelled simply by saying that the legislature is all powerful in its control over the disposition of property at death. He has undertaken to analyze the decided cases, first from the point of view of the constitutional rights of the owner of property who desires to dispose of it at death, and secondly from the point of view of the constitutional rights of the heirs and devisees of the deceased owner.

THE POWER OF TESTAMENTARY DISPOSITION

It is accepted without dissent that in order for a will to be legally effective the formalities prescribed by the statutes must be adhered to. Nowhere in the Anglo-American law is the power of testamentary disposition recognized in the sense that one's bare wishes must be recognized and given effect.\(^\text{185}\) The power of the legislature to prescribe formalities is too well established to admit of argument. However, there is a palpable difference between requiring the exercise of the power to be in accordance with fixed formalities and denying the power in whole or in part. To say that no will is valid unless its form follows an acceptable pattern does not

\(^{185}\) For an interesting historical discussion of the will see McMurray, Liberty of Testation and Some Modern Limitations Thereon, 14 Ill. L. Rev. 96 (1920).
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answer the question of the extent of the legislature’s power to delimit the power of testamentary disposition. And because a testator may not transgress legislative policy in regard to tying up property, or may not impose certain conditions on his devises and bequests, or may not dispose of his property entirely as he pleases, it does not mean that he can be prevented altogether from disposing of his property. Reasonable restrictions can be imposed on the enjoyment, use, and disposition of property.

An eminent authority states that the power to make a will is not a property right or vested interest:

“IT did not exist for realty at common law, nor at one time for more than a fraction of a testator’s personalty. It is therefore not a right protected by any of the constitutional provisions whereby property is protected, which is sometimes expressed by saying that it is not a natural right; nor an inherent right; but it is purely a statutory right, subject to the complete control of the legislature.” 186

This statement is premised upon the dicta noted above and upon dicta in other cases, including some having to do with the prescription of formalities. The rationale which he assigns for the view that the power of testamentary disposition is not a vested interest is not very persuasive. The fact that an interest had its origin in a statute rather than in the common law does not mean that it is not protected by the constitutional guarantees. 187 However, a very good position can

186 I Page, Wills, sec. 25 (Lifetime ed.).
187 “Vested rights may be created, either by the common law, by statute, or by contract. And it makes no difference as to the method of their creation; they are entitled to the same protection.” Gladney v. Sydnor, 172 Mo. 318, 326, 72 S. W. 554, 556 (1903).

Directly contrary to Page’s supposition is the recognition by the courts that interests arising under community property statutes cannot arbitrarily be taken away by subsequent legislation. Cooke v. Cooke, 65 Cal. App. 2d 260, 150 P. 2d 514 (1944); Wissner v. Wissner, 201 P. 2d 837 (Cal. 1949); Pritchard v. Citizens’ Bank, 8 La. 130 (1835); Kearse v. Kearse, 276 S. W. 690 (Tex. 1925); Guye v. Guye, 63 Wash. 340, 115 Pac. 731 (1911). See Chapter 6, p. 300.
be taken that the power to dispose of property by will is not a constitutionally protected interest. The individual whose power has been impinged upon will invariably be dead when the question of deprivation of constitutional rights arises. The dead have no constitutional rights. Thus, so far as the testator is concerned, it is hard to see how there can be any question of the validity of the statute, even if it is subsequent to the acquisition of the land which the decedent sought to devise, so that he was retroactively deprived of a power of disposition which he would have had if he had died previous to the statute. Furthermore, when the execution of the will and the death of the testator are both subsequent to the enactment of the statute, nothing more needs to be said than that the testator should have taken the statute into account and have disposed of his property _inter vivos_ if need be. Anyway, it is never the owner of land who complains of the loss of the power to will away his property, but the devisee whose expectations are thwarted. The devisee's claim to have a vested interest will be considered subsequently.

On the other hand, the concept that the state can do away with the power of devising altogether has been strongly condemned as an old, antiquated rule of law which came from the Norman Conquest and which is out of accord with the Bill of Rights:

"This means that every man has a right to acquire property by gift, or purchase; that government is instituted to protect the people, and not to rob either the living or the dead. The right to acquire and protect property is no greater that the right to dispose of it by sale or gift. According to the fundamental principles of right, when, by any just means, a person acquires title to property, and when he can no longer use his property he has a just right and is under moral obligations to devise and transfer it to his heirs. The state does not stand in the place of William the Conqueror. It is no lord paramount. It is merely a corporate entity which we, the people, have devised and created for the purpose of protecting our
natural rights. It has no kingly prerogatives. It does not exist by divine right. It is not the natural heir of any person, and it has no right to rob the citizen who pays his just and appropriate share of the public burdens." 188

The very fact that the courts have on occasion seriously considered the contention that the power to dispose of property by will is an incident of ownership which the legislature is powerless to take away would seem to indicate that they are not completely willing to disregard the interests of the dead (or, at least, not completely willing to put the claim of a devisee upon the basis of a mere sufferance). In *Sturgis et al. v. Ewing* 189 it was objected that the legislature transcended its constitutional powers if the act in question (which allowed the widow to elect to take one-half of her husband's land in lieu of dower) were to be applied to property acquired by the testator before the passage of the act. The answer of the court was as follows:

"Mr. Ewing's title to this land was as full, complete and absolute after as before the passage of the law. The fee-simple absolute was still in him, and was as much subject to his absolute use, dominion and control as ever." 190

"The power to control the disposition of our possessions after our demise is conferred by municipal laws, and is purely a subject of municipal regulation. It is not a part of the right of property itself, but is only an incident to it, as the law, for


189 18 Ill. 176 (1856). The statute provided that if a husband die leaving no children or descendants of children, his widow may elect to have in lieu of dower, one-half of all his real estate absolutely. Rev. Stat. 1845, c. 34, sec. 15. William G. Wein, who died subsequent to the statute, devised his estate to various parties including his widow. He was survived by no children or descendants of children. His widow renounced the provisions of the will and elected to take in lieu of dower as provided in the statute. Under the law as it stood when the land was acquired, the husband was empowered to devise all of his real estate as he pleased, saving to the widow her right of dower.

190 18 Ill. 176, 183.
the time being, makes it so. Without this power, our title may be complete and absolute. By devising our property we do not lessen or impair, in the least degree, our title to the property devised. We may change the devise, or alienate it, at pleasure, at any time during our lives; and, until our demise, the devisee acquires no sort of right or title to it. When we acquire property, we do not acquire with it, and as a part of it, the right to devise it in any particular mode, or even to devise it at all.”

Similarly in O'Brien v. Ash et al. it was claimed that insofar as the statute deprived the testatrix of the power to dispose of any estate which she had at the time of or prior to the passage of the same, the statute was null and void because it contravened the section of the Missouri Constitution prohibiting retroactive legislation and violated the due process clause of the Fourteenth Amendment. The court said:

“No right of the plaintiff's wife to the land in controversy is or can be invoked in this case to call for a discussion of the questions of vested rights of the wife. She is dead, and it is now a question of how the property belonging to her during life, is to be disposed of, and in that subject she could not be said to have had a vested interest which the act of 1895 in

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191 18 Ill. 176, 184.
192 169 Mo. 283, 69 S. W. 8 (1901). This was an action in partition. Plaintiff claimed one-half of the land of his deceased wife. Defendants were devisees of deceased. Mrs. O'Brien had acquired the land in 1890. She died in 1898, without any child or other descendants in being capable of inheriting. By will dated 1897 she undertook to devise all of the real estate in controversy to the defendants. Laws 1895, p. 169 provided: "When a wife shall die without any child or other descendants in being capable of inheriting, her widower shall be entitled to one-half of the real and personal estate belonging to the wife at the time of her death, absolutely, subject to the payment of the wife's debts." Mo. Rev. Stat. 1949, sec. 469.130.

Accord, Spurlock v. Burnett, 183 Mo. 524, 81 S. W. 1221 (1904); Ferguson v. Gentry, 206 Mo. 189, 104 S. W. 104 (1907) (marriage and acquisition of land both occurred prior to statute).
193 “That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly.” Mo. Const. 1875, Art. II, sec. 15; now, with insignificant modifications, Mo. Const. 1945, Art. I, sec. 13. See Chapter 2, p. 13, for a discussion of the meaning given this provision.
any way disturbed. The chief difficulty that has arisen in this controversy has been in the failure of appellants' counsel to recognize the distinction between the right to own and hold property and the right to dispose of same by will. The one is a natural right of the citizen, which, when acquired under existing laws, becomes a vested right, and not subject to be defeated by subsequent legislation; the other a creation of legislative enactment, and subject at all times to legislative regulation and change. So long as plaintiff's wife was alive to enjoy the use of her property, it belonged to her, free from legislative interference, and the act of 1895 could have no effect or influence upon it, or of her use or disposition of it whatever; but when death came and she could no longer enjoy it, her acquisition ceased, and with it the right to direct its future use and ownership only as the legislative will was indicated by the statute then in force upon that subject.”

There are other cases involving statutes which inhibit the power of testamentary disposition in which the courts were asked to protect the rights of the decedent. It is really not

194 169 Mo. 283, 297, 69 S. W. 8, 12 (1901).
See also Key v. Key, 134 Md. 418, 421, 106 Atl. 744, 746 (1919) wherein it was said: “The statute it will be seen operates only upon property owned and belonging to a person at the time of his or her death, and does not in any way change or divest rights or estates in property already descended or vested, nor does it affect the enjoyment and ownership of property by the owner during his life.” The statute in question (Acts 1916, c. 325, sec. 3) provided: “A surviving husband or widow shall take, as heir, the same share or proportion in lands, tenements or hereditaments within this State belonging to the deceased spouse, at the time of his or her death, though such deceased spouse die testate, which such surviving husband or widow would take in the personal property of a resident spouse so dying testate . . .” The testator's will made no devise or bequest to his wife.

195 The legislation involved in the following situations is but a small selection from the many statutes to be found in all jurisdictions which inhibit the power of testamentary disposition. The cases were selected for mention because the courts in determining the validity of the legislation gave some consideration to rights the decedent might have had.

It is within the power of the legislature to declare gifts and devises of lands, or any interest therein, in favor of any religious or ecclesiastical organization to be null and void. Blackbourn v. Tucker, 72 Miss. 735, 17 So. 737 (1895); Patton v. Patton, 3 Ohio St. 590 (1883) (bequest to be void when testator survived by issue, if will executed less than twelve months prior to testator's death); Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615 (1944) (bequest to be void when testator survived by issue or spouse, if will executed less than six months prior to testator's death); In re Beck’s Estate, 44 Mont. 561,
surprising that the courts have usually dismissed such matters with a flat statement that the statute is valid. The restrictions imposed on the testamentary power have not been unreasonable; most of them have been imposed to prevent the testator from ignoring obligations to the surviving spouse and family.

An examination of the cases indicates that it has not been considered to be constitutionally material that the will of the decedent was executed prior to the statute which restricts the

121 Pac. 784 (1912). The purpose of such legislation, it has been suggested, is to prevent one who will not be charitable at his own expense from being so at the expense of those who are, or should be, the natural objects of his bounty. Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615 (1944); Blackbourn v. Tucker, 72 Miss. 735, 17 So. 737 (1895).

A legislature may provide that a devise of land can be made only to natural persons and to such corporations as are created under the laws of the state and are authorized to take by devise. United States v. Fox, 94 U. S. 315 (1876). A statute is valid which declares that, with certain exceptions, devises and bequests to foreign countries, cities and bodies politic shall be void. Estate of Weeks, 154 Kan. 103, 114 P. 2d 857 (1941).

The privilege of disinheriting a spouse may be taken away. Irving Trust Co. v. Day, 314 U. S. 556 (1941) (widow allowed share under statute in spite of antenuptial agreement entered into prior to the statute). The legislature, in other words, may continue against the estate of the decedent the social obligations and responsibilities of the marriage. The householder may be deprived of the power of willing away the homestead. Brettun v. Fox, 100 Mass. 234 (1868); Thomas v. Williams, 51 Fla. 332, 40 So. 831 (1906).

The privilege of devising all his property to his wife; it may limit the share which the widow can take to a child’s portion. Leffler v. Leffler, 151 Fla. 455, 10 So. 2d 799 (1942); Adams v. Adams, 147 Fla. 267, 2 So. 2d 855 (1941), appeal dismissed for want of a substantial federal question, 314 U. S. 572 (1941). The Leffler and Adams cases involved the Florida Step Mother Act, for which see note 201 infra.

The legislature may limit the time within which application for probate of the will may be made. State ex rel. Bier v. Bigger, 352 Mo. 502, 178 S. W. 2d 347 (1944).

It has been held not to be a denial of equal protection of the law to restrict a married woman’s power to dispose of her property without the consent of her husband without imposing a similar restriction on the power of a married man to devise his property without the consent of his wife. In re Mahaffay’s Estate, 79 Mont. 10, 254 Pac. 875 (1927). This decision was predicated upon the historical differentiation of the property rights of men and women and upon the ground that the two classifications are natural and reasonable, and that, furthermore, the interpretation of the equal protection clause should not be pressed to a dryly logical extreme.
testamentary power, provided always that the death of the testator occurs subsequent to the effective date of the statute. Some courts have declared as a general principle that the law in force at the testator's death governs and not the law at the time of the execution of the will.\textsuperscript{196} This is said to be because of the ambulatory nature of wills; an executed will, unlike an executed deed, affects no interests and creates no rights, but takes effect only at the death of the testator.\textsuperscript{197} It has even been suggested that the courts are bound as a matter of principle to look exclusively to the law obtaining at the testator's death for the effect of the will, since otherwise new legislation would never begin to take effect until after all prior wills had been outlived.\textsuperscript{198}

Statutes have been applied to previously executed wills where the application resulted in partial or complete revocation of the will.\textsuperscript{199} Moreover, statutes have been applied to

\textsuperscript{196} Estate of Weeks, 154 Kan. 103, 114 P. 2d 857 (1941); Blackbourn v. Tucker, 72 Miss. 735, 17 So. 737 (1895); Wakefield v. Phelps, 37 N. H. 295 (1858); In re Gaffken's Will, 197 App. Div. 257, 188 N. Y. S. 852 (2d Dept. 1921); De Peyster v. Clendining, 8 Paige 295 (N. Y. 1840); In re Ziegner's Estate, 146 Wash. 537, 264 Pac. 12 (1928). Contra, Mullock v. Souder, 5 Watts & S. 198, 199 (P. A. 1843). (“A devise of real estate is in the nature of a conveyance ... and a statute will not be considered as altering the effect of a conveyance already made, so as to pass more than it purported to pass when made. A retroactive effect will not be given to a statute so as to affect contracts or property.”)

By the weight of authority, however, the courts construe statutes which change the law of wills to apply only to wills which are executed after the statute is enacted, unless the intention of the legislature to make the statute apply to wills which have already been executed can be found. 1 Page, \textit{Wills}, sec. 29 (Lifetime ed.).

\textsuperscript{197} In re Ziegner's Estate, 146 Wash. 537, 264 Pac. 12 (1928); In re Elcock's Will, 4 McCord 39 (S. C. 1826); Wakefield v. Phelps, 37 N. H. 295, 306 (1858); Hamilton and Wife v. Flinn, 21 Tex. 713 (1858).

\textsuperscript{198} In re Gaffken's Will, 197 App. Div. 257, 188 N. Y. S. 852 (2d Dept. 1921). But the weight of authority is contra. See note 196 supra.

\textsuperscript{199} The following group of cases is not intended to be exhaustive, but merely illustrative.

Key v. Key, 134 Md. 418, 106 Atl. 744 (1919). Decedent died in 1917, leaving a will dated April 18, 1913. He made no devise or bequest to his wife. A statute enacted in 1916 provided that a surviving husband or wife shall take one-third in fee of the lands belonging to the deceased spouse
executed wills under circumstances where it was impossible or virtually impossible for the testator to have made provision for other disposition of his property before death. In *Leffler v. Leffler et al.*\(^{200}\) the Florida Stepmother Act\(^{201}\) be-

at death, though such deceased spouse die testate. Prior to this statute, a widow was entitled to dower only.

In *In re Ziegner's Estate*, 146 Wash. 537, 264 Pac. 12 (1928). It was held that a statute, providing *inter alia* that a divorce subsequent to the making of a will shall revoke the will as to the divorced spouse, was retroactive and operated to revoke a will executed before the statute went into effect.

In *In re Goldberg's Estate*, 275 N. Y. 186, 9 N. E. 2d 829 (1937). The parties were married twelve days after Goldberg made his will. He died in 1933, and thereafter his widow elected to take her distributive share in the decedent's estate, as provided under a statute effective March 28, 1932, which provided that if after making a will, the testator marries, and the husband or wife survives the testator, the will shall be deemed revoked as to such survivor, unless provision shall have been made for such survivor by an antenuptial agreement in writing. The statute expressly provided that it should apply only to wills executed prior to Sept. 1, 1930. The testator's will gave Mrs. Goldberg $5,000. This was in accordance with an oral antenuptial agreement whereby Mrs. Goldberg agreed to accept this sum in lieu of her dower or any other claim she might have out of his estate. The antenuptial agreement was void, however, for noncompliance with the statute of frauds.


Wakefield v. Phelps, 37 N. H. 295 (1858). Testatrix executed her will in 1850, by which she devised her real property to her husband. She died in 1856. A statute which went into effect in 1854 provided that a married woman's will shall be valid as against her heirs to pass any estate of which she may be seized to any devisee except her husband.

Elcock's Will, 4 McCord 39 (S. C. 1826). The testator in 1823 made his will of personal property, which was properly executed according to the laws at that time. Under a statute enacted in 1824, three witnesses were required to wills of personal property. The testator died in 1824, leaving no other will.

\(^{200}\) 151 Fla. 455, 10 So. 2d 799 (1942); Adams v. Adams, 147 Fla. 267, 2 So. 2d 855 (1941), appeal dismissed for want of a substantial federal question, 314 U. S. 572 (1941).

\(^{201}\) Fla. Gen. Laws 1939, c. 18999: "... [P]rovided, however, that if a decedent, dying either testate or intestate, be survived by his widow and lineal descendants and that none of such lineal descendants are also the lineal descendants of such widow, then such widow shall be limited to dower in the estate of said decedent irrespective of the terms of the will of said decedent, if any, and such dower shall be limited to the portion of the estate of the decedent to which the widow is entitled under the law of descent and distribution, to-wit, a child's part, and in all cases the portion of the widow, whether said dower or such child's part or share under the will, shall be ratably liable with the remainder of the estate for all estate and inheritance taxes and all costs, charges, and expenses of administration ... ."
came effective only six days before the testator's death. In his lifetime the testator had given two-thirds of his property to his two children by a former marriage. His will gave practically all of his remaining property to his second wife. In accordance with the statute, the devise to her was declared void and she was held to be entitled to only one-third of the estate (or one-ninth of the whole) although this was quite manifestly contrary to the testator's intent. In a Kansas case, a bequest in a will executed in 1929 was rendered invalid by a statute enacted in 1939. The rule that the controlling statute is the one in force at the death of the testator, it was argued, should not apply here because of the asserted insanity of the testatrix from 1933 to her death in 1940. The court found no evidence of insanity of the testatrix at any time, but stated:

"Even if it were true, we do not see how it would affect the validity of the will. The statute makes no such exception. So far as the statute is concerned, the provision in the will is either good or bad without regard to the sanity or insanity of the testatrix at some time after the will was executed."

Fair warning to the testator would appear not to be a condition precedent to the validity of legislation limiting the power of testamentary disposition.

**Antenuptial Contracts**

While it appears that the courts do not recognize that a married person can have a constitutionally protected privilege

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202 In a letter to his attorney Leffler expressly stated that he thought leaving only one-ninth of his property to his second wife would be unfair to her.  
204 Laws 1939, c. 180, sec. 38; Kan. Gen. Stat. 1949, sec. 59-602. The statute declares that devises and bequests to foreign countries, cities, bodies politic, etc., shall be void, except devises and bequests to institutions created and existing exclusively for religious, educational, or charitable purposes. The testatrix attempted to make a bequest to the town of Buren-On-Aare in the Canton of Bern, Switzerland.  
to will away his property to other persons to the exclusion of his spouse, yet where a statute restricting the testator’s power to exclude his spouse abrogates a valid and enforceable ante- or postnuptial contract, by which the other spouse relinquished all claim under the law to his estate, the courts may be inclined to hold that the decedent acquired contract rights which the legislature is powerless to impair. Here there seems to be an outcropping of an inarticulated feeling that contract rights are more sacred than property rights; for on principle it is difficult to see why depriving a decedent of a contract right should raise any greater doubts of constitutionality than depriving him of a property interest.

In Wisconsin (where as will be recalled the courts have criticized the notion of legislative omnipotence), it has been stated that the obligation of a wife’s postnuptial contract wherein her husband relinquished all his rights in her estate cannot be impaired by subsequent legislation giving the husband curtesy in the wife’s estate. In a New York case, on the other hand, the court indicated that whatever

206 See Chapter 2, p. 17.
207 In re Nickolay’s Estate, 249 Wis. 571, 25 N. W. 2d 451 (1936) (dictum). The wife, who survived, had waived her rights in her husband’s estate in consideration of his release of all rights in her estate. After his death she discovered he was considerably wealthier than she had supposed. She sought to avoid the effect of the agreement on the ground inter alia that it was void for want of consideration in that her husband had no curtesy to release. In disposing of this contention the court made the statement concerning the incapacity of the legislature to abrogate the agreement.
208 Matter of the Will of McGlone, 284 N. Y. 527, 32 N. E. 2d 539 (1940). Two days before her marriage with appellant’s decedent, John McGlone, appellee’s decedent, Helena Day Snyder, executed an instrument in which she stated that she thereby voluntarily and irrevocably renounced all right, title, and interest she might legally or otherwise have in the estate of her husband-to-be. The instrument was dated February 4, 1922. At the time the laws of New York gave to a widow dower rights in her husband’s real estate, but except for certain restrictions left him free to make testamentary disposition of all his property to strangers. In 1929, section 18 of the New York Decedent Estate Law was adopted. Laws 1929, c. 229, sec. 4. Section 18-1 provides that where a testator dies after August 31, 1930, and leaves a will thereafter executed and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her
rights might have accrued to the decedent husband from an antenuptial agreement when entered into, a subsequently enacted statute could abrogate such an agreement without impairing any constitutional rights of the decedent, and this for two reasons: first, because the decedent’s power to dispose of his property to the exclusion of his spouse did not in fact stem from the agreement but from the laws of the state and thus the power was subject to restriction by the legislature in spite of the agreement; secondly, because the wife could not waive in advance rights created for her benefit if the law did not permit such a waiver. However, the court based its decision on the ground that the legislature had not in fact destroyed any rights which the decedent in the particular cases acquired by his agreement, but rather that what happened was the result of the decedent’s own voluntary act. The Supreme Court of the United States,209 in sustaining on appeal the New York decision, indicated in general its ap-

share of the estate as in intestacy. Section 18–9 provides that the husband or wife during the lifetime of the other may waive the right of election by an instrument subscribed and duly acknowledged. The agreement of 1932 would not have been effective under section 18–9, because it was not acknowledged. The Court of Appeals seems to have thought that it was effective under the laws at the time when entered into. A few days before section 18 went into effect, McGlone executed a will in which he devised $2,000 to Helena. On July 6, 1934, he executed a codicil to his will, which, although it did not disturb the provision made for his wife in his earlier will, had the effect of bringing the entire will, modified and republished, within the provisions of the new law, and thus according to the terms of section 18, of giving her a right of election to take under the statute and against the will. The Court of Appeals pointed out that McGlone by his own voluntary act had given Helena the privilege to claim an interest in his estate; of course, he probably would not have added a codicil if he had foreseen the consequences, but that could not be made the basis of estoppel or other equitable ground for denying to the wife her statutory right.

209 Irving Trust Co. v. Day, 314 U. S. 556 (1941). The federal question was whether section 18 worked an impairment of the obligation of contract or a deprivation of property without due process. The Court, speaking through Jackson, doubted that the instrument signed by Helena was a contract within the meaning of the federal Constitution. It nowhere appeared, either within the instrument or aliunde, that there was any consideration for the waiver. However, lest a decision on this ground should be taken as an invitation to further litigation in the New York courts, the Court undertook
proval of the statements of the court below but carefully avoided a direct decision on whether the legislature could have abrogated the antenuptial agreement.

DISPOSITION OF PROPERTY BY INTESTATE SUCCESSION

The owner of property who dies intestate also exercises by his death a power of disposition as much as does the owner who dies testate. The statutes of descent and distribution are, after all, a sort of general will and testament enacted for the benefit of persons who die without having made wills of their own.

Now, if any such comparison can really be made, one would expect the courts to be less inclined to find constitutional objection to modifications of the statute of descents and distribution than to legislative restrictions on the testamentary power: first, there is the well-established precept that no one can have a vested interest in the continued existence of a statute; secondly, the legislature, having gratuitously enacted a statute to take care of the affairs of those who neglect to leave instructions for the disposition of their property,

to dispose of the questions urged. What McGlone did, said the Court, was to free Helena of the restraints of her waiver by voluntarily committing an act to which the applicable law attached that consequence. "For the purpose of considering the application of the contract and due process clauses of the Federal Constitution, the case is as if he had made a voluntary legacy to his wife despite her waiver. If the obligation of the waiver suffered impairment, it was only because he exercised further testamentary privileges with a condition attached, and thereby brought those consequences unwittingly or intentionally upon himself and his estate.

"The condition clearly was such as New York might, without restraint from the Federal Constitution, annex to the privilege of making a will under its law. Its effect was to continue as obligations of his estate social responsibilities which he had assumed during life, unless they had been waived with required formality. The State could have conditioned any further exercise of testamentary power upon giving a right of election to the surviving spouse regardless of any waiver, however formally executed; and having recognized the binding effect of a waiver, it could condition that recognition upon acknowledgment, which was no doubt considered a desirable safeguard against casual, informal, or ill-considered abandonment of statutory protection, as well as against overreaching or fraud." (314 U. S. 556, 563).
is under no obligation to continue to offer the same kind of service, or perhaps any service at all.

However, the only statute ever actually to be held unconstitutional because it impaired the constitutional right of a decedent to dispose of his property at death was not one which restricted the testamentary power, but one which directed a new course for the intestate succession of property. In *Stratton's Claimants v. Morris* 210 a statute was declared unconstitutional because it deprived the decedent of the "right to transmit her property by inheritance to her own descendants or next of kin." But this statute, unlike the statutes considered above, was extremely narrow in application; so narrow in fact as to give rise to an inference that it was designed specifically to fit the decedent. This inference was further strengthened by the fact that the author and sponsor of the bill in the legislature was a person who stood to benefit if the statute were given effect. The facts of the case were these: Mrs. Morris inherited certain personal property from her husband. Shortly after his death she was adjudged insane and incapable of managing her own affairs. She remained insane and under guardianship from this time until her death, intestate, unmarried, and without issue. Under the statutes in force at the time of Mr. Morris' death, the personal estate inherited by Mrs. Morris would have gone to her next of kin. However, the act in question was passed in her lifetime:

"If the personal estate, as to which any person dies intestate and who was a lunatic or non compos mentis, was derived in whole or part from an intestate husband or wife, then in that event so much of the personal estate as was derived and re-

210 89 Tenn. 497, 15 S. W. 87 (1890). The action was in the nature of an interpleader to determine whether personal property in the hands of Mrs. Morris' administrator should be paid to the next of kin of her deceased husband (the Morris claimants) or to her next of kin (the Stratton claimants).
It would seem that the practical effect of the statute was to turn Mrs. Morris' estate into a life estate with a kind of future interest in the husband's next of kin, as to whom under the prior law the entire possibility of descent had become extinguished. It is certainly questionable that the legislature can retroactively convert fees simple into life estates. However, this thought does not explicitly appear in the opinion. The court's objection was not that Mrs. Morris' next of kin were deprived of any property, because they had at most a mere expectancy in respect to the property which she inherited from her husband, nor that the statute despoiled Mrs. Morris of any of her property after her death, but rather that during her life it deprived her of the right that her personal property should go to her blood relatives and not to persons of no blood relation to her. The court was of the opinion that such a right is "property" and that Mrs. Morris was unconstitutionally deprived of that property. The argument was summarily rejected that the state has an unqualified power to take the property of decedents and dispose of it as it chooses.

The Stratton case gives some support to the writer's belief that the courts have been so positive in their assertions of an unlimited power in the legislature over intestate succession and testamentary disposition only because in the particular instances they did not feel that the legislation in issue was unreasonable. The judicial pronouncements would be quite different if the courts were confronted with arbitrary statutes, as was the court in Stratton v. Morris. This is not to say that the courts in such situations would (or should) act as cham-

211 Acts of Tenn. 1885, c. 88.
pions of the dead, but the living are justified in looking to the courts to see that their interests are vindicated. The courts would surely not fail them.

RIGHTS OF HEIRS AND DEVISEES BEFORE DEATH OF ANCESTOR

There would be more sense to a court's concern over the constitutional rights of the heirs and devisees, who are living persons, than to its concern with the constitutional rights of the deceased owner, who is really past having any rights. The heir or devisee may often have more than a mere sentimental claim, having aided the decedent in the accumulation of his property. Yet the cases hold that the prospect of inheritance or of taking under a will does not constitute a property right within the meaning of the constitutional guarantees. At any time before the death of the ancestor or testator the hopes and expectancies of the heirs apparent or the prospective devisees may be defeated by a change in the law.

"There are no heirs, but only heirs apparent, to the living, persons with mere expectancies or possibilities of inheritance which may be fulfilled or defeated, depending upon various contingencies and situations. An heir apparent, therefore, has no vested right in the estate of his ancestor prior to the latter's death, and consequently no vested property rights therein." 212

"One who, by virtue of the statute of descent as its provisions exist today, will become entitled to the ownership of certain real estate if the owner dies intestate and without having previously conveyed it, has no vested interest, inchoate or otherwise, in that real estate—he has nothing more than a mere expectancy or hope. The owner may convey the lands to others during his lifetime, or may devise it to others, without impairing any right of the 'heir expectant'." 213

"A will does not take effect, nor are there any rights acquired under it, until the death of the testator . . ." 214

"It was in his power to destroy his will at any time, or make a new one, and no one could say that he had the least legal interest in his property till after his death." 215

On the basis of such reasoning it is held that statutes defeating the expectancies of heirs apparent and prospective devisees do not violate guarantees against the deprivation of property without due process, 216 nor violate constitutional inhibitions against retroactive law. 217 Even where the heirship is forced, that is, where the heir presumptive cannot be disinherited, it has been held that a statute conferring full power of disposition on the owner does not deprive the forced heir of any constitutional rights. 218


215 Loveren v. Lamprey, 22 N. H. 434, 446 (1851).


217 Loveren v. Lamprey, 22 N. H. 434 (1851); Wakefield v. Phelps, 37 N. H. 295 (1858); Hamilton and Wife v. Flinn, 21 Tex. 713 (1858); Wynne's Lessee v. Wynne, 2 Swan (32 Tenn.) 404 (1852). These decisions use Justice Story's definition of a retroactive statute as one which impairs vested rights. See Chapter 2, p. 14. Since heirs apparent and prospective devisees are deemed to have no vested rights until the death of the ancestor or testator, the statutes under discussion are held not to fall within the constitutional inhibition.

218 Hamilton v. Flinn, 21 Tex. 713 (1858). The court said: "It is very clear that the rights of forced heirship . . . were, although inchoate, but a mere expectancy during the life of the ancestor, which did not vest nor have vitality until his death; that the status and rights of forced heirs being the creatures of law, must derive their existence and force from the law under which they vest or are brought into existence, viz.: the law at the death of the parent. It is his death which gives life and seizin to the heir of his estate." (21 Tex. 713, 716).

"If forced heirs had no rights to the property of the ancestor during his life, which might not be defeated by a change of the law, they cannot object to a repealing statute conferring power on parents not only to dispose, in the future, of the whole of their property, but also validating their will, made previously, provided the ancestor lived until after the passage of the act. There is nothing retrospective in this. The will is not a perfected act, has no force and gives no rights until the death of the testator. The heirs having
In some cases, as has been remarked upon previously, the power of the legislature to change the law governing the manner in which property shall descend or be disposed of by will is described as if it were absolute and without limitation. While the power of the legislature to determine who shall inherit or take as devisee may approach the quality of being absolute and unlimited, an arbitrary and unreasonable exercise of legislative power indicating a lack of judgment and discretion on the part of the legislature would surely never be sustained. The Supreme Court of the United States has said that the due process clauses of the Fourteenth and Fifth Amendments would restrain "such an exercise of power as would exclude the conception of judgment and discretion, and which would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority." A similar feeling has been expressed by a few state courts.

It would be pointless to discuss at length the many cases which have sustained statutes changing the course of descent and distribution and statutes relating to wills. The rights cannot complain of an approval by the legislature, expressly or by implication, of wills previously made but not fixed by the death of the maker."


Campbell v. California, 200 U. S. 87, 95 (1906) supra note 182.

In re Smith's Estate, 188 Okla. 158, 107 P. 2d 188 (1940). The Wisconsin Supreme Court has stated that the right to inherit or to be a recipient under a will is subject only to a reasonable regulation by the legislature. Hood's Estate, 206 Wis. 227, 239 N. W. 448 (1931). This is consistent with the view stated in Wisconsin decisions that the privilege of disposing of property at death is a constitutionally protected interest. See p. 93 supra.

The Hood case involved a statute which changed the course of descent of the property of an adopted child from his kindred of the blood to his adoptive parents, their heirs and next of kin. The court held that since the statute did not affect the rights of the natural children or lineal descendants of an adopted child to inherit his property, it was not an unreasonable legislative regulation.
tionale of the cases has already been stated. But it would not be useless to enumerate briefly below the types of statutes which have been sustained, if only to show that the legisla­
tures have not acted unreasonably and arbitrarily. Statutes have been sustained which provide that the title shall pass on
death of the owner intestate to a different person than the one to whom it would have passed under the previous law. Legislation legitimating bas­
tard children: Cordova v. Folgueras y Rijos, 227 U. S. 375 (1913); Deihl v. Jones, 170 Tenn. 217, 94 S. W. 2d 47 (1936) (marriage annulled because of mental incapacity of father; legitimacy of child preserved by statute enacted after annulment.) Legislation bestowing upon adopted children the rights of inheritance of natural children: Sayles v. Christie, 187 Ill. 420, 58 N. E. 480 (1900); Theobald v. Smith, 103 App. Div. 200, 92 N. Y. S. 1019 (1st Dept. 1905); Dodin v. Dodin, 16 App. Div. 42, 44 N. Y. S. 800 (2nd Dept. 1897), aff'd 162 N. Y. 635, 57 N. E. 1108 (1900); McFadden v. McNorton, 193 Va. 453, 69 S. E. 2d 445 (1952). Legislation enhancing the share of the surviving spouse (and thus diminishing the share of the decedent's heirs): In re Estate of Phillips, 203 Cal. 106, 263 Pac. 1017 (1928); Noel v. Ewing, 9 Ind. 37 (1857); Kicey v. Kicey, 114 N. J. Eq. 116, 168 Atl. 424 (Err. & App. 1933). Legislation diminish­ing the share which the surviving spouse takes: Hannon v. Southern Pac. R. R. Co., 12 Cal. App. 350, 107 Pac. 335 (1909). (At the time the homestead in question was acquired, the statute provided that on death of either spouse the homestead vested absolutely in the survivor. Prior to death of husband the statute was changed so that wife took only one-third and the children the other two-thirds.) Legislation excluding persons who under the previous law would have been heirs: Richardson's Adm'r v. Borders, 246 Ky. 303, 54 S. W. 2d 676 (1932) (statute declared that in cases where a woman shall have been divorced on the ground of pregnancy by another man at time of marriage, having concealed her pregnancy from her husband, the child born of the pregnancy shall be deemed a bastard for all purposes); In re Smith's Estate, 188 Okla. 158, 107 P. 2d 188 (1940) (statute prohibited inheritance by persons not of Indian blood from persons of one-half or more Osage blood, except spouses of existing marriages); Jefferson v. Fink, 247 U. S. 288 (1917); Hood's Estate, 206 Wis. 227, 239 N. W. 448 (1931) (statute changed the descent of the property of an adopted child from his kindred of the blood to his adoptive parents, their heirs and next of kin. See note 221 supra). In re Frost's Will, 192 App. Div. 206, 18 N. Y. S. 559 (1920), aff'd In re Kingsbury, 230 N. Y. 580, 130 N. E. 901 (1920) (statute repealed so that adopted child was prevented from inheriting from his foster parent).

Expectancies of heirs have been defeated by the application of statutes which gave validity to wills which at the time of their execution were totally or partially ineffective. Statutes reducing the formalities necessary to the execution of a valid will: In re Spain's Estate, 327 Pa. 226, 193 Atl. 262 (1937) (will invalid when executed because there were no attesting witnesses. Requirement abolished as to wills of the sort involved); Langley v. Langley, 18 R. I. 618, 30 Atl. 465 (1894) (will attested by only two wit­nesses. At time of execution three were required; however, at testator's death
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Contract to Make a Will

A contract to make a will is a contract within the meaning of the contracts clause of the United States Constitution. Any change in the law which substantially takes away the remedy to enforce the contract impairs the obligation of the contract. Thus if an oral contract to make a will was enforceable when made, the legislature may not render it invalid by requiring a written memorandum.

only two were required); Hoffman v. Hoffman, 26 Ala. 535 (1855) (same situation as in Langley v. Langley); Long v. Zook, 13 Pa. 400 (1850) (will signed only with testator’s mark). Statutes removing restrictions previously preventing the disposal of property by will: Wilson v. Greer, 50 Okla. 387, 151 Pac. 629 (1915) (full-blooded Indian executed will when Indians had no power to devise their allotments. He died after statute which provided that Indians can devise their real estate); Hamilton v. Flinn, 21 Tex. 713 (1858) (when will executed children could not be disinherited). Statutes abolishing the common-law rule that land acquired after the execution of a will will not pass under will: Loveren v. Lamprey, 22 N. H. 434 (1851); Wynn’s Lessee v. Wynn, 2 Swan (32 Tenn.) 404 (1852). Antilapse statutes: Bishop v. Bishop, 4 Hill 138 (N. Y. 1843).

Prospective devisees may also fare badly as a result of statutory changes. A legitimation statute may confer upon an illegitimate the capacity of an heir so that he may set aside the provisions of the decedent’s will. Wadsworth v. Brigham, 125 Ore. 458, 266 Pac. 875 (1928), adhering to opinion, 125 Ore. 428, 259 Pac. 299 (1927). A statute may provide that when an heir or legatee dies within a short period after the death of the decedent, the estate of such first decedent shall pass as though he has survived such heir or legatee. Ostrander v. Preece, 129 Ohio St. 625, 196 N. E. 670 (1935), appeal dismissed 296 U. S. 543 (1935). An antilapse statute may be repealed, thus causing a devise to fall. Bartlett v. Ligon, 135 Md. 620, 109 Atl. 473 (1920) (will executed 1904, statute enacted 1910).

The common-law rule that an heir or devisee is entitled to exoneration of the real estate from a mortgage by the payment thereof out of the personal estate may be abolished so that lands encumbered by mortgage pass to the heirs or devisees subject to the mortgage. Swetland v. Swetland, 100 N. J. Eq. 196, 134 Atl. 822 (Ch. 1926) (will dated 1922, statute 1924). The right of nonresident aliens to take real or personal property or the proceeds thereof by succession or testamentary disposition may be abolished. The reason is, it is said, that the legislature confers the privilege and right and hence may take it away. In re Estate of Bevilacqua, 31 Cal. 2d 580, 191 P. 2d 752 (1948); In re Estate of Knutzen, 31 Cal. 2d 573, 191 P. 2d 747 (1948); Donaldson v. State, 67 N. E. 1029 (Ind. 1903), new trial awarded, 167 Ind. 553, 78 N. E. 182 (1906).

Upon the death of the owner of a devisable or descendible interest in land, property rights become fixed in his heirs or devisees. If the owner leaves a valid will, the title of the devisee becomes a vested interest at the moment of the testator's death. If the owner dies intestate, or his will is invalid, at the moment of his death title vests in his heir by descent.

In regard to personal property, the view usually taken is that at the decedent's death his title passes to the executor or administrator, but he holds it under a quasi trust for those entitled to it as next of kin or legatees, and at the decedent's death they acquire a right which ripens into full title and enjoyment on distribution (subject, of course, to diminution or destruction if necessary to pay claims on the estate or the expenses of administration). Hence statutes which change the course of distribution or diminish the interests of legatees and next of kin will not ordinarily be applicable when the decedent predeceases the effective date of the statute.

A different view with respect to the rights of next of kin and legatees before final distribution is expressed in Armstrong v. Armstrong, 1 Ore. 207 (1855). The court reasoned as follows: Upon the decedent's death his entire interest and title passes to the administrator who holds the estate in trust, not for any particular person or persons, but to be disposed of as the law shall direct. Now, when an administrator goes to distribute an estate, he must look exclusively to the law for directions, not those directions which the law gave before his appointment or any prior time, but to such directions as it gives when the distribution is made. Even though at the death of the decedent the law promises to give the property to particular persons, this does not bind the legislature. The principle is well established that the mere promise to give a thing does not, before delivery, bind the promisor or confer any right upon the promisee.

In Parlato v. McCarthy, 136 Conn. 126, 137, 69 A. 2d 648, 654 (1949), Jennings, J., dissenting, said: "It may be admitted that a legatee has, in a sense, a vested interest in his legacy, but that interest is subject to reduction or extinction because of such things as debts, administration charges and expenses, funeral expenses and taxes. . . we do not regard the full succession as having taken place upon the death of the decedent. The right to the ultimate title and ownership did arise at that time, and may be said to have vested in the beneficiary, but that was but one step in the process of succession, and the beneficiary does not become the actual and unconditional owner of the property until the estate has been administered and legally distributed and the succession consummated." Blodgett v. Bridgeport City Trust Co., 115 Conn. 127, 147, 161 Atl. 83, 89.
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Since rights are deemed to be vested at the testator's death it has been held that a statute passed subsequent to the death of the testator, which enlarges the privilege to contest a will, deprives the devisees of their property without due process. On the other hand, a statute reducing the time for filing contest of a will, when applied to cases where the will was admitted to probate prior to the statute, does not deprive the contestant of a vested right if a reasonable time is allowed after the statute within which to contest the will. This is analogous to a retroactive shortening of the period of limitations.

A will which cannot be admitted to probate at the testator's death for lack of attesting witnesses, improper execution, or

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225 Havill v. Havill, 332 Ill. 11, 163 N. E. 428 (1928). At the death of the testator in 1913 a suit to contest a will abated on the death of the contestant. By an amendment effective July 1, 1919 (Ill. Laws 1919, p. 991, Ill. Rev. Stat. 1949, c. 3, sec. 242) it is provided that a suit to contest a will shall not abate on the death of the contestant, but that the cause of action shall survive and descend to the heir, legatee, devisee, executor, administrator, grantee, or assignee of such deceased person. A bill was filed in May, 1919, to contest the will. The complainant died in 1924. After his death his widow and heir moved the court to substitute them as complainants in his stead. Held: The amendment was not intended to have a retroactive effect. It could not have been made retroactive. "The right to hold the property under the will free from any liability to contest by any one not legally entitled to contest the will at the death of the testator is a vested right, which cannot be taken away by legislative enactment." (332 Ill. 11, 17, 163 N. E. 428, 430 (1928)).

226 McQueen v. Connor, 385 Ill. 455, 53 N. E. 2d 435, 437 (1944) ("The right to contest a will is not a vested one. The Legislature, if it saw fit, could abrogate all of the provisions of our statutes authorizing will contests."); Sharp v. Sharp, 213 Ill. 332, 72 N. E. 1058 (1904) (no time allowed after statute went into effect but there was a period of about two and one-half months from the time the bill was passed until it went into effect); Sutton v. Hancock, 118 Ga. 436, 45 S. E. 504 (1903); Kenyon v. Stewart, 44 Pa. 179 (1863) (statute, which declared that an uncontested probate by the register of the proper county of any will devising real estate shall be conclusive after five years from its date, held to apply to a will proved before its passage).

The legislature may shorten the time for contesting will without providing for extension of time in behalf of persons non compos mentis. Masin v. Bassford, 381 Ill. 569, 46 N. E. 2d 366 (1943).

227 See p. 42 supra.
for any other invalidating defect, probably cannot be made valid by a statute passed subsequent to the testator’s death. To do so, it has been held, would deprive the heirs unconstitutionally of their property.\textsuperscript{228} However, none of the decisions are recent. A will invalid at the testator’s death must be distinguished from a will valid at his death, but subject to defeat only by reason of the impossibility of proof under the existing law. It is within the power of the legislature even after the death of the testator to change the rules relating to the proof of the existence of a will.\textsuperscript{229} A will is not

\textsuperscript{228} Rowlett v. Moore, 252 Ill. 436, 96 N. E. 835 (1911); Remington v. Metropolitan Sav. Bank, 76 Md. 546, 25 Atl. 666 (1893); Camp v. Stark, 81 Pa. 235 (1875); In re Alter’s Appeal, 67 Pa. 341 (1871); Shinkle v. Crock, 17 Pa. 159 (1851); Greenough v. Greenough, 11 Pa. 489 (1849); Giddings v. Turgeon, 58 Vt. 106, 4 Atl. 711 (1886).

In Alter’s Appeal supra an aged couple having no lineal descendants, and each owning property, decided to make their wills in favor of each other, so that the survivor should have all they owned. Their wills were drawn precisely alike \textit{mutatis mutandis} and laid down on a table for execution. Each signed a paper, which was duly witnessed by three subscribing witnesses. After the death of Mr. Alter, it was found that each had by mistake signed the will of the other. To remedy this error, the legislature by a special act conferred authority upon the Register’s Court to take proof of the mistake and proceed as a court of chancery to reform Mr. Alter’s will and decree accordingly. The Register’s Court held that there was no will, and that the act to reform it was invalid, the estate having passed to and vested in the collateral line of kindred. Held: The paper Alter signed was not his will. The mistake was the same as if he had signed a blank sheet of paper. He therefore died intestate and his property descended as at law. The objection to the validity of this act is not a lack of power in the legislature to establish a will upon parol proof of the fact of making it and of the intent to execute the proper paper, but a lack of power to divest estates already vested at law on the decedent’s death. There being no will, it is evident that the effect of any subsequent legislation is simply to divest estates.

See, however, Sluder v. Wolf Mountain Lumber Co., 181 N. C. 69, 106 S. E. 215 (1921) where the will was properly admitted to probate, but only one witness was examined instead of both as required by the then statute. Held: This defect can be cured.

\textsuperscript{229} In re Estate of Patterson, 155 Cal. 626, 102 Pac. 941 (1909); In re Alter’s Appeal, 67 Pa. 341 (1871) supra note 228.

The Patterson case involved a statute enacted as a result of the San Francisco earthquake fire. The testatrix executed a will in 1904 in accordance with the law. The will was entrusted to her attorney, who kept it in a safe. It was destroyed in the earthquake. The testatrix died thereafter. She had not been informed that the will was destroyed and died in ignorance of that fact.
brought into legal existence by the judgment admitting it to probate. Probate of a will merely declares in a formal way the existence of facts which have previously occurred and furnishes official evidence of those facts.\(^2^{30}\) If the ancestor has made a valid will, it speaks from the moment of his death, and the heir at law never becomes vested with title to the estate devised. The litigation attending the probate of a will is not prosecuted to divest either the heir or devisee of title to property, but to determine which of them is the owner of it.\(^2^{31}\)

The courts have not agreed whether statutes providing for the proration of federal estate taxes among heirs and devisees can be applied where the testator's death is prior to the enactment of the proration statute.\(^2^{32}\) If at the testator's death

At the time of the death of the testatrix the Code of Civil Procedure provided that no will shall be proved as a lost or destroyed will, unless the same shall have been proved to have been in existence at the time of the death of the testator, "or is shown to have been fraudulently destroyed in the lifetime of the testator." The Code was amended by addition to the quoted words as follows: "or is shown to have been fraudulently or by public calamity destroyed in the lifetime of the testator, without his knowledge." Cal. Stats. 1907, p. 122. The will in question could not be proved as destroyed except by virtue of this amendment. The contention of the contestants was that the will, at the time of the testatrix's death was not merely incapable of proof but was absolutely void and that consequently testatrix died intestate. Held: The will could be proved under the amendment. The will was not void in the sense that it was no will at all. After its destruction it had a potential existence, subject to defeat only by reason of the impossibility of proof under the law then existing. Destruction, without intention to revoke, did not revoke the will. The will could not be admitted to probate under the law as it existed at the testatrix's death, because there could be no legal proof of the will. The legislature removed this impediment. The heirs had no vested right to have this law forbidding the probate of such wills continued in force. This amendment was not retroactive. It applied only to trials which took place after its enactment. It could have no effect whatever upon previous trials or judgments.\(^2^{30}\) 2 Page, \textit{Wills, sec. 561 (Lifetime ed.)}.\(^2^{31}\) Wills v. Lochnane, 72 Ky. (9 Bush) 547 (1873).\(^2^{32}\) The Connecticut Supreme Court holds that to apply the proration statute retroactively would deprive the devisees of their property without due process. Parlato v. McCarthy, 136 Conn. 126, 69 A. 2d 648 (1949).

A federal decision disagrees with the Parlato case and holds that the Connecticut statute is not repugnant to the federal Constitution when applied
federal estate taxes are payable out of the residue, proration of taxes will in effect diminish what the devisees received. A very important consideration in determining the constitutionality of the retroactive application of a proration statute is whether or not it is treated as if it were a taxing statute. This is because the courts, recognizing that the existence of government is dependent upon its ability to raise revenues by taxation, hold that within limits of fair play retroactive


In Merchants Nat. Bank v. Merchants Nat. Bank, 318 Mass. 563, 62 N. E. 2d 831 (1945), a statute similar to the Connecticut statute was held constitutional when applied retroactively, that is, where the decedent’s death occurred before the effective date of the statute. Mass. Acts 1943, c. 519. The estimated federal tax was paid on Dec. 8, 1941, and a deficiency tax paid on Oct. 11, 1943. The petition prayed for an apportionment of the deficiency tax among the parties respondent in accordance with the provisions of the statute. “It may be conceded that in one sense the apportionment statute operates retroactively because it reaches back to the transfers made at the death of the testator. If no such transfers had then occurred, there would have been nothing to which an apportionment of the tax could apply. It must, however, be noted that liability for an apportionment of the tax could not arise until the tax was paid, and that the last installment of this tax—which is all that is sought to be apportioned—was not paid until after the apportionment statute had become effective. A taxing statute does not necessarily operate retroactively if the fact upon which the tax is laid occurs after the statute becomes operative, even though the antecedents of this fact antedated the statute.”

(318 Mass. 563, 571, 62 N. E. 2d 831, 836.)

In Central Hanover Bank & Trust Co. v. Peabody, 190 Misc. 66, 68 N. Y. S. 2d 256 (1947), the Connecticut statute involved in Parlato v. McCarthy supra was held not to be unconstitutional as applied to an inter vivos trust, although the settlor’s death occurred before the enactment of the statute. The New York court had jurisdiction because the trust res and the trustee were both in New York. Anyhow, the court found that apart from the statute, the language of the settlor’s will supported the conclusion that he intended that the tax should be apportioned.

238 In Parlato v. McCarthy, supra note 232, the court concluded that the statute was not a taxing statute, because the federal laws fix the primary obligation. Nothing the state can do will alter the nature of the obligations created by them, or affect in any way the methods of enforcement. All the state can do is to determine the way in which the burden so fixed shall ultimately be apportioned among the beneficiaries.

In Horwitt v. Horwitt, supra note 232, it was said: “If retroactive tax legislation may be due process under the ‘fair play’ test, such a statute as this, which, although not a taxing statute, does aim to affect the incidence of taxes between individuals, may be retroactive to the same extent and also amount to ‘fair play.’” (90 F. Supp. 528, 530.)
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tax statutes may be valid even though new burdens are imposed in regard to past transactions.\textsuperscript{234} Estate and inheritance taxes are considered to be impositions on the privilege of transferring or receiving property; consequently, although the decedent died before the passage of the tax statute, the tax may constitutionally be imposed with respect to so much of his estate as remains undistributed in the hands of the executor or administrator or under the control of the probate court.\textsuperscript{235}

Where a devise is void, the property right vests immediately upon the death of the testator in his heirs or residuary devisees. It is not within the power of the legislature retroactively to validate the devise and thus to divest rights acquired under the will or by descent.\textsuperscript{236} Nor may the legislature enhance the estate of a devisee at the expense of the heirs.\textsuperscript{237}

\textsuperscript{236} Wilderman v. Mayor, etc., of Baltimore, 8 Md. 551 (1855); State v. Warren, 28 Md. 338 (1867) (bequest to unincorporated church, such bequests being void); Southard v. Central Railroad Co., 26 N. J. L. 13 (Sup. Ct. 1856) (attempt to devise power of termination); Hartson v. Elden, 50 N. J. Eq. 522, 26 Atl. 561 (Ch. 1892) (bequest void under rule against perpetuities); Bonard's Will, 16 Abb. Prac. (N. S.) 128 (N. Y. 1872) (devise to society which had no authority under its charter to take real property by devise).

But see Dammert v. Osborn, 140 N. Y. 30, 35 N. E. 407 (1893), where a citizen and resident of Peru died there leaving a will which contained a charitable bequest of securities for the purpose of establishing an institution in New York City. The bequest was valid under Peruvian law but void in New York under the two lives statute. A special act was passed incorporating an institution and conferring upon it power to accept the gift. Held: Statute was valid since, under laws of domicile of the testator, the title or beneficial interest had not vested in heirs, next of kin, or legatees.

\textsuperscript{237} Saxton v. Mitchell, 78 Pa. 479 (1875). Church was devised an easement to use twenty acres for a definite purpose. A special act was passed by which the elder of the church was authorized to convey a fee.
Upon the death of the owner intestate, the title to land interests vests at once in his heirs as defined by the statutes of descents and distributions in effect at his death. It is thereafter beyond the province of the legislature to divest the rights of the heirs in part or in whole as by substituting an entirely new class, enhancing the portion of the surviving spouse, or conferring rights of inheritance upon adopted and illegitimate children and aliens.238

238 Bailes v. Daly, 146 Ala. 628, 40 So. 420 (1906) (widow's share enlarged from life estate to fee); Bottorff v. Lewis, 121 Iowa 27, 95 N. W. 262 (1903) (widow's share increased from life estate to fee); In re Nossen's Estate, 118 Mont. 40, 162 P. 2d 216 (1945) (nonresident aliens deprived of the right to inherit); Miller v. Miller, 10 Met. 393 (Mass. 1845) (statute at ancestor's death gave eldest son 2 shares; statute abrogated six months after ancestor's death); Lubbs v. Eimer, 80 N. Y. 171 (1880) (aliens permitted to inherit); Wissel v. Ott, 34 App. Div. 159, 54 N. Y. S. 605 (2nd Dept. 1898); In re Barringer's Estate, 29 Misc. Rep. 457, 61 N. Y. S. 1090 (1889) (legitimation); Re Moynahan's Estate, 158 Misc. 821, 287 N. Y. S. 106 (1936); People ex rel. Griffin v. Ryder, 65 Hun 175, 19 N. Y. S. 977 (1892); Jackson v. Rutherford, 23 Ohio App. 506, 155 N. E. 813 (1926), petition dismissed 115 Ohio St. 709, 156 N. E. 217 (1926); Cameron v. Goebel & Bettinger, 20 Ohio Cir. Ct. R. 268 (1900) (tenant by curtesy given power to sell and encumber estate, a power not possessed at decedent's death); Norman v. Heist, 5 Watts and S. 171 (Pa. 1843); Sheaffer's Estate, 24 Pa. Dist. 570 (1914); Muldrow v. Caldwell, 173 S. C. 243, 175 S. E. 501 (1934) (legitimate children allowed to inherit from or through illegitimate relatives); Bowman v. Middleton, 1 Bay (1 S. C. L.) 252 (1792).

Waugh v. Riley, 68 Ind. 482 (1879) presents a very unusual situation. John Waugh died in 1860 devising a life estate in his land to his wife. As to the remainder of his estate he died intestate. He left no child and no parents surviving, but he did leave brothers and sisters under whom the appellants claimed. A statute approved in 1852 provided that if a husband or wife die intestate, leaving no child, and no father or mother, the whole of his or her property shall go to the survivor. In 1853 this statute was amended to provide that if a husband or wife shall die intestate leaving no children or father or mother, one-half of his or her property shall go to the brothers and sisters of the deceased or their descendants and the other half to the surviving spouse. In Langdon v. Appelgate, 51 Ind. 327 (1875) it was held that the statute of 1852 as amended was unconstitutional. In a case decided six years after Waugh's death the Langdon case was expressly overruled. Greencastle Southern Turnpike Co. v. State, 28 Ind. 382 (1867). However, before the court got around to deciding this case, the legislature, in anticipation of the probable outcome, passed an act which repealed all the laws not in conformity with the ruling in the Langdon case. Acts 1867, p. 204. The statute provided that all the actions arising out of any statute thereby repealed should be commenced within ninety days from the passage of the statute.
Although the interests of heirs and devisees are fixed at the death of the testator it would seem that the legislature is not entirely without authority to make some change in the rights of the parties before distribution. The Michigan Supreme Court ruled in *In re Beecher's Estate*[^239] that a statute authorizing the compromise of a claim which prevented the final distribution of an estate did not deprive the legatees of any vested rights. When it is apparent that the best interests of all concerned would be promoted by the application of a statute, a relative diminution in the interests of a few should not be permitted to outweigh the probability of loss to all if the statute is not applied. Mere procedural changes which do not affect substantive rights may be introduced at any time whether before or after the decedent's death.^[240]

Held: The appellants were barred; the validity of the Act of 1867 was unquestionable.

This decision seems proper in light of the prevailing theory that the declaration of constitutionality or of unconstitutionality carries back to the moment the statute came into existence. Under the Langdon decision, the Act of 1853 had no legal existence and consequently no rights could have been acquired under it at the death of Waugh in 1860. But *quaere*: What would have been the result if the legislature had attempted to repeal the Act of 1853 subsequent to Greencastle Southern Turnpike Co. v. State, wherein the constitutionality of the statute as amended was upheld? Perhaps the statute could have been sustained as a statute of limitations provided the period of ninety days allowed for bringing suit was considered sufficient.^[239] 113 Mich. 667, 72 N. W. 11 (1897). Compromise statutes are further discussed *infra* Chapter 4, p. 137 et seq.

Bull v. Nichols, 15 Vt. 329 (1843) (change of tribunal for making partition between claimants); Wills v. Lochane, 72 Ky. (9 Bush) 547 (1873) (appealate court authorized to reverse verdict of jury on the issue of "will or no will").

See also Hinton v. Hinton, 61 N. C. 410 (1868), sustaining a North Carolina statute, which suspended the operation of the statutes of limitation during the emergency of the Civil War, as applied so as to preserve a widow's privilege of electing whether to take under the will or to take dower, long after her right to dower would have been barred under the law at the decedent's death. It was held that the devisees were deprived of no vested rights inasmuch as they took the land subject to the widow's common-law right of dower. The statute, said the court, did not extinguish the widow's common-law right of dower, but simply barred her right of action. Hence it was reasoned that the suspending act did not deprive the devisees of land. It only took from them the privilege of claiming the benefit of a former statute whereby the widow's right would have been barred.
It was said by a Montana court that since an alien inherits only by grace of statute, the legislature may impose conditions or burdens upon his inheriting, even after the death of the decedent so long as the heir has not actually acquired control of the property. The statute involved in the case, however, was merely a statute of limitations, which barred the claim of the heir if he did not make an appearance within a specified period after the death of the decedent.

**Statutes Authorizing Sale of Land**

Statutes authorizing the sale of the decedent’s land to pay his debts, to facilitate distribution of the estate among the heirs or devisees, or for other purposes, have been enacted in many states. In view of the state's comparatively unlimited power to control the disposition of property at death, any reasonable statute authorizing the sale of the real property of the decedent must be sustained when his death occurs subsequent to the statute. Statutes authorizing the sale of a

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241 In re Colbert's Estate, 44 Mont. 259, 119 Pac. 791 (1911). Colbert died intestate in 1909, leaving real and personal property. So far as was ascertainable at his death, the deceased left no heirs. In 1909, a number of persons who were residents of Germany filed a complaint alleging that they were his heirs. The state contended that the petitioners were barred from asserting any claim to succeed to the estate by a statute which provided that no nonresident alien can take by succession unless he appears and claims his succession within five years after the death of the decedent. Held: Petitioners were barred.

242 4 Tiffany, *Real Property*, sec. 1241 et seq. (3d ed.).

243 Bickford v. Stewart, 55 Wash. 278, 104 Pac. 263, 106 Pac. 1115 (1909). The Washington statute relating to the distribution of estates of deceased persons authorized the appointment of an agent to take charge of any estate distributed to any person residing outside the state. It was provided that when an estate has remained in the hands of the agent unclaimed for one year, it shall be sold under order of the court, and the proceeds, deducting the expenses of the sale, shall be paid into the county treasury for the benefit of the nonresidents.

Estate of Porter, 129 Cal. 86, 61 Pac. 659 (1900). The statute authorized sale when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interests of the estate, and of those interested therein, that the real estate, or some part thereof be sold.
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decedent's land have also been sustained when applied in the case of decedents whose deaths were prior to the statutes. But in order to render the sale proper when a statute

244 On the ground that heirs and devisees take subject to the decedent's debts and that the statute does no more than prescribe a procedure for the payment of debts, the courts have generally sustained retroactive statutes, special and general, which authorize the sale of a decedent's property to pay his debts. Watkins v. Holman's Lessee, 16 Pet. 25 (U. S. 1842); Livingston's Lessee v. Moore, 7 Pet. 469 (U. S. 1833); Wilkinson v. Leland, 2 Pet. 627 (U. S. 1829); Kibby v. Chitwood's Adm'r, 4 T. B. Mon. 91 (Ky. 1826); Shehan's Heirs v. Barnett's Heirs, 6 T. B. Mon. 592 (Ky. 1828); Williamson v. Williamson, 3 Sm. & M. 715 (Miss. 1844); Cargile v. Fernald, 63 Mo. 304 (1876); Charlotte Consolidated Construction Co. v. Ada W. Brockenbrough, 187 N. C. 63, 121 S. E. 7 (1923); Langdon v. Strong, 2 Vt. 234 (1829). Contra, Jones' Heirs v. Perry, 10 Verg. 59 (Tenn. 1836).

In the nineteenth century before enactment of special acts was generally inhibited or forbidden by the state constitutions, thousands of special acts to authorize the sale of the lands of 'decedents were passed by the various legislatures at the petition of executors, administrators, creditors, and other interested persons. In many instances no provision was made for bond to secure the heirs and devisees, nor for court supervision; nor were any of the usual safeguards of the interests of the heirs and devisees observed, which we would consider to be indispensable to due process. See Clusky v. Burns, 120 Mo. 567, 25 S. W. 585 (1893); Watson v. Oates, 58 Ala. 647 (1877); Kibby v. Chitwood, 4 T. B. Mon. 91 (1826); Hegarty's Appeal, 75 Pa. 503 (1874). After the passage of many years during which titles had been acquired upon the supposition that such special legislation was valid, the courts sometimes found it impossible to strike down legislation even when they were convinced that the heirs had been denied procedural and substantive due process. Watson v. Oates, 58 Ala. 647 (1877); Clusky v. Burns, 120 Mo. 567, 25 S. W. 585 (1893). The predicament of the courts was well stated in Shipp v. Klinger, 54 Mo. 238, 239 (1873): "It would be entirely safe to say, that millions of dollars have been invested upon the strength of these titles, and for the courts at this day to declare the acts, and the titles made in pursuance of them, void, would be a hazardous undertaking, and would unsettle property rights to an alarming extent.

"We must therefore decline to go into the question, or consider it open to discussion." Some courts simply indulged in the presumption that the act was passed in the interest of the beneficiaries and that they had requested it and that the proceeding was proper in all respects. Florentine v. Barton, 2 Wall. 210 (U. S. 1864); Leland v. Wilkinson, 10 Pet. 294 (U. S. 1836); Watson v. Oates, 58 Ala. 647 (1877); Doe ex dem. Chandler v. Douglass, 8 Blackf. 10 (Ind. 1846); Clusky v. Burns, 120 Mo. 567, 25 S. W. 585 (1893).

Not all courts, however, engaged in such presumptions nor hesitated to vindicate the rights of the heirs. Rozier v. Fagan, 46 Ill. 404 (1868); Davenport v. Young, 16 Ill. 548 (1853); Culbertson v. Coleman, 47 Wis. 193, 2 N. W. 124 (1879).
is thus applied, the liability to sale for the particular purpose must have existed at the time of the decedent's death. If the property has passed to the heirs or devisees free from liability to be sold for particular purposes, a statute which purports to authorize a sale for a new purpose will be held to deprive the heirs or devisees of their property without due process.\footnote{245}

\footnote{245} Wood v. Roach, 125 Cal. App. 631, 14 P. 2d 170 (1932); Jones' Heirs v. Perry, 10 Yerg. 59 (Tenn. 1836).

Estate of Newlove, 142 Cal. 377, 75 Pac. 1083 (1904). Decedent died in 1889. His land descended liable to sale to pay debts, costs of administration, to pay legacies and so forth. Stats. 1893, p. 212, amended the Code of Civil Procedure so as to authorize sale whenever it appeared to the satisfaction of the court that it is for the advantage, benefit, and best interests of the estate, and those interested therein, that the real estate, or some part thereof be sold. Held: The vested rights of the heirs could not be impaired or affected by subsequent legislation giving a power of sale for new purposes, different from and greater than those conferred by the law in force at the death of the deceased. Accord, Estate of Packer, 125 Cal. 396, 58 Pac. 59 (1899); Bazzuro's Estate, 161 Cal. 71, 118 Pac. 434 (1911).

Brenham v. Story, 39 Cal. 179 (1870), involving a private act which provided that the administrator of the deceased could sell any portion of the decedent's land as in his judgment would best promote the interests of those entitled to the estate.

Johnson v. Brauch, 9 S. D. 116, 68 N. W. 173 (1896). A special statute was passed authorizing the husband of the decedent to "sell and convey, either at public or private sale," the property in dispute. Apparently the only object sought to be accomplished was to enable the administrator to convert property owned jointly by himself and children (but two of whom were under disability) into money for the purpose of distribution. Held: The act was unconstitutional as an invasion by the legislature of the province of the judiciary.

In Hegarty's Appeal, 75 Pa. 503 (1874), the testator devised his land to his wife for life and after her death to various charities. The devises to the charities were void. The testator's heirs were adults, except one who had a guardian. A special act was passed authorizing the executor to sell the land to expedite settlement of the estate. Held: The legislature could not confer upon an entire stranger power to sell the reversion which descended to the testator's heirs. The legislature has no power to authorize the sale of the property of parties \textit{sui juris} and seized of a vested estate in the premises against their consent.

Legislation authorizing the administrator of a decedent to carry out a contract of sale of land entered into by the decedent has been sustained where the death occurred prior to the statute. Moore v. Maxwell, 18 Ark. 469 (1857). In Lanes v. Bank, etc., 3 N. J. Sup. 593, 67 A. 2d 925 (1949) it was held that a statute empowering an administrator to carry into effect terms and conditions of a contract for purchase of realty entered into by
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However, the legislature may prescribe a new mode of procedure for making and confirming sales to satisfy or carry out such purposes and objects as were provided by the law in force at the time of the decedent’s death.\(^{246}\)

When the heirs or devisees are minors the legislature has additional power to provide for the disposition of the land by virtue of its status as *parens patriae*. In the case of minors, there appears to be no constitutional requirement that the purpose for which sale is made under the statute was allowable when the minor acquired title. The validity of legislation providing for the sale of an infant’s land is discussed in the succeeding chapter.\(^{247}\)

The title to the proceeds from the sale of the lands (after the payment of debts and deductions for costs, payment of legacies and the like) vests in the heirs and devisees according to their interests in the land. But this does not prevent the legislature from retroactively devising a procedure for the distribution of the proceeds according to the interests of the heirs and claimants.\(^{248}\)

decedent prior to the adoption of the statute did not impair any vested right or interest of decedent’s widow as sole heir.

\(^{246}\) In re Estate of Benvenuto, 183 Cal. 382, 191 Pac. 678 (1920). After decedent’s death, the Code of Civil Procedure was amended and that part omitted which required that a sale of an estate of a deceased person must be upon the order of the court. The effect of this was that a preliminary order was no longer required in order to authorize the administrator or executor to negotiate a sale of the property. However, it was still provided that no sale shall be valid unless reported to and confirmed by the court.

Murphy v. Los Angeles Farmers’ Bank, 131 Cal. 115, 63 Pac. 368 (1900). At the time of the death of the testator the property of a decedent was liable to be sold for the purpose of paying debts of the deceased, expenses of administration, family allowances and legacies. Subsequent to the death of the testator a statute was passed authorizing the mortgaging of the decedent’s property for the purpose of raising money with which to pay these charges.

Vaught v. Williams, 177 N. C. 77, 97 S. E. 737 (1918). A curative statute was sustained which purported to validate a sale made by an executrix who did not file a bond as required by law.

\(^{247}\) Chapter 4, note 93.

\(^{248}\) Custer and Lantz v. Commonwealth, 25 Pa. 375 (1855).
Although an executor or administrator may be in possession of the lands of the deceased, he has no estate therein. His possession is solely for the purpose of administering the estate of the deceased. Administrators and executors are officers of the probate courts. Their duties are defined by statute. They are subject at all times to legislative regulation; it is competent for the legislature to reach existing as well as future cases. Naturally, a statute defining the duties of an executor or administrator may be so arbitrary and unreasonable as not to be sustainable, but the ground for declaring such legislation unconstitutional cannot be that the administrator or executor is deprived of an interest in the deceased's lands. He has no vested interests therein.

Of course, the administrator or executor may also be named in a will as devisee or trustee. In such case he will have an interest in the decedent's land, but not by virtue of his office. It has been held that executors named in a non-

249 Bank of Hamilton v. Dudley's Lessee, 2 Pet. 492 (U. S. 1829); Weaver's Ex'rs v. Weaver's Creditors, 23 Ala. 789 (1853); Scott v. Jenkins, 46 Fla. 518, 35 So. 101 (1902); Campau v. Campau, 25 Mich. 127 (1872); Keene's Appeal, 64 Pa. 268 (1870).

250 See cases cited note 249.

251 See Re Littleton's Estate, 129 Misc. 845, 223 N. Y. S. 470 (1927). The application of the statute would have required the executors to retain $30,000 to secure the payment of a deficiency which might possibly arise, should a deed of trust executed by the decedent in her lifetime be foreclosed. The loan secured by the deed of trust was to mature Jan. 1, 1960.

252 In re Estate of Wellings, 197 Cal. 189, 246 Pac. 21 (1925). Held: Where a foreign corporation authorized to do a trust business in the state was named as residuary trustee and legatee under the will of a person who died prior to the statute by which the privilege of foreign corporations to act as trustees of wills in this state was withdrawn, the trust estate became vested in the corporation upon the testatrix's death and could not be divested of such estate or prevented from executing the trust, even though the statute was passed prior to the decree of distribution.
intervention will are not officers of the probate court but rather trustees. \textsuperscript{253}

\textsuperscript{253} People ex rel. Phinney v. Superior Ct., 21 Wash. 186, 57 Pac. 337 (1899). Decedent left a "non-intervention will" in which several persons were named executors. The will was admitted to probate, and the executors continued in administration until the enactment of Laws 1897, c. 98, sec. 2, which provided that all insolvent estates shall be settled by the court as in cases of intestacy and the court shall make an order requiring the executor or administrator to make a report of his acts to the court. The liabilities of the estate greatly exceeded the assets. After the statute went into effect, the probate court, at the instigation of the creditors, ordered that the continued administration of the estate should be under the direction of the court. However, the statutes in effect at the decedent's death provided that when the testator provides in his will that letters testamentary or of administration shall not be required, after the probate of such will, the estate shall be managed and settled without the intervention of the court. Held: Laws 1897 deprived the testator of a vested right to appoint his own agent to settle his estate. He had a right that the disposition of his property after death should be entrusted to agents of his own choosing rather than to agents of the court. The law is particularly jealous of invasions of the rights of deceased persons, since they have no opportunity to change their business plans to correspond with changes of the law.
CHAPTER 4

Future Interests

THE validity of legislation abolishing future interests as such has rarely come before the courts, for the legislatures have not undertaken to do away with any of the future interests recognized in modern case law. One great exception is in respect to remainders and reversions limited after fees tail, which, because of the prevalent abolition of that form of land tenure, cannot exist in most jurisdictions. While the legislatures have generally refrained from imposing direct restraints upon the privilege of owners of land to create future interests, they have enacted a rather sizable body of legislation affecting the rights of owners of future interests. Our attention in this chapter will be directed largely to legislation investing private individuals with the power to impair or destroy future interests, for it is around such legislation that most of the constitutional issues revolve.

This chapter has been divided for purposes of convenient discussion into three headings, “Remainders, Reversions, and Executory Interests,” “Powers of Appointment,” and “Powers of Termination and Possibilities of Reverter.” Possibilities of reverter and powers of termination have been treated separately because the constitutional problems which have arisen in respect to these interests are quite unlike those arising in respect to the other future interests. Powers of appointment, while generally present interests, are considered because they are admittedly of importance in any discussion of future interests.
So far as it may be possible or expedient to classify the given interest according to conventional terminology, that will be done.¹ However, classifications employed in the law of future interests, important as they are, are not ipso facto determinative of constitutional issues. Other factors are very important, such as the purpose to be accomplished by the legislation, the necessity for the enactment, and the economic value of the interests. Statutes are rarely limited in effect to particular types of future interests by name. A given statute may affect different kinds of future interests. Therefore the most objective approach (and the one to be used) is to discuss individually the various types of statutes whose application may impair future interests, rather than to attempt to determine individually what constitutional protection is afforded each type of future interest.

For the most part, it will not be necessary to distinguish equitable from legal future interests. Where it is significant in a given case that the interest is equitable in nature, mention will be made of that fact; otherwise, equitable future interests will be treated as though they were legal future interests.

¹The usual classification of future interests, of course, consists of remainders, reversions, executory interests, possibilities of reverter, and powers of termination. This classification does not include all possible types of future interests. There are various kinds of future interests, notably future interests of a statutory nature, which do not strictly fit into any of the conventional molds. See I Simes, Future Interests, chapter 12 (1936), for a discussion of future interests of statutory origin. Even in respect to the conventional future interests, it appears to be extremely difficult to devise definitions or classifications which do not turn out to be more or less inaccurate, more or less subject to exceptions, and in practice difficult to apply to factual situations. See I Simes, Future Interests, chapter 5 (1936), wherein he distinguishes vested and contingent remainders; and chapter 6, in which he distinguishes contingent remainders from executory interests. Fortunately, for the purpose of delineating constitutional issues it is not necessary to undertake a consideration of each and every imaginable kind of future interest. The extent to which the conventional or usual future interests are constitutionally protected need only be considered.
What is adequate notice and who are necessary parties are problems which are beyond the scope of this discussion. Nevertheless, procedural due process is so intertwined with substantive due process in proceedings affecting future interests that at least a few general statements must be made in regard to parties and notice. To the owner of a future interest it can make little practical difference whether the legislature directly extinguishes his interest by fiat or whether his interest is obliterated in a proceeding in which he is not represented. Questions of necessary parties and adequate notice can arise in almost any kind of proceeding, but inquiries as to who are necessary parties and what is adequate notice especially press for attention when the case is one in which future interests are concerned. Whether there is a future interest at all is frequently a question fraught with much difficulty. So much depends upon the astuteness and diligence of the attorneys for the interested parties. If the possible owners of future interests are not represented in the proceedings, such interests may be eliminated for lack of careful consideration. What is said in the succeeding paragraphs will be applicable to any of the proceedings under the statutes to be discussed subsequently.

In respect to actions or proceedings in which the judgment is *in personam*, it is a fundamental principle of due process that the rights of a person may not be determined unless he is a party. Service of process upon the parties within the jurisdiction of a state is often said to be required by due process of law in order that a judgment *in personam* may be rendered, but due process is probably satisfied by any notice

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which adequately informs the person of what is going on. Persons in being generally are necessary parties whether their interests are vested or contingent.\(^4\) Reversioners and persons having absolutely vested remainders are necessary parties in nearly all situations.\(^5\) If the person is an infant, *non compos mentis*, or suffering from a legal disability, he ordinarily must be represented by his guardian or by a guardian *ad litem* appointed especially for the purpose.\(^6\) As to persons unknown or not yet born who may have an interest in the property, certain generalizations may be made. If living persons are joined who are in fact interested in the outcome of the suit in the same way as the unknown or unborn persons, the latter are bound.\(^7\) In case the interests

\(^4\) State v. Woodruff, 170 Miss. 744, 150 So. 760 (1933). "... the principal situations where this is not the case being where the person is represented by a trustee and where the person is a member of a very numerous class, so that it is impracticable to join all members." 3 Simes, *Future Interests*, sec. 687 (1936).


\(^6\) The failure to appoint a guardian *ad litem* does not always involve a denial of due process. Where the infant or incompetent has been served with process and he appears and defends or is represented in the proceedings by an attorney, a decree or judgment rendered against him will not be void or subject to collateral attack although subject to reversal on appeal. Levystein Bros. v. O'Bryan, 106 Ala. 352, 17 So. 550 (1895); Linn v. Collins, 77 W. Va. 592, 87 S. E. 934 (1916). It has been suggested that in any event a guardian *ad litem* is not indispensable in a jurisdictional sense, since the mere filing of a bill against an infant or incompetent is sufficient to make him a ward of the court. McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926). This may be quite true in an *in rem* proceeding such as a proceeding for the distribution of the estate of a decedent, but in a strictly *in personam* proceeding, it is extremely doubtful that the solicitation of a court for the interests of the incompetent would be sufficient. The adversary principle in judicial disputes is so deeply embedded in the Anglo-American legal system that any judgment which purports to bind the interests of an incompetent would probably be held void as a deprivation of property without due process unless there were either an opportunity for the incompetent himself to defend those interests, or those interests were represented by a guardian, trustee, executor, or some person before the court.

\(^7\) 3 Simes, *Future Interests*, sec. 672 (1936).

"... Although this doctrine of virtual representation is a rule of the common law, it is founded on convenience and necessity, since to shackle estates without the power of relief, unless every person having a contingent and possible interest could be brought before the court, as a party complainant
of the living persons who are parties to the proceeding are antagonistic to the interests of unknown and unborn persons, so that the former persons cannot and do not represent the latter, ordinarily a guardian ad litem must be appointed by the court to represent the interests of the latter.\(^8\)

If the proceeding is one in which the judgment is *in rem*, all persons will be bound whether or not they were joined as parties and whether or not their interests were actually represented, provided that the court has jurisdiction of the res and the statutory procedure for giving notice has been followed.\(^9\) Notice by publication is held not to deny due process when the whereabouts of persons to be served cannot be readily ascertained or they are out of the state or when the persons who may have interests are unknown.\(^10\) It is

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\(^8\) Springs v. Scott, 132 N. C. 548, 44 S. E. 116 (1903).


Notice by publication is insufficient as to known persons of known residence. "Exceptions in the name of necessity do not sweep away the rule that within
quite apparent that persons who have interests may not appear and defend their interests simply because they never saw the notice and did not learn of the proceeding. For this reason there is possibly a limit to the number of classes of judgments in rem which may be authorized by statute or created by judicial action. The courts have recognized the efficacy of such judgments because it is believed to be socially, politically, and economically desirable for a state to have the power to make final determination of property rights which are conceived of as being within her territorial domain. That is to say, the rule that no one's interests will be affected by a proceeding unless he is joined or his interests are represented is relaxed because of the paramount need to make a final determination of the status of the title or because of the impossibility of joining all the persons who might possibly have some interest in the property. This rule should not be relaxed to any greater extent than necessity requires. Proceedings which have been held to be in rem are proceedings for the probate of wills and the distribution of the property of a decedent, proceedings to quiet title, proceedings for the registration of title under the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 318 (1950).

It does not appear to have been decided whether it would be a denial of due process if the interests of an ascertainable class of unborn persons (e.g., where there is a contingent remainder to the heirs of a living person) were cut off by a decree or judgment without those interests being represented by a living person under the virtual representation principle nor by a guardian ad litem. A distinction might plausibly be made between unknown claimants, who are bound by the statutory notice even if they were not represented, and unborn claimants in an ascertainable class, who may have to be represented.


12 3 Simes, Future Interests, sec. 677 (1936); Estate of Davis, 151 Cal. 318, 86 Pac. 183 (1907).

Torrens Acts,\textsuperscript{14} proceedings for the sale of land,\textsuperscript{15} proceedings for the partition of land,\textsuperscript{16} and proceedings for the sale, mortgage, or lease of trust res.\textsuperscript{17} This list is not intended to be complete.

A warning on the word "vested"

One should be cautioned at the outset against the ambiguous use of the word "vested" which sometimes results in confusion in the cases. In Constitutional Law an interest is said to be "vested" when it has been determined that the particular interest is protected from impairment by a due process clause or some other constitutional provision. The term is also applied in real property law to interests which are ready to vest in possession without the happening of any condition precedent except the determination of the preceding estate. The sense of the term as it is used in these two ways is altogether different. The fact that an interest is vested in the property sense does not necessarily mean that it is immune from legislative impairment (\textit{i.e.}, that it is a "vested interest"). Conversely, it is certainly not correct to say that an interest which is contingent in the property sense is always subject to legislative impairment. Executory interests and contingent remainders are constitutionally protected interests (although not quite in the same degree as are technically vested future interests) which the courts rarely allow to be completely wiped out.

I. Remainders, Reversions, and Executory Interests

The statutes to be discussed do not fall into any precise groupings. Since each statute presents its own particular

\textsuperscript{14} Tyler v. Judges of the Court of Registration, 175 Mass. 71, 55 N. E. 812 (1900).
\textsuperscript{15} Lee v. Albro, 91 Ore. 211, 178 Pac. 784 (1919).
\textsuperscript{16} Grannis v. Ordean, 234 U. S. 385 (1914).
\textsuperscript{17} Lee v. Albro, 91 Ore. 211, 178 Pac. 784 (1919).
problems which are not germane to any other statute, the order of treatment must necessarily be somewhat arbitrary. The general subject matter of the statutes in the order in which they will be considered is as follows: 1 and 2, compromises; 3, quieting title; 4, 5, and 6, partition, sale, and leasing; 7, allocation of benefits; 8, improvements and repairs; 9, legitimation and adoption; 10, rule against perpetuities; 11, rule in Shelley’s Case; 12, Worthier Title Doctrine; 13, destructability rule; 14, fees tail; 15, revocation of grants; 16, marketable titles and limitations of actions.

1. Statutes Which Authorize Compromise of Claims as to Validity or Effect of a Will

In a number of states, statutes are to be found which provide that a court may affirm a compromise in settlement of a controversy as to the validity or effect of a will or of a provision thereof.

The constitutionality of such statutes has been considered in only a few cases. Consequently, the extent to which future interests may be impaired by compromises has not been very well determined. To a large extent our conclusions must rest upon conjecture.

The New York statute 18 confers power upon a court to authorize executors, administrators, and trustees to adjust by compromise any controversy that may arise between persons claiming as devisees or legatees under the will and

18 N. Y. Dec. Est. Law, sec. 19. The statute provides that all persons claiming as devisees or legatees and those claiming the estate to be intestate shall be made parties. It is also provided that where lunatics, infants, or persons not sui juris are necessary parties to a compromise under this section, these shall be represented in the proceedings by a special guardian appointed by the court. And if it appears to the satisfaction of the court that the interests of persons unknown or the future contingent interests of persons not in being are, or might be, affected by the compromise, the court must appoint a guardian ad litem to represent those interests.
persons entitled to or claiming the estate of the deceased under the statutes of descent and distribution. An agreement of compromise in writing pursuant to this statute, if found by the court to be just and reasonable in its effects upon the interests of infants, lunatics, persons of unsound mind, unknown persons, or upon the future contingent interests of persons not in being, is declared to be valid and binding upon such interests as well as upon the interests of adult persons of sound mind.

In *Fisher v. Fisher* the court has no authority to approve a compromise which results in the elimination of a tangible right unless

\[\text{19} 253 \text{ N. Y. 260, 170 N. E. 912 (1930).} \]

The testator by his will created trusts for his children, the corpus of which was to be paid over to each child on attaining the age of forty-five. The testator directed the trust to be continued, in the case of the death of any before reaching such age, for any issue of such child until the youngest issue of such child in being at the testator's death should become thirty years of age, or sooner die, but he failed to make any provision where there was no grandchild in existence at the time of the testator's death. There were no grandchildren in being at the testator's death. After the death of the testator, all of his children and his widow entered into a compromise agreement concerning the property left under the will, which in effect wiped out the trust provisions in the will and vested the property absolutely in the beneficiaries named. This compromise was effected under the statute mentioned above.

There was grave doubt whether the testator meant that, in event no grandchildren were living at his death, the child for whom the trust was created should take absolutely and in all events, or whether in case of death of a child under forty-five without leaving issue in being at the testator's death, there should be an intestacy, in which case the interest would descend to the testator's heirs, among whom would be the grandchildren. It was determined that the possible interests of the grandchildren born after the testator's death were so remote, indefinite, and vague as to bring the will within the provisions of the statute, even though the effect of the compromise in the instant case was to wipe out the trust provisions and vest the property absolutely in the beneficiaries.
there is some compensating advantage was expressed in *In re Sidman's Estate*\(^20\) where the following language may be found:

“Where, under a will, a person whether adult, infant, unknown or unborn, receives a tangible right or interest, the absolute elimination of such right or interest without any compensating advantage is not a compromise, it is a complete surrender, a making of a present, and such an act is beyond the deputed power of the court. So long as there is a possibility that any such person may have a right, however remote or contingent, the court possesses no authority to validate an agreement which totally nullifies it, for the reason that no such power has been accorded. Living persons who are *sui juris* may make gifts of their interests if such action suits their humor; others may not, and the court, as the protector of the interests of the latter, may not do it for them.”\(^21\)

The limitations upon the power of the courts, which the *Sidman* and *Fisher* cases attempt to some extent to delineate, do not stem, however, from any constitutional provisions but from the language of the act which requires that the compromise be just and reasonable in its effects upon the interests of infants, lunatics, persons of unsound mind, unknown persons, or upon the future contingent interests of persons not in being. These cases do not determine how far the legislature may go in allowing future interests to be destroyed.

The *Massachusetts* statute\(^22\) is substantially similar to the New York statute. The Massachusetts Supreme Judicial Court has intimated that an agreement would not be “just and reasonable . . . in its effect upon any future contingent interests that might arise under a will” if it extin-

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\(^{21}\) 278 N. Y. S. 43, 51 (1935).
guished an interest which was more substantial than a "film of mist."

“It is conceivable that future contingent interests may be of such tenuous nature that it would be just and reasonable to remove them even so far as concerns such interests rather than to permit them to remain a cloud upon other rights arising in the estate.”

However, in the very case in which this language is found, the court below had approved a compromise which extinguished, without compensating factors, some pretty substantial interests. The Supreme Judicial Court seems to have thought that the agreement was “just and reasonable.” By the terms of the will offered for probate, a trust was created for the benefit of an unmarried son, aged 52, and a married daughter of the testator. It was provided that upon the death of the son without issue within twenty years after the death of the testator, the share of the son should go to his heirs at law, and, if he were still living twenty years after the testator’s death, he should be given his share absolutely. At the time of the testator’s death the heir presumptive of the son was his sister and in case of her death his heirs presumptive would be her three minor children. There was considerable doubt about the testator’s testamentary capacity. He had been an insane person under conservatorship for many years. The compromise agreement gave the son his share in the trust property outright, thus cutting off all possible benefit which could come to the son’s heirs at law under the terms of the will.

In Neafsey v. Chincholo, the Massachusetts Supreme Judicial Court expressed doubt concerning the validity of a "compromise" which looked like an agreement of dissatis-

24 225 Mass. 12, 113 N. E. 651 (1916).
fied devisees, who had simply made over the will to suit themselves. In this case, the testator left a life interest in certain real estate to two of his daughters with remainder to the heirs of the testator at the time of the death of the survivor of the daughters. By the terms of the compromise, the daughters were given fee interests in the real estate in which they were given a life estate by the will, and the remainder to the heirs of the testator was obliterated. The remainder to the heirs of the testator, although contingent because the takers could not be ascertained until the death of the survivor of the daughters, was fairly certain to vest in possession in someone at some time and therefore ought not to have been eliminated except for very good reasons. No such reasons appeared in the case. The decree of the probate court, however, was set aside on the ground that no special guardian had been appointed to represent the future contingent interests as the statute requires.

In *Dodge v. Detroit Trust Co. et al.* the Michigan Supreme Court refused, on the ground that the former proceedings were *res adjudicata*, to set aside a settlement which had been entered into eighteen years previously in anticipation of the Michigan compromise statute. The settlement


Section 1 (sec. 702.45) provides: "The compromise, settlement or adjustment of any good faith contest of the admission to probate of any instrument propounded as the last will and testament of any decedent, or of any good faith controversy (a) as to the construction, validity or effect of any such provision thereof, whether such controversy shall arise before or after such instrument has been admitted to probate, or (b) as to the rights or interests in the estate of such decedent of any person as beneficiary under such will, or of any child or issue of a deceased child claimed to have been unintentionally omitted from such will, or of the widow claiming to exercise any right of election, or (c) otherwise arising in or growing out of the administration of the estate of any decedent under such will, or of any trust created thereby, including any accounting in such administration, or any distribution under such will or trust, when there is or may be any person interested who is a minor or otherwise without legal capacity to act in person, or whose present existence or whereabouts cannot be ascertained, or where there is any in-
apparently disregarded the interests of unborn persons in a trust set up by the will, but the validity of the compromise as it affected those interests was not discussed by the court. 27

alienable estate or future contingent estate or interest which will or may be affected by such compromise, settlement or adjustment, which compromise, settlement or adjustment is made in accordance with the provisions of this act, shall be lawful and valid and binding upon all the parties thereto including such as are represented therein by trustees, guardians or guardians ad litem and upon all trusts created by such instrument, and upon all future interests arising thereunder in persons then in being or who may thereafter come into being and shall be recognized and so enforced by all courts and tribunals whatsoever: . . ."

Section 2 (sec. 702.46) provides that the probate court shall appoint a guardian ad litem to represent persons whose whereabouts cannot be ascertained, minors, and incompetents who have no guardian, and unborn persons having future contingent interests or estates. It is also provided that a guardian ad litem shall be appointed in case of wills purporting to create trusts where no trustee has qualified or where the trustee doesn’t appear in answer to summons.

Section 3 (702.47) provides that if the probate court finds that the contest was in good faith, and the effects of such agreement upon the estates and interests of the persons and interests represented by any fiduciary or guardian ad litem and upon any inalienable estate or interest shall be found to be just and reasonable, an order shall be made approving such agreement.

Section 4 of the original act provided that the act was intended to apply to all cases as well where the decedent had died theretofore as where the decedent shall have died thereafter.

27 With the exception of certain specific bequests, the testator devised his entire property, which amounted after payment of debts and taxes to approximately $26,000,000 in trust, the income to be divided five ways, one portion going to the wife of the testator and the other portions to be paid in equal amounts to each of four of the testator’s six children. The share of the income of any deceased child was to go to his issue and upon the death of the last survivor of the children, the trustees were to convey the estate to the heirs of the children. One of the testator’s children was not yet born when the will was executed and therefore not included under the trust. Approximately $2,700,000 was set aside for this child after the testator’s death as its share in the estate. The remaining child, the plaintiff in the Dodge case, was practically disinherited by his father, being given a life income of $150.00 per month. After the will was filed for probate, this son announced his intention of contesting the will. The four children and the disinherited son, John, entered into an agreement, which was immediately binding on the adult signatories, but was conditioned upon obtaining within six months the consent of the minor children, the unborn, and the contingently interested. The compromise statute was pending before the legislature while the negotiations were proceeding and had been enacted when the agreement was reached. The effective date of the statute, however, was approximately two months subsequent to the date of the agreement. Apparently the parties contemplated that the statute was necessary to the fulfillment of the agreement,
The plaintiff’s main contention (there were many) was that the trust provisions of the will were null and void *ab initio* because the inclusion of a small amount of real estate caused the whole trust to violate the two-lives rule and that consequently whatever moneys he had received in the attempted settlement were only part of his intestate share of the trust property. The court cast doubt on the correctness of the contention but did not feel compelled to express a definite opinion. Clearly the court thought that the interests purported to be created by the will did have a legal existence at the time of the settlement.

The cases just discussed indicate the temper of the courts but do not aid us very much in setting the constitutional limitations to the legislative power.

We must bear in mind that we are dealing with statutes which authorize compromises. The word "compromise" connotes a giving and taking. A decision of a majority

The guardian *ad litem* to represent future contingent estates was not appointed until after the effective date of the statute and he did not sign until after the decree approving the settlement. The settlement provided for the payment of a lump sum of $1,600,000 plus interest to John and the sum of $1,000,000 to the widow and to each of the four other children mentioned in the will. It was approved by the circuit court and no appeal was taken. At the same time the other four children and the widow entered into a supplemental agreement which re-established out of the remaining property the trust provided for in the will.

28 The two-lives rule was applicable to realty but not to personality. Mich. Comp. Laws 1929, sec. 12934: "Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter; such power of alienation is suspended when there are no persons in being, by whom an absolute fee in possession can be conveyed." And in Mich. Comp. Laws 1929, sec. 12935: "The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two [2] lives in being at the creation of the estate," etc.

The two-lives statute has been repealed since the Dodge case. Pub. Acts 1949, Act No. 38.

29 The doctrine that the inclusion of a small amount of realty would cause a whole trust to violate the two-lives rule was recognized long before the first litigation in the Dodge case, but was not clearly enunciated until Richards v. Stone, 283 Mich. 485, 278 N. W. 657 (1938).
forced upon a minority is not a compromise; all parties must agree upon the result reached. The statutes presuppose that all parties in being will have voluntarily consented to the agreement. We may assume without argument that a statute allowing the majority of claimants to bind the interests of the dissenting minority of claimants would be held to deprive the latter of their property without due process, except, perhaps, if their interests are extremely unsubstantial and uncertain. It is also obvious that a statute could not make the agreement of the claimants binding upon persons who are not parties to the agreement and are in no way represented in the proceedings.

A statute is needed to make a compromise effective only where there are interests in persons not of age or suffering under a legal disability, or interests in unknown or unborn persons. Heirs and devisees not under any disability can do as they please with their own interests. Compromise statutes will, therefore, normally be unconstitutional only so far as they permit persons in being and *sui juris* to affect the interests of persons *non sui juris* and persons unknown or not in being who cannot take part in the agreement.

The constitutionality of the compromise statutes must first of all be considered in this light: Although a compromise may obliterate some of the interests created by the will, a judicial determination which is even more destructive may be avoided. Were it not for the compromise, a contest of the will might have resulted in a determination that the will is invalid, in which case all of the interests *prima facie* created by the will would have been nullified.\(^{30}\) Or an attack on the

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\(^{30}\) *Probate of a will merely declares in a formal way the existence of facts which have previously occurred and furnishes official evidence of those facts.* 2 Page, *Wills*, sec. 561 (Lifetime ed.). If, in point of fact, the will is valid, it speaks from the moment of the testator's death, but if it is invalid then the devisee never had any rights. The litigation attending the probate of a contested will is not prosecuted to divest either the heir or devisee of title...
validity of a provision might have been successful. Or a construction which would eliminate the existence of the alleged interests might have been adopted by the court. These compromise statutes are founded on the well established maxim of public policy, “interest reipublicae ut finis sit litium.” It is better that “paper” interests be impaired than that the property be consumed or diminished by expensive litigation.

The primary consideration in determining the constitutionality of the application of a compromise statute should be whether adequate safeguards are established by the statute to assure that no compromise will be allowed to affect adversely the interests of persons unknown, unborn, or non sui juris, except where there is a bona fide uncertainty as to the validity or construction of the will or of the provision. The technical classification of the extinguished interest should be only a secondary concern. Of course, the substantiality of the interest from the point of view of the likelihood that it will ultimately vest in possession or whether it is vested or contingent in the real property sense must be considered by the court. But the court should consider such

to property, but to determine which of them is entitled to the property. Wills v. Lochnane, 72 Ky. (9 Bush) 547 (1873). See Chapter 3, p. 119.

But even though the probate merely establishes the status of the proffered instrument, it might be held to be a taking of property without due process to expose future interests set up by a will to a danger not existing at the testator's death of losing the foundation upon which their existence depends, as by enlarging the grounds for contesting a will, or extending the period in which the will may be contested, or adding to the class of persons who may contest the will. There are apparently no cases involving future interests. However, it has been held, on the ground that a title vested by will is as completely vested as if granted by deed, that to extend the right to contest a will after the estate has thus vested by the death of the testator and permit the property to be taken from the devisees by a contest of the will authorized by a statute passed subsequent to the death of the testator, would be to deprive the devisees of their property without due process. “The right to hold the property under the will free from any liability to contest by any one legally entitled to contest the will at the death of the testator is a vested right, which cannot be taken away by legislative enactment.” Havill v. Havill, 332 Ill. 11, 17, 163 N. E. 428, 430 (1928). See Chapter 3, p. 117.
matters only for the purpose of judging the fairness and reasonableness of the compromise. If the interest extinguished could, in fact, have been of no value, or in all probability could never have vested in possession, the court can readily approve a compromise effected in accordance with the statute. On the other hand, if the eliminated interest had a present substantial value or was likely to vest in possession, the court will be reluctant to approve the compromise unless the claims present very difficult and doubtful questions of law and fact. A statute which does not provide for some kind of guarantee that the compromise will be fair in its effect on the interests of persons not in being or not known, or non sui juris, would, in the writer's opinion, be unconstitutional. But one should not generalize that certain classifications of future interest cannot be eliminated by the compromise.

A statute allowing disappointed heirs and devisees to remake any will to suit their desires would be obviously unconstitutional if their agreement could bind the substantial interests of nonassenting parties.

A court which deems the "substantiability" of the extinguished interest to be the primary criterion of the constitutionality of the application of the compromise statute must necessarily put great weight upon whether the effective date of the statute is before or after the death of the testator. Such a court will consider the interests to have "vested" at the death of the testator or certainly when the will has been admitted to probate.\(^\text{31}\) In *Fisher v. Fisher*\(^\text{32}\) it was stated that the New York statute could not be applied to a will which was effective before its enactment. On the other hand, the will in the *Dodge* case\(^\text{33}\) had been admitted to

\(^{31}\) See note 30 supra.

\(^{32}\) 253 N. Y. 260, 170 N. E. 912 (1930), supra note 19.

\(^{33}\) *Dodge v. Detroit Trust Co.*, 300 Mich. 575, 2 N. W. 2d 509 (1942), supra note 25.
probate some months before the Michigan statute went into effect. The result reached in that case is no doubt correct. Unfortunately, the court did not really examine the constitutionality of the application of the statute.

Where the statute is enacted before the death of the testator, although after the execution of the will, few courts are likely to find constitutional objection to allowing the statute to apply. The disposition of the property of a deceased person is largely a matter of statute. The statute which is in effect when the testator dies may be made to control rather than the one in effect when the will was executed, for a will is deemed to be ambulatory during the lifetime of the testator.\(^{34}\) The compromise statute should be treated as a provision to the effect that the precise extent to which a will creating future interests shall be executed, in cases where all other parties in interest in the estate make an agreement upon that subject, shall depend upon a judicial decree entered upon general principles of justice and reason after a full investigation.\(^{35}\) The state indubitably has power to regulate prospectively the creation of future interests. It is within the power of the state to say that, although future interests may be created by will, whenever the recipients of such interests are non sui juris, or not known or not in being, and there is a grave doubt that the will or the provision is effective, or it is very uncertain upon proper construction of the terms of the will just what interests were created, then such putative future interests may, if certain safeguards are followed, be cut off.

\(^{34}\) Estate of Weeks, 154 Kan. 103, 114 P. 2d 857 (1941); Blackbourn v. Tucker, 72 Miss. 735, 17 So. 737 (1895); Ostrander v. Precece, 129 Ohio St. 625, 196 N. E. 670 (1935), appeal dismissed 296 U. S. 543 (1935); In re Zeigner's Estate, 146 Wash. 537, 264 Pac. 12 (1928); 1 Page, Wills, sec. 71 (Lifetime ed.).

2. Statutes Which Authorize the Compromise of Claims Against Trust Estates

A Massachusetts statute enacted in 1861 provided:

"The supreme judicial court may authorize executors, administrators, guardians, and trustees, to adjust by arbitration or compromise any controversy that may arise between different claimants to the estate in their hands, to which such executors, administrators, guardians, or trustees, together with all other parties in being, claiming an interest in such estate, shall be parties. And any award or compromise made in writing in such case, shall, if found by the court just and reasonable in relation to its effects upon any future contingent interests in said estate, be valid and bind such interests as well as the interests of the parties in being: provided, however, that where it shall appear that such future contingent interests may be affected, the court may appoint some suitable person or persons to represent such interests . . . ." 

In Clarke v. Cordis it was held that merely because the statute operated on contingent interests of persons who were either not in being, or could not, from the uncertain and remote nature of their interests, be made parties to the proceeding, it did not deprive such persons of their right to property in violation of any provision of the Declaration of Rights of the Massachusetts Constitution. In this case

37 4 Allen 466 (Mass. 1862).
38 Article I: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."

Article X: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. . . . but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. . . . And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."
the testator had devised certain property in trust to his executors with directions to pay over the income to the testator's four sons during their lives, and upon the death of any son to pay over to his legal heirs the proportion of the income which he would have been entitled to receive. Upon the death of the survivor of the sons, the executors were to convey and assign all of the property to the heirs of the four sons respectively by right of representation. After the probate of the will, one of the sons died. The remaining sons were all alive; some were married and had one or two children. After the deceased son's death, two minor children appeared and claimed, through their mother, to be his children and lawful heirs. The surviving sons denied that this woman had ever married their brother or that the children were his lawful heirs. In pursuance to the statute quoted above, a compromise agreement was finally entered into between all the parties (the infants were represented by guardians), whereby it was agreed that the two children should presently receive three-eighths of the income to which the deceased was entitled. It was further agreed that they should take the same proportion of the decedent's share of the principal if they were living at the time of the final distribution of the estate. The children relinquished all claims to any other or greater share. The surviving sons took the remaining five-eighths of the income.

The statute was sustained on the broad ground that it enabled trustees and guardians to enter into expedient and beneficial adjustments or settlements of controversies relating to the property in their hands, just as persons acting in their own right may compose and settle disputes affecting their own estates. If the trustee has the power to compromise, he may be able to avoid litigation which will absorb the value of the estate or destroy all alleged interests. The court believed that the assent of all interested parties might
be presumed to such a statute as this, which (in the opinion of the court) tended to create in everyone concerned a more valuable interest. Contingent interests, it was held, were adequately protected by the provision which requires the court to appoint some suitable person whose duty it shall be to represent them in all proceedings and by the provision that the court shall not allow a proposed compromise unless it is just and reasonable in its effect on all contingent interests.

The result reached in *Clarke v. Cordis* is easily justified. The outcome of a suit would have been very doubtful. It was clearly to the advantage of everyone to prevent litigation. Moreover, the compromise was probably as advantageous to the interests of the unborn heirs of the surviving sons as could be expected. The sons had a present valuable interest in the same proportions as their presumptive and unborn heirs would some day have in the corpus. They no doubt sought to procure a settlement most advantageous to themselves and their heirs. The only interest of which the heirs of the surviving sons were possibly deprived was the interest in the share of the deceased son. But this they would have taken only if the claimants were not the heirs of the decedent. There was no certainty that the heirs of the surviving sons were actually entitled to any part of the share of the deceased.

The Massachusetts statute has not been given a retroactive effect, but it would seem that the reasons which sustain the prospective operation of the statute would also amply justify its retroactive operation.

39 This was one of the grounds upon which the Massachusetts Supreme Judicial Court sustained the retroactive application of Acts 1785, c. 62, sec. 4, which abolished the common-law presumption that a conveyance to two or more persons (not husband and wife) creates a joint tenancy. The effect of the statute was to turn existing joint tenancies into tenancies in common and to abolish the incident of survivorship. Holbrook v. Finney, 4 Mass. 566 (1808); Miller v. Miller, 16 Mass. 58 (1819). See infra Chapter 7, p. 316.
3. Statutes Which Authorize Proceedings to Determine the Status of Title to Land and Proceedings to Quiet Title: Torrens Acts

Questions do not ordinarily arise as to the general validity of statutes which authorize proceedings to quiet title, or to remove clouds upon title, or to determine adverse claims to land. If the design of such proceedings were to destroy or impair future interests in the same manner that interests are sometimes adversely affected by the compromise proceedings under the statutes just discussed, there would be grave doubts as to whether the legislature had not violated property rights. But the statutes do not vest the plaintiff with a new title; they merely enable him expeditiously to settle what his title is. It appears not to have been seriously urged that statutes like these in any way authorize the impairment of vested rights. Of course, in the application of a statute to specific instances it may well happen that interests are unconstitutionally destroyed by the improper expunction of an instrument from record or it may happen that a valid claim is denied, but the general validity of the statute is not on that account brought into question.

In one aspect these statutes are somewhat likely to occasion the destruction of future interests. Proceedings under the statutes are often declared to be in rem. Since notice by publication is sufficient in proceedings in rem when the

40 The constitutionality of statutes authorizing proceedings for quieting title and registration of title is further discussed in Chapter 3, p. 85 et seq.
42 The constitutionality of the statutes has in the past been challenged often, but very rarely for denial of substantive due process. The common charge has been that the adverse claimants were not adequately advised of the proceedings by the statutory scheme of notice by publication. The statutes have generally been held not to deny procedural due process. Wehrman v. Conklin, 155 U. S. 314 (1894); McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926); Ashton-Jenkins Co. v. Bramel, 56 Utah 587, 192 Pac. 375 (1920).
possible claimants are unknown or nonresident, the owner of a future interest may in fact be uninformed of the proceeding and may not appear with the evidence which would have tipped the scales, so to speak, and have persuaded the court that his claim is valid.

In *McFadin v. Simms*, the failure of persons claiming an indefeasibly vested remainder to appear in response to the statutory notice given them and to offer proof of their title was held to estop them from later making a collateral attack on a judgment which declared the plaintiffs in a statutory proceeding to quiet title to be the owners in fee of the land. The claimants unsuccessfully contended that the statute as applied retroactively (the testator whose will created the remainder died some 37 years before the statute) violated a provision in the state constitution prohibiting retroactive legislation. Now, ordinarily an interest overlooked by the court in a quiet-title proceeding will be less conspicuous than a vested remainder. One would be inclined to answer, if the proposition were put to him abstractly, that such an oversight must be the result of gross mistake or of fraud and collusion, but in any event utterly unjustifiable. However, under the peculiar facts of the case the finding that the plaintiffs in the proceeding were the owners in fee was reasonable. The gaps in the chain of title were thought to be but formal defects, resulting from the loss of a deed or deeds or the failure to record them. The will was not recorded in the county in which the land was located. The plaintiffs' ancestor had lived on the land for more than forty years.

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43 309 Mo. 312, 273 S. W. 1050 (1925).

44 Mo. Const. 1875, Art. 2, sec. 15: "That no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly." Now with insignificant modifications, Const. 1945, Art. 1, sec. 13. See Chapter 2, p. 13 *supra*, for a discussion of the meaning given this provision.
years under a deed purporting to convey a fee-simple estate. The plaintiffs were in complete ignorance of the fact that the grantor to their ancestor was only a life tenant under the will by which the claimants asserted an interest in the land.

The application of the Torrens Acts has given rise to very similar constitutional problems. The purpose of these statutes is not to extinguish interests in land but to do away with the uncertainty in titles inherent in the conventional system of recordation of instruments. By means of a special proceeding in the nature of a proceeding in rem, the owner of land can have the status of the title fixed and have declared the nature of the titles and interests therein and the person or persons in whom such titles and interests are at the time vested. The certificate of title acquired thereby is in theory indisputable evidence of the status of the title. A judicial proceeding to clear titles against all the world would scarcely be possible unless the proceeding got rid of unknown as well as known claims. Personal service upon unknown claimants is, of course, impossible. The statutes provide for notice by publication to all unknown claimants, resident and nonresident, and sometimes provide only for notice by publication to nonresident claimants. Known resident claimants must ordinarily be informed of the proceeding by registered mail or by some other form of individual notice. The Torrens Acts have been often attacked for denying procedural due process, but, with the exception of one or two very early cases, have always been sustained.45

45 Eliason v. Wilborn, 335 Ill. 352, 167 N. E. 101, affirmed 281 U. S. 457 (1929); Tyler v. Judges of the Court of Registration, 175 Mass. 71, 55 N. E. 812 (1900); State v. Westfall, 85 Minn. 437, 89 N. W. 175 (1902); Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129 (1907): "The state has full control over the subject of the mode of transferring and establishing titles to property within its limits. For these purposes the state has power to provide a special proceeding, in the nature of a proceeding in rem to fix the status of the land and declare the nature of the titles and interests therein and the person or persons in whom such titles and interests are, at the
4. Statutes Which Authorize Compulsory Partition

To what extent owners of future interests are liable to compulsory partition in the absence of a statute has not been very well determined by the cases. It would seem that even in the absence of a statute there should be liability as to all future interests when the partition action is brought by a possessory cotenant who has a fee simple. Suppose, for example, that Blackacre is devised, as to one undivided half, to A and his heirs and as to the other undivided half to B for life, remainder to C and his heirs. A should not have to wait until the death of B before a final partition can be made. Where the possessory interests are life estates, it is less certain that the owners of future interests are liable to compulsory partition by the possessory cotenants. It would seem, however, that if the life estate of the cotenant seeking partition is, or may become, as to any part of its duration, concurrent with the future interest against which partition is sought, then partition should be allowed.

There is very little authority dealing with the constitutionality of statutes under which owners of future interests are subject to liability to compulsory partition by the owners of possessory interests to which the power of partition is incident. But, on principle, the constitutionality of such time, vested. It may do this whenever it may be considered necessary, or likely to promote the general welfare.” (151 Cal. 40, 46, 90 Pac. 129, 131.)

3 Simes, Future Interests, sec. 658 (1936).

3 Simes, op. cit., sec. 658.

E. g., land is conveyed, as to one undivided half to A for life, remainder to B and his heirs, as to the other undivided half, to C for life, remainder to D and his heirs. If C dies before A, A will hold concurrently with D. Therefore, A should be entitled to partition as against D. Restatement, Property, sec. 177, Illustration 6 (1936). Although in the example, B's remainder can never become concurrent with A's interest, it would be unfair to D not to bind B by the partition.

Outside of California, future interests are not subject to a partition action brought by the sole owner of the entire possessory estate. Powell, Real Property, ¶ 291. The purpose of partition is to sever concurrent interests and not to attempt severance of successive interests.
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legislation is clear even where the statute is applied retroactively.49 In the first place, there is a public policy which discourages the tying up of property and the prevention of its alienation,50 or, as the principle is sometimes put, everyone has the right to enjoy his own in severalty. This particular principle would not in itself authorize an interference with or impairment of constitutionally protected interests, but if the constitutional objections can be further shown to be groundless, public policy would probably weigh heavily in the opinion of the court. A more fundamental reason, and one which does dispel constitutional objections, is to be derived from those cases which hold that liability to partition is one of the inherent characteristics of joint ownership of land.51 Where all of the interests are possessory, partition can be compelled by one of the cotenants against the

49 Wallace v. Stearns, 96 N. H. 367, 77 A. 2d 109 (1950). At testator's death in 1943 the three devisees respectively became fee owner of an undivided one-half interest, and life tenant and remainderman of the other half. There were no testamentary restrictions on the power to partition. By statute effective June, 1949, the following provision was added to the powers of the Superior Court in partition proceedings: "The holder in possession of a fee simple interest in such real estate may have partition, irrespective of the class or duration of the estate of any petitionee named in the action." N. H. Rev. Laws 1942, c. 410, sec. 1, as amended by Laws 1949, c. 266. It was held that although the statute was retroactive it did not fall within the interdiction of the constitutional provision forbidding retroactive legislation (N. H. Const., Bill of Rights, Art. 23) because it was remedial only and was not injurious, oppressive, or unjust. The court said that the power of partition is remedial in nature and promotes the enjoyment of property and hence should be liberally construed. In an initial proceeding by the same petitioner it was decided that the court was without power to grant partition save in the case of "persons holding with others of the same class." The amending statute first became available late in the pendency of the first petition and was not called to the notice of the court in connection with that petition and was not considered by it in dismissing the petition. The former proceeding was held to be no bar to the present action under the section as amended.


51 Richardson v. Monson, 23 Conn. 94 (1854); Metcalf v. Hoopingardner, 45 Iowa 510 (1877); 2 Tiffany, Real Property, sec. 474 (3d ed.). However the power is not so absolute that the cotenant cannot preclude himself by agreement with his cotenants from exercising it. Also it seems that if the grantor expressly prohibits partition during a period named, involuntary partition is prevented. 2 Tiffany, op. cit.
objections and protests of the other cotenants, and this by
duirtue of a statute which was enacted after the tenancy came
into being.52 The rights of owners of future interests are
subject to the existing law the same as the interests of pos­
sessory cotenants. There is no reason why the owner of a
future interest should be exempted from a liability which is
imposed upon the owners of possessory interests. A third
reason in support of the constitutionality of statutes imposing
liability to partition on owners of future interests is that so
far as the partition is in kind, the owner of the future interest
does not suffer any real loss on account of the partition.53
The net effect of the partition can only be to transform his
interest from an interest in an undivided share to an interest
in a determinate portion of the land.54

Slightly different constitutional issues might be raised
by statutes which permit the owner of a future interest to
compel a partition. The wording of some of the statutes is
broad enough to permit the owner of any kind of future
interest to compel partition, but probably only the owner of

52 Richardson v. Monson, 23 Conn. 94 (1854); 2 Tiedeman, State and
Federal Control of Persons and Property, p. 667: "The right of compulsory
partition of all joint estates, as an invariable incident of these estates, except in
the case of tenancies in entirety, has come down to us as an inheritance from
the mother country, and all joint estates in the United States have been
created in actual or implied contemplation of the possibility of a compulsory
partition. Consequently, no question can arise as to the constitutionality of
laws providing for compulsory partition."

53 Hill v. Sangamon Loan & Trust Co., 302 Ill. 33, 134 N. E. 112
(1922).

54 Unquestionably it may often be undesirable to allow a life tenant to
procure a partition in kind which will be effective beyond his life, especially
where the future interests are held in different proportions than the possessory
estates so that the portion set out for the life tenant will not correspond to
the share to which the owner of the future interest will ultimately be entitled.
It is easy to imagine situations in which the future interests after the life
estates are so uncertain that it would be impossible during the lives of the
tenants to say in what proportions the future owners shall hold the land.
Making a final partition at the instigation of a life tenant will often be out
of the question. And, naturally, if the future interest is in the whole of the
land, it will not at all be affected by a partition in kind of the possessory
interests.
an indefeasibly vested remainder has such power. The reason for the restriction is apparent. It would be impossible to make a permanent or final division where the interest of the person asking partition is contingent or defeasible. One case has been found which sustains the constitutionality of this type of statute (as limited to owners of indefeasibly vested remainders). In *Gillespie v. Allison*, the real estate was given to a widow "so long as she remained the widow of W. A. Owens," with remainders over. The life tenant and some of the remaindermen sought to compel partition by sale. The defendants, who were also remaindermen, contended that since their rights accrued prior to the enactment, the statute under which the other remaindermen sought partition could not be applied. Before the act, co-owners in remainder or reversion had no power to enforce a compulsory partition of land. It was held that the application of the statute to estates existing prior thereto did not impair vested rights; the statute merely permitted the remaindermen to anticipate the time of partition. This was said to be in furtherance of the public policy which discourages the tying up of property and the prevention of alienation.

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As of January 1, 1952, statutes of thirteen jurisdictions in general empowered any joint tenant or tenant in common in an unconditional and indefeasible future interest to compel partition of the future interest thus held in co-ownership (Ark., Cal., Del., Ill., Minn., Mo., N. H., N. Y., N. C., Ore., Pa., Tenn., and Wis.); the statutes of five jurisdictions were so worded that probably they had the same effect as the above statutes (Ariz., Md., Neb., N. Mex., and S. C.); and the statutes in five other jurisdictions allowed co-owners of indefeasibly vested remainders to compel partition under restricted sets of circumstances (Ala., Conn., Ind., N. J., and Me.). 2 Powell, *Real Property*, ¶ 290.

56 115 N. C. 542, 20 S. E. 627 (1894).

57 N. C. Acts 1887, c. 214, sec. 2, now N. C. Gen. Stat. 1950, sec. 46-23: "The existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common shall be deemed seized and possessed as if no life estate existed. But this shall not interfere with the possession of the life tenant during the existence of his estate."
In the cases in which remaindermen have been held entitled to bring an action for partition under the statutes, there has been no disturbance of the life estate without the life tenant’s consent.\textsuperscript{58} In effect, the remaindermen achieve only a partition of title. Permitting persons who do not have an immediate right to possession to compel partition goes beyond the concept of partition as a means of enabling cotenants to enjoy the use of their shares in severalty, but there is no reason why partition should not be used as a means of determining title, and no reason why this determination should await the death of the life tenant.\textsuperscript{59}

\textit{Partition by Sale}

The real problems arise when partition in kind is impracticable and a sale is necessary, or where some of the possessory cotenants desire a sale in order to free the title of the encumbrances of future interests. Is a statute constitutional which retroactively creates a liability upon the owner of a future interest to have his interest in the land extinguished

\textsuperscript{58} See Drake v. Merkle, 153 Ill. 318, 38 N. E. 654 (1894); Hanson v. Ingwaldson, 77 Minn. 533, 80 N. W. 702 (1899); Hayes v. McReynolds, 144 Mo. 348, 46 S. W. 161 (1898); Blakely v. Calder, 13 How. Prac. 476, aff’d 15 N. Y. 617 (1857); Priddy and Co. v. Sanderford, 221 N. C. 422, 20 S. E. 2d 341 (1942).

\textsuperscript{59} Nondisturbance of the life estate has not been predicated upon constitutional limitations but upon express or implied limitations in the statutes. The fact that life estates are not disturbed no doubt accounts for the almost complete absence of constitutional cases at this point. Whether it is unconstitutional to confer upon the remaindermen the power to compel a partition which will affect and bind the interests of the life tenant or life tenants is a problem which is somewhat unlikely to come up. Suppose that land is devised to A, B, and C for life, remainders to D and E. D desires partition. If partition by metes and bounds is possible, the court can determine which part D shall have when the life tenants have died and which part will go to E. The life estates are unaffected. Partition statutes do not give the remaindermen any right to possession against the life tenant or tenants which they do not have under the instrument creating their interests. There is ordinarily no occasion to determine the respective shares of the life tenants in a proceeding between the remaindermen and no reason why the remaindermen should want to bind the life tenants.
and transferred to the funds arising from the sale of the land? Perhaps if partition in kind can be made and the purpose of the sale is solely to free the land of future interests, there may be some question as to the constitutionality of applying the statute retroactively. But if partition in kind is impracticable, the way appears to be clear for the application of the statute. The power to compel partition is an inherent feature of joint ownership. Sale is a substitute for the primary right to have the land set off in severalty where partition in kind is not feasible. Since a possessory cotenant (where all the interests are possessory) may be compelled under a retroactive statute to accept a share of the proceeds of sale in lieu of an interest in the land, the owner of a future interest cannot be said to be deprived of property without due process by the commutation of his interest from realty into personalty.

Certainly, where the proceedings are instituted by a possessory cotenant who has a fee-simple interest, there would seem to be no doubt that a sale may properly be ordered notwithstanding the existence of future interests. In Mennig v.

60 Richardson v. Monson, 23 Conn. 94 (1854); Metcalf v. Hoopingardner, 45 Iowa 510 (1877). Supra note 51.

In Richardson v. Monson the statute gave authority to the court to order a sale of the land and to distribute the proceeds among all persons interested in the estate, in proportion to their interests, whenever a sale would, in the opinion of the court, promote the interests of all parties better than a partition in kind, and whenever the property could not be conveniently occupied in common. Conn. Pub. Acts 1853, c. LVII, now embodied in Conn. Gen. Stat. 1949, sec. 8236. The estate of the tenants in common had come into existence prior to the enactment of the statute. Facts were stated in the bill for partition to show that partition in kind was impracticable. The defendants argued that to give the statute a retroactive effect would impair the obligation of a contract and authorize the taking of property from one person and the vesting of it in another, especially in this instance, where only a small minority in interest desired a sale. The court held that the power to compel a partition enters into the very nature of the title of estates held in common and that the only question is how partition can best be made. The legislature had supplied the answer by providing for sale where partition could not be made to the best advantage of the parties. This statute, it was held, introduced no new principle; it only provided for an emergency, when a division could not be well made in any other way.
Howard a testator devised one-half of his realty to his wife, Anna, in fee simple, and to his daughter, Helen, he bequeathed a life estate so long as she and Anna both lived. There was a remainder upon certain conditions in the child or children of Helen who should survive her. At the time of this partition suit, which was brought by Anna, Helen was married but had no children. The plaintiff asked for a sale and alleged grounds to show that partition in kind was impracticable. A statute enacted subsequent to the creation of the interests provided that a partition decree should be binding on the interests of unborn persons. The defendant, Helen, claimed that a sale could not be effective to cut off the interests in her unborn heirs. The court in denying this contention said:

"There was no depriving of any one of his property under the statute in the instant case. The statute merely changed the real estate into a personal estate for the benefit of all parties in interest."

"The primary argument against the instant statute is that it might be said that the unborn children had rights to specific property, and that a sale deprived them of that right and gave them a substitute. As heretofore stated, it is the constitutional provisions against the taking of property without due process which form the foundation of the argument against this class of legislation. The possible injury to owners of the future interest is small in comparison to

61 Iowa 936, 240 N. W. 473 (1932).
62 Iowa Acts 1931, c. 231: "When it appears in the petition for partition that a person not in being has an interest, vested or contingent, as a co-tenant of the land sought to be partitioned, the court shall have jurisdiction over the interest of such person not in being and shall appoint a suitable person to act for him in such proceeding. . . . The decree of partition and the division or sale thereunder shall be of the same force and effect as to all such persons, or persons claiming by, through or under them, as though they were in being at the time of entry of the decree, and the property or proceeds of the interest of such person shall be subject to the order of the court until the right thereto becomes fully vested." Now, with immaterial modifications, Iowa Code 1950, c. 651, p. 2140.
the indisputable benefit resulting from the sale, both to the owner of the present estate and also to society at large. The interest of society in the free alienation of land has received recommendation in many ways for centuries past."

Although the court emphasized that the future interests were contingent, it is submitted that the same result would have been reached if the statute had purported to bind the interests of persons in being, whether the interests were contingent or vested. The New York Court of Appeals has allowed an action for partition and sale to be brought by the owner of a fee-simple moiety against the life tenant and persons who, by the law of New York, had vested remainders subject to defeasance.

One might surmise that if the cotenant who asks partition does not have a fee interest, his power to compel partition by sale is not unlimited. Would a retroactive statute be valid which gives a life tenant the power to affect by a compulsory partition sale the future interests limited after his estate? There are several cases holding that if the statute expressly or by necessary implication permits the life tenant to maintain partition against his fellow cotenants, he has that power as a matter of right, and where the land cannot be divided it may be sold and the proceeds divided. Judgments for the sale of the land (on suit by a life tenant) have been affirmed against the protests of reversioners having absolutely vested interests in the whole and against the protests of the owners in fee of the undivided moiety. In some

63 213 Iowa 936, 942, 240 N. W. 473, 475 (1932).
64 Mead v. Mitchell, 17 N. Y. 210 (1858).
65 Shaw v. Beers, 84 Ind. 528 (1882); Carneal v. Lynch, 91 Va. 114, 20 S. E. 959 (1895). See also, Sparks v. Clay, 185 Mo. 393, 84 S. W. 40 (1904); Brevoort v. Brevoort, 70 N. Y. 136 (1877) (action by life tenant per autre vie); Rutherford v. Rutherford, 116 Tenn. 383, 92 S. W. 1112 (1906) (remainders were contingent here).
67 Carneal v. Lynch, supra note 65.
of the cases the results may be explained by the fact that the interests arose subsequent to the partition statutes. It is very significant, however, that the jurisdiction (Virginia) in which it is held that a life tenant in one moiety of property may compel partition by sale against the fee-simple owners of the other half, is one of the very few jurisdictions where it is held that a statute giving a life tenant power to sell the premises upon a showing of necessity cannot even be applied prospectively if vested remaindermen object to the sale.\(^{68}\)

The courts are much more inclined to sustain a statute which gives a life tenant holding as a tenant in common or joint tenant the power to compel partition by sale against his cotenants, which sale will also be binding on the owners of future interests, than they are to sustain a statute which confers upon a life tenant holding in severalty the power to sell the fee without the consent of the owners of the future interests. A difference in attitude is to be expected. Where a life tenant is authorized to compel partition by sale, the sale is a substitute for the primary objective of the life tenant, which is to have his portion set off in severalty from the portions of the other possessory cotenants. The law recognizes the desirability of enjoyment and use in severalty. But when a statute confers upon a life tenant holding in severalty the power to proceed against the owners of future interests for the sole or primary purpose of compelling a sale of the land free of the future interests, it may seem as though the legislature has unduly empowered one private person to interfere with the property of others.

When sale is ordered in lieu of partition in kind, provision must be made for the transfer of the property rights of the owners of the future interest to the proceeds of the sale.\(^{69}\)

\(^{68}\) Watkins v. Ford, 123 Va. 268, 96 S. E. 193 (1918), infra note 101.

\(^{69}\) Baker v. Baker, 284 Ill. 537, 120 N. E. 525 (1918); Monarque v. Monarque, 80 N. Y. 320 (1880).
The future interests are commuted, not absolutely extinguished. Extinguishment of an interest, of course, is not an impairment of a vested right, if the interest is clearly insubstantial and amounts to no more than a cloud on title, within the technical meaning of that term, or is extremely unlikely to vest in possession. On the other hand, it seems certain that the substantiality of the future interest is no barrier to its being converted to money.

In Gillespie v. Allison, discussed above, the life tenant and some of the remaindermen secured a sale of the land under the provisions of a retroactive statute, notwithstanding the objections of the other remaindermen. There would seem to be no constitutional reason why persons having absolutely vested reversions and remainders, who are entitled to partition under a statute, should not be able to compel a partition sale which will extinguish the possessory interests in the land although the possessory cotenants do not consent. However, an objection to the retroactive application of a statute giving the power to compel a partition sale might be that since owners of future interests cannot have the land in severalty (but in effect achieve only partition of title), disturbance of the possessory interests would be an unwarranted interference with property rights.

5. Statutes Which Authorize the Sale or Mortgage of Land

Even in the absence of statute, courts will direct the sale in fee of land in which there are future interests if the land is in danger of being lost, but there are statutes in many

70 It will usually be unnecessary to determine whether a given interest is so insubstantial that it can be extinguished, since all interests may be conveniently preserved in commuted form to await the event that will determine which of the interests are valuable.

71 Supra note 56.

72 3 Simes, Future Interests, sec. 789 et seq. (1936); Schnebly, “Power of Life Tenant or Remainderman to Extinguish Other Interests by Judicial Process,” 42 Harv. L. Rev. 30, 54 (1928). Such relief will be given also when requested by the owners of the future interests. Beliveau v. Beliveau, 217 Minn. 235, 14 N. W. 2d 360 (1944).
states which provide for, or authorize the sale of land in fee simple, where, except for the statute, such land could not be sold free of interests therein or could not be sold at all.\textsuperscript{73} Statutes authorizing the mortgaging of land so as to bind outstanding future interests are to be found in a number of states.\textsuperscript{74} Quite a few constitutional cases have arisen in respect to statutes authorizing sale but none apparently have arisen out of the application of statutes authorizing the execution of mortgages. The power to mortgage resembles the power to sell; indeed, it is not unusual for both powers to be conferred by one and the same statute.\textsuperscript{75} We may surmise that on the constitutional issue the courts would approach a mortgage case with much the same attitude as a sale case, tending perhaps to allow a mortgage where a sale would not be permitted on the ground that a mortgage is less destructive of the future interests. Discussion will be limited to a consideration of statutes which authorize sale.

\textsuperscript{73} 2 Powell, \textit{Real Property}, \textsuperscript{\textsuperscript{79}} 292, lists the statutes as follows (as of Jan. 1, 1952).

Statutes providing for sale of complete ownership of land in which there are future interests exist in twenty-four jurisdictions: Cal., Conn., D. C., Ill., Ind., Iowa, Ky., Me., Md., Mass., Mich., Mo., N. H., N. J., N. Y., N. C., Ohio, Pa., R. I., Tenn., Va., W. Va., Wis., and Wyo. In Ill., Me., Pa., R. I., and Tenn., the statute can be invoked only if there is present a future interest which is not indefeasibly vested. In D. C., Iowa, Ky., Mass., Mich., Mo., N. H. and N. C., the statute can sometimes apply despite the presence of an indefeasibly vested future interest. In Cal., Conn., Ind., Md., N. J., N. Y., Ohio, Va., W. Va., Wis. and Wyo., the statute becomes available on the presence of any future interest.


\textsuperscript{75} See Massachusetts and New Hampshire statutes quoted \textit{infra} note 76.
The reader will find in the footnote below, the text of a few representative statutes currently in force. It will be observed from the quoted statutes that some are broad enough to allow the owners of future interests to compel a sale of the possessory estate. Whether or not the owners of future interests are actually endowed with this power, they very rarely exercise it. The statutes have usually been resorted to by the owners of possessory estates.

A statute authorizing sale of land, it is apparent, may be invalid on other grounds than that it is applied retroactively. A statute even when applied prospectively may be unconsti-

76 Mass. Gen. Laws 1932, c. 183, sec. 49: "If land is subject to a vested or contingent remainder, executory devise, conditional limitation, reversion or power of appointment, the probate court for the county where such land is situated may, upon the petition of any person having an estate therein, either present or future, vested or contingent, and after notice and other proceedings as hereinafter required, appoint one or more trustees and authorize him or them to sell and convey land or any part thereof in fee simple, if such sale and conveyance appears to the court to be necessary or expedient, or to mortgage the same for such an amount, on such terms and for such purposes as may seem to the court judicious or expedient; and such conveyance or mortgage shall be valid and binding upon all parties."

D. C. Code 1940, sec. 45-1104: "Whenever one or more persons shall be entitled to an estate for life or years, or a base or qualified fee simple, or any other limited or conditional estate in lands, and any other person or persons shall be entitled to a remainder or remainders, vested or contingent, or an interest by way of executory devise in the same lands, on application of any of the parties in interest the court may, if all parties in being are made parties to the proceeding, decree a sale or lease of the property, if it shall appear to be to the interest of all concerned, and shall direct the investment of the proceeds so as to inure in like manner as provided by the original grant to the use of the same parties who would be entitled to the land sold or leased; . . . ."

N. H. Rev. Laws 1942, p. 1085, sec. 28: "When real estate is subject to a contingent or vested remainder, executory devise or power of appointment the superior court for the county in which said real estate is situated may, upon petition of any person who has an estate in possession, remainder or reversion in such real estate, and after notice and other proceedings . . . , appoint one or more trustees, and authorize him or them to sell or mortgage and convey such estate, or any part thereof; in fee simple, if such sale, mortgage or conveyance appear to the court to be necessary or expedient; and such conveyance shall be valid and binding upon all parties."

Page’s Ohio Code Ann., sec. 11925: “In an action by the tenant in tail or for life, or by the grantee or devisee of a qualified or conditional fee, or
tutional in one or more aspects: there may not be adequate provision for judicial supervision;\textsuperscript{77} the possessory owner may be given too unrestricted a power to compel a sale;\textsuperscript{78} of any other qualified, conditional, or determinable interest, or by a person claiming under such tenant, grantee, or devisee, or by the trustee or beneficiaries, if the estate is held in trust, courts of common pleas may authorize the sale of any estate, whether it was created by will, deed, or contract, or came by descent, when satisfied that such sale would be for the benefit of the person holding the first and present estate, interest, or use, and do no substantial injury to the heirs in tail, or others in expectancy, succession, reversion, or remainder. This section shall not extend to estates in dower."

\textsuperscript{77} The writer did not find any cases holding that judicial supervision was necessary but it would seem a self-evident proposition that, if judicial supervision is not provided for, there cannot be due process. It cannot be denied that in the past many special acts authorizing the sale of land have been sustained where no provision was made for any judicial supervision or any provision for the representation of owners of interests. But it is submitted that the cases which sustain such acts cannot be taken as authorities by modern courts. The courts which sustained such acts often expressed their disapproval of what had been done and refrained from striking down the acts only because at the time so many titles were derived from sales made under special authorization by the legislatures. See Norris v. Clymer, 2 Pa. 277 (1845) where a list of 900 statutes, in principle like the one there in issue, was laid before the court. Since at least 10,000 titles, said the court, depended on legislation of this stamp, "It would be fraught with incalculable mischief to let a doubt rest on the power of the legislature." It was stated in Clusky v. Burns, 120 Mo. 567, 568, 25 S. W. 585, 586 (1893): "'It would be entirely safe to say that millions of dollars have been invested upon the strength of these titles; and for the courts of this day to declare the acts, and the titles made in pursuance of them, void, would be a hazardous undertaking, and would unsettle property rights to an alarming extent. We must, therefore, decline to go into the question, or consider it open to discussion.'"

\textsuperscript{78} The power of the persons holding the present estate to compel a sale is in no jurisdiction, irrespective of whether the future interests are vested or contingent, as complete as the power of a cotenant to compel partition and sale. Schnebly, "Power of Life Tenant or Remainderman to Extinguish Other Interests by Judicial Process," 42 Harv. L. Rev. 30, 70 (1928). The statutes generally provide that the petitioner for sale must allege and prove facts which show some necessity for the sale or that the land is not beneficial to him. See the statutes quoted \textit{supra} note 76. Moreover the court is commonly directed not to decree a sale unless the interests of all persons will be subserved or unless the sale will be for the benefit of the person holding the first and present interest and do no substantial injury to the owners of future interests. See the statutes quoted \textit{supra} note 76. See Restatement, \textit{Property}, sec. 179, ¶ 1 (1948 Supp.), for an enumeration of statutes classified according to the requirements of proof as to need for, or expediency of, sale for reinvestment.

What degree of necessity must the possessory tenant prove in order to entitle himself to a sale? That, of course, depends in the first instance upon
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or the statute may not provide for the transferring of the interests in the land to the proceeds of the sale. Whether the statute is applied retroactively or prospectively the judgment must substitute the fund for the land or the interests will not be concluded.\(^79\) It is only because the interests are merely

the wording of the particular statute. To what extent the owners of future interests are constitutionally entitled to a finding of necessity is more difficult to determine. Some finding is undoubtedly necessary. A sale will always be justified if the land is about to be lost by the life tenant and remaindermen alike because the income is insufficient to preserve the property or to pay taxes and encumbrances. Courts of equity often have granted relief in the absence of statute. Gavin v. Curtin, 171 Ill. 640, 49 N. E. 523 (1898); Graff v. Rankin, 250 F. 150 (7th Cir. 1918). Where there are future interests in unborn persons and all the persons in being consent to the sale, there seems to be no denial of due process in ordering a sale merely upon a showing that a sale will be advantageous to the present tenant and not unduly prejudicial to future interests. Sohier v. Massachusetts General Hospital, 3 Cush. 483 (Mass. 1849); Springs v. Scott, 132 N. C. 548, 44 S. E. 116 (1903); Anderson v. Wilkins, 142 N. C. 154, 55 S. E. 272 (1906); Lee v. Albro, 91 Ore. 211, 178 Pac. 784 (1919); Geary v. Butts, 84 W. Va. 348, 99 S. E. 492 (1919). Where the future interests are vested, perhaps something more needs to be shown than that the sale will be advantageous to the life tenant. The Ohio statute (supra note 76) is one of the most liberal. It permits a life tenant to compel a sale contrary to the wishes of the owner of the indefeasibly vested remainder or reversion upon a showing merely that he is unable to manage the land, that the income is small, and that if it were sold and the proceeds invested, a much larger income could be produced, provided that a sale will do no substantial injury to owners of future interests. It is possible that the authority purported to be conferred by this statute may be held to be in excess of constitutional limitations where the life tenant is merely an investor or creditor, or where the land is very likely to have a much greater value and command a much higher price at the expiration of the life estate. A statute which would clothe a life tenant with the power to compel a sale without respect to the effect on future interests whenever a sale would be desirable from his point of view would probably be declared unreasonable. McConnell v. Bell, 121 Tenn. 198, 114 S. W. 203 (1908).

\(^79\) Sohier v. Mass. Gen. Hospital, 3 Cush. 483 (Mass. 1849); Clarke v. Hayes, 9 Gray 426 (Mass. 1857); Monarque v. Monarque, 80 N. Y. 320 (1880); Barnes v. Luther, 77 Hun 234, 28 N. Y. S. 400 (1894); Wolford v. Morgenthal, 91 Pa. 30 (1879). If, due to any event, the fund should be lost, the original rights of the parties to the property are not thereby revived, but remain concluded. Bofil v. Fisher, 3 Rich. Eq. 1 (S. C. 1850).

See Restatement, Property, sec. 179, ¶ m (1948 Supp.) for an enumeration of extent to which statutes providing for partition and judicially ordered sales provide for commuted money payments to holders of successive interest.
commuted by the sale—changed from realty to personalty—that forced sale can at all be justified.

Since all interests must be transferred to the proceeds, the courts have never found it necessary to decide whether there are interests which are so slight that they can be extinguished without recompense. All interests may be conveniently preserved in commuted form to await the happening of the event which will determine which of the interests would have vested in possession, or as the situation then stands, who will get the money.

For convenience, the statutes can best be considered under the following heads: (1) where the owner of the possessory estate seeks to compel a sale of land in which the future interests are contingent; and (2) where the owner of the possessory estate seeks to compel a sale of land in which the future interests are vested.

Contingent future interests, as they appear in the constitutional cases, may be divided into three classes: (1) interests which are contingent because limited to persons not yet in being; (2) interests which are contingent because the identity of the persons who are to take is uncertain, although there are persons in existence to whom one can point as possible takers if the life estate were to end at once (e.g., a remainder to the heirs of a living person where there are heirs apparent or presumptive in existence); and (3) interests which are contingent because the interest of a designated person is conditioned upon some uncertain event such as the death of the life tenant without issue.

I have treated both executory interests and contingent remainders under the heading of contingent future interests. The courts do not seem to have made any distinction between the two kinds of interests in passing upon the constitutionality of the statutes. At least when the statutes operated prospectively, the courts have allowed life tenants to procure forcible
commutation of both common-law contingent remainders and of contingent executory interests. Similarly, owners in fee have been permitted to commute executory interests limited in total or partial defeasance of their estates. Of course, in those jurisdictions in which the common-law rule of destructibility of contingent remainders still obtains, it would be much easier for the courts to permit retroactive destruction of contingent remainders than of executory interests. An indestructible contingent remainder does not differ substantially from an executory interest.

(a) Contingent Future Interests. Insofar as the statutes under discussion empower the owner of a freehold estate to extinguish through judicial sale contingent interests of persons not yet born, they are held constitutional, even as applied to contingent interests created before their passage. The courts are faced with the problem of weighing the possible disadvantage which the unborn persons may suffer against the indisputable disadvantage to society if lands are

80 Remainders to persons unborn or unascertained: McClure v. Crume, 141 Ky. 361, 132 S. W. 433 (1910) (prospective); Sohier v. Mass. Gen. Hospital, 3 Cush. 483 (Mass. 1849) (retroactive); Garrison v. Hecker, 128 Mich. 539, 87 N. W. 642 (1901) (retroactive); In re Field, 131 N. Y. 184, 30 N. E. 48 (1892) (prospective); Geary v. Butts, 84 W. Va. 348, 99 S. E. 492 (1919) (retroactive); In re Rees, 182 Wis. 239, 196 N. W. 239 (1923) (prospective). Reminders to ascertained persons: Linsley v. Hubbard, 44 Conn. 109 (1876) (retroactive); Bamforth v. Bamforth, 123 Mass. 280 (1877) (prospective); Gamble’s Estate, 9 Dist. 691 (Pa. 1900) (prospective). It is difficult in many instances to determine whether cases should be cited in this note or in that succeeding.

81 In re Vail, 99 N. J. Eq. 598, 133 Atl. 866 (1926) (prospective); Clark v. Clark, 110 Ohio St. 644, 144 N. E. 473 (1924) (prospective); Symmes v. Moulton, 120 Mass. 343 (1876) (prospective); Burlington v. Vandevender, 47 W. Va. 804, 35 S. E. 835 (1900) (prospective).

82 Whitcomb v. Taylor, 122 Mass. 243 (1877) (retroactive); In re Grenawalt’s Appeal, 37 Pa. 95 (1860) (prospective).

83 See 3 Simes, Future Interests, sec. 98 (1936).

made inalienable for indefinite periods of time. In comparison to the benefit resulting from the sale, both to the owner of the present estate and also to society at large, the possible injury to potential interests of persons who may never be born is small. These interests can be adequately protected by being transferred to the fund arising from the sale. The courts do not seem to have any difficulty in making a choice in favor of alienability. In *Geary v. Butts* 85 it was said:

"Without such authority as this act bestows an estate subject to contingent remainders frequently might be tied up indefinitely, and a sale thereof rendered impossible, because no purchaser could be induced to risk a title which would be a source of future litigation, when the interests of remaindermen, living and unborn, clearly might require a sale owing to lack of funds to preserve the corpus of the property at its original value or to develop or improve it sufficiently to yield the income that it should yield. Without such remedy not only is the sale of such property rendered difficult, but its value may be greatly diminished or entirely lost to those interested therein." 86

In some of these cases the sale appears to have been allowed merely for the reason that sale was advantageous to the life tenant (and not too prejudicial to the unborn owners of future interests). 87

So long as no person is born into the class of possible takers there is really no constitutional problem at all in the retroactive application of the statute. The constitutional provisions protect the rights of persons. It is very difficult to see how an unborn person can have any constitutional rights. However, a person may subsequently be born who will claim that his interest in the land was unconstitutionally extin-

85 84 W. Va. 348, 99 S. E. 492 (1919), *supra* notes 80, 84.
86 84 W. Va. 348, 354, 99 S. E. 492, 494.
guished. A sufficient answer to his claim would seem to be that his alleged interest in the land was extinguished for good reason while it was a mere possibility but that his rights were not destroyed as such, having been transferred to the fund arising from the sale.

When there are in being possible takers, the question becomes more difficult whether the legislature can by retroactive statute empower the owner of the possessory estate to commute the future interests by forced sale. The courts recognize that interests of living persons are more substantial, and are entitled per se to greater constitutional protection than the interests of persons not in esse. However, retroactive statutes which apply to contingent future interests of living persons have been sustained. Generally, in the cases sustaining the retroactive application, there has been proof that the property is unproductive and useless to the life tenant, but usually proof has been lacking that sale is essential to the preservation of the interests of the life tenant and remaindermen. It is not clear whether the courts would approve a retroactive statute which purports to authorize a

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89 Clarke v. Hayes, 9 Gray 426 (Mass. 1857) (remainder to heirs of a living person); Willhite v. Rathburn, 332 Mo. 1208, 61 S. W. 2d 708 (1933) (to A for life, remainder in fee to the heirs of her body); Re Mersereau, 233 N. Y. 540, 135 N. E. 909 (1922) (devise to A for life, remainder to her heirs). But see Rogers v. Smith, 4 Pa. 93 (1846) holding that the legislature could not confer on a life tenant (who had testamentary power of appointment) the power to convey the fee. The remainder was to the heirs of the life tenant who had several minor children living at the time the statute was passed. The reason, however, that the interests of the minor children were held not to be affected by the statute was apparently that they were not represented before the legislature.

In Willhite v. Rathburn supra it was contended that the statute conflicted with the provision in the Missouri Constitution prohibiting retroactive legislation (supra note 44) insofar as it affected an estate created prior to its enactment. It was held that the statute did not fall within the prohibition, which only prevents legislation operating retrospectively to the substantial prejudice of the interested parties, for it contemplated only a beneficial change from a less fruitful to a more fruitful form of property with no injury to the interests of any person.
sale upon a showing merely that a sale will be desirable for the life tenant. The justification which the courts give for allowing a forced sale is that a beneficial change is merely wrought in the form of the property without loss or injury to any interests.

When the takers are ascertained and only the event is uncertain, there appears to be a divergence of opinion as to whether the statute may be given retroactive effect. The Connecticut Supreme Court upheld a special legislative act empowering a life tenant to procure a judicial sale which destroyed alternative contingent remainders to ascertained persons, notwithstanding the objections of the remaindermen. The New York courts have held, on the other hand, that when the owner of the contingent future interest is an ascertained living person (as distinguished from a member of a class of possible takers), the legislature has no power to authorize a sale of lands free of his contingent interest unless he assents to the sale, or unless he is disabled on account of infancy or lunacy from acting in his behalf. Dicta in accord

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90 Linsley v. Hubbard, 44 Conn. 109 (1876). The land was devised to M. for life and upon certain contingencies the life estate was to become a fee simple in her and the heirs of her body; otherwise, upon her decease, the remainder was to pass to others, among whom were the plaintiffs. The real estate was completely or nearly completely unproductive. M. had no other means of support except that which she received from relatives. She was thirty-seven years old and unmarried. At her request the legislature passed a resolution authorizing the sale of the land, the proceeds of which were to be invested at interest. The resolution further provided that M. should be maintained with the income from the invested proceeds and that upon her death the principal should be paid over according to the terms of the will. The plaintiffs sought to enjoin the sale of the land on the ground that it amounted to a taking of their property in violation of Article I, sec. 11 of the Connecticut Constitution: "The property of no person shall be taken for public use without just compensation therefor." Held: Plaintiffs are not being deprived of their property. It was simply changed from one kind of estate to another. If a sale can be made of real estate held in joint tenancy, although there is a tenant opposed to the sale, then this resolution surely does not deprive plaintiffs of any vested right.

91 Brevoort v. Grace, 53 N. Y. 245 (1873). Testator devised land to his daughter E. for life, the remainder to her issue in fee; in case of her death without issue or children of issue surviving, then to such of the children of...
with the New York view may occasionally be found in the cases of other jurisdictions.  

The Connecticut and the New York cases cannot be reconciled. The only answer seems to be that some courts are more inclined than others to protect property interests against what appears to them to be unwarranted encroachments by the legislature, and consequently divergent results must be expected. Even those courts which have allowed the forced commutation of contingent interests of living persons would probably draw a line somewhere and say thus far the legislature can go but no farther. The Connecticut Supreme Court had probably nearly reached that line.

(b) Vested Future Interests. The courts are reluctant to uphold a statute which permits the extinguishment of vested interests without the consent of the owners. The gen-

the testator's brother J. as should be living at the time of the testator's death and to their heirs. The legislature passed a special act (Laws 1872, c. 23) authorizing the Supreme Court to order a sale in fee-simple absolute upon the petition of E. and her issue. The act provided for the investment of the proceeds for the benefit of those entitled under the will. At this time E. had one child, an adult. All the children of J. had died, leaving heirs, a portion of whom were adults. H. joined with his mother in the petition for the sale of land. Their reason for wishing a sale was that the assessments for improvements were in excess of the income. Held: The adult heirs of J. had an estate in expectancy, contingent upon the death of E. without issue surviving, and the statute, so far as it authorized the transfer of such interest without their consent, was unconstitutional. The court inferred, however, that a sale would have been ordered if it had been necessary for the payment of taxes and assessments. Accord, Powers v. Bergen, 6 N. Y. 358 (1852); Gedney v. Marlton Realty Co., 258 N. Y. 355, 179 N. E. 766 (1932). But see Re Mersereau, 233 N. Y. 540, 135 N. E. 909 (1922), where it is held that collateral heirs need not be made parties.

92 Brown v. Brown, 83 W. Va. 415, 422, 98 S. E. 428, 431 (1919). Land was devised to W. for life, with remainder to the heirs of his body, but if W. should die without issue living at the time of his death, then the land should pass to C. and E. for life, with remainder to their issue. E., who was an adult, sui juris, objected to the sale. The court said "But we seriously doubt the constitutional right and power of the Legislature to authorize a court to sell the lands, or any vested interest therein of a person who is sui juris, without his consent, simply for the purpose of reinvesting the funds for his benefit. The jus disponendi is a property right which the policy of the law has always been to allow the owner, when sui juris, to determine for himself."
eral view seems to be that statutes which permit the involuntary extinguishment of vested future interests cannot be applied to interests which were in being prior to the statute.\footnote{Statutes authorizing the sale of lands in which there are future interests must be distinguished from statutes which authorize the sale of a decedent’s land for various purposes such as payment of debts or facilitation of distribution of the estate among the heirs or devisees. See Chapter 3, p. 124 supra.}

A caveat must also be interposed here in respect to statutes authorizing the sale of lands belonging to minors, lunatics, and other persons who are \textit{non sui juris}. The power of the legislature to authorize the sale of an infant’s land is held to be derived from its functions as \textit{parens patriae}. As general guardian of all, it may justly interpose and authorize the property to be sold for the benefit of such persons. Otherwise many minors and incompetents might suffer for lack of legal capacity to dispose of property which does not yield an income. \cite{Rice v. Parkman, 16 Mass. 326 (1820)}. Another reason often given for the validity of such legislation is that the property of the infant is not taken from him; it is merely converted from realty into personality for his benefit. \cite{Dosrey v. Gilbert, 11 Gill and J. 87 (Md. 1839); Louisville, N. O. & T. Ry. Co. v. Blythe, 69 Miss. 939, 11 So. 111 (1892); Clarke v. Van Surlay, 15 Wend. 436 (N. Y. 1836)}.

The interests which are sought to be sold or extinguished under these statutes are frequently future interests, but the broad ground upon which statutes relating to the disposition of the land of incompetents are sustained renders unnecessary a distinction between future interests which are vested and those which are not. It is clear that any interest which an infant has in land may be sold, provided only that it is an interest which is alienable under the laws by one \textit{sui juris}. Reversion: Davidson v. Koehler, 76 Ind. 398 (1881). Vested remainders: Davis v. Helbig, 27 Md. 452 (1867); Ebling v. Dreyer, 149 N. Y. 460, 44 N. E. 155 (1896). Fee simple: Nelson’s Heirs v. Lee, 10 B. Mon. 495 (Ky. 1850); Rice v. Parkman, 16 Mass. 326 (1820); Gannett v. Leonard, 47 Mo. 205 (1871); Stewart v. Griffith, 33 Mo. 13 (1862); In re Post, 13 R. L. 495 (1882).

It is firmly established that the legislature may authorize the guardian or trustee of an infant to sell the realty of the infant if such sale is for the infant’s benefit. The validity of the title under such sale does not depend on the assent of the infant; he cannot disaffirm the sale on coming of age. \cite{Munford v. Pearce, 70 Ala. 452 (1881); Todd v. Flournoy’s Heirs, 56 Ala. 99 (1876); Brenham v. Davidson, 51 Cal. 352 (1876); Davidson v. Koehler, 76 Ind. 398 (1881); Davis v. State Bank, 7 Ind. 316 (1885); Davis v. Helbig, 27 Md. 452 (1867); Dorsey v. Gilbert, 11 Gill and J. 87 (Md. 1839); Nelson’s Heirs v. Lee, 10 B. Mon. 495 (Ky. 1850); Clusky v. Burns, 120 Mo. 567, 25 S. W. 585 (1893); Gannett v. Leonard, 47 Mo. 205 (1871); Stewart v. Griffith, 33 Mo. 13 (1862); Louisville, N. O. & T. Ry. Co. v. Blythe, 69 Miss. 939, 11 So. 111 (1892); Rice v. Parkman, 16 Mass. 326 (1820); Snowhill v. Snowhill, 3 N. J. Eq. 20 (Ch. 1834); Ebling v. Dreyer, 149 N. Y. 460, 44 N. E. 155 (1896); Cochran v. Van Surlay, 20 Wend. 365 (N. Y. 1838); Clarke v. Van Surlay, 15 Wend. 436 (1836); In re Post, 13 R. I. 495 (1882).
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It has been so held both in regard to special acts\(^ {94} \) and in regard to general acts.\(^ {95} \)

Since the courts distinguishing between vested and contingent future interests in respect to liability to forced sale under a retroactive statute, it is appropriate to ask: "Just what is included under the heading of vested future interests?" The

\[ \text{A statute authorizing the sale of the lands of an infant is not objectionable because it was enacted subsequent to the acquisition of the lands by the infant. Indeed, in nearly all of the cited cases the statutes were retroactive.} \]

In a number of cases involving special statutes (which were necessarily retroactive) it was held that sale might properly be for any purpose whatsoever, provided only that it be one which the infant might have approved had he been \textit{sui juris}. Cochran v. Van Surlay, 20 Wend. 365 (N. Y. 1838); Davidson v. Kochler, 76 Ind. 398 (1881); In re Post, 13 R. I. 495 (1882). The burden, it has been held, is on the infant, or the person claiming through him, to show that there has been a breach of trust or violation of good faith on the part of the person who applied for the special statute, or that there was no need for a sale and that the infant was not benefited by it. Snowhill v. Snowhill, 3 N. J. Eq. 20 (Ch. 1834).

As to the validity of retroactive legislation authorizing mineral leases which will extend beyond the minority of the infant, see note 122 infra.

Just as the legislature has the power to authorize the sale of an infant's property, so it can authorize the guardian of a person \textit{non compos mentis} to sell a part of his ward's real estate. Rider v. Regan, 114 Cal. 667, 46 Pac. 820 (1896); Davison v. Johonnot, 7 Metc. (48 Mass.) 388 (1884). Statutes authorizing the appointment of a guardian for persons who have been shown to the satisfaction of a court examining into the matter to be incapable of managing their own affairs, whether because of senility, alcoholism, idiocy, or other cause, have been declared not to deprive the incompetent of his property without due process. Shapter v. Pillar, 28 Colo. 209, 63 Pac. 302 (1900); Kutzner v. Myers, 182 Ind. 669, 108 N. E. 115 (1915); Flewwellin v. Jeter, 138 Fla. 540, 189 So. 651 (1939).

\(^{94}\) Ervine's Appeal, 16 Pa. 256 (1831); Hegarty's Appeal, 75 Pa. 503 (1874); Kneass's Appeal, 31 Pa. 87 (1855).

\(^{95}\) Gilpin v. Williams, 25 Ohio 283 (1874); Ream v. Wolls, 61 Ohio St. 131, 55 N. E. 176 (1899); McConnell v. Bell, 121 Tenn. 198, 114 S. W. 203 (1908).

Ohio Const., Art. 2, sec. 28, provides that "the general assembly shall have no power to pass retroactive laws or laws impairing the obligation of contracts." The statute in McConnell v. Bell was held not to afford due process and was held not to come within the meaning of the expression, "the law of the land" (Tenn. Const., Art. 1, sec. 8, supra Chapter 2, note 13).
courts tend to follow real property classifications closely. The following have been held to be “vested” interests in the sense that they could not be involuntarily sold: an indefeasibly vested remainder in fee, a vested remainder subject to a power of sale, a reversion in fee, a reversion subject to a contingent remainder, and a reversion subject to a testamentary power of appointment. Technical classifications are useful to the court when it has to make distinctions between vested and contingent future interests in constitutional

96 Watkins v. Ford, 123 Va. 268, 96 S. E. 193 (1918) (devise to P. for life, remainder to testator's nephews and nieces); Kneass's Appeal, 31 Pa. 87 (1855) (testator devised land to wife for life and after her death the estate was to be divided equally among the testator's children); Curtis v. Hiden, 117 Va. 289, 84 S. E. 664 (1915).

97 Ervine's Appeal, 16 Pa. 256, 257 (1851). The testator directed in his will that his executors should rent his lands, and support his son Daniel out of the proceeds, and "it is further my will and desire that none of my real estate should be sold during the life of my said son Daniel, . . . and it is further my will and desire that after the death of my said son Daniel, that then my real estate shall be sold to the highest bidder, and all my children to receive share and share alike." At Daniel's instigation an act was passed authorizing a sale and the investment of the proceeds, the interest to be paid to Daniel during his life and the principal sum to be subject to the provisions of the will. Held: The legislature could not anticipate the time provided in the will for the exercise of the power and that the legislature did not have the power to direct a sale against the wishes of the other parties in interest (the brothers of Daniel) who were sui juris. A sale would have deprived them of the probable increase of the land during Daniel's life and of the privilege of taking it as land at his death.

98 Hegarty's Appeal, 75 Pa. 503 (1874). (Devise to Y. and after her death to various charities. Devise to charities held void. Reversionary interest passed by intestacy to testator's brothers and sisters.)

99 Gilpin v. Williams, 25 Ohio 283 (1874). (Devise to Mrs. G. for life, and after her death to her children. Mrs. G. was in her late forties and had no children. No disposition was made of the inheritance. Defendants were the heirs of the testator.)

100 Shoenberger v. School Directors, 32 Pa. 34 (1858). (Devise to Mrs. S. for life, with power to appoint by will amongst her children or grandchildren, with remainder over, in default of appointment, to the surviving children and issue of deceased children per stirpes.)

It was held in the Shoenberger case that the act here was the sort prohibited by the ninth section of the Bill of Rights, which declares that a person accused of crime cannot be deprived of life, liberty, or property, "unless by the judgment of his peers, or the law of the land." See Chapter 2, note 16. The court said that if the property of criminals was protected in this way, surely the property of persons in the position of the heirs must be likewise protected.
cases, but it should be careful not to fall a victim to mere labels. Should, for example, a vested remainder for life, where the remainderman is aged and in poor health and the life tenant young and vigorous, be accorded the same degree of protection as a vested remainder in fee? Should not an executory interest be given the same protection as a vested remainder where the event is certain to occur and the takers are ascertained persons in being? A very commonplace example may be given wherein if property concepts are applied without reservation, an undesirable result might be reached. Suppose A devises Blackacre to B for life, remainder to B’s heirs, in a jurisdiction where the rule in *Shelley’s Case* is not applicable. B has a numerous progeny. In technical contemplation the reversion descends to A’s heirs, but should it not be held that they cannot prevent a sale of the fee by the life tenant?

Life tenants seeking advantage of the statutes have not usually attempted to show that the property would probably be lost to everyone unless sold—the kind of showing upon which equity will, in the absence of a statute, order a sale notwithstanding the remainderman’s insistence upon his alleged rights. Where the situation is such that equity would grant relief, there is no reason why the life tenant should not be permitted to proceed under a statute enacted after the creation of the life estate rather than in equity, if he so prefers. But what the life tenants generally have sought is the sale of the land merely for the purpose of investing the proceeds in other property which would produce a greater income.

The retroactive application of statutes authorizing the involuntary sale in fee of land in which there are vested future interests is probably unwarranted in most instances. No pressing social policy requires that all such interests be liable to sale upon the request of the owner of the freehold. The
operation of the statute can, without very serious consequences, be restricted to interests subsequently coming into being.

In Kentucky and Virginia, upon the ground that one who is *sui juris* cannot be compelled to defer his right of disposition to the judgment of a court, it has been held that even as to subsequently created interests, legislation authorizing sale deprives the nonconsenting owners of vested future interests of property without due process.\(^{101}\) Purely as a policy question, it might be unwise to subject vested future interests to a liability to be liquidated, but it does not seem reasonable to say that such a liability cannot even be imposed prospectively without an unconstitutional taking of private property. When the problem arises hereafter in other jurisdictions, this writer is inclined to think that most courts will not follow Kentucky and Virginia, assuming that the statute in question is adequately drawn, with provision for proper judicial supervision and with some restraint upon the power of the owner of the freehold interest to compel a sale. New Hampshire, Ohio, and Pennsylvania have held contrary to Kentucky and Virginia.\(^ {102}\) Of course, the choice will not be easy to make where the life tenant seeking to take advantage of the statute is merely an investor or creditor, or where the land is very likely to have a much greater value and command a much higher price at the expiration of the life estate. Depriving

\(^{101}\) Gossom v. McFerran, 79 Ky. 236 (1881); Curtis v. Hiden, 117 Va. 289, 84 S. E. 664 (1915); Watkins v. Ford, 123 Va. 268, 96 S. E. 193 (1918). In Curtis v. Hiden and in Gossom v. McFerran, the life tenants had purchased the life estates as investments. When their investment turned out to be unprofitable, they tried to compel a sale. This fact probably had some influence on the decisions.

\(^{102}\) Brierley v. Brierley, 81 N. H. 133, 124 Atl. 311 (1923); Nimmons v. Westfall, 33 Ohio St. 213 (1877); Smith's Estate, 207 Pa. 604, 57 Atl. 37 (1904). (Held: The property in question became vested under a rule of law promulgated in the statute by which it and property similarly situated might be divested. There is nothing contrary either to natural justice or to constitutional right to allow the act so to operate when the fund is substituted for the estate.)
the remaindermen of the anticipated future enhancement of the value of their interests is harsh. But if the legislature so desires, is there really any constitutional barrier to its investing the owners of all life tenancies thereafter created with the power, upon the conditions and limitations prescribed by the statute, to compel the sale of remainders and reversions? Is it not reasonable to assume that the creator of the estates intended the benefit to accrue primarily to the first donee? When it is made to appear that the estate vested in such donee is not beneficial to him, and can be made so in another form of investment, why not permit the statute to aid the first donee when it can do so without injury to the owner of the future interest (other than that sustained in the commutation of his interest)? It must not be overlooked that the owner of the future interest will always be entitled to an interest in the proceeds and that also the owner of the future interest will often be in a position to buy in the land at the sale or at least to force the bids up.

(c) Land Held in Trust. In some of the cases previously discussed the land was held in trust. The courts, in allowing or refusing to allow the forced commutation of future interests under a statute, have not explicitly distinguished between the situation where the possessory interest is a legal life estate and the situation where the land is held in trust, but it seems that a distinction might possibly be

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103 On January 1, 1952, statutes treating the situation where a trust exists and providing for the sale of complete ownership existed in eighteen jurisdictions. 2 Powell, Real Property, ¶ 292. See note 73 supra.

E.g., Ore. Comp. L. Ann. 1940, sec. 9-801, provides: "When any trust in real or personal property, or both, shall have heretofore been created, or shall thereafter be created by will, deed or otherwise, and the trustee or trustees of such trust, or any person interested in said trust or any person interested in the property embraced in said trust upon the termination thereof, whether such latter interest be by way of a vested or contingent remainder, executory devise, conditional limitation, shifting use, or of any other nature, shall deem it for the interest of all persons who are or may become interested in said property that the same or any part thereof should be sold, mortgaged, improved, exchanged or leased; or otherwise dealt with in any manner, such
made. Where there is a legal life estate, a court will not, in the absence of a statute, authorize the sale in fee of the land against the wishes of the owners of future interests unless sale is necessary to prevent the loss of the property. But courts of equity have inherent power to authorize trustees to do what is necessary in order to conserve the trust property and to protect all interests, even though the instrument creating the trust does not give the trustees such power; this is in order to carry out the main purpose of the trust. Courts of equity will direct the sale of the trust lands when lapse of time or changes in the condition of the property have made it prudent and beneficial to alienate the lands. They may even allow a trustee to act contrary to the express stipulations of the settlor and sell, mortgage, or lease (provided the limitations do not create a condition upon the happening of which the estate is to be forfeited) where exigencies have arisen which make departure from the directions of the settlor necessary to the fulfillment of the purpose of the trust.

party or parties may commence a suit for the purpose of obtaining a decree for the sale, mortgaging, leasing, improving, exchanging of, or otherwise dealing with said property, or any portion thereof. Any court of equity in a county in which any of such trust property may be situated shall have jurisdiction to hear the cause of suit and enter the proper decree.

The act further directs that all persons who are living at the time of the commencement of such suit, and who are interested whether as trustees or as beneficiaries in the property under the trust, or who have any vested, contingent, executory, or reversionary interest therein at the termination of the trust, shall be made parties to the suit, as also all persons living at the commencement of suit who have at that time any apparent interest. The act also provides for notice to unknown heirs or unknown persons by publication in the same manner as in suits against nonresident defendants.

Sec. 9-805 provides: "All interested persons who are born subsequent to the commencement of said suit shall be deemed parties to said suit by being represented therein by the defendants served, and shall be bound by any decree or decrees therein as fully as if made parties and duly served with process therein."

105 2 Scott, Trusts, sec. 167; 3 Bogert, Trusts, sec. 742.
106 2 Scott, Trusts, sec. 190.4.
107 2 Scott, op. cit.
The settlor's specific desires are subordinated to his general intent.

Thus to the extent that future interests, where there is a trust, can be subjected under the present law to the authorized acts of the trustee, there will be relatively less objection to permitting the trustee to sell, exchange, mortgage, lease, or otherwise deal with the corpus as provided in a statute enacted subsequent to the creation of the trust than there will be to allowing a life tenant to sell in fee under a retroactive statute.

(d) The Effect of Restrictions Against Sale. An interesting problem is whether a statute which otherwise can be applied retroactively will override a stipulation in the will or deed that the land is not to be sold. One case intimates strongly that the testator or grantor may condition the estate so that it will terminate if the life tenant procures an order of sale.\(^\text{108}\) There is no good reason why a forfeiture provision should not be given effect, notwithstanding the statute. The public policy to be furthered by the statute is not only the amelioration of the condition of life tenants but also the promotion of alienability by getting rid of future interests. The latter objective may be as much accomplished by forfeiture as by sale in fee.

A restraint on the life tenant's power of alienation, which is unaccompanied by a forfeiture provision, is generally held to be ineffective.\(^\text{109}\) Yet, even though a stipulation against sale is void, it might persuade the court of the inexpediency of a sale out of deference to the wishes of the grantor or testator. A court once admonished that

"A just government ought as emphatically to protect wills as deeds and contracts. Because, by so doing, not only the rights of the living are secured, but also the rights of the


\(^{109}\) 1 Bogert, Trusts, sec. 220; 2 Simes, Future Interests, sec. 447 (1936).
dead—rights which all civilized nations regard. Those who are now the living will shortly be the dead. And we labor not only for the present, but for the future, and for those who shall be in that future.”

Where, however, courts do not sustain retroactive statutes, it is because the interests of living persons are unduly disturbed, not because the wishes of the dead are flaunted.

On the other hand, restrictions in a trust instrument against sale by the trustee (or mortgaging, leasing, or other acts) will be enforced by the court although unaccompanied by forfeiture provisions. The trustee has no right to alienate or encumber the corpus unless the power is given him under the terms of the trust or conferred by the court. However, restrictions in the trust instrument against sale, mortgaging, or leasing do not prevent the trustee’s taking advantage of a statute authorizing any of those acts, provided that the limitations do not create a condition upon the happening of which the estate is to be forfeited. Indeed, the only reason why the trustee would need to take advantage of the statute would be on account of some supposed defect of power resulting from a limitation expressed or implied in the trust instrument.

6. Statutes Which Authorize a Life Tenant to Execute Leases

At common law, a lease executed by a life tenant automatically expires at his death. A statute may constitution-

110 Ervine’s Appeal, 16 Pa. 256, 265 (1851), supra note 94.
111 2 Scott, Trusts, sec. 186 et seq. Of course, the trustee, as owner of the fee, has the power to alienate and if he conveys to a bona fide purchaser who pays consideration before receiving notice, the corpus will be discharged of the trust. 2 Scott, Trusts, sec. 284.
112 Stanley v. Colt, 72 U. S. (5 Wall.) 119 (1866) (restriction against sale); Russell v. Russell, 109 Conn. 187, 145 Atl. 648 (1929) (language of will indicated that the testator did not intend that any further encumbrances be placed on the property).
ally provide that leases which have already been executed by life tenants of existing estates shall not expire immediately upon the death of the tenant but shall be continued in effect for a limited period after the lessor's death. For example, it has been held that a statute is constitutional which provides that such leases shall be continued until the end of the lease year current at the time of the life tenant's death, in lieu of emblements, to the end that the lessee may gather the growing crops.\textsuperscript{115}

If there is a strong showing of necessity, similar to the circumstances under which courts of equity order a sale of the premises, it would seem not unconstitutionally deprivative of the interests of the remaindermen to permit the life tenant to take advantage of a statute enacted after the creation of his estate to execute a lease which will not terminate for a long period after his death. A remainderman can scarcely be heard to complain if the life tenant's execution of a long-term lease is the only expedient short of sale to prevent everyone's interests from being lost. The power to make leases for the preservation of property is like the power of sale, and as a matter of fact the power to make leases is sometimes conferred in statutes authorizing sale or mortgage.\textsuperscript{116}

However, where there is no proof of necessity, a statute which would authorize life tenants of existing estates to execute leases which would endure any substantial period of time after the life tenant's death would be of doubtful constitutionality.

No cases were found which directly passed upon the validity of a statute which purported to give life tenants power to execute long-term leases. However, a similar constitutional issue was considered in a case arising under a statute which authorized trustees, with the approval of a court, to

\textsuperscript{115} King v. Foscue, 91 N. C. 116 (1884).
\textsuperscript{116} E.g., D. C. Code 1940, sec. 45-1104, supra note 76.
lease real property for such periods as might be deemed advantageous to the estate. In *Campbell v. Kawananakoa*,\(^{117}\) where this statute \(^{118}\) was sought to be applied to an existing trust (the testator died some thirty years before the enactment), it was held that the trustees could not execute a fifty-year lease which would probably endure beyond the life of the trust, where some of the remaindersmen who stood in line to take upon termination of the trust objected to the execution of a long-term lease. The testator had clearly indicated in his will that he intended a distribution of the res at the time designated for the termination of the trust. There was no showing in the *Kawananakoa* case that the execution of the lease was necessary to save the res from destruction or that the income from the trust in its present condition was too small to carry out the plans of the testator.\(^{119}\) The life beneficiaries would have been clearly benefited by the lease. The remaindersmen might or might not have been, depending upon conditions existing when the lease expired, of which the court would make no prognostication. It was held that it would be unjust to the remaindersmen (and also unconstitutional) to deny to them the privilege of choosing for them-

\(^{117}\) 34 Hawaii 333 (1937).

\(^{118}\) Hawaii Rev. Laws 1945, sec. 12573.

\(^{119}\) The courts of some jurisdictions will authorize the execution of leases to endure well beyond the life of the trust, even when this appears to be contrary to the intent of the trustor, if it is shown that by the execution of a long term lease the res can be preserved, or that only by this means can the purpose of the trust be carried out, or if some other equally pressing reason is established. Marsh v. Reed, 184 Ill. 263, 56 N. E. 306 (1900); Denegre v. Walker, 214 Ill. 113, 73 N. E. 409 (1905); Hubbell v. Hubbell, 135 Iowa 637, 113 N. W. 512 (1907).

Courts sometimes go to rather extreme lengths to find that the power to execute long term leases is implied in the trust arrangement. In *Upaham v. Plankinton*, 152 Wis. 275, 140 N. W. 5 (1913) it was held that the trustees might execute a ninety-nine year lease, if such term were reasonable under all circumstances as the testator might probably have regarded the matter when he created the trust. The court found that the trustor was a capable businessman who must have appreciated that the property was especially suited for long term business leases.
selves, when the time for the exercise of that privilege arrived, what disposition they wished to make of the corpus.

From the facts as stated in the *Kawananakoa* case it is impossible to determine whether the remainders were vested or contingent. The court thought it unnecessary to make any distinction. One might surmise, however, that the court believed the legislature could have made the statute applicable to an existing trust at any time before the coming into existence of any of the class who might take.\(^{120}\)

The statutes of some jurisdictions permit life tenants to execute oil and mineral leases.\(^{121}\) Since it is indubitably within the police power of the state to encourage the development and exploitation of its natural resources, there can be little question of the constitutionality of such statutes if reasonable provision is made for safeguarding future interests from unnecessary diminution in value. In an Arkansas case, *Love v. McDonald*,\(^{122}\) it was determined that the statute of that state

\(^{120}\) "Upon the birth of this grandchild [the first born of the class of remaindermen] there came into existence one of a class of beneficiaries clothed with a future interest vested by the terms of the will of the testator in the corpus of the estate. Upon the subsequent birth of other grandchildren the class opened and they also automatically became members of it. To be sure under the terms of the testator's will the right to the enjoyment of the absolute ownership and control of the corpus is postponed until the termination of the trust. The right itself, however, ceased to be nebulous and merely theoretical and became a reality. Whether it is a vested or contingent remainder it is unnecessary to decide." 34 Haw. 333, 343.

\(^{121}\) E.g., W. Va. Code 1949, sec. 3550. This statute permits, under supervision of a court, the sale or lease of timber, oil, gas, coal, or other minerals without the consent of persons in being having vested estates or vested interests in such minerals and resources, where such minerals on account of their volatile or fugitive nature are clearly in danger of being drawn away, or where, in the case of timber and coal, it appears that the coal and timber are being removed from adjoining areas and if this coal or timber is not removed at the same time as that from adjoining lands, it will be difficult and less profitable to mine or produce at any other time and that on account of the circumstances such coal or other mineral will probably deteriorate in value unless it is sold or leased immediately.

\(^{122}\) 201 Ark. 882, 148 S. W. 2d 170 (1941).

In Lawrence E. Tierney Coal Co. v. Smith's Guardian, 180 Ky. 815, 203 S. W. 731 (1918), a statute, which provided that the guardian of an infant or incompetent may execute coal, oil, and gas leases for such length of time
was applicable to an estate created by deed many years before the statute was passed. The Arkansas statute 123 provides that one to whom land is devised or granted in fee tail (he has a life estate under the laws of that state 124) may petition a court for permission to execute an oil and gas lease. It is provided that the court shall award the life tenant, as compensation for the use of the surface of the lands for exploration, an absolute title in a proportion of the minerals, not exceeding a one-sixteenth interest, and also a proportion of the consideration and delay rentals. In the particular case, the heirs apparent of the life tenant, her children, who were

as the guardian may approve, without regard to the time at which the disability of such infant or incompetent shall be removed (Ky. Acts 1916, c. 99), was held, where the infants in question had acquired their interests prior to the statute, to deprive them of their inalienable right to acquire, hold, and enjoy property. Under the authority of the act a forty year coal lease with option to renew for like period had been approved by a lower court. A substantial difference was declared to exist between the sale of the lands of an infant or incompetent and what was attempted under this statute. "When the land of an infant is sold for purposes of reinvestment, there is only a change in the character, or perhaps, the location of his estate. The principal fund remains intact to come into his possession when he reaches his majority. . . . When, however, the whole estate is seized during his infancy, and at a time when he is presumed to be incapable of acting for himself, and leased for a term of years that will, under ordinary conditions, extend far beyond the period of his life, the legislature, through the instrumentality of the court, is assuming to exercise a guardianship, for life, over his affairs that is only tolerated in cases of infancy and mental unsoundness." (180 Ky. 815, 828, 203 S. W. 731, 736.) On rehearing, the court stated that its previous decision should be modified so as to exempt oil and gas leases, the same involving substantially different problems, 181 Ky. 764, 205 S. W. 951 (1918). A number of courts have permitted the execution of oil and gas leases for a period of years extending beyond the minority of the infant. Cabin Valley Mining Co. v. Mary Hall, 53 Okla. 760, 155 Pac. 570 (1916); Jones v. Prairie Oil and Gas Co., 273 U. S. 195 (1927). Courts have also approved long term leases of infant's lands on the ground that the interests of the infant would be benefited. Ricardi v. Gaboury, 115 Tenn. 484, 89 S. W. 98 (1905) (ninety-nine years); Beauchamp v. Bertig, 90 Ark. 351, 119 S. W. 75 (1909).


Sec. 4 (b) [53-306b] provides that the court shall appoint some suitable person as trustee for the benefit of the contingent remaindersmen and reversioners and requires that such trustees shall execute bond in such sum as the court may deem proper.

all of age, assented to the lease in writing. They also signed a statement that their mother had reached an age where she probably would not have any more children and their interest on that account reduced. In fact, the only person who raised any objection at all was the defendant who was trying to get out of his agreement to accept the oil and gas lease on the alleged ground that since the interests of the remaindermen could not be affected, title was not merchantable. The lease was held to be valid and binding upon the interests of the remaindermen. The decision proceeded partially on the theory that under its police power the state may permit the life tenant to execute leases in order to conserve the contingent estate from the depletion of minerals by production from adjacent territory, but the greater stress was laid upon the very dubious theory that the interests of the remaindermen were not property within the contemplation of the Fourteenth Amendment nor the Constitution of Arkansas. The court quoted with approval a statement from a well known law encyclopedia to the effect:

"The legislature has no power to alter or destroy by statute the nature of vested estates in property. Indeed, authority is not wanting to the effect that a contingent remainder may not be impaired or destroyed by a statute passed after its creation, but the better opinion is that contingent remainders may be impaired or abolished at any time before they become vested. . . ." 125

The court intimated that the result would have been different if the remaindermen had been named.

This case is the only one which the writer has found in which it is declared that contingent remainders are not property within the meaning of the Constitution. The decisions, it is true, permit effects to be wrought on some kinds of contingent remainders which they will not allow in respect to

125 12 C. J. p. 959, § 496.
vested remainders, but they do not hold that contingent remainders as such are not property in a constitutional sense. The remainders in the *McDonald* case were contingent in the respect only that the takers after the death of the life tenant could not at the time of the suit be absolutely ascertained (*nemo est haeres viventis*), but the interests of the children were more than mere expectancies. The only condition to their coming into possession was that they outlive the life tenant. The Arkansas court pretty surely confused vested remainders with vested interests, and contingent remainders with contingencies or expectancies.

What the court said about contingent remainders was dictum. The case did not present a situation in which the proposition that contingent remainders are not property could be tested. All of the persons who in all probability would ever have any interest consented. Even if the remaindermen had objected, the benefit they derived from having the land explored would fairly offset the loss occasioned by payment of royalties to the life tenant. There were excellent reasons for sustaining the statute as applied to an existing life estate. It is well known that oil and gas may be lost by underground drainage. If wells are sunk in the vicinity of the land, the oil and gas under it may shift to the operating wells and be lost to both the life tenant and remaindermen. The latter cannot execute a lease. What could be more reasonable than a statute which allows the life tenant to execute a lease so that wells might be sunk before the oil and gas are depleted?

7. Statutes Which Alter the Rules for Allocation of Benefits Between Life Tenant and Remaindermen

The primary guide for the allocation of benefits between the life tenant or life beneficiary and the remaindermen is, of course, the instrument creating the interests. But often the instrument is an insufficient guide, and for such cases the
courts have devised rules. A few legislatures have adopted comprehensive statutes on allocation of benefits.

A statute embodying a material modification of existing rules, it appears, ordinarily cannot constitutionally be applied to existing estates. An established rule of allocation, the courts hold, is a rule of property. The legislature cannot qualify or extinguish the relative interests of the life tenant or beneficiary and of the remaindermen as ascertained by the rule in existence at the time of the creation of the interests.

In *Franklin et al. v. Margay Oil Corp. et al.* the apportionment statute went into effect fourteen days after the death of the testator whose will created the trust in question. The statute provides as follows for the apportioning of money received as consideration for the permanent severance of natural resources from the land (whether as royalties or otherwise). The percentage allowed for depletion under the federal income tax laws should be treated as principal, and invested or held for the remaindermen, the balance to be treated as income subject to be disbursed to the tenant.

Two years after the enactment of the statute, the trustees, under authority of the power vested in them, executed certain oil and gas leases. This suit was brought to determine (inter alia) the proper allocation of royalties between life beneficiary and the remaindermen. Under the rule in force at the testator's death, royalties went into the fund to be held for the remaindermen and only the interest on the royalty fund went to the life beneficiary. It was held that a statute

129 Okla. Laws 1941, p. 260, sec. 33, 60 Okla. Stat. Ann., sec. 175.33. The statute also provides that if no deduction for depletion is made by the federal laws, then twenty per cent of the net proceeds shall be treated as principal and the remainder as income.
setting up a new rule of apportionment, which has the effect of increasing income and correspondingly reducing the principal or corpus of the estate which may go to the remaindermen at the termination of the trust, if applied to existing trusts, would deprive the remaindermen of property without due process of law.

In *In re West's Estate* 130 the question concerned the constitutionality of certain provisions of the New York Personal Property Law 131 insofar as the same modified retroactively the rules relating to proceeds of sale in mortgage salvage operations. The court found there would be no taking of property without due process if the statute were applied in case of existing trusts, but the ground of decision was that rules laid down in the cases prior to the statute were tentative only and not intended to be final 132 and that the trustee in his discretion might have paid to the life tenant the amount which the statute directed:

"Before a judicial declaration, thus tentatively stated, becomes a rule of property, it must have become permanently fixed and long continued."

The statute allots to the life tenant out of the net income earned from the operation of real estate in salvage, 133 an annual amount up to three percent of the face value of the mortgage investment, regardless of principal advances for expenses of foreclosures, arrears of taxes, and capital im-

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131 N. Y. Pers. Prop. Law, sec. 17-c, effective April 13, 1940.
132 The cases primarily referred to were Matter of Chapal's Will, 269 N. Y. 464, 199 N. E. 762 (1936) and Matter of Otis' Will, 276 N. Y. 101, 11 N. E. 2d 556 (1937).
133 Salvage income is derived generally from three sources: "(1) rents received by the trustee as mortgagee in possession, (2) rent received by the trustee after foreclosure as owner of the property, (3) interest and amortization payment received by the trustee upon resale, where part of the purchase price consists of a purchase money mortgage," Skilton, "The Rights of Successive Beneficiaries in Unproductive Trust Assets Bearing Interest," 15 Temp. L. Q. 378, 396 (1941).
provements.\textsuperscript{134} Such payments are to be made from the beginning of the salvage operation and are declared to be final and not subject to recoupment either from the life tenant or from the trustee by way of surcharge.\textsuperscript{135} Prior to the statute, the trustee could, during the salvage period, at his discretion, make payments to the life tenant from time to time out of the surplus income not necessary for the payment of expenses or for the repayment of advances made out of principal.\textsuperscript{136} But as a matter of fact, trustees hesitated to exercise their discretion for fear of possible surcharge in the event of an overpayment to the life tenant;\textsuperscript{137} consequently, the life tenant was often left without income during the salvage period. The legislature came to the aid of life tenants who presumably are the primary objects of the settlor's beneficence and made absolute what formerly was discretionary. It is questionable whether depriving the remaindermen of a right of surcharge against the trustee for overpayment made in conscious good faith is a taking without due process even if the rule of apportionment is held to have been established.

The dissenting opinion in the \textit{West} case strongly attacked the position of the majority that the rule of apportionment was not settled,\textsuperscript{138} and vigorously contended that insofar as

\textsuperscript{134} Remaindermen are required to advance new principal to pay the expenses of the salvage operations. In re Schnitzler's Estate, 40 N. Y. S. 2d 554 (Surr. Ct. 1943). Pers. Prop. Law, sec. 17-c (b) (c) provide that principal advances shall be repaid out of excess income above three per cent and that unpaid principal advances shall be a primary lien on proceeds of sale.

\textsuperscript{135} Subsec. (a) provides that payments made are to be credited against life tenant's income in the final computation.

\textsuperscript{136} Matter of Chapal's Will, 269 N. Y. 464, 199 N. E. 762 (1936).

\textsuperscript{137} Matter of West, 175 Misc. 1044, 26 N. Y. S. 2d 622 (1941).

The statute declares that its purpose is to simplify rules of procedure in mortgage salvage operations and to eliminate complications which often worked disadvantageously to the life tenant who is usually the principal object of the testator's or settlor's bounty. It is stated that only equitable adjustments and balances are intended to be effected by the provisions.

\textsuperscript{138} He quoted as follows from Matter of Chapal's Will, 269 N. Y. 464, 472, 199 N. E. 762, 764 (1936): \textquote{"... the proceeds should be used first to pay the expenses of the sale and the foreclosure costs and next to reimburse..."}
the statute retroactively took away the remaindermen’s right of recoupment from the life tenant—for payments fixed arbitrarily and without regard to the demands of justice and equity—it was nothing but a mandatory transfer of the remaindermen’s property to the life tenant, and a taking of property without due process. On appeal, the Supreme Court of the United States agreed with the majority that the earlier decisions did not amount to a rule of property. The sole question considered by this court was whether the New York Court of Appeals had attempted to avoid the constitutional issue by denying on an unsubstantial ground the existence of rights claimed to be impaired by the statute. The finding by both courts that the remaindermen never possessed such a property right as they claimed was taken from them

the capital account for any advances of capital for carrying charges not theretofore reimbursed out of income from the property. Then the balance is to be apportioned between principal and income in the proportion fixed by the respective amounts thereof represented by the net sale proceeds. In the capital account will be the original mortgage investment. In the income account will be unpaid interest accrued to the date of sale upon the original capital.

He contended in addition that the statute also violates the rule that the legislature may not declare the law in the decision of causes before the courts; the courts are required to ignore the law that pending questions of apportionment are to be decided upon equitable principles and directed instead to decide according to the legislative mandate.

There could be no constitutional objection if the amount of income which was found to be due the life tenant upon the final computation always exceeded the amount of income irrevocably paid over during the salvage operations. In In re Wacht's Estate, 32 N.Y.S. 2d 871 (Surr. 1942), a number of hypothetical illustrations are given which show how application of the statutory rule may result in the life tenant's getting a greater share than he would be entitled to under the Otis-Chapal rule.

Since the remainderman is required to advance new capital to pay the cost of salvage operation, if the entire investment is ultimately lost, the irrevocable income payments under 17-c will be, in effect, an expropriation of the remainderman’s contributed capital. This happened in In re Schnitzler's Estate, 179 Misc. 957, 40 N.Y.S. 2d 554 (1943), affirmed In re Schnitzler's Will, 290 N.Y. 885, 50 N.E. 2d 293 (1943).

Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944). Douglas and Black concurred. They were of the opinion that the record did not show a substantial federal question. They would simply have dismissed the appeal.
disposed of the federal question.\textsuperscript{141} However, Justice Jackson implied that even assuming the contentions of the remaindermen, the state did not lack power to devise new and reasonable directions to the trustees of existing trusts to enable them to meet new conditions such as those the depression produced.

In \textit{In re Crawford's Estate}\textsuperscript{142} it was held that the Uniform Principal and Income Act,\textsuperscript{148} if applied retroactively to an existing trust, would deprive the life beneficiary of vested

\begin{footnotesize}
\textsuperscript{141} Demorest v. City Bank Farmers Trust Co., 321 U. S. 36, 47 (1944). Jackson, J., remarks that what really seems “to have been taken from the remainderman is his right to question the equity of the rule in his individual circumstances, a right which he had while it was a rule of court.” It should be observed that the Chapal-Otis rules were laid several years after the deaths of the decedents in question. Property rights would seem to have been settled at the death of the testators.

\textsuperscript{142} 362 Pa. 458, 67 A. 2d 124 (1949). Accord, \textit{In re Pew’s Estate}, 362 Pa. 468, 67 A. 2d 129 (1949). In the Crawford case, under the will of the testator, who died some ten years before the statute, certain property was placed in trust to pay the income to his daughter for life. After the effective date of the statute, the trustees received stock dividends from corporations whose stock formed part of the trust, and they also sold other corporate stocks and rights to subscribe which resulted in large capital gains. The court below decided that by long established decisions of the Supreme Court of Pennsylvania under the Pennsylvania Rule of Apportionment, the life tenant possessed a vested right to receive as “income” the stock dividends and a share of the capital gains (representing accumulated unpaid earnings) on sales of the stock.

The legislature, in adopting the Uniform Principal and Income Act in substance, substituted the Massachusetts Rule for the Pennsylvania Rule. Under the Massachusetts Rule all cash dividends are payable to the life tenant and all stock dividends to the remaindermen. 3 Simes, \textit{Future Interests}, sec. 693 (1936). Uniform Principal and Income Act, Pa. Stat. Ann. 3470, sec. 5 (1) provides: “All dividends on shares of a corporation forming a part of the principal, which are payable in the shares of the corporation itself shall be deemed principal. Subject to the provisions of this section all dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends and dividends payable in shares or other securities or obligations of corporations other than the declaring corporation, shall be deemed income.”

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rights, since he would receive a smaller share under the Act than he would get under the rule in existence when the trust was created. It was argued that the life tenant’s property right was inchoate or a mere expectancy because the quantum of income may vary upon the application of the rule. The court disagreed with this. There was no uncertainty as to the rule of apportionment. Uncertainty as to the quantum of income and the time of receipt, said the court, cannot convert a vested interest into a mere expectancy.¹⁴⁴

In Willhite v. Rathburn et al.,¹⁴⁵ a case involving the sale of unproductive land under a statute, it was held that a decree which directed that the present value of the life estate be paid to the life tenant as her absolute property, could not be sustained since the estate had been created prior to the enactment of the statute providing for the computation of the present value of life estates.¹⁴⁶ The statute under which the sale was ordered was sustained although it was retroactive;¹⁴⁷ but insofar as the decree sought to give the life tenant more than the interest on the invested proceeds, above the expenses of administration, the court held that it operated to enhance and enlarge the life estate with consequent depreciation and impairment of the remaindermen’s interest in a manner forbidden by the constitution of the state.¹⁴⁸ The

¹⁴⁴ “Appellant asserts that no vested property right exists in a rule of law. This is true, except where such rule of law has established a vested property interest. Where a decision of the Supreme Court of Pennsylvania declares an interest to be vested, no retroactive statutory enactment may modify or extinguish it.” (In re Crawford’s Estate, 362 Pa. 458, 467, 67 A. 2d 124, 129.)

However, if the rule had not been established but was in a process of formulation by the courts at the time the legislature declared its rule, it would seem that the life beneficiary would have no such interest in the imperfected rule as to prevent the application of the statute. This would be the corollary of In re West’s Estate, supra note 130.

¹⁴⁵ 332 Mo. 1208, 61 S. W. 2d 708 (1933).
¹⁴⁷ See supra note 89 and the text to which this note is appended.
court stated that under the law existing at the time the life estate was created, the life tenant was entitled to the emble­ments, rents, and income accruing during the continuance of the life estate but was in no respect entitled to any part of the corpus, nor was she entitled to enforce a sale in fee of the land and have a portion of the proceeds set apart to her as her absolute property. 149

On the other hand, a statute 150 providing that when money is paid into court on foreclosure proceedings the court shall, upon request of the owner of any life estate, direct the pay­ment to him of such gross sum as shall be deemed a just and reasonable satisfaction for said estate for life, was held in Leach v. Leach et al. 151 not to divest vested rights when applied to existing estates even though the statute did not require the consent of persons interested in remainder, whether vested or contingent. But this situation may be differentiated from that in the Willhite case. Where land is converted into money under a right superior to life tenant and remainder­man alike, as in the Leach case, the legislature can determine the period when the money resulting from such sale and the interest therein shall cease to be held as if it were land.

"... the conversion of lands into money under a superior right, to which the tenure of the lands was subject, terminates ipso facto the precise property right in the lands, and the proceeds of sale in strict legal theory are held not as lands, but rather as in lieu of the lands, for the ultimate purpose of compensating the parties interested in the lands.” 152

149 The estate involved was created in 1904. Apparently the court did not realize that the law of 1905 was not the first statute relating to the computation of the present value of life estates. The law of 1905 repealed Laws 1903, p. 167. The law of 1903, however, employed the American experience table of mortality, whereas the law of 1905 was based on the Carlisle table.


151 72 N. J. Eq. 571, 66 Atl. 595 (Ch. 1907).

152 72 N. J. Eq. 571, 574, 66 Atl. 595, 596 (Ch. 1907). It was also stated in the opinion that the courts in this jurisdiction had never denied that a court in the absence of any statute might direct payment of sums in gross where the parties were sui juris and could receive it.
The remainders in the *Franklin* case were described by the court as being contingent, but it appears that they were actually vested subject to a power in the trustees to give to the life beneficiary from the principal. The nature of the remainders in the *West* case does not appear from the facts, but they were stated by Justice Jackson to be contingent. The remainders in the *Willhite* case were contingent. The objecting remaindermen in the *Leach* case had a remainder for life.

Before any benefits have actually accrued, the interests of both the life tenant and the remaindermen in any such prospective benefits may seem to be inchoate or mere expectancies. Consequently, it may strike one that there is no basis for holding that a statutory change (otherwise equitable) in the rule of apportionment cannot be applied to benefits accruing after the statute if the interests came into being before the modification. There may, furthermore, be doubt as to the propriety of holding that either the life tenant or remainderman has a vested right in a rule of law. All of these suppositions ignore, however, the basic premise upon which judicial rules of apportionment are predicated: the property (which may be denominated the principal) must, except as

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153 The land was conveyed to "Mattie M. Rathburn and her bodily heirs." This conveyance would have created an estate tail at common law but which by statute was converted into a life estate in the first taker with a remainder in fee over to those who should prove to be the heirs of her body at her death. Mattie's children were the ostensible heirs of her body. Mo. Rev. Stat. 1949, sec. 442.470.

154 The lands sold in the foreclosure suit belonged to Mrs. Leach. The marriage took place in 1878, and issue was born, who, at the time of this case, was still alive. In Leach v. Leach, 69 N. J. Eq. 620, 61 Atl. 562 (Ch. 1905) it was held that under the decisions declaring the effect of the statutes relating to the real estate of married women, the respective interests of the husband and wife in the lands sold and their proceeds were as follows: The wife had an estate for her life, with remainder to the husband for his life, if he survived the wife, and with remainder over to the issue in fee. Mr. Leach objected to the payment of a lump sum to his wife. He insisted that only the interest on the sum in court should be paid to the wife.
directed otherwise by the instrument creating the interests, be kept intact for distribution to the remainderman at the expiration of the estate; income is to be paid to the life tenant. The principal, according to the prevailing view, consists not merely in the value of the property as of the time the remainders were created but in the property itself.\textsuperscript{155} Enhancement in value accrues, in other words, to the remaindermen. Benefits either may be income in the ordinary sense or may arise as a result of the commutation of the principal. The purpose of a rule of apportionment is to ascertain the portion of the benefits which is principal in commuted form and hence belongs to the remainderman and the portion which is income in the proper sense and therefore is to go to the life tenant. The interests of the remainderman and life tenant, then, do not arise for the first time when the benefit accrues; the accrual simply indicates a change in the form of the interests. From this process of reasoning it follows that a modification of the existing rule, whereby the life tenant or remainderman receives a larger proportion of the benefits, results in a diminution of the relative interest of the other party. Such a shift of relative interests may be deemed a taking of property.

8. Statutes Relating to Improvements and Repairs Made by the Life Tenant or His Grantee

In the absence of statute, the remaindermen or reversioners are under no obligation to place improvements on the premises or to make advances for the upkeep and repair of the same, except that the life tenant may complete improvements begun by the donor of the estate and demand contribution.\textsuperscript{156}

\textsuperscript{155} 3 Simes, \textit{Future Interests}, sec. 689 (1936).
\textsuperscript{156} 1 Tiffany, \textit{Real Property}, sec. 64 (3d ed.).
Nevertheless, permanent improvements annexed to the land become a part of the inheritance and the property of the remaindermen or reversioners.\(^{157}\)

A statute giving a remainderman a charge or lien on the property for advances made to the life tenant for necessary repairs, improvements, and support has been declared to deprive the other remaindermen of vested rights where the advances were made prior to the statute.\(^{158}\) The remainders were contingent with a double aspect. The court did not explain why the statute could not be applied retroactively but said that it would be a mere waste of words and time to bother stating the reason. Presumably, the reason was that under the existing law the remainderman who made the advances was a volunteer; she could not create an obligation binding the interests of the other remaindermen for expenditures which were not requested by them and which were not necessarily beneficial to them.

It is sometimes held under the occupying claimant statutes that the life tenant who makes improvements in the belief he is owner in fee is entitled to compensation.\(^{159}\) Generally, it is held that one in possession of property, believing himself to be owner in fee, under a conveyance from one who had only a life estate, is entitled, as against a remainderman, to an allowance for improvements.\(^{160}\) In such jurisdictions, where it is held that the existing betterment statute does not extend

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\(^{157}\) Darnell v. Williams, 171 Ga. 651, 156 S. E. 584 (1931); Belfield v. Findlay, 389 Ill. 526, 60 N. E. 2d 403 (1945); Leininger v. Reiche, 317 Ill. 625, 148 N. E. 384 (1925); Day v. Day, 180 Minn. 151, 230 N. W. 634 (1930).


\(^{160}\) Fee v. Cowdry, 45 Ark. 410 (1885); Harper v. Durden, 177 Ga. 216, 170 S. E. 45 (1933); Folsom v. Clark, 72 Me. 44 (1880); Plimpton v. Plimpton, 12 Cush. 458 (Mass. 1853); Harriett v. Harriett, 181 N. C. 75,
to those who are life tenants or the grantees of life tenants, a modification of the statute so as to bring such persons, who built on the bona fide belief that they were owners in fee, within its scope would seem to be a just and equitable act of the legislature even when the modification is applicable to existing life tenancies. A number of courts in cases not involving life tenancies have allowed the application of betterment statutes where the possession of the adverse claimant antedated the statute on the ground that a right to betterments already existed in equity and good conscience.\footnote{161} If the occupant acted in good faith, it would seem that his equities should not be less merely because he turned out to be a life tenant or tenant per autre vie instead of a trespasser.

However, there is an old case holding that a statute which purported to allow the grantees of life tenants to obtain compensation for the increased value of the premises by reason of all proper and judicious improvements which they or the life tenants had placed on the premises, could not be applied where the improvements were made and the death of the life tenant occurred before the statute.\footnote{162} This was said to follow from the fact that upon the termination of the life estate an event had occurred by which the improvements became absolutely the property of the remaindermen. While this opinion may be correct as a matter of pure deduction

\begin{itemize}
  \item \footnote{106} S. E. 221 (1921); Beardsley's Lessee \textit{v.} Chapman, 1 Ohio St. 118 (1853); Whitney \textit{v.} Richardson, 31 Vt. 300 (1858).
  \item The measure of damages will be not the cost of the improvements, but only the amount to which the improvements have added to the actual and permanent value of the property. Cagle \textit{v.} Schaefer, 115 S. C. 35, 104 S. E. 321 (1920).
  \item \footnote{161} Beard \textit{v.} Dansty, 48 Ark. 183, 2 S. W. 701 (1886); Fee \textit{v.} Cowdry, 45 Ark. 410 (1885); Mills \textit{v.} Geer, 111 Ga. 275, 36 S. E. 673 (1900);
  \item Bracket \textit{v.} Norcross, 1 Greenl. 89 (Me. 1820); Bacon \textit{v.} Callender, 6 Mass. 303 (1810). Contra, Wilson \textit{v.} Red Wing School District, 22 Minn. 488 (1876); Billings \textit{v.} Hall, 7 Cal. 1 (1857); Society, etc. \textit{v.} Wheeler, 22 Fed. Cas. 756, No. 131,156 (C. C. D. N. H. 1814).
  \item \footnote{102} Austin \textit{v.} Stevens, 24 Me. 520 (1845). Me. Rev. Stat. 1841, c. 145, secs. 26–45.
\end{itemize}
from a rule of law, it is not a point of view which is likely to be acceptable to a modern court where the grantee appears to have acted in good faith.

9. Legitimation and Adoption Statutes

Statutes which confer the rights and privileges of natural and legitimate children upon illegitimates and adopted children, it is said, do not entitle such persons to come in as beneficiaries under a will or deed unless the grantor or testator intended to include such children.\textsuperscript{163} The courts will give effect to the intent of the grantor or testator to include or not to include, as that intent may be gathered from the instrument, or, in the case of wills, from surrounding circumstances. But the courts follow a policy of construing both wills and deeds to extend the benefits of the statutes to adopted and legitimated children whenever they can do so without too obviously disregarding the true intent of the maker. Words such as "lawful issue" or "children" which would not be construed in the absence of the statutes to include illegitimate or adopted children, will be construed to include them in accordance with the spirit of the statutes. Words which can be used technically to describe a class (heirs, lawful issue, lawful children, etc.) are sometimes conclusively presumed to have been used in their technical sense; thus all persons who by virtue of the statute are members of that class will be held to take under the instrument, whatever the true intent of the maker.\textsuperscript{164} It follows, there-

\textsuperscript{163} Butterfield v. Sawyer, 187 Ill. 598, 58 N. E. 602 (1900); Central Trust Co. of N. Y. v. Skillin, 154 App. Div. 227, 138 N. Y. S. 884 (2d Dept. 1912); In re Truman, 27 R. I. 209, 61 Atl. 598 (1905); Lichter v. Thiers, 139 Wis. 481, 121 N. W. 153 (1909).

\textsuperscript{164} Dunlavy v. Lowrie, 372 Ill. 622, 25 N. E. 2d 67 (1940) (will); Butterfield v. Sawyer, 187 Ill. 598, 58 N. E. 602 (1900) (deed); Sewall v. Roberts, 115 Mass. 262 (1874) (conveyance in trust); Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697 (1906); McGillis v. McGillis, 154 N. Y. 532, 49 N. E. 145 (1898) (will); In re Sheffer's Will, 139 Misc. 519, 249 N. Y. S. 102 (1931); Miller's Appeal, 52 Pa. 113 (1866) (will).
fore, that although theoretically the court is carrying out the intent of the grantor or testator, the statute may actually have the effect of altering the will or deed.

The courts, while giving acknowledgment to the idea that it is the intent of the maker which controls, recognize that rights may be conferred independently of the intent of the maker, for they hold that a legitimation or adoption statute may be applied retroactively but only so long as it does not divest vested rights.\textsuperscript{165} This means that persons who would have no rights under the instrument as it would have been construed at common law can derive no rights from a statute which is enacted subsequent to the time when the instrument became effective unless the enactment of the statute occurs before the takers are absolutely ascertained. Thus if a devise were made to A for life, remainder to his children, but if he die without issue then to his heirs, an adopted child of A cannot take by virtue of the statute unless it is enacted in A's lifetime. Who will take must be determined at or before A's death and not thereafter. The persons who will take in default of children are said to have only an expectancy; their interests are necessarily uncertain and liable at any time before the death of the life tenant to be diminished or defeated by the coming into existence of persons who will take at the life tenant's death. Consequently, they are not deprived of property without due process if adopted or legitimated children are allowed to take.\textsuperscript{166} It probably would also be held that vested remaindermen,

\textsuperscript{165} Butterfield v. Sawyer, 187 Ill. 598, 58 N. E. 602 (1900); Sewall v. Roberts, 115 Mass. 262 (1874); McGillis v. McGillis, 154 N. Y. 532, 49 N. E. 145 (1898); In re Sheffer's Will, 139 Misc. 519, 249 N. Y. S. 102 (1931).

\textsuperscript{166} Sewall v. Roberts; Butterfield v. Sawyer supra note 165. Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697 (1906). But see Schafer v. Eneu, 54 Pa. 304 (1867) where it is intimated that if the takers in default of children are named persons, the legislature is powerless to enable the adopted child of the life tenant to take.
where the remainder is subject to open up, are not unconsti-
tutionally deprived of property if adopted or legitimated
children are let in. Conversely, at any time before the takers
are definitely determined, the statute conferring rights of in-
eritance upon illegitimate or adopted children may be re-
pealed so as to prevent such children from taking any in-
terest.167

10. Statutes Relating to the Rule Against Perpetuities

A number of states have enacted modifications of or substi-
tutes for the common-law rule against perpetuities.168 A few
states have become dissatisfied with the statutory rules and
have returned to the common law.169 It is probable that the
courts would not permit a statute adopting the common law
or supplanting the common law to have the effect of destroy-
ing an existing interest which was good under the previous
law. As we have already seen, the extinguishment or im-
pairment of an executory interest or contingent remainder
is almost never allowed unless the owner is compensated in
some manner.

Kingsbury, 230 N. Y. 580, 130 N. E. 901 (1920). There was a devise in
trust to the testator's daughter, B., for life and then to the issue of B., or in
default of issue, to her heirs. In 1916 B. adopted an adult child, K. B. died
in 1918. Under N. Y. Laws 1915, c. 352, which for the first time in the
history of the state permitted adoption of adult children, K. would have
taken under the will as an "heir." In 1917, Laws 1915 was amended by
providing that "nothing in this article in regard to an adult adopted pursuant
hereto inheriting from the foster parent applies to any will, devise or trust,
made or created before April twenty-second, nineteen hundred and fifteen, or
alters, changes or interferes with such will, devise or trust, and as to any
such will, devise, or trust, an adult so adopted is not an heir so as to alter
estates or trusts or devises in wills so made or created." N. Y. Laws 1917,
c. 149. Held: K. was not an heir. No vested right in the trust fund could
arise until the death of B., for a living person can have no heirs.

168 2 Simes, Future Interests, sec. 560 et seq. (1936). See Restatement,
Property, Appendix on the Statutory Rules Against Perpetuities.

The validity of a future interest under the common-law rule against perpetuities or under a statutory rule must ordinarily be determined as of the time when the instrument purporting to create the interest becomes effective.\(^{170}\) There is usually no period of abeyance, therefore, between the time the instrument takes effect and the time for vesting of the interest, within which the legislature can act to save the interest.\(^{171}\) It has been held that a statute which purports to validate a devise void under the rule against perpetuities at the time of the testator's death, cannot take from the heirs the reversionary interest which passed to them as intestate property as a consequence of the invalidity of the devise.\(^{172}\)

In any case where the validity of a future interest under the rule against perpetuities or under a statutory rule is to be determined at a time subsequent to the creation of the interest,\(^{173}\) it would seem that in the interim until such time arrives the interest could probably be validated by retroactive legislation. The objections of the person who stood to gain by the

\(^{170}\) Simes, *Future Interests*, secs. 494, 496 (1936), as to common-law rule against perpetuities and c. 32 generally as to the statutory schemes.

\(^{171}\) It should not be overlooked in this regard that where the common-law or statutory rule is applied to present interests whose potential duration is too long (as distinguished from the situation discussed in the text where the rule is applied to prevent the creation of remotely vesting future interests) the interest may be held to be voidable rather than void. Suppose for example that an indestructible trust is limited to endure beyond lives in being and twenty-one years. Assuming that the rule against perpetuities is applicable at all, such a trust should not be held void *ab initio*, but rather the provisions for indestructibility should be held subject to attack by the beneficiary. 2 Simes, *Future Interests*, sec. 557. While depriving a beneficiary of his power to terminate the trust and to compel a conveyance of the res to him might well be held to be a taking of property without due process, there would at least not be the apparent taking away of the title from persons in whom it had vested as the consequence of the invalidity of a devise or bequest under the previous law.

\(^{172}\) Hartson v. Elden, 50 N. J. Eq. 522, 26 Atl. 561 (Ch. 1893).

\(^{173}\) Where there is in some individual an unqualified power to destroy the future interest, the time at which the validity of the interest is determined is not the moment of the creation of the interest but the time at which the power to destroy ceases; for until the power to destroy is ended, there has been no inconvenient fettering of property. Gray, *Rule Against Perpetuities*, sec. 524.1 (4th ed. Roland Gray 1932). Situations of this type might exist where
invalidity of the interest would no doubt be met with the proposition that under the previous law he had only a chance to acquire property and that such chance is not a constitutionally protected interest. The maxim would seem to be applicable that no one can have a constitutional right that the law shall not be changed.

II. Statutes Which Abolish the Rule in Shelley’s Case

The classic statement of the rule in *Shelley’s Case* is that of Lord Coke:

“It is a rule in law, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either medially or immediately to his heirs in fee or in tail; that always in such cases, ‘the heirs’ are words of limitation of the estate, and not words of purchase.”

The rule has been abolished in most states by statute, and where this is the case the grantee or devisee ordinarily takes a life estate with a contingent remainder to his heirs. The statutes have either contained an express provision that they are to have only prospective operation or the courts have declared that they are not intended (save in certain special instances) to apply to instruments executed prior to the date of enactment. In the nature of things, the statutes which abolish the rule cannot be retroactively applied to perfected conveyances and devises. If any legislature or court should attempt to do so, titles would be drastically unsettled.

the future interest is subject to complete destruction by the exercise of a general power of appointment or an unrestricted power of revocation, or where a future interest after a fee tail is subject to be destroyed by the tenant in tail.


175 For a list of the states in which the rule has been abolished see 3 Powell, *Real Property*, ¶ 380.

176 2 Tiffany, *Real Property*, sec. 355 (3d ed.).
The problem of the retroactive operation of the statute can, however, arise in the case of wills which were executed prior to the statute when the rule obtained but the testator died after the effective date of the statute. An executed will, unlike an executed deed, is ambulatory and is subject to revocation at the instance of the testator at any time during his life. The will does not vest any rights until the death of the testator.\textsuperscript{177} There would appear, therefore, to be no constitutional objection to the application of the statute abolishing the rule to a will executed prior to the effective date but where the testator dies after it. The only questions would be whether the statute was designed to have this limited retroactive effect and whether the testator intended his will to be given effect according to the law when he executed it or according to the law at the date when the will became effective. In \textit{Reynolds v. Love}\textsuperscript{178} the court held that a statute enacted in 1852\textsuperscript{179} abolishing the rule ought to be applied to a will executed in 1849 when the rule was in force. The testatrix died in 1861. She left real estate in trust for the benefit of a granddaughter for life, then in trust forever for the granddaughter’s issue. The question was whether the granddaughter took an absolute estate or only a life estate with remainder over. The court said that this was a statute which was leveled against an abuse, or remedial in its nature, and therefore ought to be applied to every case which its words could properly include; the abolition of the rule enlarged the power of the owner to entail his property, and being beneficial in its nature, would be given a retroactive effect. It might also be added that by not applying the rule in \textit{Shelley’s Case} the court probably gave to the instrument the effect the testatrix intended.

\textsuperscript{177} 1 Page, \textit{Wills}, secs. 31, 71 (Lifetime ed.), \textit{supra} note 34.
\textsuperscript{178} 191 Ala. 218, 68 So. 27 (1915).
\textsuperscript{179} Ala. Code 1852, sec. 1304.
The Worthier Title Doctrine, or rather its *inter vivos* branch, is very well described in a recent law review article:

“If a person makes an inter vivos conveyance with an ultimate end limitation to his own heirs or next of kin, the end limitation is void in the sense that it designates purchasers, and the grantor retains a reversionary interest.”

Unlike the rule in *Shelley's Case*, which is now in force in only a handful of states, the Worthier Title Doctrine has been recognized in one form or another or at least has a potential existence, in most jurisdictions. A few states have statutes abolishing the Doctrine. The statutes of several other states may have the effect of making the Doctrine wholly or partially inapplicable. A statute abolishing the

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180 The rule as to wills is that if a testator devises to an heir the precise interest in land which the latter would have inherited in the absence of the provision in the will, the heir is regarded as acquiring the land by descent and not by purchase. Simes, *Future Interests*, sec. 144 (1936). The rule as to wills is not within the scope of this chapter, since it does not necessarily involve the creation of future interests.

181 Morris, “The Inter Vivos Branch of the Worthier Title Doctrine,” 2 Okla. L. Rev. 133, 134 (1949). At the time this article was written over twenty-four jurisdictions had recognized the Doctrine in one form or another.

182 Morris, op. cit. at 134.

183 E.g., Neb. Rev. Stat. 1943, sec. 76-115: “When any property is limited, in an otherwise effective conveyance inter vivos, in form or in effect, to the heirs or next of kin of the conveyor, which conveyance creates one or more interests in favor of a person or persons in existence, such conveyance operates in favor of such heirs or next of kin by purchase and not by descent.” Nebraska has adopted the Uniform Property Act and this statute is part of the Act.

The wording of the Minnesota statute abrogating the rule in *Shelley's Case* may be broad enough to encompass also the Worthier Title Doctrine. Minn. Stat. 1949, sec. 500.14 (4). The first part of the statute abolishes the Rule in *Shelley's Case*. The latter part which is thought to abolish the Worthier Title Doctrine reads: “No conveyance, transfer, devise, or bequest of an interest, legal or equitable, in real or personal property, shall fail to take effect by purchase because limited to a person or persons howsoever described, who would take the same interest by descent or distribution.”

184 E.g., N. C. Gen. Stat. 1950, sec. 41-6: “A limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be the children of such person, unless a contrary intention appear by the deed or will.”

Purdon's *Pa. Stat. Ann.*, Tit. 20, sec. 301.14 (1): “A conveyance of real or personal property, whether directly or in trust, to the conveyor's or another designated person's 'heir', or 'next of kin', or 'relatives' or 'family' or to 'the
rule in *Shelley's Case* does not, it is generally held, have the effect of abolishing the Worthier Title Doctrine, as the two rules are distinct.  

The courts have not yet had much occasion to consider the constitutionality of statutes abolishing the Doctrine. Since the effect of the application of the Doctrine is that the grantor retains a reversion or possibility of reverter, the constitutionality of a statute abolishing the Doctrine, if applied retroactively, would no doubt be vigorously challenged. The decision could conceivably go either way. It might on one hand be reasoned that since the Doctrine is a rule of construction merely, no one can have a vested interest in it. Or it might be decided that, although it is a rule of construction, yet where its application is appropriate, property rights are retained which cannot be taken away by legislative declaration. The latter view was that of the Minnesota Supreme Court in *Shaw v. Arnett*; however, as this court declined persons thereunto entitled under the intestate laws, or to persons described by words of similar import, shall mean those persons, including the spouse, who would take under the intestate laws if such conveyor or other designated person were to die intestate at the time when such class is to be ascertained, a resident of the Commonwealth, and owning the property so conveyed: etc."

185 Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919); Fidelity and Columbia Trust Co. v. Williams, 268 Ky. 671, 105 S.W. 2d 814 (1937); Wilcoxen v. Owen, 237 Ala. 169, 185 So. 897 (1938); Robinson v. Blankenship, 116 Tenn. 394, 92 S.W. 854 (1906); Morris, "The Inter Vivos Branch of the Worthier Title Doctrine," 2 Okla. L. Rev. 133, 172 (1949).

186 By far the greatest number of American cases have applied the rule as one of construction. This is especially true of the more recent cases. Morris, "The Inter Vivos Branch of the Worthier Title Doctrine," 2 Okla. L. Rev. 133, 144 (1949). The leading case is Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919). It was there held that to transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed. The New York Court of Appeals, however, has since stated that the presumption which exists from the use of the common-law doctrine has lost much of its force since Doctor v. Hughes; evidence of intent need not be very great in order to allow the remainder to stand. Matter of Burchell, 299 N.Y. 351, 87 N.E. 2d 293 (1949).

187 226 Minn. 425, 33 N.W. 2d 609 (1948). In 1907, one Arnett conveyed the property to his son for life, remainder to the son's children, but if the son should die leaving no children or descendants of children, "then the said lands to revert to the heirs of the grantor." Arnett died in 1912. His
to determine whether the statute in question 188 really did abolish the Doctrine, the case is weak as an authority.

13. Statutes Which Abolish the Destructibility Rule

The few cases passing on the constitutionality of statutes that abrogate the power of the life tenant to destroy contingent remainders 189 unanimously hold that the life tenant's power to destroy contingent remainders is not a vested right. 190 In *Jennings v. Capen* 191 the court was compelled to distinguish between divestible rights and nondivestible or vested rights because it failed to realize that what the life tenant had was a "power" to destroy contingent remainders and not a "right" in the strict sense. The conclusion reached,

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188 See note 183 supra.
189 E.g., Ill. Rev. Stat. 1951, c. 30, sec. 40: "That no future interest shall fail or be defeated by the determination of any precedent estate or interest prior to the happening of the event or contingency on which the future interest is limited to take effect."
191 Supra note 190.
however, was that the life tenant had only an “inchoate right” which could be taken from him at any time before he had exercised it. It was said in another case:

“... [T]he rule of law authorizing the destruction of contingent remainders is not regarded as having its foundation on principles of natural justice. We think that the rule is generally regarded as one that does a greater wrong to the contingent remaindermen and to the testator whose will is thus defeated than the denial of it would do to the parties who might desire to defeat such rights, and that there is no reasonable ground for holding that the legislature has denied any natural or vested right to anyone by abolishing the rule in all cases in which such remainders were not destroyed until after the law became effective.” 192

The Supreme Court of South Carolina, in holding that a life tenant did not have a vested right to bar contingent remainders, 193 relied upon two grounds: first, this privilege had become part of the law of the state by virtue of an early statute and, being thus derived only from the statute law of the state, might be withdrawn whenever the law-making-power saw fit to do so; second, the doctrine that a life tenant may bar contingent remainders, which had its origin under the feudal system, seems, very generally, to be regarded as a means of doing a wrong to the contingent remainderman, always defeats the intention of the testator, and cannot therefore expect favor of any kind beyond mere support.

It seems that if the life tenant has already exercised his power to destroy the contingent remainders before the statute goes into effect, the statute cannot be given the effect of reviving the remainders. 194

192 Wood v. Chase, 327 Ill. 91, 100, 158 N. E. 470, 473 (1927), supra note 190.
The policy of free alienation of property is opposed to entailments. Public policy has always been felt in America to be strongly against this form of land tenure, which was designed to enable landed families to retain their holdings within the family. The Bill of Rights of the Constitution of North Carolina, stating that “Perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed,” was pronounced by one court to impose a direct and mandatory obligation on the legislature to rid the people of fees tail without delay.

“We are to recollect that, for many centuries in England the establishment of perpetuities in landed estates has been deemed a great grievance. An estate tail, in particular, created by the statute de donis (which is undoubtedly a perpetuity, because by possibility it may last forever), has been considered a dangerous support of a high aristocratic interest attended with numerous evils both public and private, so much so that though the statute has never been directly repealed, yet successful evasions of it have been practiced, and some of them with the direct sanction of the legislature itself. If this act, therefore, has been in such discredit even in England, where there exists a government consisting of kings, lords, and commons, of course a great aristocratical interest, notwithstanding which it has been deemed too aristocratical even for them, well might it excite the jealousy and precaution of the representatives of the people of this state, assembled to establish a republican form of government, founded on the basis of political equality among all the citizens, and to which any aristocratical devices must be particularly detrimental.”

There are (or seem to be) cogent reasons that the legislatures should be permitted to abolish existing fee tail estates. A serious inconvenience could arise if the statute had to be

limited to affect only estates arising after its enactment. An entailment can conceivably last until the extinguishment of the line of issue to whom the estate is limited. Many generations may pass before the entailment is ended.

The fee tail can no longer be created in most states. Generally, this has been the result of express legislation. Not all courts have waited for the legislature to act; some have declined to recognize the statute de donis as operating within their jurisdictions. It has even been held by some courts that the statutes on descents put an end to fees tail.

196 Fees tail exist in Delaware, Maine, Massachusetts, and Rhode Island (as to wills only), but the estate is obsolescent and infrequently encountered. 2 Powell, Real Property, ¶ 196.

Restatement, Property, c. 5, Introductory Note (5) p. 209 (1936), says that in six states (by Jan. 1, 1936), neither statute nor decisive decision has been found dealing with fees tail. “This group includes Alaska, Idaho, Louisiana, Nevada, Utah and Washington. In these states it is possible that estates tail would be recognized, if the question were presented for decision. This possibility seems negligible as to Louisiana because of the civil law rules applicable therein.” (Copyright 1936. Printed with permission of the American Law Institute.)

197 Kepler v. Larson, 131 Iowa 438, 108 N. W. 1033 (1906); Yates v. Yates, 104 Neb. 678, 178 N. W. 262 (1920); Rowland v. Warren, 10 Ore. 129 (1881); Blume v. Peary, 204 S. C. 409, 29 S. E. 2d 673 (1944). In these jurisdictions a grant to A. and the heirs of his body vests A. with a conditional fee which becomes an absolute fee upon the birth of heirs capable of inheriting. The estate conferred upon A. by the grant has the essential characteristics of a common-law fee-simple conditional. See extensive note on fee-simple conditional, 114 A. L. R. 602 to 627. See also Restatement, Property, c. 5, Introductory Note, Special Note 1 (1936) and Introductory Note, Special Note 1 (1948 Supp.).

Fees conditional have now been abolished by statute in Nebraska. Neb. Rev. Stat. 1943, sec. 76-110 provides: “The creation of fees simple conditional as they existed under the law of England prior to the 'statute de donis' is not permitted. The creation of fees tail is not permitted. The use in an otherwise effective conveyance of property, of language appropriate to create such a fee simple conditional or fee tail, creates a fee simple in the person who would have taken a fee simple conditional or fee tail. Any future interest limited upon such an interest is a limitation upon the fee simple and its validity is determined accordingly.” This is part of the Uniform Property Act which Nebraska adopted in 1941. Laws 1941, c. 153.

In Connecticut neither the conditional fee nor the statute de donis was ever recognized by the courts. It has been held in this jurisdiction from the earliest times that words appropriate to the creation of an estate tail vest a fee simple in the issue of the first donee in tail; such issue taking no interest in the land
The statutes differ in the effect which they have upon a limitation which formerly would have operated to create an estate tail. In some jurisdictions a limitation formerly sufficient to create an estate tail is declared to create a fee simple absolute. In some states such a limitation is declared to create an absolute fee, but with the additional provision that when the language of the instrument would have created a remainder in fee after a fee tail according to the previous law, this remainder is to be valid as a contingent limitation on a fee and shall take effect in possession if the first taker dies unsurvived by descendants. In other states a life estate during the life of the donee and the donee having no alienable interest beyond a life interest. Rudkin v. Rand, 88 Conn. 292, 91 Atl. 198 (1914). Conn. Gen. Stat. 1949, sec. 7083, provides that each estate given in fee tail shall be an absolute estate in fee simple to the issue of the first donee in tail.

E.g., N. J. Rev. Stat., 1937, 46:3-15: “Whenever any conveyance, will or instrument in writing shall hereafter be made, whereby any grantee, devisee or other person shall become seized in law or in equity of such estate in any real estate . . . [as would have been held a fee tail under de donis] such conveyance, will or instrument shall vest an estate in fee simple in such grantee, devisee or other person.”

E.g., N. Y. Real Property Law, sec. 32: “Estates tail have been abolished; and every estate which would be adjudged a fee tail, according to the law of this state, as it existed before the twelfth day of July, seventeen hundred and eighty-two, shall be deemed a fee simple; and if no valid remainder be limited thereon, a fee simple absolute. Where a remainder in fee shall be limited on any estate which would be a fee tail, according to the laws of this state, as it existed previous to such date, such remainder shall be valid, as a contingent limitation on a fee, and shall vest in possession on the death of the first taker, without issue living at the time of such death.”


In some jurisdictions the creation of estates in fee tail is prohibited, but there is no statutory declaration as to what shall be the consequence of a limitation which would have created a fee tail at common law. Included in this group are Hawaii and Texas. The Restatement states that under such a statute the first taker gets a fee simple except when the manifested purposes of the conveyor are to be more nearly attained by creating an estate for life in favor of the first taker with a remainder in fee simple in favor of the issue of the first taker. Restatement, Property, Introductory Note, Special Note 3 (1948 Supp.).
only is conferred upon the first taker, with remainder in fee to the person or persons to whom the estate tail would pass according to the course of the common law.\textsuperscript{201} In still others, the first taker receives a fee tail, but when the estate reaches the issue of the first donee, the statute enlarges it into an absolute estate in fee simple.\textsuperscript{202} In some of the states where the fee tail is still recognized, the tenant is given by statute the power to convey a fee simple.\textsuperscript{203}

Contrary to their usual tendency to be conservative in matters of retroactive legislation, the courts have often been rather hasty in permitting the statutes to operate on existing fees tail. The courts have been so eager to promote reform that they have frequently dealt quite summarily with interests other than those of the tenant in tail.\textsuperscript{204}

\textsuperscript{201} E.g., Ark. Stat. Ann. 1947, sec. 50-405: "In cases when by common law any person may hereafter become seized in fee tail of any lands or tenements, by virtue of any devise, gift, grant or other conveyance, such person, instead of being or becoming seized thereof in fee tail, shall be adjudged to be and become seized thereof for his natural life only, and the remainder shall pass in fee simple absolute to the person to whom the estate tail would first pass according to the course of the common law by virtue of such devise, gift, grant or conveyance."

As of Jan. 1, 1952, states having this type of statute included Ark., Colo., Fla., Ill., Kan., Mo., and N. Mex. 2 Powell, \textit{Real Property}, ¶ 199. As to conveyances made prior to 1934, New Jersey also belongs in this group; and Vermont as to conveyances prior to 1941. See note 199 \textit{supra} for current New Jersey statute.

\textsuperscript{202} E.g., Page's Ohio Gen. Code 19512-8: "All estates given in tail, by deed or will, in lands or tenements lying within this state, shall be and remain an absolute estate in fee simple to the issue of the first donee in tail . . . ."

Under such statute, children of the donee have, during the life of the donee, a mere possibility which they cannot convey. Dungan v. Kline, 81 Ohio St. 371, 90 N. E. 938 (1910).

As of Jan. 1, 1952, states in which estates in fee tail were preserved as such for a single lifetime only included Connecticut, Ohio and Rhode Island (wills only). 2 Powell, \textit{Real Property}, ¶ 198.

\textsuperscript{203} E.g., Me. Rev. Stat. 1944, p. 2066, sec. 10: "A person seized of land as tenant in tail may convey it in fee simple. . . . When land is owned by 1 person for life with a vested remainder in tail in another, they may by a joint deed convey the same in fee simple. Such conveyances bar the estate tail and all remainders and reversions expectant thereon."

\textsuperscript{204} No case was found in which a tenant in tail resisted the effect of a statute. We can be reasonably sure, however, that he would not be permitted
(a) The Heirs of the Body of the Tenant in Tail. The heirs, who would have taken in the line of descent from the tenant had it not been for the statutory alteration of the law, have been unsuccessful in attacking the statutes on constitutional grounds regardless of the form of the statute. Not a single case is to be found in which the interests of the heirs of the body are held to be protected from the operation of statutes upon estates created before their enactment. Now, it is granted that public policy may sufficiently justify this result. An early Federal Court in answer to the contention of an heir that the statute deprived him of constitutional and natural rights replied:

“The persons to be affected by this act who resided in the state, and were citizens of it, might derive more benefit from their share of the public property occasioned by the remedy against so great an evil, than loss by being deprived of a particular estate derived from so obnoxious a source.”

“In a state of society properly regulated it must frequently happen that private and public interests in some degree interfere with each other. . . . Yet, clear as this principle is, and necessary as in many cases it is that it should be enforced, many, from injudicious notions of liberty, speak of the rights of each individual as if he subsisted in a state of nature unconnected with any other mortal in the universe, and deriving no benefits from a well-constituted society, which
to question, even if he were inclined to, the validity of a statute which elevates his estate to a fee simple or which enables him to convey a fee. See Pollock v. Speidel, 27 Ohio St. 86 (1875); Gilpin v. Williams, 25 Ohio St. 283 (1874). No one is likely to complain if his estate were to be made more valuable.

It is equally apparent that those statutes which reduce the estate of the first taker to a life estate or to a nonbarrable fee tail during his lifetime cannot be applied to existing estates against the wishes of the tenant. One of the characteristics of the fee tail estate is the power of the tenant to convert his estate into a fee simple. To take this power from the tenant and leave him with a life estate, or what amounts to little more than a life estate, would surely be to deprive him of property without due process.

As to the mode in which the tenant can exercise his power to convert his interest into a fee simple, see infra note 213.
are more than an ample compensation for any accidental sacrifice which the public interest may occasionally require of a subordinate private advantage to a superior public good." 205

However, the courts have not generally based their conclusion upon public policy but upon the ground that during the lifetime of the tenant, his issue, who will be the heirs of his body if they survive him, have no interest in the premises except the mere possibility of acquiring property by descent, as heirs of the body, for the maxim is "nemo est haeres viventis." 206 It is said that before descent casts, the legislature has the power, at all times, to change the course of the inheritance, and deprive the issue of the capability of inheriting. 207

206 Pollock v. Speidel, 27 Ohio St. 86 (1875). In 1807 the lands in question were conveyed to John Pollock, Jr., and the heirs of his body. On Dec. 17, 1811, an act (Laws 1811, c. iv) was passed which provided that "All estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail." (Now, Page's Ohio Gen. Code 10512-8.) In 1836, James, a son of John, conveyed the premises by warranty deed to H. from whom defendant claimed. Plaintiffs were the issue and heirs of James. It was contended that the act of 1811 did not apply to this estate tail, and that consequently James could not by his conveyance deprive plaintiffs of their interest in the land. Held for defendant.
207 De Mill v. Lockwood, 7 Fed. Cas. 453, No. 3,782 (C. C. S. D. N. Y. 1853). The legislation here was in the form of a special resolution of a legislature which authorized the sale of entailed lands. The resolution declared the estate to be a fee simple.

Jensen v. Jensen, 54 Wyo. 224, 89 P. 2d 1085 (1939). This was a suit under a declaratory judgment act for construction of a deed. In 1892 the grantors executed the deed to Mrs. Murray and the heirs of her body. The plaintiffs were the heirs of Mrs. Murray and the present tenants in tail. The defendant was the son of one of the plaintiffs. The trial court held that the effect of the deed was to create in the grantees a fee tail; that defendant would be entitled to the use of the land during his lifetime; that the plaintiffs could not bar the entail except by compliance with Wyo. Rev. Stat. 1931, secs. 89-3922 to 89-3930, which authorized tenants in tail to maintain an action to secure the sale of an estate in fee-simple absolute, provided that the court should be satisfied that the sale would cause "no substantial injury to the heirs in tail." This statute directed that the proceeds of such sale be substituted for the land sold and be subject to the same conditions originally made relative to the land so sold. After the case had been
“Naked possibilities or mere expectancies of this character are not property in the ordinary sense. They cannot be disposed of by will or deed and are not subject to attachment. They are therefore not property, and are not regarded as vested rights beyond legislative control.” 208

It is apparent that these courts regarded the entailment only as a restriction of the inheritance to lineal heirs, that is, that the persons who take as heirs of the body at the death of the tenant take only in the manner of heirs and not in any way as purchasers under the original grant or devise. This would seem not to accord with the historical concept of the nature of the fee tail estate. According to the English authorities the heir of the tenant takes not by descent but as

appealed, the legislature passed a statute, Session Laws, 1939, c. 92, sec. 1, which provided that all estates given in tail shall be and remain absolute estates in fee simple to the issue of the first donee in tail. Held: Plaintiffs were now the owners of a fee simple. The defendant had no vested rights in the land. Laws 1939, c. 92, sec. 1, has since been repealed. The present statute provides that language formerly appropriate to create a fee tail shall create a fee simple. Wyo. Laws 1949, c. 93; Wyo. Comp. Stat. 1945, sec. 66-137 (1951 Supp.)

In Minge v. Gilmour, 1 Hay 279 (N. C. 1796), the statute (Acts 1784, c. 22, sec. 5) declared that all conveyances in fee simple made in good faith by any tenant in tail, in actual possession, shall be effective to bar the entailment. The particular tenant in tail had sold the land in 1779 with warranty to Gilmour. Minge claimed as heir of the tenant in tail. It was held that the plaintiff was bound by the Act of 1784, and also by the warranty of his ancestor, inasmuch as assets of greater value than the land conveyed to Gilmour were devised by the tenant to the plaintiff.

208 Comstock v. Gay, 51 Conn. 45, 62 (1883). The tenant in tail, believing he had a fee simple, sold the land with covenants of seizin and warranty. In Comstock v. Comstock, 23 Conn. 349 (1854) it was held he was a tenant in tail and could convey only a life estate. Thereafter the legislature passed a special act validating and confirming the deeds and making good the title in the grantees in fee simple, upon the condition that the tenant hold the proceeds in trust for those who might take under the will creating the tenancy. After the tenant died his heir sought to recover the land from the grantees of his father. Held: He could not recover.

The provision for holding the funds, which assured the heir of receiving his estate in commuted form, was not a controlling factor; in fact it was not even considered by the court. General statutes do not usually require the tenant to hold the funds for the heirs. See the Maine statute supra note 203. An exception was the prior Wyoming statute, Wyo. Rev. Stat. 1931, secs. 89-3922 to 89-3930, supra note 207.
a substituted purchaser from the original donor, *per formam doni*, although, of course, he takes because he is heir of the body.\(^{209}\) It was the consequence of this principle that in England, the heir was held not to be bound by contracts in regard to the property made by a previous tenant,\(^{210}\) whereas the heir would be bound if he took by descent. The principle also had the consequence in England that the tenant was incapable of alienating any greater indefeasible interest in the land than an estate *per autre vie* unless he had first destroyed the entailment by fine or common recovery.\(^{211}\)

Furthermore, statutory changes of the common-law rules of descent have been held by a number of American courts not to apply to the fee tail estate on the ground that this estate does not pass by descent.\(^{212}\)

However, the decisions to the effect that the heirs of the tenant in tail have no interest in the land prior to the death of the tenant except a possibility of inheriting, may be rationalized upon the ground that the tenant always has the power to defeat the entailment or to bar the heirs.\(^{213}\)

\(^{209}\) Cruise, *Digest*, Tit. 2, c. 2, sec. 19 (3d Am. ed. 1827).
\(^{210}\) Cruise, *op. cit.*
\(^{211}\) Cruise, *op. cit.*, Tit. 2, c. 2, sec. 1.
\(^{212}\) Davis v. Hayden, 9 Mass. 514 (1813); Corbin v. Healy, 20 Pick. 514 (Mass. 1838); Sauder's Lessee v. Morningstar, 1 Yeates 313 (Pa. 1793); Guthrie's Appeal, 37 Pa. 9 (1860).
\(^{213}\) A fee tail which could never be barred would doubtless be void as a perpetuity. The whole history of the fee tail estate is to the effect that there can be no such thing as an unbarrable fee tail. 2 Simes, *Future Interests*, sec. 480 (1936); Orndoff v. Turman, 2 Leigh. 200 (Va. 1830). There has been, however, a diversity of opinion in this country as to the mode in which the tenant can exercise his power. In at least one state it has been held that an inherent characteristic of the fee tail is the power of the tenant to convert his estate into a fee simple by conveyance. Ewing v. Nesbitt, 88 Kan. 708, 129 Pac. 1131 (1913). In other states the courts have stated that in the absence of statute a conveyance by a tenant in tail is ineffective to bar the issue or bar the remainder expectant on the estate in tail and that his deed confers only a life estate *per autre vie* or a voidable base fee on the grantee. Comstock v. Comstock, 23 Conn. 349 (1854); Soule v. Soule, 5 Mass. 61 (1809); Giddings v. Smith, 15 Vt. 344 (1843); Gleeson's Heirs v. Scott, 3 Hen. & M. 278 (Va. 1809). However, at an early date statutes
Consequently, the issue can expect to take only if the tenant has not disposed of the fee in his lifetime. The statutes, then, merely have the effect (1) of relieving the tenant (whether the first donee or the issue of the first donee) of having to take any steps on his own behalf to convert the fee tail into a fee simple, and (2) of removing the restrictions on the line of descent so that collateral heirs can take. Looked at from this point of view, the statutes do not add to the uncertainty of the interests of the heirs, and, in the case of the statutes which cut down the estate of the first taker to a life estate and give the fee to the next taker, the heirs of the body of the first tenant will be more certain to take than they would have been at common law.

Of course, if the tenant had no power to defeat the interests of his heirs, their coming into possession of the land would be dependent solely on their outliving the tenant. Their right to succession would be as vested as the interest of the heirs of a life tenant who have a remainder after the life estate; and as we have seen it is generally agreed that were passed in several states authorizing tenants in tail to bar the entail by conveyance. 1 Tiffany, Real Property, sec. 46 (3d ed.). E.g., Me. Stats. 1821, c. 36, sec. 43 Mass. Stats. 1791, c. 60; N. C. Acts 1784, c. 22, sec. 5. Where there was no general statute, the legislatures appear to have enacted special acts as a matter of course to enable tenants in tail to alienate in fee simple. See Comstock v. Gay, 51 Conn. 45 (1883); Pollock v. Speidel, 27 Ohio St. 86 (1875); Carroll v. Olmsted’s Lessee, 16 Ohio 251 (1847); De Mill v. Lockwood, 7 Fed. Cas. 453, No. 3782 (C. C. S. D. N. Y. 1853); Orndoff v. Turman, 2 Leigh. 200 (Va. 1830). At one time fines and common recoveries were recognized as a mode of barring entails in several of the colonies and states. 1 Tiffany, op. cit., sec. 46. In Riggs v. Sally, 15 Me. 408 (1839) it was stated that the common recovery had been recognized in that jurisdiction and on this ground it was held that a statute which permitted the same result to be accomplished by a conveyance as by suffering a common recovery could be applied to existing estates.

Restatement, Property, sec. 79 (1936): “A person who has an estate in fee tail has both the privilege and the power to create any interest in the land so held which could be created by a person having an estate in fee simple absolute therein, provided he makes an otherwise effective conveyance inter vivos which conforms to the special formalities prescribed for a disentailing conveyance, by the law of the state wherein such land is located.” (Copyright 1936. Printed with permission of the American Law Institute.)
the legislature cannot divest the interests of such remaindermen, except in certain situations where the remaindermen are compensated for the loss of the interests in the land. In those jurisdictions in which the statute preserves the fee tail for the life of the first taker only, with the fee going to his issue, the tenant may lack the power to bar the entailment.\(^{214}\)

Where this is true, if a change were to be made to the type of statute under which a limitation formerly sufficient to create an estate tail creates a fee simple, the new statute probably could not be given retroactive effect so as to wipe out the interests of the issue. Also, in jurisdictions where under the present statute the donee takes a life estate only, with a remainder in his issue, the tenant of an existing estate probably could not be invested with the fee simple. Nor, probably, could he be given the power to convey the fee except under those conditions and circumstances where a statute authorizing the sale in fee of land in which there are future interests could be applied retroactively.\(^{215}\)

(b) The Reversioners and Remaindermen. The remaining question is whether reversions and remainders expectant

\(^{214}\) *Restatement, Property*, sec. 89 (1936): “A person who has an estate in fee tail preserved as such for a single lifetime only, has both the privilege and the power to create any interest in the land so held which could be created by a person having an estate in fee simple absolute therein, except that the interest so created may be defeated, upon the death of the conveyor, by the persons entitled after such conveyor, under the form of the limitation which created the estate in fee tail.” A special note immediately following the quoted section states: “This Section states the law applied in both Connecticut and Ohio, but the exception is contra to the rule existing in Rhode Island as to estates in fee tail created by wills. In Rhode Island the first donee in tail has the full power to make a disentailing conveyance (see sec. 79). Only when a disentailing conveyance is not made, does the estate become an estate in fee simple absolute in the issue of the first donee in tail. The rule stated in this Section is preferable because, if the entailment can last not more than a single lifetime, there is no sufficient reason for permitting a disentailing conveyance, during that single lifetime. So to permit it frustrates the desires of the creator of the interest.” (Copyright 1936. Reprinted with permission of the American Law Institute.)

\(^{215}\) Willhite v. Rathburn, 332 Mo. 1208, 61 S. W. 2d 708 (1933), *supra* note 89.
on fees tail can be cut off by retroactive legislation. A remainder after a fee tail is vested if the remainderman is an ascertained person who is ready to come into possession whenever and however the particular estate terminates. The uncertainty, and even the improbability, that the remainderman will in fact ever enjoy the estate in possession does not make his interest contingent in the real property sense. However, reversions and remainders after fees tail are not necessarily vested interests in the constitutional sense. Their vulnerability to defeasance would appear to be the deciding factor. The writer does not mean that the legislature can abolish an interest simply because it is subject to defeasance at the hands of the parties. But if the interest is subject to defeasance, and in addition there is a strong policy against the particular form of land tenure, the power of the legislature to abolish the interest will almost certainly be vindicated by the courts.

Cases in point are infrequent. However, in a few decisions there is dictum, or statements without authority cited or reasons given, that reversions and remainders after fees tail can be destroyed by the legislature. In *Gilpin v. Williams et al.* the interest of the donor was described as a mere possibility of reverter, which the court intimated could be cut off. However, no express ruling in this respect was made because none was required by the facts of the case. In *Moore*
v. Bradley the tenant in tail had conveyed in fee simple and had died without issue before the effective date of a statute which provided that a conveyance by a tenant in tail will be effective to bar the entailment. The remainderman made an entry before the passage of the act but at the time of the enactment the grantee was in actual possession. It was held without discussion that the case came within the words and spirit of the act and so judgment was given against the remainderman in his action in ejectment.

On the other hand, where the tenant has no power to bar the entailment (as may be the case in jurisdictions having a statutory type of fee tail which is to exist for a single lifetime only, or as most probably would be the case in jurisdictions where under the statute the first taker gets only a life estate), it is probable that the legislature could not raise the tenant’s estate to a fee simple nor authorize him to convey a fee except on the conditions and under the limitations applicable to the sales of land in which there are remainder interests. In Green v. Edwards the court had before it a testamentary trust, under the terms of which the beneficiaries took equitable fees tail. One of the beneficiaries

219 3 N. C. 142 (1801).
220 N. C. Acts 1784, c. 22, sec. 5: “All Sales and Conveyances made bona fide, and for valuable Consideration since the first Day of January, in the Year of our Lord one thousand seven hundred and seventy-seven, by any Tenant in Tail in actual Possession of any real Estate where such Estate hath been conveyed in Fee-Simple, shall be good and effectual in Law to bar any Tenant or Tenants in Tail, and Tenants in Remainder of and from all Claim and Claims, Action and Actions, and Right of Entry whatsoever, of, in and to such entailed Estate, against any Purchaser, his Heirs or Assigns, now in actual Possession of such Estate, in the same Manner as if such Tenant in Tail had possessed the same in Fee-Simple.”

The Act was held in Den ex dem. Lane v. Davis, 2 N. C. 277 (1796) to be applicable to tenancies in tail in existence. This case is also without opinion.
221 31 R. I. 1, 77 Atl. 188 (1910).
222 The trustees were to pay the income for life to the three children of the testator and upon the death of any child to convey such portion to his or her lineal descendants in fee simple. If there were no lineal descendants, then the trustees were to convey equally to the survivors of the children of
executed a deed which purported to convey in fee simple all of her interest in the trust property to the complainant. The deed stated the grantor's intention to bar the entail, as provided by a statute, which permitted the barring of equitable estates tail and the remainders and reversions expectant thereon. The complainant sought to compel the trustees to convey to him the legal title of his share of the trust estate acquired under the conveyance. The court ruled that inasmuch as the doctrine of barring an equitable estate tail had never been followed in that state, the reversions or remainders expectant upon the estate in question were vested in the constitutional sense and that legislation which attempted to cut them off was an unconstitutional exercise of the legislative power in violation of the state constitution and of the Fourteenth Amendment.

It is to be observed that statutes which convert existing fees tail into fee-simple estates may indirectly destroy remainders limited after the fees tail. A remainder after a fee tail is not at common law within the rule against perpetuities, however remote it may be. However, after the statute has raised the fee tail to a fee simple, a remainder after the fee tail can then be given effect only as an executory

the testator or their lineal descendants, and in case of the decease of all of the children of the testator without issue, to his heirs at law. It was held in Paine v. Sackett, 27 R. I. 305, 61 Atl. 753 (1905) that the rule in Shelley's Case operated to give the beneficiaries equitable fees tail.

223 R. I. Laws 1906, c. 1346, sec. 16: "Equitable estates-tail in possession or remainder, and all remainders and reversions expectant thereon, may be barred in the same manner as legal estates-tail and the remainders and reversions expectant thereon; and all conveyances of equitable estates-tail made since January 31st, 1896, by deed in common form in which the intention is expressed of barring the entail and reference is made to the specific land by metes and bounds or by other definite description, shall bar the estate-tail and all remainders and reversions expectant thereon."

224 Gray, Rule Against Perpetuities, sec. 443 (4th ed., Roland Gray, 1942). See Kirk v. Furgerson, 6 Cold. 479 (Tenn. 1869). The reason is because the future interest is barrable.
interest, which will be invalid if by any possibility it may not vest in possession within the period of the rule. 225

(c) Effect of Repeal of Statutes. A few words should be added in regard to the effect that repeal of the statute which modified or abolished fees tail would have upon estates tail in existence before the statute. This problem was before the court in James v. Dubois. 226 In 1768 Robert James conveyed the premises in question to his son, Robert II, and the heirs male of his body. In 1784 the legislature passed an act which provided that no entailment shall last longer than the life of the first donee. 227 Robert II died in 1800 and Robert III entered into possession. In 1820 the legislature repealed the Act of 1784. Thereafter, in 1833, Robert III conveyed the premises to one James Cook for valuable consideration. Robert III died in 1834. Robert IV, claiming the premises as tenant in tail under the deed of his great-grandfather, brought an action in ejectment against the defendant who claimed under a conveyance from James Cook. The court held that the effect of the Act of 1784 was to end the entailment immediately on the death of Robert II, but that the statute did not confer any estate on Robert III; he took whatever interest he had under the conditions of the deed of his grandfather. The court then reasoned that, since the Act of 1784 operated only provisionally to raise the interest of Robert III to a fee, when the statute was


At common law a gift over on failure of issue was formerly construed to create a fee tail in favor of the first donee. It has been considered that by reason of a statute changing an estate in fee tail into an estate in fee simple, the common law construction is inadmissible, since it would make the gift over invalid as too remote. Also, the fact that an estate tail cannot by reason of the statute be created, has been viewed as a reason for regarding the failure of issue intended as definite and not indefinite. 1 Tiffany, Real Property, sec. 44 (3d ed.).

226 16 N. J. L. 285 (Sup. Ct. 1837).

repealed he had to look to the deed to ascertain the nature
and quantity of his estate, and by the terms of that deed he
was a tenant in tail.

The defendant, who claimed under the conveyance from
Cook, should have had, according to this line of reasoning,
no valid claim to the property as against the plaintiff. How­
ever, the court quite unexpectedly concluded that estates
tail were so odious that it was best to consider them as having
been done away with once and for all by the Act of 1784.
Therefore judgment was entered for the defendant. Most
courts as a matter of policy would arrive at the same con­
clusion.

15. Statutes Which Authorize the Revocation of Grants
of Future Interests

North Carolina enacted in 1893 a statute which provided:

"That the grantor in any voluntary conveyance in which
some future interest in real estate is conveyed or limited to
a person not in esse, may at any time before they come into
being revoke by deed such interest so conveyed or lim­
ited." 228

It was held in two cases that the Act of 1893 could have no
application to deeds made prior to enactment as the rights
confferred under the deeds were fixed when the deeds were
registered. 229 The Supreme Court of North Carolina sub­
sequently withdrew from its earlier position that the future
interests of unborn persons are vested rights. In Stanback v.

229 Roe v. Journegan, 175 N. C. 261, 95 S. E. 495 (1918); Roe v.
A grantor cannot generally derogate from his own inter vivos grant. Lillard
v. Lillard, 63 Ohio App. 403, 26 N. E. 2d 933 (1939); Reed v. Barkley,
123 Misc. 635, 205 N. Y. S. 803 (1924).
Citizens National Bank\textsuperscript{230} the maker of a trust sought to revoke the trust under the authority of an amendment of 1929,\textsuperscript{231} which extended the provisions of the Act of 1893 to trusts in real or personal property. The trust had been created voluntarily without value in 1927. By the terms of the trust, it was to terminate when the \textit{cestui que} trust reached the age of fifty or at his death if he did not reach that age. When the trust came to an end the whole interest therein was to vest in the \textit{cestui} if living, but if he died under the age of fifty years the trust property should go to his issue, if any, \textit{per stirpes}, and if there were no issue then to his next of kin. The maker and the \textit{cestui} both were agreed upon the revocation, but the trustee doubted that the contingent interests could be extinguished. It was held that all the future contingent interests in the issue and next of kin of the \textit{cestui} were wiped out.

"The term 'vested rights' relates to property rights, and 'a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws does not constitute a vested right. Contingent rights arising prior to the enactment of a statute, and inchoate rights which have not been acted on are subject to legislative control.'"\textsuperscript{232}

In a subsequent case the court remarked:

"Mere expectancies of future contingent interests provided for persons not \textit{in esse} do not constitute vested rights such as would deprive the Legislature of the power to enact the statute authorizing revocation of a voluntary grant."\textsuperscript{233}

\textsuperscript{231} N. C. Sess. Laws 1929, c. 305.

If the settlor has not reserved a power of revocation, he cannot revoke the trust unless the power of revocation was omitted by mistake, except with the consent of the beneficiaries. 3 Scott, \textit{Trusts}, sec. 330. The same principles are applicable to the modification of a trust. Scott, \textit{op. cit.}, sec. 331.
\textsuperscript{232} 197 N. C. 292, 296, 148 S. E. 313, 315 (1929).
The legislature of North Carolina subsequently added some significant provisions to the statute as amended in 1929. With the appearance of federal estate and gift taxes, the statute proved to be more detrimental than beneficial. There was a great deal of uncertainty in regard to the incidence of taxes on trusts in which some future interest was limited to a person not in esse and even considerable doubt whether the settlor could by any act make a trust irrevocable within the contemplation of the federal statutes. To remedy this situation the legislature in 1943 added several provisions, the purport of which is that the future interest cannot be revoked when the instrument creating the interest expressly states that the grantor or trustor cannot revoke such interest. In the case of instruments already executed, the grantor or trustor was given six months after the effective date of the amendment to revoke such future interests, or to file with the trustee an instrument stating or declaring that it is his intention to retain the power to revoke. To have made this amendment prospective only, would, in a large measure, have defeated its purpose. The amendment was designed primarily to remove the uncertainty attending existing trusts. In *Pinkham v. Unborn Children* it was argued that the legislature could not take away a grantor's "right" to revoke the grant of interests to unborn persons. The court was unable to formulate a definition of "vested rights." The conclusion was that the grantor had merely a personal power

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234 N. C. Sess. Laws 1943, c. 437: "Provided, further, that this section shall not apply to any instrument hereafter executed creating such a future contingent interest when said instrument shall expressly state in effect that the grantor, maker, or trustor may not revoke such interest: Provided, further, that this section shall not apply to any instrument heretofore executed whether or not such instrument contains express provision that it is irrevocable unless the grantor, maker, or trustor shall within six months after the effective date of this proviso either revoke such future interest, or file with the trustee an instrument stating or declaring that it is his intention to retain the power to revoke under this section: ..."

235 227 N. C. 72, 40 S. E. 2d 690 (1946).
or privilege, solely created by statute and reflecting the existing public policy, and that this privilege was subject to change or withdrawal at the pleasure of the legislature at any time before its exercise and before the happening of the contingency.

16. Statutes of Limitations and Marketable Title Statutes

Ordinarily, until a future interest has become possessory the period of adverse possession does not begin to run against it. This is because generally the owner of a future interest has no right of action against which the statute of limitations can operate. But some statutes of limitations purport, at the expiration of the specified period, to confer title upon the adverse claimant. If this form of language is given literal effect, serious constitutional questions may be raised when the statute is applied retroactively. Admittedly, the immunity of future interests from the operation of the usual statute of limitations is an impediment to the marketability of land. Sometimes a very long period must pass before the adverse possessor finally gets title. But it is improbable that enhancement of marketability would be accepted by the courts as a sufficient reason for obliterating a future interest, unless it were an interest very unlikely to vest in possession. An indefeasibly vested remainder or reversion could surely not be wiped out. There would even be question whether

236 Simes, Future Interests, sec. 776 (1936).
237 Supra Chapter 3, note 54; 2 Restatement, Property, sec. 220, Comment c, and Special Note (1948).

An Illinois statute provides, for example: "Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, and who shall for seven successive years, continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title." Ill. Rev. Stat. 1951, c. 83, sec. 6.
238 For the most part such statutes are construed sooner or later not to bar future interests. See Dunlavy v. Lowrie, 372 Ill. 622, 25 N. E. 2d 67 (1939); McDowell v. Beckham, 72 Wash. 244, 130 Pac. 350 (1913).
239 In Webster v. Cooper, 14 How. 488 (U. S. 1852), a remainderman brought action to recover possession as soon as his interest became possessory.
contingent future interests in unborn or unascertained persons could be summarily destroyed. As we have seen, the courts are generally reluctant to permit the extinguishment of any future interest where the owner does not receive compensation or a substitute for the interest which he loses.

In order for a statute of limitations which bars future interests to be capable of retroactive application without serious doubt of constitutionality, some provision must be made for allowing the owners of existing interests to preserve their interests, and a reasonable period of time must be allotted for this purpose. Recordation as a method of preservation would be easy and inexpensive and in keeping with the policy of the recording statutes. In the case of future interests in unascertained or unborn persons, some difficulty might yet be experienced because such persons (when born or ascertained) would not have had a real opportunity to protect their interests. Perhaps these instances could be passed off as an occasional sacrifice that must be made for social progress. The statute would be on safer ground if provision were made for recordation on behalf of persons who cannot record for themselves.

Another method of preserving existing interests would be by bringing action. The obvious objection to this method is

While his action was pending the following statute was passed. "No real or mixed action for the recovery of any lands . . . shall be commenced or maintained against any person in possession of such lands, where such person or those under whom he claims, have been in actual possession for more than forty years, and claiming to hold the same in his or their own right, and which possession shall have been adverse, open, peaceable, notorious, and exclusive." Me. P. L. 1848, c. 87. If the statute had been given retroactive effect, plaintiff's cause of action would have been extinguished.

240 See supra Chapter 3, p. 73 et seq.
241 The Michigan Marketable Title Statute, for example, provides that "Such notice may be filed for record by the claimant or by any other person acting on behalf of any claimant who is: (a) Under a disability, (b) Unable to assert a claim on his own behalf, (c) One of a class whose identity cannot be established or is uncertain at the time of filing such notice of claim for record." Mich. Comp. Laws 1948, sec. 565.103.
that the owner of a future interest may have no right of action against the possessor. If there is no available action, the owner of the future interest would be given only an illusory remedy. He would have reason to complain of deprivation of property without due process. Of course, a cause of action could be created for the purpose. The owner of the future interest, for example, might be permitted to maintain a suit to quiet title.\textsuperscript{242} As a mode of preserving a future interest this would be considerably more expensive than recordation and might be objectionable on that account. Decisions in Kansas\textsuperscript{243} and Pennsylvania\textsuperscript{244} indicate that in some jurisdictions it may be held unconstitutional for the legislature to create a new cause of action and force the owner of an interest to pursue this cause of action if he does not wish to lose his interest.

The same constitutional problems which arise from the retroactive application of statutes of limitations to existing future interests also arise when the marketable title statutes,

\textsuperscript{242} An Iowa statute authorizes the owner of a future interest to bring an action to quiet title. Iowa Code 1950, sec. 649.1. It has been held under this statute that the period of adverse possession runs against future interests, since the statute affords owners of future interests a present remedy to contest the right of the adverse possessor. Ward v. Meredith, 186 Iowa 1108, 173 N. W. 246 (1919).

\textsuperscript{243} Murrison v. Fenstermacher, 166 Kan. 568, 203 P. 2d 160 (1949), \textit{supra} Chapter 3, p. 84.

\textsuperscript{244} Girard Trust Co. v. Pa. R. Co., 71 Pa. D. & C. 553 (C. P. 5 Phila.), aff’d 364 Pa. 576, 73 A. 2d 371 (1950). The statute provided \textit{inter alia} that in case of money paid or to be charged against land under any ground rent where a period of fifty years has elapsed and no proceeding or action has been instituted within this period for payment or collection of such ground rent, then there shall be a conclusive presumption of payment, release, or satisfaction thereof, and that no such ground rent shall be enforceable unless within one year after effective date of this act a proceeding to enforce payment, or to preserve, revive, or continue such charge shall be instituted. Act of May 23, 1949, P. L. 1692, Purdon’s Pa. Stat. Ann., Tit. 68, sec. 451 (Supp. 1949). It was held that the act could not apply to an existing ground rent because this would allow the legislature to so affect the remedy as “substantially to impair and lessen the value of the contract.” The Pennsylvania Supreme Court declared the statute to be so conflicting and irreconcilable in its various provisions and so unsusceptible of rational interpretation as a whole as to be incapable of judicial enforcement.
discussed in Chapter 3, are applied to existing future interests. But as pointed out, the present marketable title statutes are drafted so that the instances will be infrequent where valid interests are subject to extinction. Quite generally speaking, the present statutes operate in favor of persons in possession who can show a chain of title back a rather large number of years. Where a person has both possession and a record title for the specified period, the probabilities are remote that there are any outstanding ancient future interests which are still valid. As a means of preserving such valid ancient future interests as there may be, most of the existing marketable title statutes have provided for recordation within a specified time although one statute does provide for the bringing of an action. In \textit{Lane v. Travelers Insurance Co.}, the Iowa Supreme Court apparently

\footnotesize
\textsuperscript{245} Supra Chapter 3, p. 80 et seq.
\textsuperscript{247} 230 Iowa 973, 299 N. W. 553 (1941). The statute provided: "No action based upon any claim arising or existing prior to January 1, 1920, shall be maintained . . . in any court to recover any real estate . . . or to recover or establish any interest therein or claim thereto . . . against the holder of the record title . . . in possession, when such holder of the record title and his grantors . . . are shown by the record to have held chain of title . . . since January 1, 1920, unless such claimant, by himself, or by his attorney or agent, or if he be a minor or under legal disability, by his guardian, trustee, or either parent shall within one year from and after July 4, 1931, file in the office of the recorder of deeds . . . a statement in writing . . . definitely describing the real estate involved, the nature and extent of the right or interest claimed, and stating the facts upon which the same is based . . ." Iowa Code 1935, sec. 11024; now with different dates, Iowa Code 1950, sec. 614.17, amended Acts 1951, c. 209, sec. 3. The testator, who died in 1895, devised his farm to his son Patrick Lane for life with remainder to the heirs of the son. Patrick mortgaged the land in 1906. In 1910 the mortgage was foreclosed and the land was sold to one Kinney, who in 1913 conveyed to Patrick's wife in fee simple. Thus Mrs. Lane held record title as of 1913. In 1923 she instituted an action to quiet title and a decree was entered in her favor. In 1926 Mr. and Mrs. Lane mortgaged the land to the defendant insurance company, which later foreclosed and claimed full title. After July 4, 1932 (the final date for recording under the above statute), the remaindermen brought an action to establish their interests in the land. Two of the remaindermen were minors, born before 1920. The interests of the adult remaindermen were held to be barred by the running of the statute of limitations on the right to
assumed the constitutionality of the recordation require-
ment. Contingent remainders were held to have been barred
"by the plain provisions" of the statute because no preserv-
ing statement had ever been recorded. Unfortunately, the
constitutional question was not raised or argued.

II. POWERS OF APPOINTMENT

A discussion of future interests would not be complete
without mention of powers of appointment, even though
most powers are strictly present interests. By their exercise,
future interests may be created. The instrument which
creates the power of appointment may also create future
interests which will be affected by the exercise of the power.

In some jurisdictions the law of powers of appointment
has been materially modified by statute. Conclusions as
to what would be the result if a statute were to be applied
in case of existing powers of appointment can be only a
matter of conjecture in view of the paucity of authority.

For constitutional purposes, the courts would undoubtedly
treat a general power of appointment as virtually tantamount
to ownership of the property which is subject to the power,
since the donee can appoint in favor of himself, or, if the
power is limited to an appointment by will, he can appoint
in favor of his estate or his creditors. Beyond this, I do

set aside the decree of 1923 quieting title in Mrs. Lane. The interests of the
minor remainders were held to be extinguished under the statute quoted
above, for whether the rights of these remainders were deemed to have
arisen at the time of their grandfather's death or at the time of their births,
the interests had certainly arisen prior to Jan. 1, 1920. The defendant, in
the opinion of the court, had filled all the requirements of the statute.

Statutes may be found, notably statutes in aid of creditors, which treat
property subject to a general power as part of the donee's assets, even when
the power is unexecuted. The Federal Bankruptcy Act provides: "The trustee
of the estate of a bankrupt . . . shall . . . be vested by operation of
law with the title of the bankrupt . . . powers which he might have exer-
not believe any general statement can be made concerning the extent to which the power of the donee would be considered a constitutionally protected interest. Possibly not even a special power would be considered to be a mere privilege which the legislature can take away, especially if the power is created by contract.\textsuperscript{250} Quite certainly, the legislature would not be permitted to take away the power if it is of demonstrable value to the donee or if it is connected with some other interest the donee has in the subject matter of the power.

With some degree of assurance, it may be stated that until an appointment is made, the prospective appointees would be deemed by most courts to have only a mere possibility of acquiring property in case the donee chooses to exercise his power and elects to appoint in their favor. It was held in \textit{Thomson's Ex'rs v. Norris},\textsuperscript{251} where the donee was given the power to appoint among the testator's sisters and their children, that the legislature could probably validate a compromise whereby the donee, in consideration of a share in the estate outright, agreed with the adult prospective appointees not to exercise the power. At any rate, in this case the compromise agreement so confirmed was held to be effective to cut off all interests of the minor prospective

cised for his own benefit, but not those which he might have exercised solely for some other person; \ldots\textquotedblright; \textit{11 U. S. C. A. sec. 110a}.

A Michigan statute provides: "When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate, for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed, or the lands should not be sold for the satisfaction of debts." \textit{Mich. Comp. Laws 1948, sec. 556.9}. See 3 Powell, \textit{Real Property}, \textsection{} 390 for a discussion and enumeration of statutes.

For computation of federal estate taxes, the appointive assets in case of powers created subsequent to October 21, 1942, are to be included in the gross estate of the decedent whether the power is exercised or not. \textit{Int. Rev. Code, sec. 811 (f)}.\textsuperscript{250}


\textsuperscript{251} 20 N. J. Eq. 489 (Err. and App. 1869).
appointees who did not consent to or participate in the compromise.

The interest of the prospective appointees, especially where the power is general, has been compared to the expectancy of an heir. However, where the power is in favor of a limited class of persons, and a duty is imposed upon the donee to exercise it, the prospective appointees do have an interest which may be more substantial than a mere expectancy. In default of appointment, courts of equity will give the property to the members of the class in equal shares. Whether the prospective appointees would here be held to have a constitutionally protected interest, would be much influenced by the theory which the court adopted to explain the result reached by the equity courts. It is Professor Simes' theory (the constructive trust theory) that equity simply imposes a remedy in view of the impossibility of the beneficiaries taking in the precise manner intended, to prevent the unjust enrichment of the donor's heirs or of other persons into whose hands the property may have come. Professor Gray, on the other hand, believed that the courts are merely enforcing an implied gift in default of appointment. The theory indicated by the Restatement of Trusts is that the donee is a trustee of the power and the power is


However, where the power is special, courts of equity will set aside fraudulent appointments at the instance of a prospective appointee, thus recognizing that the prospective appointee may have something more than a mere expectancy. Simes, *op. cit.*, sec. 290.

If the exercise of the power were treated as a mere event named in the original limitation, the interest of a prospective appointee would be very much like an executory interest or a contingent remainder. But the act of the donee is not treated by the cases like other events. It involves too much uncertainty. The courts avoid, as a rule, calling the expectancy of an appointee either a contingent remainder or an executory interest. Simes, *op. cit.*, sec. 286.


the subject matter of the trust.\textsuperscript{255} If Professor Simes' view is adopted, then it is somewhat difficult to see how the members of the class can have much more than an expectancy before the appointment is made or the constructive trust enforced. Gray's view might suggest that the members of the class have some kind of present interest from the time the power is created, analogous, perhaps, to a contingent remainder or executory interest. The Restatement theory would also seem to presuppose a present interest in the members of the class as beneficiaries of the trust.

As a consequence of the federal estate tax legislation of 1942, making property over which a decedent has at the time of his death a power of appointment includable in his gross estate,\textsuperscript{256} statutes have recently been enacted in many states permitting the release of powers of appointment.\textsuperscript{257} In order for such statutes to be fully effective for avoiding taxes, it is necessary that they be retroactive and most of them are. They are probably constitutional, except perhaps insofar as they are applicable to powers in trust, but their constitutionality has not yet been passed on. It appears that as a matter of common law all powers are releasable except powers in trust.\textsuperscript{258}

\textsuperscript{255}Restatement, Trusts, secs. 27, 414 (1936). This is also the view of Professors Bogert and Scott. \textsuperscript{1} Bogert, Trusts, sec. 116; \textsuperscript{1} Scott, Trusts, sec. 27.

\textsuperscript{256}Int. Rev. Code, sec. 811 (f) (Sec. 403a, Rev. Act of 1942). The law was changed again in 1951, 65 Stat. 91. As to powers created on or before Oct. 21, 1942, the 1951 amendment restores in general the law as it existed prior to 1942. The impact of the law is now limited to general powers.

\textsuperscript{257}3 Powell, Real Property, ¶ 394.

\textsuperscript{258}1 Simes, Future Interests, sec. 280 (1936); 3 Powell, Real Property, ¶ 393. Restatement, Property, sec. 334 (1936) states: "All general powers \[whether presently exercisable or exercisable only by will\] can be released by the donee." Restatement, Property, sec. 335 (1948 Supp.) states "All special powers can be released by the donee unless the donor in creating the power manifests an intent that it shall be non-releasable." (Copyright 1948. Printed with permission of the American Law Institute.)
There is no authority at all as to how far the interests of the takers in default before the exercise of the power are constitutionally protected. Categorical statements are hazardous because the substantiality of the interests of the takers in default must depend upon the wording of the instrument, upon whether the power is general or special, and upon other factors. However, in view of the fact that the gift in default is in the nature of a remainder and the takers in default purchasers under the donor's will or deed, it is safe to say the courts are not likely to permit the legislative extinction of the interests of the takers in default unless the statute merely accomplishes what the donee could and would have done had there been no statute.

Where property has been devised to one for life and after his death to such person as he shall appoint by will and no provision is made in the donor's will for takers in default of appointment, the reversion (a technically vested interest) descends to the heirs of the testator subject to complete divestment by the exercise of the power. The heirs, however, have no such certain interest in the property as to prevent the application of a statute enacted after the testator's death but before that of the life tenant, under which the will of the life tenant is effective to exercise the power, although the will would not have been effective to do so at the time of the execution.

259 A remainder in default of appointment is vested in the absence of language which would make it contingent; that is, the fact that a remainder is subject to a power does not prevent its being vested. 1 Simes, Future Interests, sec. 80 (1936).

260 Aubert's Appeal, 109 Pa. 447, 1 Atl. 336 (1885).

But it was held in an older Pennsylvania case that a life tenant donee of a special testamentary power could not be allowed to convey the fee inter vivos under the purported authority of a retroactive statute, where the reversioners were opposed. Shoenberger v. School Directors, 32 Pa. 34 (1858) supra note 100.
Several articles in recent years have pointed out the grave danger to security of titles arising from grantors’ conveying the fee to land subject to conditions or limitations so that upon breach of the condition or happening of the event, the title either reverts automatically to the grantor, or the grantor has the power by taking the proper steps to cause a forfeiture of title. The *in terrorem* aspect of powers of termination and of possibilities of reverter has, perhaps, been exaggerated. It is unlikely that present day courts will enforce forfeiture or termination if enforcement will cause a loss to the grantee out of all proportion to any loss the grantor may suffer from breach of condition or the happening of the event, or if changing conditions have rendered enforcement inequitable, although few courts, it appears, have expressly applied equitable notions to the enforcement of possibilities of reverter and powers of termination.

But possibilities of reverter and powers of termination do add undesirably to confusion of titles. Since these interests are generally held to be descendible and devisable and in many jurisdictions alienable *inter vivos*, and since neither


262 Goldstein, *op. cit. supra* note 261.

263 Generally possibilities of reverter and powers of termination pass on intestacy of the owner exactly on the same basis as his present interests. These interests are also generally held to be devisable. 2 Powell, *Real Property*, § 284. Powers of termination are not generally alienable *inter vivos* except by release or conveyance with a reversion or between the heirs of the grantor. 3 Simes, *Future Interests*, sec. 716 (1936). The authorities are about equally divided on the question of whether a possibility of reverter is alienable *inter vivos*. 3 Simes, *op. cit.* sec. 715. Many states have enacted statutes permitting alienation of any estate or interest in property [*E.g.*, Ala. Code Ann. 1940, Tit. 47, sec. 13] and at least nine states specifically authorize alienation of the power of termination [*E.g.*, Cal., Conn., Idaho, Md., Mich., Mont., N. J., N. M., R. I.]. See Note, 45 Mich. L. Rev. 375 (1946).
interest is subject to the rule against perpetuities, over long periods of time the ownership of a power of termination or possibility of reverter may come to be shared by a large number of persons who have no real hope ever to compel forfeiture, but some of whom may nevertheless attempt litigation or may try to capitalize on the nuisance value of their claims. Such threats hinder the use and development of the land. Alienation is indirectly restrained.

There would appear to be need for remedial legislation. Yet despite the repeated warning of the writers, statutes have been enacted in only a few states. The legislation in existence takes four general patterns: (1) statutory time limit imposed in the absence of a differing time stipulation by the parties, (2) prohibition against trivial conditions annexed to a conveyance, (3) a combination of time limit and prohibition against trivial conditions, (4) a statutory time limit


265 Mass. Gen. Laws 1932, c. 184, sec. 23: “Conditions or restrictions, unlimited as to time, by which the title or use of real property is affected, shall be limited to the term of thirty years after the date of the deed or other instrument or the date of the probate of the will creating them, except in cases of gifts or devises for public, charitable or religious purposes.” [Act declared not applicable to conditions existing at the date of enactment.]

266 Mich. Comp. Stat. 1948, sec. 554.46: “When any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto.” Same: Wis. Stat. 1951, sec. 230.46; Ariz. Code Ann. 1945, sec. 71.123.

267 Minn. Stat. 1949, sec. 500.20 (1): “When any conditions annexed to a grant, devise or conveyance of land are, or shall become, merely nominal, and of no actual and substantial benefit to the party or parties to whom or in whose favor they are to be performed, they may be wholly disregarded; and a failure to perform the same shall in no case operate as a basis of forfeiture of the lands subject thereto.” (2) “All covenants, conditions, or restrictions hereafter created by any other means, by which the title or use of real property is affected, shall cease to be valid and operative 30 years after the date of the deed, or other instrument, or the date of the probate of the will, creating them; and after such period of time they may be wholly disregarded.” (3) [Limits the period in which to assert right of re-entry to six years after happening of breach.]
imposed regardless of any stipulations of time by the parties.\textsuperscript{268}

Out of fear that these statutes cannot be given a retroactive effect without unconstitutionally taking the property of the owners of existing possibilities of reverter and powers of termination, the statutes, with the exception of that of Illinois, have been made prospective in operation. The retroactive features of the Illinois statute, have not caused litigation as yet, but it is probable that they will do so.\textsuperscript{269} It

\textsuperscript{268} Ill. Rev. Stat. 1951, c. 30, sec. 37e: “Neither possibilities of reverter nor rights of entry or re-entry for breach of condition subsequent, whether heretofore or hereafter created, where the condition has not been broken, shall be valid for a longer period than fifty years from the date of the creation of the condition or possibility of reverter. If such a possibility of reverter or right of entry or re-entry is created to endure for a longer period than fifty years, it shall be valid for fifty years.” Sec. 37f: “If by reason of a possibility of reverter created more than fifty years prior to the effective date of this Act, a reverter has come into existence prior to the time of the effective date of this Act, no person shall commence an action for the recovery of the land or any part thereof based upon such possibility of reverter, after one year from the effective date of this Act.

“If by reason of a breach of condition subsequent created more than fifty years prior to the effective date of this Act, a right of re-entry has come into existence prior to the time of the effective date of this Act, no person shall commence an action for the recovery of the land or any part thereof based upon such right of entry or re-entry after one year from the effective date of this Act, unless entry or re-entry has been actually made to enforce said right before the expiration of such year.”

\textsuperscript{269} See Ill. Rev. Stat., c. 30, sec. 37f quoted supra note 268. The restrictions imposed by sec. 37f in respect to the time in which actions must be brought raise serious questions concerning equal protection of the laws. The following comments appeared in 43 Ill. L. Rev. 90, 102, 103 (1948): “A more serious objection may be raised by the provision affecting remedies where such interests were more than fifty years old at the effective date of the act, since Sec. 37f restricts the time for bringing an action in that situation to one year from the date the act goes into effect. Where such an interest is a possibility of reverter, and the limiting contingency has in fact occurred, the grantor has an estate in fee upon which an action to recover would not previously have been barred by the Statute of Limitations for twenty years. Is there any policy reason sufficiently compelling to justify limiting the right to recover in that eventuality to a one year period where another whose interest was only forty-nine years old or less when the act became law would still have the full twenty-year period in which to seek his remedy if the reverter fell in? If not, the classification is clearly arbitrary.”

“The subsection further provides that where a right of entry has existed more than fifty years at the passage of the act, not only must the breach have
is often assumed that possibilities of reverter and powers of termination are property interests of which the owners cannot be deprived by legislative act. 270 One of the points of argument of early advocates of legislative control was that the legislature ought to restrict the creation of these interests while they are still comparatively rare, because the evils once existing might be difficult to remedy by subsequent legislation without violating the Constitution. 271

There is actually almost no case authority of any kind to support the view that these interests cannot be extinguished. Certain Illinois cases dealing with statutes relating to vacation of streets have been nearly the only cases where a court has been called upon to decide the constitutionality of statutes which allegedly impair or extinguish possibilities of reverter or powers of termination. The point has several times been raised in that jurisdiction in regard to vacation of streets because the Supreme Court appears formerly to have taken the view that the dedication of a street or alley-way creates in the city a determinable fee, which will last until the city abandons the use, and leaves an interest in the grantor very similar to a possibility of reverter. 272 Since it occurred before that time to enable the holder to bring an action, the time for which is also limited to one year from the effective date of the act, but also there is a further stipulation that no such action may be maintained ‘unless entry or re-entry has been actually made to enforce such right before the expiration of such year.’ As a practical matter this presents certain difficulties, since there is no agreement as to what actually constitutes ‘entry’ today.”  

“Here also the holder of a right of entry is being deprived of his right to pursue his remedy by limiting the period of recovery to a single year. Under modern conditions it is very possible that the holders of these now terminated interests might not know there had been a cessation of user or breach of condition, much less that there had been a statute which in effect amended the Statute of Limitations, until long after the year had passed.” 270

272 St. John v. Quitzow, 72 Ill. 334 (1874); Gebhardt v. Reeves, 75 Ill. 301 (1874).
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would be undesirable that the title to the strips of land should revert upon vacation to persons who had ceased to own the adjoining lots, as early as 1851, a statute was passed which provided that upon vacation of a street the city authorities shall convey any interest the city has in the street to the owners of lots next adjoining. 273 Succeeding statutes have contained similar provisions. 274 The Illinois Supreme Court has had some difficulty in making up its mind what effect these statutes have upon the interest retained by the dedicator. In an early case, the court averred:

“The fee plaintiff had in the street and alley could not be divested and transferred to the adjacent lot owners by direct legislative action; nor could authority be given to any agency to do it for private purposes. An intention to take the property of one man and transfer it to another, without compensation, ought not to be attributed to the legislature, where a different motive may be assigned for its action. A law that would have that effect, or that would authorize it to be done, would be palpably in violation of the constitution, as well as unjust.” 275

Yet in a comparatively recent case, Prall v. Burckhartt, 276 the court concluded that title must upon vacation go to adjoining property owners. In People ex rel. Franchere v. City of Chicago, 277 decided a few years after the Prall case, this statement appears:

273 Ill. Laws 1851, p. 112.
Sec. 69-12 provides that upon abandonment of the street, highway, or alleyway, title shall vest in the owners of the adjoining lands, except in cases where the instrument dedicating the street, highway, or alleyway shall expressly provide for a specific devolution of title upon abandonment.
275 Gebhardt v. Reeves, 75 Ill. 301, 308 (1874).
277 People ex rel. Fabriel Franchere, Jr. v. City of Chicago, 321 Ill. 466, 152 N. E. 141 (1926).
“Prior to the act in question, after the executing and recording of a statutory plat and its acceptance by the municipality, nothing remained in the dedicator but a mere possibility of reverter. This possibility of reverter was not an estate but only the possibility of having an estate at a future time. (Hart v. Lake, 273 Ill. 60.) This possibility, not being an estate, was not protected by any constitutional limitation, and it was competent for the legislature to abolish this possibility of reverter or to change the devolution of the title upon the happening of the future contingency in any way it saw fit, ... any legislative enactment to that end is not unconstitutional.” 278

Neither the Prall case nor the Franchere case afford substantial evidence that the Illinois Supreme Court would tolerate legislative abolition of all possibilities of reverter and powers of termination. The court did not overrule the earlier vacation cases. In these earlier cases 279 the dedication seems in each instance to have been made prior to the particular statute under which the street was vacated, but the facts are not altogether clear. Moreover, in one case, Helm v. Webster, 280 the deed to the city contained an express provision that if the street should at any time be abandoned, the title to the land should revert to the grantor, his heirs and assigns as though the deed had never been made. The platting in Prall v. Burckhartt was made after the vacation act was in effect and the plattor did not expressly retain any interest. 281 The court in Prall v. Burckhartt sought to reconcile the result which it reached with the prior holdings and strongly intimated that an express reservation made prior

278 321 Ill. 466, 476, 152 N. E. 141, 144 (1926).
279 Helm v. Webster, 85 Ill. 116 (1877); St. John v. Quitzow, 72 Ill. 334 (1874); Gebhardt v. Reeves, 75 Ill. 301 (1874).
280 85 Ill. 116 (1877), supra note 279.
281 In Franchere v. City of Chicago, the alleyway was dedicated about 62 years before the enactment of the particular statute (Ill. Laws 1923, p. 629), under which the alley was vacated. However, the act of 1865 containing similar provisions, was in force in 1871.
to the enactment of a vacation statute cannot be defeated or impaired by subsequent legislation.

The prospective operation of the statute in the later cases, as opposed to the retroactive operation in the earlier, would be a completely satisfactory basis for a distinction between the holdings, except that the court did not clearly recognize this basis, or at least it did not use terminology which adequately expressed the ratio decidendi. If the court in the Prall and Franchere cases had not spoken of the grantor's "possibility of reverter," which term has the technical denotation of a certain kind of interest in land, in describing the interest which a grantor retains when the grant is made after the statute, the court could have reached the desired result with a great deal less ambiguity. What the grantor in these cases retained was a possibility—a possibility that he might re-acquire title upon abandonment of the street, provided that he was still owner of the adjoining lot when that event occurred.

The claim of a grantor at common law, who has conveyed land to a corporation, to a reversion in case of the dissolution of the corporation, is, like the interest of a dedicator in Illinois, somewhat akin to a possibility of reverter. It has been held that any expectancy the grantor may have can be defeated by subsequent legislation.282 This result is not, however, inconsistent with the view that, in general, possibilities of reverter are nondivestible property interests. The possibility that the corporation will be dissolved is generally remote. The grantor will normally not be injured in any way if the land is put to other uses. If he has been paid the value of the fee, he will suffer no loss if the title never reverts. Indeed, in most jurisdictions the notion has been

abandoned that the grantor retains by implication of law an interest in the land in case of dissolution. 283

In Kelso v. Steiger 284 land had been conveyed in trust for certain specified purposes. Subsequently the trustees procured a special act which authorized them to sell a portion of the land no longer used for the specified purposes. It was held that when the land ceased to be used for the purposes contemplated by the original grantor, a right of entry accrued to his heirs which could not be divested by the act.

There is dictum in a Kentucky case, Evans v. Cropp, 285 that a deed reserving a possibility of reverter is a contract which the legislature is incompetent to impair by a subsequently enacted statute. The land in question was conveyed for school purposes upon condition that title would revert if the land were abandoned by the school authorities. A subsequently enacted statute required school authorities to perfect the title to all lands dedicated for school purposes. Thereafter the school building on the lot was sold and the premises abandoned by the school trustees. The claim of the grantor’s successor to the land was not seriously questioned. He brought an action for damages for the removal of the building. Recovery was denied because it was found that the school board did not abandon the lot until after the building was removed.

Language might be taken from certain cases to support the contention that possibilities of reverter and powers of termination are not property interests which are constitutionally protected. It is said frequently, for example, that neither interest is an estate in land but only the possibility of acquiring one. 286 This is merely a question of definition.

283 Fletcher, Cyclopedia Corporations, sec. 8134 (Perm. ed.).
284 75 Md. 376, 24 Atl. 18 (1892). A similar result was reached on similar facts in Second Universalist Society v. Dugan, 65 Md. 460, 5 Atl. 415 (1886).
285 141 Ky. 514, 133 S. W. 221 (1911).
286 2 Tiffany, Real Property, sec. 314 (3d ed.).
A contingent remainder has also been said not to be an estate but the possibility of acquiring one; however, as we have seen, a contingent remainder is an interest which is constitutionally protected.

Sometimes in eminent domain cases it is said that possibilities of reverter and powers of termination are mere expectancies which the courts cannot protect. The general rule is that when determinable fees or fees subject to a condition subsequent are taken under eminent domain proceedings, the owners of the possibilities of reverter and powers of termination are not entitled to any portion of the award. This rule appears to be based, however, not upon the idea that these interests are not constitutionally protected (whatever may be occasionally remarked in the cases), but upon the matter of valuation. The value of the possibility of reverter or power of termination depends upon how you construe the condition or limitation. Most courts assume that the limitation or condition does not include the taking by eminent domain. Consequently, unless the fee is likely to terminate or be terminated for some other reason, the possibility of reverter or power of termination is practically valueless.

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287 Tiffany, *Real Property*, sec. 320 (3d ed.).
291 *Restatement, Property*, sec. 53 (1936), sets forth rules, or perhaps more accurately stated, suggestions for the distribution of the award between the owners of the fee and the owners of the reversionary interest. The Restatement's rules ( paraphrased) are: Where the event upon which the possessory estate is to end (not taking into account the effect of the condemnation) is an event, the occurrence of which, within a reasonably short period of time, is not probable, the future interest has no ascertainable value. But if the event upon which the possessory estate is to end (not taking into account any changes resulting from the condemnation) is likely to occur within a reasonably short period of time, then the award is to be divided
The improbability that the possibility of reverter or power of termination will ever vest in possession is also the basis for the courts' refusal to enjoin the owner of the fee from committing waste.

"A court of chancery will interfere to enjoin equitable waste by the owner of a base or determinable fee only when the contingency which is to determine the estate is reasonably certain to happen and the waste is of a character to charge the owner with a wanton and unconscientious abuse of his rights." 292

This is purely a problem of weighing interests and again does not indicate a belief that in general owners of possibilities of reverter and powers of termination can expect no protection from the Constitution. In keeping with the spirit of American institutions which favors the vesting of estates, opposes entailments and endeavors to secure to the citizen the greatest immediate enjoyment of property consistent with the law, the owner of the fee must be accorded the privilege of using the land pretty much as he pleases. 293

The authorities are, as we see, inconclusive. Leaving the cases and attacking the problem on reason, what argument can be proposed against the constitutionality of a statute which retroactively destroys possibilities of reverter and powers of termination? One argument might be that destruction of the grantor's interest enhances the interests of the grantee. This windfall to the grantee, it may be claimed, constitutes a taking of private property for strictly private purposes. Yet, it is submitted, if public property does require

between the owner of the possessory estate and the owner of the future interest in such shares as fairly represent the proportionate value of the present defeasible possessory estate and the future interest. If the condition has been broken prior to the commencement of the eminent domain proceedings, then the owner of the power of termination has the option to claim and to receive the entire award.

292 Fifer v. Allen, 228 Ill. 507, 521, 81 N. E. 1105, 1109 (1907).
an abolition of existing possibilities of reverter and powers of termination, then the abolition may be accomplished, benefit or not to the grantee. Someone will always be benefited by any changes in the law.

“A principle of broad public policy has intervened to the extent that modern progress is deemed to necessitate a sacrifice of many former claimed individual rights. The only obstacle met has been the rule of property or as termed the disinclination to disturb vested property rights. To some extent this, too, has yielded in the sense that many rights formerly labeled as property rights by a process of academic relation are now considered merely personal and have been subjected to the common good.” 294

There is some basis for distinguishing between the susceptibility of possibilities of reverter and powers of termination to legislative destruction in the greater transferability of possibilities of reverter and in the greater liability of powers of termination to destruction by acts of the grantor. But in the practical application of the statutes no distinction can be made. Either both interests must be subject to legislative control or neither. From the point of view of the owners of the interests they are equally valuable. From the point of view of the owner of the fee, it can make little practical difference whether he has a determinable fee or a fee upon a condition subsequent. The same evils are produced by possibilities of reverter as by powers of termination. To distinguish between the interests in the application of the statutes would be an open invitation to litigation.

It is really quite improbable that any legislature would prohibit absolutely the creation of possibilities of reverter or powers of termination or abolish entirely existing interests. The retention of such interests affords a useful control device for legitimate purposes. 295 If the statutes which have

295 See Brake, “Fees Simple Defeasible,” 28 Ky. L. J. 424 (1940) for an appraisal of the utility of fees simple defeasible. The author of this article
been enacted to date are any indication of what the legislatures of the remaining states are likely to do, the legislation of the future will be aimed at controlling the abuses growing out of the courts’ failure to apply the rule against perpetuities and certain equitable doctrines to such interests. Setting a time limit for the duration of the interests is perhaps the easiest way of dealing with them. A period, say of thirty years, would be long enough to accomplish most objectives. If this period is not long enough to achieve the grantor’s objectives, he can employ other conveyancing devices more susceptible to control. A statute imposing a thirty year limit probably would not be unreasonable if made applicable to existing interests, provided the full period is allowed after the passage of the statute. The troublesome problem of existing interests might be met by providing that such interests shall lose their capacity to cause a forfeiture after a specified number of years from their creation (say the period of the rule against perpetuities), but if circumstances still warrant they shall assume the character of covenants enforceable in equity.

enumerates, *inter alia*, the following uses: securing payment of annuities and of legacies, compelling grantee to support the grantor, restraining marriage, influencing moral conduct, prohibiting will contests.

Thirty years is the period provided in the Uniform Act promulgated by the Commissioners on Uniform State Laws called an “Act Relating to Reverter of Realty.” This act, which has not yet been adopted in any jurisdiction, excludes any retroactive effect.


Like possibilities of reverter and powers of termination, restrictive covenants tend to cloud titles and restrain alienability. But unlike the case of possibilities of reverter and powers of termination, which in theory (at least) subsist even after conditions have so changed as to make forfeiture inequitable and after it can no longer be of any real concern of the grantor to what use the premises are put, many courts of equity have refused to enforce restrictive agreements where there has been such a change in the character of the neighborhood as to defeat the purposes of the restriction and to render the enforcement of the same unreasonable. 3 Tiffany, *Real Property*, sec. 875 (3d ed.). Since relief at law is usually either so inadequate as to make a suit useless or else is not available at all, the refusal of a court of equity to enforce a restrictive covenant has substantially the effect of extinguishing it. Restrictive
Terms for years and estates for life may also be created subject to limitations and to conditions subsequent. There would be little justification for legislation which retroactively extinguishes such limitations and conditions, because the creation of qualified estates for life or for years does not involve or lead to the same undesirable consequences as the practice of conveying fees upon limitations and upon conditions subsequent. The happening of the event or the breach of the condition must occur within a determinate period of time. Social policy does not require that life estates and estates for years shall be freely alienable. Indeed, to the contrary, it may be good policy to allow the lessor, grantor, or testator to restrict the alienability of such estates. To destroy the conditions and limitations (thereby conferring an unqualified estate upon the lessee or life tenant) would work undue hardship upon the lessor or grantor in depriving him of the most effective means of obliging the lessee or life tenant to comply with agreements and restrictions.

covenants may also be abandoned and waived by the parties concerned. 3 Tiffany, Real Property, sec. 874 (3d ed.). None of these modes of extinguishing restrictive covenants has the degree of certainty desirable in commercial transactions. Legislative attempts to fix more certain modes of extinguishing existing restrictive agreements have not fared very well with the courts. A Georgia statute, Laws 1935, p. 112 [Ga. Code Ann. 1936, sec. 29–30] providing that "covenants restricting lands to certain uses shall not run for more than twenty years in municipalities which have adopted zoning laws" (p. 113) was held not to have the effect of terminating a covenant that was already in existence as a valid and binding contract between the parties. Dooley v. Savannah Bank & Trust Co., 199 Ga. 353, 34 S. E. 2d 522 (1945). Twenty years ought to be long enough to accomplish most purposes. The courts plainly do not like substitution of arbitrary standards for the flexible standards of the common law. See also Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N. E. 244 (1917), supra Ch. 3, note 165. For a discussion of legislative proposals limiting the duration of restrictive covenants see Clark, "Limiting Land Restrictions," 27 A. B. A. J. 737 (1941).

298 Conger v. Lowe, 124 Ind. 368, 24 N. E. 889 (1890); Southeastern Land Co. v. Clem, 239 Ky. 417, 39 S. W. 2d 674 (1931); Gunsenhisser v. Binder, 206 Mass. 434, 92 N. E. 705 (1910).
CHAPTER 5

Trusts

SPENDTHRIFT TRUSTS

In many states a restraint on the alienation of the right of a beneficiary to receive the income under a trust created by a person other than the beneficiary himself is valid and in some states it is held that a restraint on the alienation of the beneficiary's interest in the principal is effective. Trusts in which the interest of the beneficiary

1 Scott, Trusts, sec. 152.1. The following is a summary of Scott's survey of spendthrift trusts in the various jurisdictions (through 1951). These jurisdictions recognize spendthrift trusts although no statute so provides: Ark., Colo., D. C., Fla., Me., Md., Mass., Miss., Mo., Neb., N. J., Pa., Tex., Hawaii, S. C., and Vt. There are dicta upholding spendthrift trusts in Iowa and Oregon. In several states there are statutes having a common origin in the legislation of New York in which it is provided that the right of a beneficiary of an express trust to receive the income cannot be transferred by him; and it is provided that the surplus beyond the sum which may be necessary for the education and support of the beneficiary shall be liable to the claims of creditors: Mich., Minn., Mont., N. Y. In a few states there is legislation based on the California statute, in which it is provided that the settlor may impose a restraint on the voluntary assignment by a beneficiary of his right to the income; creditors are allowed to reach the income in excess of what may be necessary for the education and support of the beneficiary: Cal., N. D., S. D. The statutes of two states provide that the beneficiary cannot assign his right to the income unless the right to do so is conferred by the terms of the trust: Ind., Kan. There are statutes in a number of states which provide that a proceeding may be maintained to reach the interest of a beneficiary under a trust “except when such trust has been created by, or the fund so held in trust has proceeded from, some person other than the debtor himself”: Ill., N. H., N. J., Tenn., Wash. In several other states there are statutes which permit spendthrift trusts to a limited extent: Ala., Ariz., Conn., Del., Ga., La., N. C., Nev., Okla., Va., W. Va.

cannot be assigned by him or reached by his creditors are known as "spendthrift trusts." The recognition of spendthrift trusts is in a sense an anomaly, for disabling restraints on legal estates are generally held invalid. Probably the real reason why the courts have recognized spendthrift trusts lies in the fact that any trust is likely to impair alienability to some extent. Hence an express prohibition against alienation of the beneficial interest does not add materially to the restriction on alienability caused by the trust itself. However, the judicial explanation has usually been one of pure logic, that a donor of property ought to be able to dispose of his property as suits himself, provided that he does not violate any principle of public policy. The courts have not felt there is anything anti-social in the spendthrift trust.

The process of reasoning by which the courts have justified the spendthrift trust has generally caused them to overlook the dubiousness of the policy of permitting the settlor to create a trust in which the beneficiary's interest is free from the claims of creditors, regardless of the beneficiary's needs or the size of the income. Can such an immunity from involuntary alienation be taken away? In Brearley School v. Ward, the New York Court of Appeals held that a life

however, that a restraint on the voluntary or involuntary transfer of the beneficiary's right to the principal is invalid. Restatement, Trusts, sec. 153 (b) (1935).

2 Simes, Future Interests, sec. 447 (1936).
4 Simes, Future Interests, p. 340 (Hornbook).
5 1a Bogert, Trusts, sec. 222.

The statutes of a number of states permit spendthrift trusts only to the extent necessary to educate and support the cestui in the manner of life to which he has been accustomed or limit the size of the spendthrift trust as to size of corpus or purpose of trust. Supra note 1. Generally see 1a Bogert, Trusts, sec. 222.

7 201 N. Y. 358, 94 N. E. 1001 (1911). The theory of the dissenting opinion in the court below was that the beneficiary of a trust fund whose income therefrom is wholly exempt from execution at the time of the creation of the trust has a constitutional right which prohibits the legislature from
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beneficiary was not deprived of property without due process by a statutory amendment whereby the income from the trust was subjected to a judgment lien of a creditor. Several factors present in the case, however, relatively simplified the problem of the court in arriving at this conclusion. The trust was created by will; thus the impediment of supposed making any part of such income applicable to the payment of his debts. The Court of Appeals said this theory was tenable only upon the assumption that the state had entered into a contract with the cestui que trust to that effect, because there certainly was no such contract between the creator of the trust and the trustee. The trustee merely undertook to pay over the income as directed, provided the law of the land permitted him to do so. But the legislature did not enter into any contract with its citizens, nor did it offer to contract with them. The statute was enacted in the exercise of the plenary power of the state to regulate the tenure of real and personal property within its borders. The provision that the income of a trust fund may not be taken to satisfy the debts of the beneficiary is no inherent or necessary part of the trust. The exemption of the homestead of a debtor can be repealed. Why not the exemption of the income from a trust? "... a party has no vested right in a defense to a contract which he has actually made and which he is under a moral obligation to perform, though the law at the time makes such contract void. There is recognized in every civilized country the obligation of a man to pay his debts if he has property out of which they can be satisfied, and the failure to do so is moral dishonesty. No one has a moral right to be dishonest." (201 N. Y. 358, 372, 94 N. E. 1001, 1006.) To sustain the position of the beneficiary that the amendment could not be applied as to trusts already in existence, said the court, it would be necessary to hold not only that he had a vested right to hold the income of the trust exempt from the claims of his creditors prior to the enactment of the law, but that he had a vested right to incur such debts as he might see fit in the future with a similar exemption. Such a result, the court considered, was rather too startling to be contemplated with equanimity. Gray, J., thought that to apply the statute retroactively deprived the beneficiary of property without due process. The right to receive income is a valuable property interest. Before the amendment, this right was subject only to the right of creditors to reach the surplus beyond what was necessary for the beneficiary's support. If the legislature can validly change the statute so as, arbitrarily, to direct the application of ten per cent of the income to the claim of a creditor, it could as competently direct the application of any percentage, even of the whole.

See King v. Irving, 103 App. Div. 420, 92 N. Y. S. 1094 (1st Dept. 1905) wherein doubt is expressed that the amendment could be applied where a trust had been created by will previous to the date of the amendment. The court said that the testator had a right to direct that a certain income should be paid to the beneficiary and that it was difficult to see how the legislature had power to direct payment in a different way.
contract rights was eliminated.\textsuperscript{8} There was no spendthrift provision in the will. The exemption was simply part of the Real Property Law as it stood at the time the trust was created.\textsuperscript{9} The case, therefore, seemed to the court to be governed by the well-established rule that a debtor can have no vested interest in an exemption statute. The third factor was that the change was not far reaching. Even before the amendment, the beneficiary could be compelled to apply all of the trust income which was not necessary for his education and support to the payment of debts. The amendment merely measured the quantum which was to go for the payment of debts by a different standard.

A California case holds, without discussion of the point, that a statute cannot make the interest of a beneficiary of an existing spendthrift trust subject to the reach of creditors.\textsuperscript{10} In \textit{State v. Caldwell},\textsuperscript{11} a Tennessee decision involving an \textit{inter vivos} rather than a testamentary trust, it was determined that there would be a violation of the due process clause of the Fourteenth Amendment, as well as a violation of the contracts clause, in the application to an existing trust of a statute whereby it was provided that the interest of a beneficiary under a spendthrift trust could be subjected to the judgment claims of the state of Tennessee.\textsuperscript{12} It was con-

\textsuperscript{8} That a will cannot be deemed a contract within the meaning of the contracts clause of the federal Constitution was settled in Cochran v. Van Surlay, 20 Wend. 365 (N. Y. 1838).

\textsuperscript{9} Under N. Y. Real Property Law, sec. 98, only the surplus of rents and profits, beyond the sum necessary for the education and support of the beneficiary is liable to the claims of his creditors. Laws 1908, c. 148, provided \textit{inter alia} that income from trust funds due or owing to a judgment debtor to the amount of $12 or more per week is subject to execution, not to exceed ten per cent.

\textsuperscript{10} Seymour v. McAvoy, 121 Cal. 438, 53 Pac. 946 (1898).

\textsuperscript{11} 181 Tenn. 74, 178 S. W. 2d 624 (1944).

\textsuperscript{12} Tenn. Code 1932, sec. 10353 provided: "To subject trust property; exception.—The creditor whose execution has been returned unsatisfied, in whole or in part, may file a bill in chancery against the defendant in the execution, and any other person or corporation, to compel the discovery of any property, including stocks, choses in action, or money due to such defendant, or held
tended by the state that the right of the beneficiary to have his interest free from the claims of creditors arose entirely out of statute 13 and not out of the provisions of the trust instrument and that this exemption privilege could unquestionably be taken away by the state. However, the court was of the opinion that spendthrift trusts had been recognized by judicial decision in Tennessee prior to the enactment of the statute referred to by the state as an exemption statute and that the statute and decision constituted a rule of property which was not at all an exemption for poor debtors.

"We are therefore constrained to hold that these defendants having acquired a title and interest in property by virtue of judicial decisions, grounded on public policy, supplemented by legislative declaration, and declared to be a rule of property, such title and interest must necessarily be adjudged a vested estate and beyond the reach of the Legislature. It is as much a vested estate as if there had been a conveyance to them of an estate in fee simple. The fact that it was inalienable and free from the claims of creditors would not alter the case." 14

The court in the Caldwell case referred to Brearley School v. Ward but distinguished that decision from the situation under consideration in that here the instrument contained a

in trust for him, except when the trust has been created by, or the property so held has proceeded from, some person other than the defendant himself, and the trust is declared by will duly recorded or deed duly registered." (Acts 1832, c. 11, sec. 1.) Pub. Acts 1943, c. 108, sec. 1, amended sec. 10353 by adding: "Provided, however, that where the State of Tennessee shall be such judgment creditor, whether the debt be created before or after the effective date of this Act and whether or not the trust for the benefit of the debtor shall have been declared prior to or subsequent to the effective date of this Act, the Chancery Court shall have jurisdiction to subject such property to the satisfaction of the claims of the State of Tennessee despite the fact that the trust has been created or the property so held has proceeded from some person other than the defendant himself and the trust declared by will duly recorded or deed duly registered."

14 181 Tenn. 74, 82, 178 S. W. 2d 624, 627.
provision against alienation (which was not so in Brearley) and that the exemption arose not only by virtue of a statute (as in Brearley) but also by sanction of the common law. It is submitted, nevertheless, that these are distinctions without difference. The spendthrift provision is in effect a kind of exemption\(^\text{15}\) whether its source is in statute or in the common law. The law says to the testator or settlor: If you insert a provision in the trust instrument that the interest of the beneficiary shall be exempt from the creditor's reach, then his interest shall be exempt from creditor's claims. Now, there may be persuasive reasons why the law should permit the creation of spendthrift trusts. Incompetent and inexperienced beneficiaries often need this sort of protection.\(^\text{16}\) However, this is a matter to be addressed to the discretion of the legislature. Certainly, it cannot be said that opinion is

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\(^{15}\)So far as the legislature's power to abolish the spendthrift provision is concerned, the provision can properly be classified only as an exemption—an immunity from attachment by creditors. I do not wish to imply that there may not be instances where it would be inappropriate to treat the spendthrift provision as a mere personal exemption. For certain purposes, a spendthrift provision may be more appropriately treated as a restraint on alienation than as an exemption. For example, in a jurisdiction where the laws permit a person to set up a trust in which the beneficial interest is voluntarily alienable but cannot be reached by creditors, suppose the beneficiary of such a trust becomes bankrupt. The Federal Bankruptcy Act provides that the bankrupt shall be allowed the exemptions prescribed by the state law. \(^\text{17}\) U. S. C. A. sec. 24. On the other hand, the Act also provides that the trustee in bankruptcy shall be vested with the title of the bankrupt to all property which the bankrupt could by any means have transferred. \(^\text{11}\) U. S. C. A. sec. 100 (a) (5). If the spendthrift provision in this example is classified as a personal exemption, the interest of the beneficiary will not pass to the trustee. It has been held, however, that the interest does pass to the trustee. Young v. Handwork, 179 F. 2d 70 (7th Cir. 1950), cert. den. and reh. den. Handwork v. Young, 339 U. S. 949 (1950). The court held that it was not obliged to follow the state court decisions to the effect that such an interest does not pass to the trustee. "And to construe this section [of the state statute] so as to prevent such interest from passing to the trustee in bankruptcy while the state recognizes it as alienable property would present a serious challenge to the validity of the state provision. At any rate, such a construction places the state provision in direct conflict with the bankruptcy provision which Congress in the exercise of its paramount power has enacted." (179 F. 2d 70, 79.)

\(^{16}\)Costigan, "Those Protective Trusts Which Are Miscalled 'Spendthrift Trusts' Reexamined," 22 Calif. L. Rev. 471 (1934).
unanimously in favor of permitting the creation of spendthrift trusts. The *Caldwell* decision appears to contradict the prevailing view that no one has a vested interest in an exemption. The court called the immunity from attachment "a rule of property," but this is a mere play on words.

When the statute removes the restraint on the power of the beneficiary of a spendthrift trust to make a voluntary transfer (as distinguished from the involuntary transfers considered above), the beneficiary is scarcely likely to complain, but the court may find that the statute as applied to an existing trust invades a constitutional privilege of the settlor or testator to dispose of his property on such terms as he saw fit. In *In re Borsch's Estate*, the Pennsylvania Supreme Court declared that a statute, under which the

17 The classic denunciation of spendthrift trusts was written by John Chipman Gray. Gray, *Restraints on Alienation*, Preface VII (2d ed. 1895). Gray believed that everyone should pay his debts. One of the worst results of spendthrift trusts, he thought, was the encouragement they give to a plutocracy. The pros and cons of spendthrift trusts are discussed, ra Bogert, *Trusts*, sec. 222.


The testator, who died twenty-four years before the enactment of the statute, devised his real estate to trustees subject to spendthrift provisions as to income. The life tenant, pursuant to the statute, delivered a release to the trustees, wherein she sought to renounce her life interest in the trusts thus terminating them and vesting a fee-simple absolute in her son, the remainderman.


Sec. 1 of the Act of 1945 provided: "... any interest in, to, or over, real or personal property, or the income therefrom, held or owned outright, or in trust, or in any other manner which is reserved or given to any person by deed, will or otherwise howsoever, and irrespective of any limitation of such power or interest by virtue of any restriction in the nature of a so-called spendthrift trust provision, or similar provision, may be released or disclaimed, either with or without consideration, by written instrument signed by the person possessing the power or the interest and delivered as hereinafter provided." Sec. 2 contained the limitation that no power or interest, subject to a spendthrift trust provision, or similar provision, could be released or disclaimed except in favor of a remainderman.

The Act of 1943 was prompted by a change in the federal tax laws by the Revenue Act of 1942, making property over which a decedent has at the time
beneficiary of a spendthrift trust was authorized to release his interest in favor of a remainderman, was unconstitutional when applied retroactively as it violated the right of the testator by whose will the trust was created to dispose of his property.\textsuperscript{20}

The Court declared that from 1838 to 1945, the decisions of the court had firmly established that the right of the testator or deceased donor to have his spendthrift provisions enforced is a "right of property."

"When prior to the act, a beneficiary of income subject to spendthrift trust provisions accepted the gift, this Court consistently held that the beneficiary could not thereafter terminate the trust by releasing, renouncing and disclaiming his interest. The basis for this doctrine rested upon the ancient maxim: \textit{Cujus est dare, ejus est disponere}: the bestower of a gift has the right to regulate its disposal. Spendthrift trusts are sustained not because of the law's concern for the donee, but because the testator or donor possessed an individual right of property in the execution of the trust. \textit{To permit a termination by agreement or release would be an invasion of the donor's property right."} \textsuperscript{21}

"'The testator has no interest in the property after his death, which is subject to constitutional protection.' True, there are no pockets in shrouds. The Constitution, however, is not protecting \textit{present} ownership of a property of a deceased. What it does protect is the property right possessed of his death a power of appointment includable in his gross estate for computation of federal estate taxes. Int. Rev. Code, sec. 811 (f) (Sec. 403a, Rev. Act of 1942). This tax liability makes a complete or partial release or disclaimer of a power of appointment or other property interest often desirable. The purpose of the Act of 1943 was to establish an orderly method by which releases and disclaimers could be evidenced. The federal tax law was amended in 1951 to limit its import to general powers. See \textit{supra} Ch. 4 note 256.

\textsuperscript{20} Pa. Const., Art. I, sec. 9, providing that a man cannot be "deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land."

\textsuperscript{21} In re Borsch's Estate, 362 Pa. 581, 586, 67 A. 2d 119, 121.
by the testator or donor, *to have enforced the limitations and restrictions affixed to the gift.*”

True, in the absence of statute, once a beneficiary under a spendthrift trust has accepted, he cannot terminate the trust by releasing his interest since that would violate the donor’s directions. But this general principle should not be used to overturn a statute. In spite of the insistence of the Pennsylvania court that the law’s concern is with the donor, it would seem that it is rather the beneficiary’s interests which are to be considered. As stated before, the donor has no natural right to create spendthrift trusts; if he may do so, it is because the law permits him this privilege. At any rate, the Pennsylvania statute did not impair the testator’s *jus disponendi.* The beneficiary took *cum onere.* The situation in the *Borsch* case was analogous to the acceleration of a remainder by a widow’s renunciation of the will. The statute provided that the release must be in favor of the remainderman; his interest was accordingly accelerated.

While the court’s position in respect to the constitutional rights of the donor would have been dubious even if the donor had been alive when the decision was rendered, the position is astounding when it is considered that the donor was dead. Of course, the wishes of the dead are honored so far as the law permits them to be. When the legislature changes the law, the courts listen sympathetically to the claims of the living and extend the arm of the judiciary to protect their interests, but ordinarily the courts are quite

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24 See Costigan, “Those Protective Trusts Which Are Miscalled ‘Spendthrift Trusts’ Reexamined,” 22 Calif. L. Rev. 471, 483 (1934) taking the view that the needs of the beneficiary should be the primary justification for such a dispositive scheme.
unmoved by claims that the rights of the dead have been invaded.\textsuperscript{25}

It is interesting to note that an inferior Pennsylvania court saw no unconstitutional impairment of a testator's rights in the application of a statute to an existing trust, although the testator's rights were necessarily modified thereby.\textsuperscript{26} The statute provides that an attachment may be issued against an interest in a spendthrift trust to satisfy a decree or judgment against the beneficiary for the support of his wife and children.

**TERMINATION OF TRUSTS**

Closely related to the problem at issue in the retroactive application of the Pennsylvania Spendthrift Statute is the question whether statutes authorizing the termination of trusts can be applied to existing trusts. If the termination will result in the involuntary extinguishment of future interests the statute probably cannot be so applied. However, if the effect of the termination is merely to convert the equitable future interests to legal future interests and the possessory tenant is not invested with any greater power over the disposal of the principal than was the trustee, there would seem to be no violation of due process in applying the statute, and no impairment of a contract obligation (assuming that a contract in the constitutional sense subsists between the remaindemen and the trustee). Likewise, the beneficiary with the present right to income or principal cannot be heard to complain of unconstitutional deprivation of property if

\textsuperscript{25} Chapter 3 \textit{supra} p. 96 et seq.


Purdon's Pa. Stat. Ann., Tit. 20, sec. 301.12 provides: "Income of a trust subject to spendthrift or similar provisions shall nevertheless be liable for the support of anyone whom the income beneficiary shall be under a legal duty to support."
the effect of the statute is to invest him with the legal title to the property in which he had previously only a beneficial interest. On the other hand, if his right to income is destroyed and the principal distributed among the remaindermen, he will be deprived of property without due process.

Ordinarily, the terms of the trust fix the period of its duration, and it will not be terminated until the expiration of that period. Termination of the trust before the time fixed is usually allowed only under certain conditions, such as where the accomplishment of the trust becomes impossible or illegal or the continuance of the trust will substantially impair the accomplishment of the purposes of the trust. Even if all of the beneficiaries are desirous of terminating the trust, the courts are unwilling to allow it if such termination would run counter to the intention of the settlor in creating the trust. The judicial rationalization is that the wishes of the settlor must control unless they run contrary to some public policy. From this it may well be gathered that the settlor who is still living at the time of the attempted application of a statute which permits the termination of the trust against his wishes, would be in a good position to assert constitutional rights. But it is difficult to see how a settlor who is deceased at the time the statute becomes effective can be said to have any constitutional rights. Nor is it reasonable to presume that a testator-donor can have any rights after his death, unless it be said, as in the Borsch case, that the termination of the trust would entail an impairment of

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27 3 Scott, Trusts, sec. 329A.
28 When such circumstances obtain, the trust may be terminated prior to the time fixed for termination even though all of the beneficiaries do not consent. The settlor or his successor in interest may have the trust rescinded where the creation of the trust was induced by fraud, duress, or mistake. Where the trust is created inter vivos the settlor may retain a power of revocation. If he does not reserve expressly or by implication a power of revocation, and the failure to reserve the power is not due to mistake or fraud, he cannot revoke without the consent of the beneficiaries. 3 Scott, Trusts, sec. 329A.
29 3 Scott, Trusts, sec. 337.
the testator's right while living to dispose of his property as he saw fit, but such reasoning is entirely fanciful.

There remains to be considered whether the trustee has such an interest in the res that the termination of the trust would deprive him of property without due process or invade some other constitutional right. In 1893 and 1897, statutes were enacted in New York which permitted the beneficiary of income from a trust, who is entitled to the remainder, to release his interest in the income thereby causing a termination of the trust. In *Metcalfe v. Union Trust Co.* the life beneficiary of a trust created in 1892, who had acquired the interests of the persons entitled to the res after her death, requested that the defendant trustee pay to her the trust funds. The court held that the statute in question was not intended to have a retroactive effect. But it was strongly asserted by several of the judges that the statute would not have been unconstitutional if given retroactive effect; that it would not have impaired the obligation of contracts; and

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30 N. Y. Laws 1893, c. 452. Laws 1897, c. 417, § 3 provided: "... Whenever a beneficiary in a trust for the receipt of the income of personal property is entitled to a remainder in the whole or a part of the principal fund so held in trust, subject to his beneficial estate for a life or lives, or a shorter term, he may release his interest in such income, and thereupon the estate of the trustee shall cease in that part of such principal fund to which such beneficiary has become entitled in remainder, and such trust estate merges in such remainder." This statute took the place of Laws 1893, c. 452, which provided that a "person beneficially interested in the whole or any part of the income of any trust heretofore or hereafter created for receipt of the rents and profits of lands or the income of personal property," who "shall have heretofore become or may hereafter be or become entitled" to the remainder in a trust fund, can release to himself all his interest in the income of the trust estate and, thereafter, the estate of the trustee is to cease and determine. The words "to any trust heretofore or hereafter created" were omitted from the 1897 statute. Laws 1897, c. 417, was repealed by Laws 1903, c. 88.

31 181 N. Y. 39, 73 N. E. 498 (1905).

It is to be noted that the *Metcalfe* case is the converse of Borsch's Estate, 362 Pa. 581, 67 A. 2d 119 (1949) *supra* note 18. In the former, the life beneficiary acquired the remainder and sought to bring about a merger of life interest and remainder and an extinguishment of the trust. In the latter, the life beneficiary sought to extinguish the life estate by what in effect amounted to an acceleration of the remainders.
that the constitutional guaranty against the deprivation of one's property without due process of law has no application to the case of the trustee because he has no property in the ordinary sense of that word. 32 "Property," said Judge Gray,

32 Gray, J., whose opinion was concurred in by O'Brien, J. A similar view was expressed by Cullen, C. J. Bartlett, J., thought that the res was property in the hands of the trustee and that the legislature could not deprive him of it. He was also of the opinion that the testator had a constitutional right that the legal title should remain in the trustee for the period of time necessary to carry out the terms of the trust. Vance, J., concurred with Bartlett, J. The other three judges expressed no views on the constitutional issue.

The inferior courts were in disagreement as to whether the statutes could be given retroactive effect. In In re Heinze's Estate, 20 Misc. Rep. 371, 46 N. Y. S. 247, 248 (1897) it was said: "It is contended in behalf of the trustee that its effect is to permit the taking of property without due process of law. This contention cannot be sustained. The trustee has no beneficial interest whatsoever in the fund except the right to receive compensation for services rendered by way of commissions. If the constitutional provision cited has any application whatever, it would apply to the rights of the parties having a beneficial property interest in the fund. The legislative enactment in question does not deprive such owners of any right of property or ownership in the fund without their consent. The owners in remainder have made an absolute assignment of their interest in the fund to the life beneficiary. The right of property of the cestui que trust to receive the income during her life has been changed by a compliance with the terms of the statute to an absolute ownership of the fund. So far from depriving her of property, the effect of the statute and proceedings thereunder has been to confer upon her additional rights of property."

In Oviatt v. Hopkins, 20 App. Div. 168, 46 N. Y. S. 959 (4th Dept. 1897) it was held that when the defendant trustee entered upon the execution of his trust, he became invested with the legal title to the trust estate, and so long as the trust thus created continued, the beneficiary's interest therein did not extend beyond the right to enforce the execution of the trust. Prior to the attempted modification of the rule by legislative enactment, an express trust could not be terminated or dissolved until the expiration of the time, or the fulfillment of the purpose, for which it was created, except in case of unforeseen exigencies which rendered the execution of a trust impossible or impracticable, in which case a court of equity might decree a dissolution. Hence it was declared that if the statute were applied to the trust in question, the trustee would be deprived of property without due process of law (N. Y. Const., Art. I, sec. 6). Since the legal title vested in the trustee, it thereby became property in his hands.

In Newcomb v. Newcomb, 33 Misc. Rep. 191, 68 N. Y. S. 430 (1900), the court held that it was constrained to follow Oviatt v. Hopkins, even though the court recognized that in spite of the peculiar provisions of the New York statutes as to the estate vested in the trustee, there is no property right in him in the true sense of the term.

The peculiar statutory provision alluded to in Newcomb v. Newcomb is N. Y. Real Prop. Law, sec. 100 which declares that "the legal estate" is vested
"suggests some unrestricted, or exclusive, right to that which has been created or acquired." A trustee exercises certain powers for the sole benefit of the cestui que trust. He has no beneficial interest and can be removed whenever, in the judgment of a court of equity, it becomes necessary. This is an exercise of the inherent power of the court and is independent of the instrument of appointment.

"Although the legal estate is in the trustee, he but possesses a naked right, which is to be exercised, not for his own benefit, but for that of another. His estate is commensurate with the trust duties imposed upon him, and it ceases when they are performed, or when they are at an end. The whole beneficial proprietorship, or interest, is in the cestui que trust, for whom he holds the estate and who has the right to enforce the performance of the trust." 33

In Brearley School v. Ward 34 the New York Court of Appeals held that a contract relation does not exist between the trustee and the creator of the trust where the trust was created by will. If the trust had been created by an inter vivos transfer and the settlor had still been alive, possibly the New York Court would have permitted the trustee the protection of the contracts clause on behalf of the settlor. The Louisiana Supreme Court, on the other hand, concluded that a devise to a trustee for the use of designated persons for life creates a relationship between the trustee and the testator that is a contractual one within the meaning of the famous case of Trustees of Dartmouth College v. Woodward, 35 and being a contractual relationship within the meaning of that

in the trustee. This statute is quoted infra note 50. Professor Richard B. Powell of the Columbia Law School testified before the House of Lords, in a case involving the application of the English income tax law to the income of a New York trust, that under this statute the cestui of a trust has no interest in the trust property or its income as property, but merely a chose in action. Archer-Shee v. Garland, [1931] A. C. 212.

34 201 N. Y. 358, 94 N. E. 1001 (1911) supra note 7.
35 1 N. H. 111, rev'd 4 Wheat. 518 (U. S. 1819).
case, the trustee, upon accepting the trust, acquires substantial rights of which he cannot be divested by a repeal of the law authorizing the creation of the trust.\textsuperscript{36} Private trusts were not recognized in Louisiana until the act of 1920,\textsuperscript{37} which authorized them but which provided that the duration of a trust shall be limited to ten years after the death of the donor, except when the beneficiary is a minor at the time of the death of the donor, in which case it shall not exceed ten years after the minor has attained majority. The 1920 act was repealed in 1935,\textsuperscript{38} and beneficiaries of trusts created under the 1920 act were declared to be entitled to a full accounting and immediate delivery of any property held by trustees appointed under the authority of that act. It was the repeal statute which occasioned the pronouncement of the Louisiana court. The exact situation is quite unlikely to be repeated in any other state, for it is inconceivable that the legislatures of the states with the common-law tradition would ever attempt to abolish trusts as such. The Louisiana decision is significant, however, because it expresses a point of view opposite to that of the Metcalfe case. The Louisiana court presupposed a contractual relationship out of the provisions of the act of 1920 which showed that the trustee was not a free agent. He could not, of his own volition, terminate a trust created under the act, nor could he resign his trusteeship except with the written consent of all the bene-


The use of the private trust device has again been made possible to a limited degree by the Trust Estates Act of 1938. La. Acts 1938, No. 81; La. Rev. Stat. 1950, Tit. 9, secs. 1791–2212. This statute is based upon the general common law of express, private trusts in the United States as stated in the American Law Institute's Restatement of the Law of Trusts, as modified and supplemented by the Uniform Trusts Act, the Uniform Principal and Income Act, and the proposed Uniform Spendthrift Trusts Act. Stubbs, "Louisiana Trusts for the Louisiana Lawyer," 1 La. L. Rev. 774, 777 (1939).
ficiaries or their legal representatives, or by order of the court after due notification, and for good cause shown.

In the respects enumerated by the court, the position of a trustee under the statute was not materially different from that of a trustee in common-law states. In the absence of express grant of such power to the trustee, either by the settlor or by statute, the trustee has no power to modify the terms of the trust or to end it. The trustee can resign only with the permission of a proper court, in accordance with the terms of the trust or with the consent of all the beneficiaries who are *sui juris*.

**THE TRUSTEE AS HAVING A VESTED INTEREST**

Does the trustee have a property interest in the *res* of the trust which will enable him successfully to assail a retroactive statute on the ground that it deprives him of constitutional rights where the beneficiaries, remaindermen, and all other interested persons do not object to the statute? The better view is that he does not have such property interest. The trustee has a bare legal title to enable him to carry out the purposes of the trust. His interest is the right to receive compensation while the trust lasts. If those who have the beneficial property do not object to the application of the statute, it seems absurd to treat the trustee as if he were the owner of an absolute title.

In nonconstitutional cases the courts certainly do not treat the trustee as absolute owner. His creditors cannot satisfy their claims from the trust property. He cannot use the land for his own purposes. His function is to tend to the

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40. 2 Scott, *Trusts*, sec. 106.
42. 1a Bogert, *Trusts*, sec. 146.
43. 2 Scott, *Trusts*, sec. 170.17.
trust property and apply its revenues as provided in the trust instrument.\textsuperscript{44} It is true that he may convey title to a \textit{bona fide} purchaser for value and thus extinguish the interests of the beneficiaries, but this result is reached not on the supposition that the trustee is owner but that it is commercially expedient to protect the third person who relies upon the appearance of ownership.\textsuperscript{45} When the sole trustee dies, the legal title may pass to his heirs or personal representatives but they are not entitled to administer the trust, merely holding title to the property pending the appointment of a new trustee by the court.\textsuperscript{46} The trustee can be removed for proper cause by the court which has supervision over the administration of trusts.\textsuperscript{47}

This does not mean that the trustee ought never to be allowed to invoke the protection of the property guarantees of the state and federal Constitutions. If the trustee is also one of the beneficiaries, he may protect his beneficial interest. If the case concerns a statute whose application would deprive the beneficiaries or remaindermen unconstitutionally of their interests, it would be appropriate, and might well be the duty, of the trustee as representative of the trust estate to demand the protection of the Constitution. Here, although ostensibly he may be protecting his interest in the \textit{res}, he is really defending the interests of the beneficial owners. Or, the case may be one in which the trustee is threatened with removal without cause on account of some unjustifiable statute. Now it is possible that he may invoke in his own name a due process clause,\textsuperscript{48} or even the contracts clause where he was named trustee in an \textit{inter vivos} transfer.

\textsuperscript{44} 4 Bogert, \textit{Trusts}, sec. 961.
\textsuperscript{45} 1 Scott, \textit{Trusts}, sec. 130.
\textsuperscript{46} 1 Scott, \textit{Trusts}, sec. 104.
\textsuperscript{47} 1 Scott, \textit{Trusts}, sec. 107.
\textsuperscript{48} See Brown v. Hummel, 6 Pa. 86 (1847). The trustees of a public trust were removed from office by special statute without cause.
Yet even here, if there is an unconstitutional invasion of interests it is not in the trustee's being deprived of the legal title to the *res*, but in the loss of privileges and emoluments which the trusteeship carries with it.\(^{49}\)

Statutes in a number of jurisdictions declare that the whole estate or interest in real property held in trust is vested in the trustee and that the beneficiary takes no estate or interest therein.\(^{50}\) This would seem to be a legislative adoption of the *in personam* theory. It would appear to make the beneficiary's interest merely a power to obtain a decree against the trustee to enforce the trust. Where such a provision obtains, the effect may conceivably be to induce the court to hold that the trustee has a constitutionally protected interest, as such, in the real property which constitutes the *res* of the trust. Professor Richard B. Powell of the Columbia Law School testified before the House of Lords, in a case involving the application of the English income tax law to the income of a New York trust, that under the New York statute the *cestui* of a trust has no interest in the trust property or its income as property, but merely a chose in action.\(^{51}\)

\(^{49}\) It would seem to be clear that, except possibly where the trustee is removed unjustifiably and without cause, the due process clause does not guarantee to the trustee the continued right to compensation. Certainly so far as trust law is concerned, a trustee has no vested right to compensation. He is subject at all times to being removed by the court for cause. 3 Bogert, *Trusts*, sec. 527. Where a trust is terminated by a court, it is the duty of the trustee to obey the terms of the decree. 4 Bogert, *Trusts*, sec. 1003. On the other hand, the trustee may in some instances have, as against the settlor, a contract right to compensation which would have constitutional protection.


The New York statute, N. Y. Real Prop. Law, sec. 100, reads: “Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust.”

However, this statute was in effect when the Metcalfe case was decided and, even so, part of the court was firmly convinced that there would have been no deprivation of property without due process or impairment of the obligation of contract in the retroactive application of a statute permitting a termination of the trust.\(^{52}\) This view seems correct. In spite of the apparent effect of a statute declaring the whole interest to be in the trustee, it would appear that the purpose is to restrict the beneficiary’s power to deal with the trust property rather than to invest the trustee with a vested property interest in the res which he would not have had in the absence of the statute.\(^{53}\)

A trustee is not an officer of the court as is an administrator or executor, but nevertheless his management of the trust property is subject to control and supervision by the court.\(^{54}\) He is subject to the statutes which the legislature may from time to time pass regulating the mode of administering the trusteeship. It has been held that a statute which requires trustees to make annual reports to the court does not violate any constitutional rights of a trustee who became vested with the title prior to the enactment of the statute.\(^{55}\)

Obviously, the trustee of a dry legal trust (who holds his title merely because the rightful claimant has failed to take the necessary judicial steps to acquire it) has no substantial interest in the land or other thing. Such a situation may occur when a trust has been completely fulfilled and nothing

\(^{52}\) The divergent views of the inferior New York courts prior to the decision in the Metcalfe case are discussed supra note 32.

\(^{53}\) See the comments of Judge Gray in the Metcalfe case, supra p. 261.

\(^{54}\) In most of the jurisdictions having this type of statute, it is recognized that the beneficiary does have some kind of estate or interest in the property. 1a Bogert, Trusts, sec. 184.

\(^{55}\) See generally, 2 Scott, Trusts, Chapter 7.

McManus v. Park, 287 Mo. 109, 229 S. W. 211 (1920) (Held: Does not violate the provision in the Missouri Constitution prohibiting retroactive laws because it is purely remedial); Greenamyre's Estate, 133 Neb. 693, 276 N. W. 686 (1937).
remains but the conveyance of the title to the beneficiaries, or when title has been acquired under circumstances where equity imposes a duty to hold the title for another. A statute which declares title to be transferred to and vested in the one who previously had the power to compel such transfer by an application to the proper tribunal is not unconstitutional on the ground that it invades any rights of the trustee. 56

Likewise, where the sole trustee of an active trust dies and title passes under the common law to his heirs, they hold as bare trustees pending the appointment of a new trustee by the court 57 and have no vested interest in the premises. Consequently, the heirs can claim no deprivation of constitutional rights if the legislature divests them of legal title. 58

STATUTES WHICH AUTHORIZE THE SALE, MORTGAGE, OR LEASING OF TRUST PROPERTY

Courts of equity have sometimes authorized trustees to depart from the stipulations of the settlor, and even to act contrary to his expressed wishes, where exigencies have arisen which made departure from the directions of the settlor necessary to the carrying out of the purpose of the trust. 59 It is assumed that the settlor would have assented to the departure in preference to a frustration of the purpose of the trust. Courts of equity will direct the sale of the trust

56 Trustees of Presbytery of Jersey City v. Trustees of the First Presbyterian Church of Weehawken, 80 N. J. L. 572, 78 Atl. 207 (Sup. Ct. 1910).
57 1 Scott, Trusts, sec. 104.
58 Reformed Protestant Dutch Church v. Mott, 7 Paige 77 (N. Y. 1838).
59 Marsh v. Reed, 184 Ill. 263, 56 N. E. 306 (1900). The settlor expressly provided in the will which set up the trusts that the trustees should not execute leases of the premises to run for periods exceeding ten years. It subsequently developed that rentals to be derived from such short term leases were inadequate to carry out the purposes of the trusts, but that ample income could be derived from the premises if the trustees might execute ninety-nine year leases. Held: Trustees could execute ninety-nine year leases.
lands when lapse of time or changes as to the condition of
the property have made it prudent and beneficial to alienate
the lands.\textsuperscript{60} The same power exists in the legislature. In
instances where a sale of the trust lands would promote the
interests of all parties concerned, and beneficiaries and
remaindermen do not object, statutes authorizing sale are
valid when applied to existing trusts.\textsuperscript{61} The purchaser takes
free of the trust.\textsuperscript{62} The power to authorize a sale certainly
includes the power to authorize the execution of a mort­
gage \textsuperscript{63} or the execution of a lease.\textsuperscript{64}

The question might well be asked whether there can really
be any serious doubt as to the constitutionality of a statute
which retroactively authorizes a sale, mortgage, or lease if
the settlor is dead (as is usual when the problem arises) and
there is no dissent on the part of beneficiaries and remainder-
men. The courts have not speculated at this point about
possible rights of the deceased. The cases sustaining such
retroactive legislation where the beneficiaries and remainder-
men have assented are almost devoid of discussion. The
assumption is simply made that the legislature is doing what
the settlor would have done or would have authorized if he
had anticipated that the necessity would arise.

Restrictions in the trust instrument against sale, mortgag-
ing, or leasing do not prevent the trustee's taking advantage

\textsuperscript{60} Stanley v. Colt, 72 U. S. 119 (1866); 2 Scott, \textit{Trusts}, sec. 190.4; 3

\textsuperscript{61} Stanley v. Colt, 72 U. S. 119 (1866); Kerr v. Kitchen, 17 Pa. 433
(1851); Norris v. Clymer, 2 Pa. 277 (1845); In re Van Horne, Petitioner, 18 R. I. 389, 28 Atl. 341 (1893).

On Jan. 1, 1947, statutes providing for sale of the complete ownership of
trust \textit{res} for reinvestment existed in eighteen jurisdictions: Ala., Conn., Del.,

\textsuperscript{62} Kerr v. Kitchen, 17 Pa. 433 (1851); Norris v. Clymer, 2 Pa. 277
(1845); Sergeant v. Kuhn, 2 Pa. 393 (1845); In re Van Horne, Petitioner, 18 R. I. 389, 28 Atl. 341 (1893).

\textsuperscript{63} Russell v. Russell, 109 Conn. 187, 145 Atl. 648 (1929); Long v. Sim-
mons Female College, 218 Mass. 135, 105 N. E. 553 (1914).

\textsuperscript{64} See Freeman's Estate, 181 Pa. 405, 37 Atl. 591 (1897).
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of a statute authorizing any of those acts, 65 provided that the limitations do not create a condition upon the happening of which the estate is to be forfeited. 66 Indeed, the only reason why the trustee would need to take advantage of the statute would be on account of some supposed defect of power resulting from a limitation expressed or implied in the trust instrument.

It cannot be safely assumed, however, that in every instance the courts will sustain retroactive legislation authorizing sales, mortgages, or leases, merely because the remaindermen and beneficiaries do not object. In the more recent cases where such legislation has been sustained, necessity was shown, 67 the trustees acted under court supervision, and the proceeds were devoted to trust purposes and held subject to the same conditions as the original res. Out of respect for stability of property interests, the courts would be unlikely to permit an unnecessary or merely capricious sale, or the

65 Stanley v. Colt, 72 U. S. 119 (1866) (restriction against sale); Russell v. Russell, 109 Conn. 187, 145 Atl. 648 (1929) (language of will indicated that the testator did not intend that any further encumbrances be placed on property).


Stanley v. Colt, 72 U. S. 119 (1866): Buildings old and dilapidated and earning only small income. Tenants would not rebuild because trust instrument contained restriction that no lease in excess of thirty years could be executed. Cestui could not rebuild. Trustees desired to sell.


In re Van Horne, 18 R. I. 389, 28 Atl. 341 (1893): House and lot devised to church for parsonage became unsuitable for this purpose because of change in neighborhood. Trustees desired to sell and use money to acquire parsonage in a more suitable neighborhood.

In the early Pennsylvania cases cited supra notes 61 and 62, the reason for the sale seems to have been more a matter of expediency than of necessity. The sales were authorized by special statutes. So common was this sort of legislation that the courts hesitated to strike it down for fear of the effect on titles. Norris v. Clymer, 2 Pa. 277 (1845). See Chapter 3, note 244, and Chapter 4, note 77 supra.
encumbrancing of the trust land with mortgages and long term leases unless this were reasonably expedient.

The legislature cannot deprive the beneficiary of his interest involuntarily by authorizing a sale of the land and application of the proceeds to other purposes. The validity of legislation authorizing the sale of land in which there are future interests, is discussed elsewhere.

STATUTES DESIGNED TO PROTECT BONA FIDE ALIENEES OF THE TRUST RES

The legislature may apply as to existing trusts, reasonable legislation designed to protect third persons who deal with the trust res although the effect of such legislation may somewhat detrimentally affect the right of the beneficiary to redress misconduct of the trustee. It has been held that where the grantee of the trustee continues to have the burden of showing that he is a bona fide purchaser for value, a statute is valid which provides that the grantor shall be presumed to be the owner in fee if the deed by which he holds title desig-

68 General Board of State Hospitals for the Insane v. Robertson, 115 Va. 527, 79 S. E. 1064 (1913). Land was devised to the trustees of the state hospital for the use of the inmates. Subsequently, by two acts of legislation the trustees were authorized to sell the lands in question and to use the proceeds for the purposes of an epileptic colony. Held: The proposed diversion would deprive inmates of property without due process.

But see Freeman's Estate, 181 Pa. 405, 37 Atl. 591 (1897). The trust was created some two years after the enactment of a statute which authorized the court to decree a sale where property is held in trust and "one or more persons required to consent ... unreasonably withhold consent." Act of 1853, P. L. 503. The will provided that no sale of any part of the real estate held in trust should be made without the consent in writing of the several cestuis. The trustees desired to make a long term lease (which the court considered to amount to a sale). Held: Statute does not unconstitutionally divest estates of parties sui juris of their property without their consent. It is a regulation merely of joint rights where the joint owners cannot agree in the control and disposition of the property. It defeats or interferes with the individual rights or property no differently and no further than does any other mode of changing their rights to severalty or of regulating the management until that is done. Furthermore, added the court, the settlor was an experienced lawyer and knew that the powers of leasing and selling which he gave to the trustee could be supplemented by the court.

69 Chapter 4, p. 163.
nates him merely as “trustee” and no beneficiary is named or indicated.  

The Illinois Torrens Act requires that when an instrument is filed in the registrar’s office for the purpose of effecting a transfer of an interest in registered lands, and it shall appear that such transfer is upon trust, the registrar shall, unless such instrument expressly directs to the contrary, note in the certificate the words “in trust.” When such land is thereafter to be transferred, it is provided that the registrar shall not issue a new certificate nor register title except in pursuance of the order of some court, or upon the written opinion of two examiners that such transfer is in accordance with the true intent and meaning of the trust. The registration is declared to be conclusive in favor of the grantee and of those claiming under him in good faith and for a valuable consideration that such transfer is in accordance with the true intent and meaning of the trust. In People ex rel. Deneen v. Simon, the Illinois Supreme Court stated that the statute did no more than to change the law as to notice and to abrogate the rule in equity requiring the purchaser of trust property to see to the application of the purchase money, both of which alterations of the law are well within the legislative capacity. It might be added that even in the absence of statute, the modern position of the courts is that the buyer is under no duty to inquire as to the purpose to which the proceeds are to be applied or to act as a surety to the cestui que trust that the terms of the trust will be adhered to.


The court inferentially upheld also sec. 2 of the statute, which provided in effect that if the title of the grantee of a trustee is not called into question within five years after the recording of the grantee’s deed, the presumptions shall become conclusive that the person designated as trustee is sole owner. This section appears clearly sustainable as a limitation statute.


72 176 Ill. 165, 52 N. E. 910 (1898).

73 3 Bogert, Trusts, sec. 747.
Chapter 6

Estates and Interests Arising From Marriage

"The marriage relation is one of the most important of those fundamental social facts or relations upon which both civilized society and government rest. The interest of the public in its preservation and in the fair and equitable enjoyment and control of property rights by the husband and wife respectively, to the end that the relation may be permanent and satisfactory, is very great; consequently there can be no doubt of the right of the public to control and regulate both the relationship itself and the property rights of the parties to the relation by such reasonable and appropriate regulations as do not unnecessarily interfere with those rights of person and property which both state and federal Constitutions were framed to protect."  

Hardly any area of legislative reformation of the common law has provoked so much constitutional litigation as the statutes modifying the common-law marital estates. Beginning with the middle of the nineteenth century and extending past the start of the twentieth, there was a veritable flood of cases contesting one or the other aspect of the statutes which altered the property rights of husband and wife to accord with modern concepts of public policy. Much of this litigation concerned problems no longer likely to recur, but it is essential that it all be mentioned in order that the discussion shall be complete.

The courts should always take into consideration the degree to which the welfare of the state depends upon wise policies in respect to the marital relation and the property in-

terests arising therefrom. Consequently, it might be sup­posed that the courts will sustain any legislation which is equitable and works an adjustment of the husband’s and wife’s property interests which most spouses would approve. However, the courts, at least in the past, have tended to ig­nore the public interest and to concentrate exclusively on the problem of the “vested interests” of the spouses with the result that reasonable statutes have been invalidated when given retroactive force. Some of the earlier cases even found that modification of the marital estates would impair the obligation of the marriage contract.2 However, since the United States Supreme Court declared in Maynard v. Hill,8 that the marriage contract is not a contract within the constitutional prohibition against impairing the obligation of contracts, the contracts clause has been rarely resorted to as a protection against the retroactive application of legislation affecting the marital estates.

HUSBAND’S ESTATE JURE UXORIS

The husband’s common-law interest in his wife’s real property (and personalty) has been abrogated or substantially abolished by the Married Women’s Property Acts assur­ing to the wife the control of her property as if she were unmarried.4 It is thus only of academic interest now whether


The curtesy cases have almost always been made to turn on the question of “vested rights” or “due process.” Impairment of the obligation of the marriage contract has rarely been injected into the discussion. However, in the dower cases the courts sometimes have held that marital rights are contractual in nature. See cases discussed infra note 42.

3 125 U. S. 190 (1888).

4 2 Powell, Real Property, ¶ 214. For a list of the statutes see 3 Vernier, American Family Laws, pp. 171–185 (1935). For a history of the estate jure uxoris see Haskins, “The Estate by the Marital Right,” 79 U. of Pa. L. Rev. 345 (1949). Prof. Haskins suggests that an occasional relic of the old rules appears in those jurisdictions which require the wife to obtain her husband’s
the husband's estate *jure uxoris* might be abolished by the legislature, but a century ago the question was vital.

The common law gave to the husband a life estate during coverture in all the freehold estates of inheritance which his wife had at the time of the marriage and which she subsequently acquired during coverture.\(^5\) He was entitled absolutely to the rents and profits; his right to possession was exclusive. He could convey his estate without the consent of his wife. He became the owner of her personalty.\(^6\) For certain purposes he also became owner of her chattels real.\(^7\) In brief, the husband's power over his wife's property was very considerable.\(^8\) The Married Women's Property Acts, when applied in case of existing marriages and property already acquired by the wife, were often held to be unconstitutional

\(^5\) The legislature might be abolished by the legislature, but a century ago the question was vital.

\(^6\) The common law gave to the husband a life estate during coverture in all the freehold estates of inheritance which his wife had at the time of the marriage and which she subsequently acquired during coverture. He was entitled absolutely to the rents and profits; his right to possession was exclusive. He could convey his estate without the consent of his wife. He became the owner of her personalty. For certain purposes he also became owner of her chattels real. In brief, the husband's power over his wife's property was very considerable. The Married Women's Property Acts, when applied in case of existing marriages and property already acquired by the wife, were often held to be unconstitutional.

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\(^6\) He also had the power to bring suit in his own name to recover personalty to which his wife was entitled. Jackson's Adm'rs v. Sublett, 10 B. Mon. 467 (Ky. 1850); Leete v. State Bank, 115 Mo. 184, 21 S. W. 788 (1892); Westervelt v. Gregg, 12 N. Y. 202 (1854); Dilley v. Henry's Ex'r, 25 N. J. L. 302 (Sup. Ct. 1855). If he recovered, the property belonged to him absolutely. Leete v. State Bank; Westervelt v. Gregg. Only if he died before reducing the chattel to possession, his wife surviving him, could she claim the chattel. Leete v. State Bank; Dilley v. Henry's Ex'r; Westervelt v. Gregg.

\(^7\) He could dispose of them during his lifetime without her consent. They were liable for his debts. The rents and profits belonged to him. After her death the chattels real became his absolutely. However, if she survived him, and he had not disposed of them during his life, they belonged to her. 2 Tiffany, *Real Property*, sec. 484 (3d ed.).

\(^8\) However, courts of equity permitted property of every kind to be settled upon the wife to her own separate use free from control by the husband, and free from liability for his debts. Although at one time it was thought that the legal title had to be vested in trustees for this purpose, it became settled that if property was given or devised to a married woman for her separate and exclusive use, even without the intervention of trustees, her interest would be protected from the claims of her husband and his creditors. 2 Tiffany, *Real Property*, sec. 485 (3d ed.). While at law the husband might have been deemed to have an estate in his wife's separate property, it is manifest that the legislature could have constitutionally abolished such an estate, inasmuch as the husband was a mere trustee, the beneficial interest being in the wife.
so far as they purported to deprive the husband of the valuable privileges accorded him by the common law. It was held that to allow the wife to convey her land without her husband's consent would deprive him of property without due process. The husband's privilege to sue in his own name to

9 It was held that the husband had a vested property right in his wife's personal property where the marriage and acquisition occurred prior to the Married Women's Statute and that this interest could not be taken from him without his consent, except in violation of constitutional provisions against the taking of private property without due process. Buchanan v. Lee, 69 Ind. 117 (1879); Holmes v. Holmes, 4 Barb. 295 (N.Y. 1848).

The cases were not in accord as to whether the husband's power to reduce his wife's chattels to possession was a vested interest which could not be taken from him without his consent. Some cases proceeded on the theory that the marriage contract clothed the husband with the power to reduce his wife's chattels to possession and that therefore the Married Women's Act could not be applied where the marriage occurred prior to the statute. Sperry v. Haslam, 57 Ga. 412 (1876); Jackson's Adm'r s v. Sublett, 10 B. Mon. 467 (Ky. 1850); Dunn v. Sargent, 101 Mass. 336 (1869); Leete v. State Bank, 115 Mo. 184, 21 S.W. 788 (1892); Westervelt v. Gregg, 12 N.Y. 202 (1854); Norris v. Beyea, 13 N.Y. 273 (1855); O'Connor v. Harris, 81 N.C. 279 (1879).

The opposing line of cases was based upon the proposition that the marriage contract did not give the husband any interest in his wife's chattels; but all that he had before the statute took effect was a power which the common law gave him to acquire an interest by taking the necessary steps if he chose to do so. Price v. Sessions, 3 How. 624 (U.S. 1844); Percy v. Cockrill, 53 Fed. 872 (8th Cir. 1893); Clarke v. McCready, 12 Smedes & M. 347 (20 Miss. 1849); Dilley v. Henry's Ex'r, 25 N.J.L. 302 (Sup. Ct. 1855); Goodyear v. Rumbaugh, 13 Pa. 480 (1850); Mellinger v. Bausman, 45 Pa. 522 (1863); Alexander v. Alexander, 85 Va. 353, 7 S.E. 335 (1888); Keagy v. Trout, 85 Va. 390, 7 S.E. 329 (1888); Trapnell v. Conklyn, 37 W.Va. 242, 16 S.E. 570 (1890).

Where the wife's title to the personalty accrued subsequent to the statute (although the marriage occurred prior thereto), the cases were in accord that the husband had no right to the chattel. Winn v. Riley, 151 Mo. 61, 52 S.W. 27 (1899); Holliday v. McMillan, 79 N.C. 315 (1878).

10 Hubbard v. Hubbard, 77 Vt. 73, 58 Atl. 969 (1904). The statute purported to authorize the court of chancery, in its discretion, upon the petition of a married woman, to empower her to convey her real estate by separate deed as effectively as if the deed were executed by herself and her husband. The petitioner was no longer living with her husband because of his fault, but they were not divorced. Held: Statute violated the Fourteenth Amendment. "We are not aware of any instance where the law has attempted to subject the right of a person to retain his estate to the decision of a magistrate unguided and unregulated save by his own sense of fairness and justice. The grant of discretionary power in the legal sense apparently implies the existence of certain well-understood principles within which it should be exercised.
recover possession of real property of his wife was declared to be a vested right.\textsuperscript{11} The right to rents and profits was held not to be divestible by the legislature.\textsuperscript{12} One court even went so far as to hold that land which the wife owned at the time of marriage could not be regarded as her property within the meaning of the Married Women's Act; the land must rather be considered to belong to her husband by virtue of the marriage and so not within the scope of the statute.\textsuperscript{13}

But when a statute declares that a husband's property may be taken from him and bestowed upon his wife in the discretion of the chancellor, what are the well-understood principles which are to govern him in the exercise of his discretion?" (77 Vt. 73, 78, 58 Atl. 969, 970.)

Erwin v. Puryear, 50 Ark. 356, 7 S. W. 449 (1887). This was a suit brought by the husband and wife to recover land from a grantee of the husband on the ground that the husband had no interest to convey because the common-law marital interest had been excluded. Held: Vested rights cannot be taken away.

Beale v. Knowles, 45 Me. 479 (1858). But see Peck v. Walton, 26 Vt. 82 (1853). This was a bill to foreclose a mortgage upon land belonging to the wife, the mortgage being executed by the husband alone since the passage of a statute which provided inter alia that no conveyance made during coverture by the husband of any interest in real estate belonging to his wife shall be valid, unless the wife join in the deed. The statute was held to be applicable here and that it was not unconstitutional as so applied. "But we do not regard this statute as having deprived the husband of any rights, which were not clearly subject to the control of the legislature. The husband is not in any sense deprived of the estate, which he might have in any of his wife's property, or of the right to any estate in her prospective acquisitions. The statute only provides a special mode of conveying this particular estate. And of this no man can complain. The legislature may at all times prescribe the mode of conveying property, and especially real property." (26 Vt. 82, 86.)

\textsuperscript{11} Arnold v. Willis, 128 Mo. 145, 30 S. W. 517 (1895); Vanata v. Johnson, 170 Mo. 269, 70 S. W. 687 (1902).


\textsuperscript{13} Rose v. Rose was an action brought by a wife against her husband, from whom she was separated, to recover possession of her land, which he refused to surrender. Held for the husband.

Van Note v. Downey, 28 N. J. L. 219 (Sup. Ct. 1860). This was an action for trespass for taking cranberries from plaintiff's land. Defendant relied upon a license from plaintiff's wife. The premises in question belonged to her at the time of her marriage to plaintiff. She was no longer living with him because of his cruelty, but was not divorced.
There were a few courts which held that the husband's right to future rents and profits from land owned by the wife at the time of the statute was a mere possibility or expectancy which might never accrue and hence which could be defeated by legislation any time before accrual. One of these cases, however, was decided in 1915, by which time several previous statutes in this state had left nothing of the husband's estate *jure uxoris* except the power as head of the family to rent out his wife's lands and to collect the rents for the benefit of the family. In another of these cases, the person contesting the legislation was not the husband, but a creditor of the husband who sought to attach crops on the wife's land in satisfaction of the husband's debt. The court declared that:

"Statutes of this class rest upon the right of the state to regulate the marriage relation, and are liable to be altered


15 Parlow v. Turner: "We deem it unnecessary to consider how far the matter may properly rest upon the extraordinary power which the legislature possesses over the marriage relation and the property rights of the pair *inter se*, for the public good . . . It may be that the husband, by living apart from his wife, without her fault, abandoned his powers and duties as governor of the family, and hence his right to either rent out the land, or to collect the rents; but we do not decide this question, preferring to rest our judgment upon the broader ground." (132 Tenn. 339, 348, 178 S. W. 766, 768 (1915).) In the earlier case of Taylor v. Taylor, there was also grave doubt expressed that the husband had a vested right before the passage of the statute in question to the rents and profits of his wife's land. It was thought that an earlier statute had substantially destroyed the estate *jure uxoris* in the rents and profits.

16 Niles v. Hall, 64 Vt. 453, 25 Atl. 479 (1892).

The weight of authority was that the Married Women's Statutes exempting the wife's land from the debts and liabilities of the husband could not be applied in case of debts contracted by the husband before the passage of the statute. It was held that to do so would impair the obligation of the creditor's contract. Cunningham v. Gray, 20 Mo. 170 (1854); Bouknigh v. Epting, 11 S. C. 71 (1878). But as to debts contracted subsequent to the statute, it was held that there was no impairment of the obligation of the creditor's contract to apply the statute. Hitz v. National Bank, 111 U. S. 722 (1883); Peck v. Walton, 26 Vt. 82 (1853). ("A subsequent creditor acquires no such interest in the husband's vested rights in his wife's property, or future acquisi-
whenever the good of that relation is thought to require it. It would seriously abridge this beneficent control of the state to hold that a creditor of the husband has an interest in the prospective products of the wife's realty which cannot be taken away by legislation."  

That the legislature might have a paramount interest in altering some of the incidents of the common-law marital estate, however, was rarely conceded in the *jure uxoris* cases.

The decisions were in accord that the husband had no interest by virtue of the marriage contract in the future acquisitions of the wife. Hence, it was held that the Married Women's Act could be applied in case of land acquired by the wife subsequent to the statute although the marriage had occurred prior thereto.  

**CURTESY**

Upon the birth alive of a child capable of inheriting the land of which the wife is seized during coverture in fee simple or fee tail, the husband at common law acquires an estate for his own life in his wife's land known as curtesy initiate.  

The estate *jure uxoris* terminates with the death of the wife, whereas the estate of curtesy initiate, upon the death of the
wife (the husband surviving), merely changes its name to curtesy consummate and continues to endure for his lifetime.

Curtesy initiate as it existed at common law before the universal statutory modifications did not confer a very much greater power of control over the wife’s property while she was alive than did the estate *jure uxoris*. The husband had by virtue of marriage quite ample powers of disposal as it was. But a distinction was made between the two estates. It was said that before the birth of issue the husband had an estate through the right of his wife, but that after the birth of issue he held in his own right as if his wife had conveyed the estate to him for a valuable consideration.20

The courts would not allow the Married Women’s Act to divest the husband of the valuable incidents of the estate by the curtesy initiate, which had vested before the passage of the Act,21 as depriving him of the sole power to bring suit to recover the wife’s lands,22 or as depriving him of the right to the rents and profits.23 It was also held that creditors could not be divested of the right to look to the husband’s estate by curtesy initiate for satisfaction of the husband’s debts.24

The husband’s interests in the wife’s land were protected to a truly remarkable degree. In *White v. White*25 the plaintiff instituted proceedings against her husband to establish what she claimed were her rights in relation to certain land she had inherited prior to the Married Women’s Act, and to restrain the defendant from interfering with the same. She alleged in her complaint that the defendant had ejected her from the premises by force and refused to allow her to re-

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20 Shortall v. Hinckley, 31 Ill. 219 (1863); Rose v. Sanderson, 38 Ill. 247 (1865); Wyatt v. Smith, 25 W. Va. 813 (1885).
21 Junction R. R. Co. v. Harris, 9 Ind. 184 (1857).
22 Noble v. McFarland, 51 Ill. 226 (1869).
23 White v. White, 5 Barb. 474 (N. Y. 1849).
25 5 Barb. 474 (N. Y. 1849).
turn and that he was in possession enjoying the rents and profits. Nevertheless, it was held that the Married Women’s Act could not be applied here for to do so would violate the Constitution of New York which says that no one shall be deprived of any rights or privileges unless by the law of the land.26

“I do not hesitate, in conclusion, to declare that the people of the state of New York have never delegated to their legislature the power to divest the vested rights of property legally acquired by any citizen of the state, and transfer them to another, against the will of the owner. The legislature of this state can only lawfully exercise such powers as have been confided to it by the sovereign will of the people; and when it usurps powers not intrusted to it by the sovereign power, its acts are as utterly void as those of the most inferior magistrate in the land, in a case where he has transcended his jurisdiction.” 27

However, since marriage, seizin of the wife, and birth of issue are all requisite to create an estate by the curtesy initiate, it was held that marriage and birth of issue alone could not vest the husband with an interest in the future acquisitions of his wife. Hence it was deemed to be permissible for the legislature to provide that all property thereafter acquired by a married woman shall constitute her separate estate free from control by her husband.28

The Married Women’s Acts have relegated to history the valuable common-law privileges which the tenant by the curtesy initiate enjoyed in his wife’s land during her lifetime. The institution of curtesy itself has ceased to be a source of estates for life in a majority of states, and even in those states where curtesy is still recognized, statutes have made great

27 5 Barb. 474, 485 (N. Y. 1849).
28 Allen v. Hanks, 136 U. S. 300 (1889) (“... that such regulations do not take away or impair any vested right of the husband, is, in our judgment, a proposition too clear to require argument or the citation of authorities to support it.” p. 310).
changes in the common law.\textsuperscript{29} The trend of legislation is definitely toward the abolition of curtesy. Can a statutory change be applied so as to affect the rights of a man whose wife dies subsequent to the effective date of the statute?

The cases are in agreement that if no child has been born of the marriage at the time of the act abolishing curtesy, the husband has no vested right to an estate for life in the lands of his wife if he survive her. The statute is valid to the extent that it abolishes the right of curtesy and gives him a dower share or gives him curtesy subject to a power of his wife to will all of her property.\textsuperscript{30}

It is also held that the husband does not acquire any vested rights to a tenancy by the curtesy in lands acquired by the wife subsequent to legislation abolishing curtesy, although marriage and birth of issue occurred before the passage of the statute.\textsuperscript{31}

\textsuperscript{29}Powell, \textit{Real Property}, \textsuperscript{2} p. 218. Powell states (as of Jan. 1, 1952) that curtesy has completely ceased to exist in twenty-nine states and Alaska. He groups these states as follows: eight community property states, Ariz., Cal., Idaho, La., Nev., N. M., Tex., Wash.; twelve states, including Alaska in which the surviving husband takes a distributive share in his wife's property, Colo., Ga., Mich., Miss., Mont., N. D., Okla., S. C., S. D., Utah, Vt., Wyo.; nine states in which the husband has an interest in land owned by the wife during coverture, but this interest is defined in terms of some fraction of fee ownership, Fla., Ill., Ind., Iowa, Kan., Me., Minn., Neb., Pa. Four states are listed in which the institution of curtesy is only an indirect or infrequent source of life estates, Conn., Mo., N. H., N. Y. Seventeen jurisdictions remain in which the institution of curtesy is still a potential source of estates for life, Ala., Ark., Del., D. C., Hawai., Ky., Md., Mass., N. J., N. C., Ohio, Ore., R. I., Tenn., Va., W. Va., and Wis. In Del., N. J., Ore., and Va. the prerequisite of issue born alive has been abolished. In twelve of these jurisdictions the estate given to the husband applies only to a fraction (usually one-third) of the wife's lands, instead of to all of them, Ark., Del., Hawai., Ky., Md., Mass., N. J., Ohio, Ore., Va., W. Va., Wis. In Tenn. and Hawaii the wife can bar curtesy by \textit{inter vivos} conveyance, and by either \textit{inter vivos} or testamentary conveyances in Ark., D. C., and Wis. In the remaining eleven states, the husband's curtesy cannot be barred by either deed or will of the wife, without the husband's consent.

\textsuperscript{30}Henson v. Moore, 104 Ill. 403 (1882); Phillips v. Farley, 112 Ky. 837, 66 S. W. 1006 (1902); Hathorn v. Lyon, 2 Mich. 93 (1851); Richardson v. Richardson, 150 N. C. 549, 64 S. E. 510 (1909).

\textsuperscript{31}Scaife v. McKee, 298 Pa. 33, 148 Atl. 37 (1929), appeal dismissed 281 U. S. 771 (1929); Jackson v. Jackson, 144 Ill. 274, 33 N. E. 51 (1893);
When we come, however, to the cases wherein the husband is a tenant by the curtesy initiate when the statute abolishing curtesy goes into effect (i.e., acquisition of the property by the wife and birth of issue occurred before the statute), we find the authorities in discord. Some cases hold that a tenant by the curtesy initiate cannot be deprived of curtesy consummate. The dearth of reasoning in these cases makes it difficult for one to see how the expectancy of the husband to have a life estate in his wife's land if he should outlive her can be considered a vested right. The explanation must lie in the theory that upon birth of issue, the husband acquires a life estate for *his* life, an estate which is perfected without regard to the wife's death and in no way enlarged by her death. Yet this reasoning seems entirely too anachronistic to account for the holding in the New Jersey cases cited below, which, it will be observed, were decided quite recently. Curtesy consummate was not abolished in that state until 1927, but the husband's estate of freehold during his wife's lifetime was abolished by the Married Women's Act of 1852.

By 1927, then, curtesy in New Jersey differed from dower only in the respect that the husband was entitled to a life estate in all the lands of which his wife died seized rather

Mitchell v. Violett, 104 Ky. 77, 47 S. W. 195 (1898); Thurber v. Townsend, 22 N. Y. 517 (1860); In re Curtis' Will, 61 Hun 372, 16 N. Y. S. 180 (1891); Moninger v. Ritner, 104 Pa. 298 (1883).

32 Anastasia v. Anastasia, 138 N. J. Eq. 260, 47 A. 2d 879 (Ch. 1946); Walker v. Bennett, 107 N. J. Eq. 151, 152 Atl. 9 (Ch. 1930). N. J. Pamph. Laws 1927, p. 128, as amended by Pamph. Laws 1928, p. 380, provides that the husband of a woman who dies intestate, or otherwise, shall be endowed for life of one-half of the land of which his wife "was seized of an estate of inheritance, at any time during coverture" whether issue is born alive or not. N. J. Rev. Stat. 1937, 3:37-2.

Jackson v. Jackson, 144 Ill. 274, 33 N. E. 51 (1893) (surviving husband given a life estate in one-third of land of which wife was seized during coverture); Mitchell v. Violett, 104 Ky. 77, 47 S. W. 195 (1898) (surviving husband given life estate in one-third of land which was seized during marriage).

33 Laws 1852, p. 407.
than in one-third. However, New Jersey is the only state in which it is held that inchoate dower is a constitutionally indivestible interest.\(^{34}\) New Jersey seems to have greater regard for property interests emanating from the marital estate than do her sister states.

An opposing line of cases maintains that the legislature may pass an act which will prevent the accrual of curtesy consummate on the wife’s death. These holdings are based upon the proposition that the Married Women’s Acts have divested curtesy initiate of all its valuable privileges, leaving only an uncertain interest, a bare expectancy, very much like dower.\(^{35}\) In *Day v. Burgess*\(^{36}\) the Tennessee Supreme Court described the husband’s right to curtesy as an heritage of the feudal age, having no basis in natural or moral right. The Supreme Court of Pennsylvania has concluded curtesy and dower are equally subject to legislative modification.\(^{37}\)

\(^{34}\) Walker v. Bennett, 107 N. J. Eq. 151, 152 Atl. 9 (Ch. 1930).

\(^{35}\) McNeer v. McNeer, 142 Ill. 388, 32 N. E. 681 (1892) (surviving husband limited to dower); Hill v. Chambers, 30 Mich. 422 (1874); Duncan v. Duncan, 324 Mo. 167, 23 S. W. 2d 91 (1929); Day v. Burgess, 139 Tenn. 559, 202 S. W. 911 (1918).

\(^{36}\) 139 Tenn. 559, 202 S. W. 911 (1918) *supra* note 35.

\(^{37}\) Moninger v. Ritner, 104 Pa. 298 (1883). This case concerned a statute which provided that a married woman, who has been deserted by her husband, and who has been decreed to have the privileges of a *feme sole* trader, may convey, without her husband’s joining in the deed, a good title to her separate real estate which she acquires during coverture, free from any subsequent claim by her husband as tenant by the curtesy. Pa. Act of 1855, P. L. 430. The husband in the case, who deserted his wife in her lifetime, came back after her death to claim his curtesy from the remote grantee of his wife. As a violator of the marriage contract he was not in a very good position to rely on the sanctity of the contract and the rights flowing from it. “It is, therefore, a curious travesty on the constitutional powers of this Commonwealth to say that the legislature can make no provision for the support of an abandoned wife, if such provision happens to impinge upon some marital right of the derelict husband,” said the court.

In a decision rendered by the Pennsylvania Supreme Court in 1929, involving a constitutional problem similar to that in Moninger v. Ritner, it was declared that marriage is not such a contract as is contemplated by the constitutional provisions, and that the property rights arising solely by reason
The problems in regard to the abolition of curtesy could be resolved without difficulty if the husband were held to take curtesy consummate by inheritance. However, it is firmly established at common law that the husband is not an heir of his wife.\textsuperscript{38} There is really no reason, even so, why a court today should have any difficulty in sustaining the statute abolishing curtesy. Conceding that the husband has a present interest in the expectancy of an estate in his wife's land upon her death, this interest stands no better in modern law than does dower, which the courts have always held to be subject to legislative control. Where the requirement of issue has been abolished (which is true in a number of jurisdictions still recognizing curtesy) there is no difference at all between curtesy and dower except perhaps as to the portion of the land of the decedent spouse subject to the respective estate. Curtesy has outgrown its usefulness as an institution with the decline of the dominance of the male.\textsuperscript{39}

After the death of the wife, it is probably too late to apply the statute abolishing curtesy. Although there are no cases involving curtesy, this is the result indicated in the dower cases, where the husband's death preceded the effective date of the statute.

**Dower**

Quite unlike the solicitude which the courts have felt for the common-law interests of the husband in his wife's land of marriage are within legislative control. Scaife v. McKee, 298 Pa. 33, 148 Atl. 37 (1929), appeal dismissed 281 U. S. 771 (1929).\textsuperscript{38} Reese v. Stires, 87 N. J. Eq. 32, 103 Atl. 679 (Ch. 1917); Hopper v. Gurtman, 126 N. J. L. 263, 18 A. 2d 245 (Err. & App. 1941). 2 Tiffany, *Real Property*, sec. 552 (3d ed.).

\textsuperscript{39} Professor Powell suggests that the states still having traces of curtesy would do well to substitute a distributive share in the wife's assets as the proper provision for the surviving husband, giving this share such protection against destruction by will of the wife as social policy may dictate. 2 Powell, *Real Property*, ¶ 219.
is their attitude towards dower. Dower, it is professed, is a sacred institution, yet it seems that only after the husband's death does dower rise to the dignity of a vested estate which cannot be divested by the legislature. Inchoate dower is subject to legislative diminution and may even be abolished without any estate at all allowed to the widow in her husband's property. With almost monotonous uniformity, the cases declare that it is competent for the legislature to modify the law on the subject of dower in a manner unfavorably affecting the wife, even after the acquisition by the husband of the land in which dower is claimed. In doing so, the legislature does not impair the obligation of a contract nor deprive the wife of any right of property vested in her.

40 Randall v. Krieger, 23 Wall. 137 (U. S. 1874) (sustaining a curative statute which validated a void power of attorney); Adams v. Adams, 147 Fla. 267, 2 So. 2d 855 (1941), appeal dismissed for want of a substantial federal question, 314 U. S. 572 (1941); Fletcher v. Felker, 97 Fed. Supp. 755 (W. D. Ark. 1951); Boyd v. Harrison, 36 Ala. 533 (1860); Ware v. Owens, 42 Ala. 212 (1868); Steinhagen v. Trull, 320 Ill. 382, 151 N. E. 250 (1926) (widow required to elect between dower and a statutory portion in lieu of dower); May v. Fletcher, 40 Ind. 575 (1872); Sturdevant v. Norris, 30 Iowa 65 (1870); Buffington v. Grosvenor, 46 Kan. 730, 27 Pac. 137 (1891); Magee v. Young, 40 Miss. 164 (1866); In re Lawrence's Will, 1 Redf. Sur. 310 (N. Y. 1848); Ruby v. Ruby, 112 W. Va. 62, 163 S. E. 717 (1932); Bennett v. Harms, 51 Wis. 251, 8 N. W. 222 (1881).

In support of the proposition that dower is not an interest based on contracts see Skelly Oil Co. v. Murphy, 180 Ark. 1023, 24 S. W. 2d 314 (1930); Scaife v. McKee, 298 Pa. 33, 148 Atl. 37 (1929), appeal dismissed 281 U. S. 771 (1929); Noel v. Ewing, 9 Ind. 37 (1857); Lucas v. Sawyer, 17 Iowa 517 (1864).

As of Jan. 1, 1952, dower has completely ceased to exist in twenty-six states and is of comparatively little significance in seven more. 2 Powell, Real Property, ¶ 217. Powell groups the twenty-six states as follows: eight community property states, Ariz., Cal., Idaho, La., Nev., N. M., Tex., and Wash.; seven states in which the wife receives a distributive share in the assets owned by the deceased husband at death, which share is in no instance restricted to an estate for life, Colo., Miss., N. D., Okla., S. D., Vt., Wyo.; ten states in which the wife has a considerably protected "dower" interest in land owned by the husband during coverture, but this interest is defined in terms of some fraction of fee ownership, Fla., Ill., Ind., Iowa, Kan., Me., Minn., Neb., Pa., and Utah. In five of the seven states wherein dower is of greatly lessened significance, the surviving spouse is given the power to elect an intestate share which in the vast majority of cases is so much more valuable than the dower estate for life that dower is seldom taken, Mich., Mo.,
This postulate would not be astounding if in lieu of inchoate dower the wife were always assured of at least some estate in her husband's land for support during widowhood, but in many cases the constitutionality of the statute was sustained even though the application to the given case deprived the wife of all interest whatsoever in her husband's estate.\textsuperscript{41}

Mont., N. H., and S. C. The nineteen jurisdictions in which dower is still significant are Ala., Alaska, Ark., Del., D. C., Ga., Hawaii, Ky., Md., Mass., N. J., N. C., Ohio, Ore., R. I., Tenn., Va., W. Va., and Wis. In eleven of these jurisdictions dower still consists (as at common law) of an estate for life in one-third of the lands in which the husband had an estate of inheritance during coverture, Ark., Del., D. C., Hawaii, Md., Mass., N. C., R. I., Va., W. Va., and Wis. In three jurisdictions the estate for life has been enlarged so as to exist in more than one-third of the husband's lands, Ala., N. J., Ore. In three jurisdictions the widow has an estate for life only in respect to land owned by the husband at time of death, Alaska, Ga., Tenn.

\textsuperscript{41} In Strong v. Clem, 12 Ind. 37 (1859) the widow got neither dower nor the statutory interest which had been substituted for dower. The husband conveyed his land, the wife not joining, when common-law dower was still recognized in that state. The purchaser, of course, took subject to the wife's inchoate dower. The husband died after a statute which abolished dower and gave the widow instead a one-third interest in fee in the lands of which her deceased husband was seized during coverture. It was held that the legislature had abolished dower without preserving rights already existing and furthermore that the widow in the instant case could not claim a fee interest because when the land was sold it was encumbered only by the right of the wife to a life estate in one-third in case she should outlive her husband. The legislature could not enact that one-third of the fee purchased and paid for should be divested out of the purchaser and given to the widow of the deceased grantor. Accord, Wiseman v. Beckwith, 90 Ind. 185 (1883); Carr v. Brady, 64 Ind. 28 (1878); Frantz v. Harrow, 13 Ind. 507 (1859). Approved, Logan v. Walton, 12 Ind. 639 (1859); Giles v. Gullion, 13 Ind. 487 (1859).

The same result as in Strong v. Clem was reached on similar facts in Morrison v. Rice, 35 Minn. 436, 29 N. W. 168 (1886). The courts in other jurisdictions have avoided the result reached in Strong v. Clem by construing the statute as abolishing the name of dower merely but not the existing rights. Hilton v. Thatcher, 31 Utah 360, 88 Pac. 20 (1906).

Strong v. Clem is not extraordinary in holding that there is no deprivation of constitutional rights in taking away the wife's inchoate dower and giving her nothing in return. The courts have sustained statutes which defined dower in terms of the land of which the husband died seized, thus extinguishing the inchoate interest of the wife in lands which her husband conveyed without her joinder at the time when dower was defined as at common law. Hatcher
Only a handful of cases are to be found in which it is held, or even intimated, that there is any inhibition upon the power

v. Buford, 60 Ark. 169, 29 S. W. 641 (1895); Bates v. McDowell, 58 Miss. 815 (1881); Reeves v. Haynes, 88 N. C. 310 (1883).

Also the following statutes have been sustained when retroactively applied: a statute providing that if lands held in joint ownership are sold in lieu of partition in kind, the wife's inchoate dower in her husband's undivided interest is wiped out, Turner v. Turner, 185 Va. 505, 39 S. E. 2d 299 (1946) (this, however, is the law in many jurisdictions even in the absence of statute, see infra note 49); a statute providing that the wife shall not have dower in lands divested by execution sale, or sale under decree of a court, or by deed of assignment for the benefit of creditors, or by insolvency or bankruptcy proceedings, Griswold v. McGee, 102 Minn. 114, 112 N. W. 1020, aff'd 113 N. W. 382 (1907); Lucas v. Sawyer, 17 Iowa 517 (1864); a statute barring dower unless the widow perfect her right by filing within a designated time an instrument declaring her intention to take dower, Classen v. Heath, 389 Ill. 183, 58 N. E. 2d 889 (1945); a statute simply abolishing dower, Hamilton v. Hirsch, 2 Wash. Ter. 223, 5 Pac. 215 (1884); Richards v. Bellingham Bay Land Co., 54 Fed. 209 (9th Cir. 1893); a statute denying dower to a wife who kills her husband, Hamblin v. Marchant, 103 Kan. 508, 175 P. 678, aff'd 104 Kan. 689, 180 P. 811 (1919); a statute barring dower when the wife leaves her husband without such cause as would entitle her to divorce, Thornburg v. Thornburg, Adm'r, 18 W. Va. 522 (1881).

In Skelly Oil Co. v. Murphy, 180 Ark. 1023, 24 S. W. 2d 314 (1930), the statute read: "The inchoate right of dower of any married woman in any real estate in the State of Arkansas is hereby barred in all cases when the husband has been barred of his title, or of any interest in said property for fifteen years or more, and also in real estate or interest therein conveyed by the husband, but not signed by his wife when such conveyance is made fifteen years ago or more. This act shall affect her inchoate right of dower in real estate only when the husband has now been barred fifteen years or more, or, when a conveyance by him without her signature has been made fifteen years or more prior to the passage of this act." Ark. Acts 1923, p. 250; now, with modifications, Ark. Stat. 1947, sec. 61-226. The conveyance in question was made forty-five years prior to the statute so the wife's interest was immediately extinguished when the statute went into effect. Held: The statute did not violate any constitutionally protected interests in cutting off the interests of the nonjoining wife.

In Ruby v. Ruby, 112 W. Va. 62, 163 S. E. 717 (1932), the statute provided: "If the owner of real estate contracts to sell the same, and the spouse of such owner refuses to release his or her dower interest therein, such owner, or the person contracting to purchase, may institute suit in chancery for the purpose of having the dower interest released and the contract consummated. The court on the hearing may, in its discretion, and if satisfied that the contract of sale was made in good faith and without design to force such spouse to part with his or her dower interest, approve the sale and price, and cause to be paid to such spouse such gross sum, . . . as shall represent the present value of his or her inchoate dower right. Upon such payment as aforesaid the court shall order a release of the dower interest, by such spouse, or if he or she refuses to execute the release, then by a special
of the legislature to abolish inchoate dower. 42 Most of these cases, moreover, are contradicted by other cases in the same

commission to be appointed by the court for the purpose, which release shall be effectual to pass the property to the purchaser free of such right of dower.” W. Va. Rev. Code 1931, sec. 43-1-6; W. Va. Code 1949, sec. 4101 (1951 Supp.). Held: The statute makes the inchoate dower more valuable. Formerly the value of such right was entirely contingent upon the wife surviving her husband. Now, its present value may be ascertained and decreed to her.

In keeping with its broad powers over inchoate dower, the legislature need not treat all widows alike. Reasonable classifications may be made. The Florida Stepmother Act, Fla. Gen. Acts 1939, c. 18999, provided that when a decedent is survived by his widow and lineal descendants and none of such lineal descendants is the lineal descendant of such widow, dower shall be limited to a child’s part. It was contended in Adams v. Adams, that this statute contravened the equal protection clause of the Fourteenth Amendment. 147 Fla. 267, 2 So. 2d 855 (1941), appeal dismissed for want of substantial federal question, 314 U. S. 572 (1941). The widow in this case was not the mother of the children of the decedent, of which there were several. The marriage occurred prior to the effective date of the statute; the death of the husband was subsequent thereto. Said the court: “Having been accustomed to think of dower in terms of one-third of the husband’s estate, it is at first blush somewhat shocking to our traditional concepts to see it reduced to a child’s part for the childless widow, but we find no reason to hold that such a change violates any constitutional mandate. Neither can we say that such a classification is not based on a fair and reasonable economy. Since the basis of it is bread for the widow and children, it cannot be said that the needs of the childless widow are the equivalent of those of the widow on whom there are dependent children. There is no sounder basis for classification than economic considerations.” (147 Fla. 267, 272, 2 So. 2d 855, 857.)

The statutes of a number of states limit the interest of the widow who was a nonresident of the state during coverture to the lands of which her husband died seized, while giving to the widow who was a resident during coverture an interest in all the real estate of which the husband was seized at any time during the marriage. E.g., Kan. Gen. Stat. 1949, sec. 59-505, infra note 59. Where such exceptions occur, the husband may transfer good title without the signature of the nonresident wife. The fact that the wife does not accompany her husband to the state, or has abandoned him and gone to another state, and may or may not have obtained a divorce elsewhere, thus leaving the status of the parties in doubt, and making it difficult to obtain a perfect transfer of title in many cases, may be deemed a sufficient reason for prescribing a different rule of conveyance where the wife is nonresident than where she is resident. Ferry v. Spokane, Portland and Seattle R. R. Co., 268 F. 117, aff’d 258 U. S. 314 (1921); Thornburn v. Doscher, 32 Fed. 810 (C. C. D. Ore. 1887); Buffington v. Grovenor, 46 Kan. 730, 27 Pac. 137 (1891). Statutes of this sort have been held applicable in cases where the marriage and acquisition of the land occurred before the statutes made any distinction between the rights of resident and nonresident wives. Miner v. Morgan, 83 Neb. 400, 119 N. W. 781 (1909); Bennett v. Harms, 51 Wis. 251, 8 N. W. 222 (1881).

42 Walker v. Bennett, 107 N. J. Eq. 151, 152 Atl. 9 (Ch. 1930); In re Alexander, 53 N. J. Eq. 96, 30 Atl. 817 (Ch. 1894); Lawrence v. Miller,
state adhering to the majority view, that is, that the inchoate right of dower which a wife has in her husband's real estate in his lifetime is not a vested interest but a mere expectancy of property in the future and may be changed, modified, or

2 Comst. 245 (N. Y. 1849) (intimates that a statute extinguishing dower right where marriage and seizin occurred prior to the statute would be invalid as impairing the obligation of the marriage contract); Williams v. Courtney, 77 Mo. 587, 588 (1883) ("The right of a married woman to dower in the land of her husband rests on as secure a foundation as does the fee of the husband in such land. From the moment the facts of marriage and seizin concur, the right of the wife in this regard becomes a title paramount to that of any person claiming under the husband by subsequent act." "The Act of the legislature authorizing the guardian of plaintiff's deceased husband to sell the land in question, does not profess to confer any authority on such guardian to dispose of plaintiff's dower right, and if it did, it would violate that constitutional provision which forbids that any one be deprived of property 'without due process of law', and would be a legislative attempt to take the property of one person and bestow it upon another."); Russell v. Rumsey, 35 Ill. 362 (1864) (declaring unconstitutional a curative statute insofar as it purported to validate a defective release of dower); O'Kelley v. Williams, 84 N. C. 241 (1881); Grove v. Todd, 41 Md. 633 (1874) (declaring invalid a curative statute as applied to a defectively executed release of dower).

O'Kelley v. Williams, 84 N. C. 241 (1881) supra was an action to recover land. The defendant acquired the fee in 1867 at which time the statute gave a widow dower in one-third in fee of all the land of which her husband was seized at any time during coverture. This statute was repealed in 1869. In 1876 defendant mortgaged the land, his wife not joining. The land was sold on default to plaintiff. Held: Wife is entitled to dower according to the statute in effect when the land was acquired. When defendant acquired the land he took it subject to the laws existing at the time, for laws which subsist at the time and place form part of the contract, as if they were expressly referred to or incorporated into its terms. The wife's dower was vested before the repealing statute and was not affected thereby, for a "vested right" cannot be destroyed by a subsequent repealing statute. "We by no means subscribe to the doctrine that a right vested by operation of law is less inviolable than when it arises from contract; where it once exists, no matter how, it is inviolable." (84 N. C. 244, quoted from Reade, J. in Sutton v. Askew.)

In Green v. Estabrook, 168 Ind. 123, 79 N. E. 373 (1907) it was remarked that "marriage is a valuable consideration, and a married woman is regarded as a purchaser for a valuable consideration of all property which accrues to her by virtue of the marriage." This case had to do with a statute providing that in cases of judicial sales of real property in which a married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed to be barred by virtue of such sale, such interest shall become absolute and vested in the wife in the same manner as if her husband were to die.
abolished by legislative action. Only the New Jersey courts have adhered consistently to the proposition that a statute unfavorably affecting the wife's inchoate dower may not be applied to cases where the marriage and the acquisition of the land by the husband occurred before the passage of the act.

In *Russell v. Rumsey*, the Illinois Supreme Court said:

"Dower, although its enjoyment is contingent, is as much a vested right as a contingent remainder or reversion, and it would not be contended that they are not vested rights although not vested estates. Although the estate is contingent the right to dower is vested and absolute."

Why has not this view commended itself to more courts? Inchoate dower does in many respects resemble a contingent remainder. It is a present interest which may possibly vest in possession upon the happening of certain events. It attaches upon the husband's land upon marriage or as soon

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44 In re Alexander, 53 N. J. Eq. 96, 30 Atl. 817 (Ch. 1894), *supra* note 42, the court refused to give retroactive application to a statute providing: "That whenever it shall appear to the satisfaction of the chancellor that any person entitled to an inchoate right of dower in any lands or premises is incapacitated, by mental infirmity or disease, from executing a valid release or relinquishment of the same, and that the interests of the owner of such lands and premises require and would be promoted by a sale of the same, it shall be lawful for the chancellor to direct such release or relinquishment to be made by any master of the court of chancery, whose deed or deeds executed in behalf of such person shall release and bar all the dower, or right, or estate in dower, to which such person may be entitled or would at any time succeed or become entitled to in the lands and premises therein mentioned." N. J. Laws 1878, p. 193; covered now, N. J. Rev. Stat. 1937, 3:40-1.

45 35 Ill. 362 (1884), *supra* note 42.

46 35 Ill. 362, 374 (1864).

In *Tatum v. Tatum*, 174 Ark. 110, 295 S. W. 720 (1927) it was held, on the view that inchoate dower is very much like the interest of a contingent remainderman, that a wife's interest in oil and gas being extracted from land which the husband had conveyed without his wife's joinder would be protected by impounding a sufficient portion thereof.
thereafter as the husband becomes seized, and it cannot be discharged by the husband without his wife's concurrence.47

It is true that at common law inchoate dower cannot be transferred to one having no interest in the land, or attached for the wife's debts, and that it entitles the wife to no control over her husband's land.48 But neither can a contingent remainder generally be sold or attached for debts at common law, nor can the owner of a contingent remainder by virtue of his ownership exercise any extensive control over the land. Even so, a contingent remainder may not be divested by the legislature.

In a number of respects inchoate dower is regarded as a valuable interest, which the law will recognize and protect at the instance of the wife.49 The cases which hold that inchoate

47 2 Tiffany, Real Property, sec. 507 (3d ed.).
A conveyance by the husband before marriage will bar the wife's dower, since seizin or title during coverture is then wanting. But this general rule is subject to an exception in America in case the conveyance by the prospective husband is in fraud of dower, that is, intended to deprive the wife of dower. Then she is entitled to dower as if the deed had not been made. 2 Tiffany, Real Property, sec. 506 (3d ed.).

48 See generally 2 Tiffany, Real Property, sec. 533 (3d ed.); 2 Thompson, Real Property, secs. 894, 898 (Perm. ed.).

49 See generally 2 Tiffany, Real Property, sec. 533 (3d ed.).
The wife's inchoate dower has been regarded as a sufficient interest to enable her to redeem from a mortgage. Tuller v. Detroit Trust Co., 259 Mich. 670, 244 N. W. 197 (1932). When the husband fraudulently alienates his land in order to deprive her of dower, or by fraud induces her to release her right, the law will protect her rights at her instance. Clifford v. Kampfe, 147 N. Y. 383, 42 N. E. 1 (1895); Bonfoey v. Bayne, 100 Mich. 82, 58 N. W. 620 (1894). A wife has been granted an injunction against waste by an alience of the husband. Brown v. Brown, 94 S. C. 492, 78 S. E. 447 (1913); Tatum v. Tatum, 174 Ark. 110, 295 S. W. 720 (1927). The release of dower is a valuable consideration which will support a transfer to, or contract with the wife. Flynn v. Flynn, 171 Mass. 312, 50 N. E. 650 (1898); In re Alexander, 53 N. J. Eq. 96, 30 Atl. 817 (Ch. 1894). The husband's trustee in bankruptcy cannot sell the husband's property free of the wife's dower right without the wife's consent. In re Macklem, 28 F. 2d 417 (D. Md. 1928).

On the other hand according to the weight of authority the inchoate dower interest of the wife of a cotenant is barred by a sale in partition proceedings. Lee v. Lindell, 22 Mo. 202 (1855); Holley v. Glover, 36 S. C. 404, 15 S. E. 605 (1891); Turner v. Turner, 185 Va. 505, 39 S. E. 2d 299 (1946). This view is apparently not based upon any concept that inchoate dower is
dower is entirely within legislative control seem somewhat inconsistent with the regard which the courts generally have for the wife's interest. This apparent inconsistency would not be of any great significance, to be sure, if only the courts had not gone so far out of the way to protect the marital interests of the husband from legislative impairment. The marital estates, being conceived for the social welfare, should not be beyond reasonable legislative alteration. But in comparison with the husband, the wife has indeed been treated shabbily by the courts. Few courts have felt the necessity for examining into the reason why curtesy and the estate *jure uxoris* were frequently deemed to be "vested rights" while dower was, and is, treated as a mere encumbrance on the husband's power of alienation whenever the wife seeks to assert constitutional rights in her marital estate.

That dower is not within the protection of the constitutional guarantees has usually been accepted without question. When the earliest of the cases dealing with the constitutionality of legislation altering the marital property interests were decided, a married woman did not have a legal personality. Consequently, it was assumed that she could have no constitutionally protected rights in the land of her husband. The pattern of the law having been established by those cases has carried under juridical inertia to the present. The law reflects the former predominance of the male.

This is what some courts have said in rationalization of the doctrine that inchoate dower is not a constitutionally protected interest:

"The wife has no property in the husband's lands, pending the coverture. Three things are necessary to the perfection

not a property interest, but upon the broad ground that the right of the tenants to have partition of the common property is paramount to the rights of the wife. Unless the purchaser takes free of dower claims, a sale of the land at its actual value will be difficult if not impossible."
of the right of dower. These three things are, marriage, seizin, and the husband's death. Before the husband's death, the wife has not a contingent right. Her attitude is that of a party in whose favor two prerequisites to the existence of a right have occurred, and a remaining one is wanting. She has a mere expectancy, resting upon the probability that the remaining requisite may, at some future time, come into existence." 50

"Many reasons might be adduced to show the propriety and soundness of these decisions, as that marriage and the rights incident thereto are public matters, to be regulated and governed by law; that the obligations arising are, for the most part, created by the public law and subject to the public will, and not to that of the parties; that it is a connection of such a solemn character, and one upon which the public welfare so greatly depends, that the society and the public have as great an interest in its regulation as the parties themselves; that its rights and obligations are derived rather from the law than from the contract itself; that it is not strictly a contract, but a status, resembling rather the relation of father and child, than that of a contract between two parties; that, by the common law, the legal existence of one of the parties is merged into that of the other; that, as a status, it is essentially dependent upon the sovereign will, and is not embraced in the constitutional interdict or acts impairing the obligations of contracts . . . ." 51

"In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil policy. Hence, as between husband and wife, there is no constitutional provision protecting the marriage itself, or the property incident to it, from legislative control, by general law, upon such terms as public policy may dictate." 52

"If marriage itself can be . . . dissolved at the discretion of the sovereign power, whether by general or special statute

50 Boyd v. Harrison, 36 Ala. 533, 538 (1860).
51 Lucas v. Sawyer, 17 Iowa 517, 522 (1864).
52 Noel v. Ewing, 9 Ind. 37, 50 (1857).
matters not, surely the mere incident of marriage—property—is not higher or more sacred than the principal thing itself. The support of the wife is an incident of the marriage. The legislature can vary that at pleasure." 53

"It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away." 54

Dower Consummate

Upon the death of the husband the wife’s inchoate dower matures and becomes a right to possession. The cases are in accord that the widow’s dower right cannot be detrimentally affected by a statute enacted after her husband’s death. 55 The widow’s right is held not to be subject to legislative impairment even though at the time the statute went into effect the widow had not yet been assigned her dower. 56 The difference is merely between the right of possession, and the right to be in possession.

THE STATUTORY MARITAL RIGHTS

Many states have abolished curtesy and dower as they existed at common law. 57 Where the statute which replaces curtesy or dower gives to the surviving spouse a distributive share in the real estate owned by the deceased spouse at

53 Noel v. Ewing, 9 Ind. 37, 53 (1857).
55 Burke v. Barron, 8 Iowa 132 (1859); Swartz v. Andrews, 137 Iowa 261, 114 N. W. 888 (1908); Adams v. Palmer, 51 Me. 480 (1863) (statute validating voidable release of dower); McAllister v. Dexter & P. R. Co., 106 Me. 371, 76 Atl. 891 (1910); Talbot v. Talbot, 14 R. I. 57 (1882) (statute provided that owner of fee subject to dower can be relieved of any dower charge by giving security for the payment to the widow of the annual value of the dower).
56 Burke v. Barron, 8 Iowa 132 (1859); Adams v. Palmer, 51 Me. 480 (1863). Supra note 55.
57 For a general survey of the statutes, see 2 Powell, Real Property, ¶¶ 217, 218. Prof. Powell’s analysis is set forth in notes 29 and 40 supra.
death, it is not probable that the courts would recognize any kind of vested interest in the continued existence of such statute. The comparatively unlimited power of the legislature to change the course of descent of property at death and to restrict the testamentary power has been discussed in Chapter 3.

But when the statute confers upon the surviving spouse an interest (often termed "dower" or "curtesy") in the land of which the deceased spouse was seized at any time during coverture, how extensive is the legislative power to repeal such statute in relation to existing marriages and property already acquired? A present interest of some kind is clearly indicated under statutes of this sort upon marriage and acquisition of land by the respective spouse. However, this interest does not carry with it any power of disposition over the property of the owning spouse during his or her lifetime. In one aspect, the marital right under the statute is merely a restraint on the power of alienation of the owning spouse.

58 E.g., Vt. Stat. Rev. 1947, sec. 3027: "A widow shall be entitled in fee to one-third in value of all the real estate of which her husband died seised, and if such husband left surviving him only one heir and such heir is the issue of the widow or the heir by adoption of both the widow and husband, she shall be entitled to half in value of such real estate in fee, . . ." Vt. Stat. Rev. 1947, sec. 3040: "A widower shall be entitled in fee to one-third in value of all the real estate of which his wife died seised. If the wife left surviving her only one heir and such heir is the issue of the husband or the heir by adoption of both the wife and husband, he shall be entitled to half in value of such real estate in fee, and his interest may be assigned and set out to him in the same manner as is provided for the severance of the interest of the widow in the real estate of her deceased husband . . . ."

59 E.g., Kan. Gen. Stat. 1949, sec. 59-505: "Also, the surviving spouse shall be entitled to receive one-half of all real estate of which the decedent at any time during the marriage was seized or possessed and to the disposition whereof the survivor shall not have consented in writing, or by a will, or by an election as provided by law to take under a will, except such real estate as has been sold on execution or judicial sale, or taken by other legal proceeding: Provided, That the surviving spouse shall not be entitled to any interest under the provisions of this section in any real estate of which such decedent in his lifetime made a conveyance, when such spouse at the time of the conveyance was not a resident of this state and never had been during the existence of the marriage relation."
or on his or her power of testamentary disposition. In its other aspect, that is from the point of the nonowning spouse, the right is primarily an expectancy not dissimilar to inchoate dower at common law, except as to the quantity and extent of the share which may be received. The distinction made in the cases between the divestibility of curtesy and of inchoate dower has quite clearly no application under the statutes. While under the particular statute, the share which the surviving husband receives may be greater or less than the share of the surviving wife, before the death of the owning spouse the statutory interest of the husband is not distinguishable in nature from the statutory interest of the wife. It is submitted that these interests (whether they are called dower or curtesy and whether the surviving spouse receives his or her share for life or in fee) may, at any time before they are vested in possession or ownership by the death of the owning spouse, be abolished by the legislature to the same extent that inchoate dower may be abolished. The cases touching at all on this point indicate that statutory curtesy and dower stand on the same ground as common-law dower and that interests given by the statutes may always be altered or taken away in the public interest by the same power which gave them.  

60 Adams v. Adams, 147 Fla. 267, 2 So. 2d 855 (1941), appeal dismissed for want of substantial federal question, 314 U. S. 572 (1941) (statutory dower); Scaife v. McKee, 298 Pa. 33, 148 Atl. 37 (1929), appeal dismissed 281 U. S. 771 (1929) (statutory curtesy); Hamblin v. Marchant, 104 Kan. 689, 180 Pac. 811 (1919) (statutory dower); Griswold v. McGee, 102 Minn. 114, 112 N. W. 1020, aff'd 113 N. W. 382 (1907) (statutory dower); Lane v. St. Louis Trust Co., 356 Mo. 76, 201 S. W. 2d 288 (1947) (statutory curtesy); Ruby v. Ruby, 112 W. Va. 62, 163 S. E. 717 (1932) supra note 41. But see O'Kelley v. Williams, 84 N. C. 281 (1881) supra note 42, which holds that statutory dower cannot be extinguished.

In Lane v. St. Louis Trust Co., 356 Mo. 76, 201 S. W. 2d 288 (1947) supra, the decedent, Mrs. Wackwitz, set up a trust the income from which was to be paid to her for life, and if she should not survive her husband, the trustee at her death, upon receipt of an agreement in writing properly executed by the husband waiving all his marital rights in her estate, was to pay the trust
The courts are often prone to speak of the homestead exemption as an "estate," but the homestead statutes and constitutional provisions do not in any true sense create marital estates. The exemption may usually be enjoyed by an unmarried person if he is head of a family. Although the statutes and constitutional provisions vary greatly from jurisdiction to jurisdiction, it may be said that in general there are two aspects to the homestead: (1) an exemption privilege to the householder, (2) an estate in the widow and children after the householder's death.\(^{61}\)

It is uniformly held that a debtor has no vested interest in a statute fixing exemptions, and that a retrospective effect fund to him. In case he should refuse to execute a waiver, then the trust fund was to go to her sons. Mr. Wackwitz abandoned his wife in 1935 and was not with her at death, but shortly after her death he executed a written agreement and delivered same to the trustee claiming the trust fund and relinquishing his marital rights. The decedent's sons sought to prevent Wackwitz from claiming the res. They contended that he lost all interest by virtue of Mo. Rev. Stat. 1939, sec. 337 (Laws 1919, p. 104, now Mo. Rev. Stat. 1949, sec. 469.210) which provides that if a man leave his wife or abandon her without reasonable cause and shall continue to live apart from her for a period of one year next preceding her death, "he shall be forever barred from his inheritance, jointure, homestead, curtesy and statutory allowances in the real and personal property of the wife\(^{61}\) unless she voluntarily becomes reconciled. At the time when the trust instrument was executed, the statute did not provide for forfeiture of the husband's marital rights in his wife's estate. Held: The trust agreement gave Wackwitz no present interest. It merely amounted to an offer that if she failed to survive him, he could take the trust fund upon consideration that he waive his marital rights in her estate. In order for there to be a binding contract between the husband and the estate, there must have been a valid consideration upon which the contract could rest. But Wackwitz had forfeited his marital rights by abandoning his wife and consequently had nothing to offer as consideration for his acceptance of the fund.

\(^{61}\) 2 Tiffany, Real Property, sec. 576 (3d ed.); 5 Tiffany, Real Property, sec. 132 (3d ed.).

During coverture the wife is usually accorded the power to prevent her husband from alienating the homestead. 1 Powell, Real Property, \(\S\) 121. But this power ought never to be referred to as an "estate." It is a mere veto power. Bushnell v. Loomis, 234 Mo. 371, 137 S. W. 257 (1911); Castlebury v. Maynard, 95 N. C. 281 (1886).
can be given to a statute which abolishes or diminishes the exemption without depriving the debtor of any constitutional right. As to the homesteader, the homestead is a mere privilege of exemption which the sovereign may recall.

“It seems absurd to say that a debtor can have a vested right to keep property against a debt contracted for its purchase, or, indeed a vested right in any exemption. As to him, the law grants the exemption as a boon, and because the state does not care to lend its aid to push an unfortunate to the wall. Its own public policy requires it, and that alone is the object. The exemption is not a right of the debtor.”


One case holds contra to statement in text. Bridgman v. Wilcut, 4 G. Greene 563 (Iowa 1854).

63 Noble v. Hook, 24 Cal. 638 (1864); Sparger v. Cumpton, 54 Ga. 356 (1875); Harris v. Glenn, 56 Ga. 94 (1876); Mooney v. Moriarty, 36 Ill. App. 175 (1889); Bramble v. State, Use of Twilly, 41 Md. 435 (1874) (but holds that under statute providing “when the whole shall be sold and the defendant whose property is so sold, shall have one hundred dollars of the proceeds in money” the right of the debtor becomes vested upon full consummation of the sale and cannot be taken from him by subsequent statute); Bushnell v. Loomis, 234 Mo. 371, 137 S. W. 257 (1911); Leak v. Gay, 107 N. C. 468, 12 S. E. 312 (1890); Walkup v. Covington, 173 Tenn. 7, 114 S. W. 2d 45 (1938).

The homestead exemption is created by constitutional provision in some states. E. g., Tex. Const., Art. XVI, secs. 50, 51, and 52; N. C. Const., Art. X, sec. 2. This does not have the effect of giving to the homestead exemption an indivisible quality which it would not have had if created by statute. A constitutional exemption may not ordinarily be repealed by a statute, but only for the reason that constitutional provisions are paramount to, and not amendable by, statute. Nolan v. Reed, 38 Tex. 425 (1873); Bassett v. Messner, 30 Tex. 604 (1868); Bull v. Conroe, 13 Wis. 260 (1860). Constitutional exemptions may be terminated by the same power that created them—the people—expressing their sovereign will by amendment of the organic law. Harris v. Glenn, 56 Ga. 94 (1876).

The exemption called a “homestead” must be distinguished from the property in which the exemption exists, also called a “homestead.” Of course, the property in which the exemption exists cannot be arbitrarily taken from the owner.

64 Sparger v. Cumpton, 54 Ga. 356, 360 (1875).
The homestead estate which vests in the widow and minor children on the death of the householder, under the provisions of the usual statute, is still essentially an exemption from sale by creditors but it also has the aspect of an estate for the life of the widow and minority of the children (so long as the conditions prescribed in the statute for the existence of a homestead are complied with).\textsuperscript{65} It has been said that this homestead estate in the widow and minor children cannot, under the constitution, be detrimentally affected by a change in the statutes.\textsuperscript{66}

**COMMUNITY PROPERTY**

Eight of our states have adopted from the Spanish-Mexican jurisprudence the community property system.\textsuperscript{67} Not being a part of the English common law, the community property system is premised largely on legislation. Although there is some variation in the laws of the different states,

\begin{itemize}
\item \textsuperscript{65} E.g., Mo. Rev. Stat. 1949, sec. 513.495: "—1. If any such housekeeper or head of a family shall die and leave surviving him a widow or minor children, his homestead, to the value aforesaid, shall pass to and vest in such widow or children, or if there be both, to such widow and children, and continue for their benefit until the youngest child attains the age of twenty-one years and until the remarriage or death of such widow; that is to say, the children of the deceased shall have the joint right of occupation with the widow until they shall arrive, respectively, at the age of twenty-one years, and the widow shall have the right to occupy such homestead during her life or widowhood, and upon her remarriage or death it shall pass to the heirs of the husband. 2. Such homestead shall not be subject to sale for the debts of the husband unless such debts be legally charged thereon during his lifetime, for which said debts the same may be sold free from the rights of such widow, children or heirs; provided, that if the heirs of the husband be persons other than his children, then such homestead may be sold for the payment of any debt or debts legally established against his estate, subject to the rights of the widow. Such sale in either case may be made at any time during the course of administration of the husband’s estate, and to be conducted in like manner and the same proceedings had as is or may be provided by law for sales of other real estate for the payment of the debts of deceased persons."
\item \textsuperscript{66} Sparger v. Cumpton, 54 Ga. 356 (1875); Bushnell v. Loomis, 234 Mo. 371, 137 S. W. 257 (1911); Balance v. Gordon, 247 Mo. 119, 152 S. W. 358 (1912).
\item \textsuperscript{67} Ariz., Cal., Idaho, La., N. M., Nev., Tex., and Wash.
\end{itemize}
basically the community property concept is that all property acquired by either the husband or wife during marriage, except that which is acquired by gift, bequest, devise, or descent by one or the other, shall be deemed the common property of the husband and wife.\textsuperscript{68}

Most of the constitutional cases concerning community property have arisen out of attempts of the legislature to enhance the power of the wife over the disposition of the community property. Two lines of apparently conflicting cases have arisen, whose divergence stems from opposing views of the nature of the interests of the spouses in the community property prior to the statute. One line of cases takes the view that the property is an acquiet of the community and not the sole property of the one in whose name it was bought, although by the law existing at the time, the husband was given the exclusive management, control, and power of sale of such property. This power was given him, not because he was the exclusive owner, but because by law he was created the agent of the community. The power which he had was a simple power or agency to be exercised by him, not alone in his own interest, but also as a trustee for the interest of his wife. According to this line of cases, the husband is not deprived of property without due process when he loses the power to dispose of the community property without the consent of his wife,\textsuperscript{69} or when his absolute power of disposition is taken away and his wife is given the power of testamentary disposition over one half of the community property.

\textsuperscript{68} Tiffany, \textit{Real Property}, sec. 437 (3d ed.).

\textsuperscript{69} Arnett v. Reade, 220 U. S. 311 (1911). Held: It is plain that the wife has a greater interest than the mere possibility of an expectant heir. It is conceded that she has a remedy for an alienation made in fraud of her rights by her husband. As she is protected against fraud already, we can conceive no reason why the legislature can not make that protection more effectual by requiring her concurrence in her husband's deed; Arnold v. Leonard, 114 Tex. 535, 273 S. W. 799 (1925); Mabie v. Whittaker, 10 Wash. 656, 39 Pac. 172 (1895).
RETROACTIVE LAND LEGISLATION

(in default of such testamentary disposition the share of the deceased wife to descend to her issue); or when he is denied control over the personal earnings of the wife and the rents and interests from her separate real and personal property.

The opposing line of cases consists entirely of California decisions. In *Spreckels v. Spreckels* it was held that an amendment to the Civil Code in 1891, forbidding the husband to give away community property without the consent of the wife in writing, could not be construed retroactively, because prior to the amendment the code vested in the husband all of the elements of absolute ownership of the community property to the exclusion of the wife, whose interest was a mere expectancy.

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70 Warburton v. White, 176 U. S. 484 (1900). At the time the community property was acquired, the statute provided that upon the death of the husband or wife the whole of the community property subject to the community debts shall go to the survivor. Held: The husband had no vested right to succeed to the whole upon his wife's death.


72 116 Cal. 339, 48 Pac. 228 (1897). The court said: "The community property, as a rule, constitutes the earnings, gains, and savings of a man during his whole lifetime. If he can make presents to his friends, provide for indigent relatives, make advancements to his children, it must be from this property. To deprive him of this power is certainly to divest him of a property right. This argument need not, however, be pursued further, because counsel admit that, if the husband is the owner of the property, then a statute which makes the exercise of the right to dispose of it subject to the will of another is unconstitutional." 116 Cal. 339, 348, 48 Pac. 228, 231. Accord, Clavo v. Clavo, 10 Cal. App. 447, 102 Pac. 556 (1909). In the Clavo case it was contended that the question was not necessarily involved in the Spreckels case, and what was there said was pure dictum. Held: "An examination of the reported case will show that the parties to the action treated the point decided as involved, and the opinion is devoted almost entirely to its consideration."


74 Cal. Civil Code 1888, sec. 172: "The husband has the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate estate."

The interest of the wife was described as a "mere expectancy" in *Stewart v. Stewart*, 199 Cal. 318, 249 Pac. 197 (1926). See Simmons, "Interests of a Wife in California Community Property," 22 Calif. L. Rev. 404 (1934).
The code was again amended in 1917 by the addition of the following section:

"The husband has the management and control of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or incumbered . . ." 75

Prior to this amendment the code read:

"The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto . . ." 76

The court also held that this amendment could not be applied where the community property had been acquired prior thereto. 77

The legislature of 1923 amended the California Civil Code to read as follows:

76 Cal. Civil Code, sec. 172 (Kerr 1908).
77 Roberts v. Wehmeyer, 191 Cal. 601, 218 Pac. 22 (1923). The land in question was purchased after the effective date of Stats. 1917 but with community funds acquired prior to the effective date. A house was later built on the land, also with community funds. In 1920 Mrs. Roberts commenced divorce proceedings against her husband. She was granted an interlocutory decree on Feb. 20, 1920, and was awarded the real estate. However, in January, 1920, Roberts conveyed the premises to defendant Wehmeyer and received as consideration a promissory note. Mrs. Roberts did not join in this conveyance. Held: Prior to the adoption of the amendment the husband had the unqualified power to sell the community property and the wife had a mere expectancy and not any title or interest she could convey; hence to apply the amendment where the property had been acquired previous to the amendment and thus require the husband to obtain the consent of his wife to transfer realty would deprive him of vested rights. It is true, said the court, that the legislature may prescribe regulations concerning the method of transferring property and change them at will, but such regulations may not contravene the constitutional guarantee that one may not be deprived of his property without due process.
“Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent . . . .” 78

In McKay v. Lauriston et al., 79 where the wife predeceased the husband, the Supreme Court declined to give retroactive


Prior to amendment in 1923, Cal. Civil Code, sec. 1401 provided that upon death of the wife the entire community property belongs to the surviving husband. Sec. 1402 provided that upon death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband.

79 204 Cal. 557, 269 Pac. 519 (1928). The land in question was acquired by Mr. and Mrs. McKay in 1918. No change in the ownership of this property was made up to 1926 when Mrs. McKay died, leaving a will by the terms of which she sought to devise an interest in the said real property to her husband, the plaintiff, and to the defendants the other half. Held: When this land was acquired by the McKays, the law was that during the marriage the husband is the sole and exclusive owner of the community property and that the wife has no title thereto, nor interest or estate therein other than a mere expectancy as heir, if she should survive him. However, the interest of the wife during the life of her husband is somewhat greater than that of an ordinary heir, in that she is given access to appropriate legal remedies against fraudulent or inconsiderate acts of her husband in respect to the community property.

In subsequent cases the courts have followed McKay v. Lauriston in declining to give retroactive effect to the amendment of 1923. Sexton v. Daly, 95 Cal. App. 754, 273 Pac. 109 (1928); Williamson v. Kinney, 52 Cal. App. 2d 98, 125 P. 2d 920 (1942). In Reeve v. Phillips, 2 Cal. App. 2d 239, 70 P. 2d 607 (1937) it was held that community property acquired prior to the amendment of 1923 vested absolutely in the husband upon the death of the wife without the necessity of administration, although the death of the wife occurred subsequent to 1923.

While the husband's rights in the community property were held to be virtually that of a sole owner prior to the enlargement of the wife's rights by the statutes of 1917 and 1923, his rights were not immune from reasonable regulation for the enforcement of the duties owing to his wife and his family. It was contended in Goetting v. Goetting, 80 Cal. App. 363, 252 Pac. 656 (1927) that a statute granting the power to the court in actions for separate maintenance to make the same disposition of the community property as in actions for divorce, could not be applied when the property was acquired prior to the statute. Cal. Stats. 1917, p. 35. The court rejected the contention and remarked that it was not necessary to discuss what force this contention might have if the action were based wholly on facts arising before the adoption of the amendment of 1917 as it impliedly appeared from the finding that the course of conduct on which the court below based its decree continued after 1917.
effect to the amendment on the ground that the interests of the husband and wife become fixed and determined by the law in force at the time the community property is acquired by them. Their rights therein, thus acquired, cannot be diminished, enlarged, or in any way affected by subsequent legislation.

This case does not mean that the wife cannot be given the power of testamentary disposition over community property which has descended to her if it appears that the property was acquired by husband and wife prior to the amendment of 1923. Here the wife was not the survivor and the exercise by her of the testamentary power would have invaded the vested province of the husband (so the case holds). The California cases are in accord with the holdings elsewhere that the law in force at the death of the owner of the property determines who shall inherit it. The heirs of the husband have no vested right to inherit a share of the community property. 80

The California courts have been alone among the courts in the community property states in maintaining that the wife does not have an actual ownership of half the community property during marriage but has only an expectant interest which she takes upon the husband's death. 81 But even when it is agreed that this was the law of California prior to the amendments of 1891 and 1917, it is not altogether clear how

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80 In re Phillips' Estate, 203 Cal. 106, 263 Pac. 1017 (1928). Prior to the amendment of 1923, upon the death of the husband, one-half of the community property went to the wife, and the other half was subject to his testamentary disposition. In the absence of such disposition, this half went to his descendants. After the amendment of 1923, if the husband failed to exercise his testamentary power, the one-half over which he had the power went to the surviving spouse. The decedent in this case died intestate in 1925, leaving as his sole heirs, his wife and a daughter. The decedent and his wife were married in 1893. The bulk of his estate consisted of community property acquired before 1923. Held: The wife is entitled to all.

this legislation was any more unconstitutional than the legis­
lation sustained in other jurisdictions restricting the husband's
power of disposition. The husband is injured whatever in­
terest the wife is considered to have in the property.

The California adherence to the doctrine that legislation
changing the rights of husband and wife in community prop­
erty cannot be made to operate as to property already ac­
quired has been strongly condemned as a blind following of
\textit{Spreckels v. Spreckels}, wherein the doctrine seems to have
had no firmer foundation than an admission by counsel. 82
The attitude of the courts means that any reformation of
community property law cannot go completely into effect
until the existing generation has died. In the meanwhile there
is bound to be considerable confusion as to which statute
applies to any particular piece of property. 83

In 1927 the legislature of California declared that during
continuance of the marriage relation the respective interests
of the husband and wife in community property are present,
existing, and equal interests under the management and con­
trol of the husband. 84 As to community property acquired
since this legislation, it is recognized that the wife has a
vested interest of which she cannot be involuntarily deprived
without violation of the Fourteenth Amendment. 85 A num­
INTERESTS ARISING FROM MARRIAGE

ber of cases from various jurisdictions have held that community property rights existing at the time and place of marriage and acquisition of the property cannot be taken away by subsequent legislation. 86

policies, the premiums on which were paid out of the husband's salary, which is community property.

In Cooke v. Cooke it was contended that the policy had been granted to the husband in divorce proceedings held in Arkansas. An Arkansas statute provides: “In every final judgment for divorce from the bonds of matrimony granted to the husband, an order shall be made that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof . . .” Ark. Stat. 1947, sec. 34-1214. It was held that the Fourteenth Amendment forbade the application of the statute to the facts of the case, since the wife had a vested property interest in the policy.

Wissner v. Wissner was an action by the wife of a deceased insured to recover half of the proceeds of a National Service Life Insurance Policy. The husband apparently had become estranged from the plaintiff and without her knowledge and without her consent he made his parents, the defendants, beneficiaries. The defendants relied on 38 U. S. C. sec. 802 (g) (1946 ed.) which provides that the insured shall have the privilege of changing the beneficiary without consent of the beneficiary (but only within the class including parents and wife). The state court thought that the Fifth Amendment prohibited Congress from giving to this statute the effect claimed by the defendants, that the wife had a vested right in one-half of the proceeds, which Congress could not take from her. The Supreme Court of the United States thought otherwise. Wissner v. Wissner, 338 U. S. 655 (1950). That Court declared that the judgment below had frustrated the deliberate purpose of Congress from giving to this statute the effect claimed by the defendants, that the wife had a vested right in one-half of the proceeds, which Congress could not take from her. The Supreme Court of the United States thought otherwise.

It was held in Brunvold v. Victor Johnson & Co., 59 Cal. App. 2d 75, 138 P. 2d 32 (1943) that the legislature, in giving the wife a vested interest in the community property, can impose a condition that such property shall be liable for debts contracted by the husband.

86 Dixon v. Dixon's Ex'rs, 4 La. 188 (1832) (held that a right to the community of acquets and gains, existing by the law of the place and time of marriage, is a right springing from contract and cannot, therefore, be taken away by subsequent legislation); Kearse v. Kearse (Tex. Civ. App.) 262 S. W. 561, aff'd 276 S. W. 690 (1925) (wife contended that the deed by which she conveyed certain community property without the joinder of her husband attached to the property the status of separate property, by virtue of a statute declaring that no person shall "be restrained from inserting any clause or clauses in conveyances thereafter to be made, that may be deemed proper and advisable by the purchaser and seller"); Guye v. Guye, 63 Wash. 340, 115 Pac. 731 (1911) (statute enlarging the class of separate property).
Five common-law states, Oregon, Nebraska, Michigan, Oklahoma, and Pennsylvania, experimented briefly with the community property system in the 1930's and 1940's and then repealed their statutes. Constitutional questions may well arise in respect to the community property acquired while the statutes were in effect. The devices by which the legislatures sought to return to status quo were: (1) It is presumed that property acquired during the existence of the community property law, and all property acquired after repeal but in exchange for (or with the proceeds, increase, or income from) property acquired prior to repeal, is not community property; (2) Any claim that property is community property must be filed within a designated period to be available as a claim or defense by either husband or wife in any action, proceeding, or controversy; (3) Third persons relying on the record or apparent separate title of one spouse are protected against undisclosed community property.

There are also a number of Texas cases which hold invalid a statute enlarging the wife's separate property, not, however, on the ground of due process or impairment of the obligation of contract, but on the ground that the statute conflicted with a constitutional provision prescribing what shall be the wife's separate property. Tex. Const., Art. 16, sec. 15. Arnold v. Leonard, 114 Tex. 535, 273 S. W. 799 (1925); Gohlman, Lester & Co. v. Whittle (Tex. Civ. App.) 254 S. W. 595, rev'd 114 Tex. 584, 273 S. W. 808 (1925); Frame v. Frame (Tex. Civ. App.) 14 S. W. 2d 865, rev'd 120 Tex. 61, 36 S. W. 2d 152 (1931).

The reason for the adoption of the community property system was to allow taxpayers to take advantage of the federal income tax provisions whereby husband and wife in community property states were privileged to declare only half of their respective incomes, the other half being declared by the nonearning spouse as community income. After Congress, by the addition of the "split income" provision to the Internal Revenue Code in 1948 (Int. Rev. Code, sec. 12 (d)) extended to married persons everywhere the income tax advantages which had been enjoyed in the community property states, there was no longer any need for the community property acts adopted by the five states. They immediately repealed their legislation. See Chapter 3, p. 32 et seq.

87 Neb. Laws 1949, c. 129, sec. 2.
INTERESTS ARISING FROM MARRIAGE

rights; 90 (4) Where a spouse dies later than two years after the repeal takes effect, all property which would have been separate property of the decedent if the community property law had never been enacted shall pass by will or intestacy as separate property; 91 (5) Spouses are privileged to join in a written agreement changing their community holding to a tenancy in common, tenancy by entireties, or to separate property. 92

Device (5) above presents no constitutional difficulties. (4) is based upon the general view that legislation may constitutionally alter or restrict testation and the laws of inheritance. 98 (3) may be sustained under the general principles relating to retroactive recording statutes, that is, that they are constitutional so long as a reasonable opportunity to record is accorded the person affected. 94 (2) is more doubtful. It has usually been held that one in possession of property and not made a party to a proceeding involving the title may not constitutionally be obliged to take affirmative steps to assert his interest on penalty of losing it if he does not act. 95

The exceptions have involved some degree of emergency where the public interest in certainty of titles greatly outweighed the individual prejudice. Perhaps the community property situation is one in which the courts would recognize a public interest sufficient to warrant the private inconvenience. (1) is probably constitutional. No one can be said to have a constitutional right that a court should not use a presumption against him. However, if the erection of a presumption greatly hampers the claimant in establishing his interest there may conceivably be a taking of property with-

90 Ore. Laws 1949, c. 349, sec. 5.
91 Ore. Laws 1949, c. 349, sec. 4.
92 Ore. Laws 1949, c. 349, sec. 3.
93 Supra Chapter 3, p. 90 et seq.
94 Supra Chapter 3, p. 73.
95 Supra Chapter 3, p. 48 et seq.
out due process. Statutory presumptions have been declared unconstitutional when unreasonable, but this presumption hardly appears to be that.

CHAPTER 7

Concurrent Ownership

I. JOINT TENANCIES AND TENANCIES IN COMMON

STATUTES AFFECTING THE INCIDENT OF SURVIVORSHIP

The common law was partial to joint tenancies, the principal characteristic of which is the element of survivorship by which the entire tenancy, on the decease of one tenant, remains to the survivors, and ultimately to the last survivor. This heritage of the feudal system, which was opposed to a division of tenures and consequently favored joint estates, was expressed in a rule of construction that the grantor or testator must be presumed to have intended to create a joint tenancy. Despite the disappearance of reasons for this presumption, it was generally held, until the policy of the law was changed by statute, that a grant or devise to two or more persons, not husband and wife, must ordinarily be construed as creating a joint tenancy in the absence of any indication that the grantees or devisees are to hold as tenants in common. The presumption that a joint tenancy is in-

1 Thompson, Real Property, sec. 1775 (Perm. ed.). 2 Tiffany, Real Property, sec. 419 (3d ed.) states: “This doctrine of survivorship appears to be the result of, or at least associated with, the theory that the joint tenants together own but one estate, a theory which, rigidly applied, would recognize no distinct interest in one to pass on his death to his heirs or devisees, his claim being, as against the others, merely extinguished in that case. The survivor takes no new title by survivorship, but holds under the deed by virtue of which he was originally seized of the whole.” That this theory is not rigidly applied is evident from the fact that the incident of survivorship can be defeated by the acts of the joint tenants. See infra note 5.

2 Thompson, Real Property, sec. 1775 (Perm. ed.); 2 Tiffany, Real Property, sec. 421 (3d ed.). Of course, the essential unities of time, interest, title, and possession had to be present.
tended (which could not usually be rebutted by evidence of
the real intent of the grantor or testator but only by the words
appearing on the face of the instrument) was not a presump-
tion based on probabilities.

“When lands were conveyed to two persons and their heirs,
few supposed that the heirs of the one who happened to die
first would have none of it, and that they gave it to the sur-
vivor and his heirs.”

Yet the orthodox view required the application of the pre-
sumption whatever may have been the real intention of the
grantor or testator.

The results of the rule were not inevitably pernicious, for
joint tenants can at any time partition the lands and defeat
the incident of survivorship. But sometimes grantees and
devisees died without effecting a partition because they did
not realize it was necessary. The common-law presumption,
and the incident of survivorship resulting from its applica-
tion, has generally been felt to be unjust and contrary to the
spirit of our institutions.

As a result of hostility to survivorship, this feature of
joint tenancy has been declared never to have existed in a
few jurisdictions and in all (or nearly all) of those which

3 Boston Franklinite Co. v. Condit and Torrey, 19 N. J. Eq. 394, 397
(Ch. 1869).
4 Noyes v. Parker, 92 F. 2d 562 (D. C. Cir. 1937).
5 2 Tiffany, Real Property, secs. 425, 468 (3d ed.). The incident can be
defeated in other ways such as alienation by one of the tenants of his interest,
or leasing or mortgaging by one tenant of his interest, or levy and sale upon
execution of the interest of one of the tenants. These acts destroy the unities,
all of which are necessary to the existence of a joint tenancy. 2 Tiffany,
op. cit., sec. 425.
Steinberger, 2 Hammond 305 (1826). In Sergeant v. Steinberger it was said:
“The reasons which gave rise to this description of estate, in England, never
existed with us. The jus accrescendi is not founded in principles of natural
justice, nor in any reason of policy applicable to our society or institutions.
But on the contrary, it is adverse to the understandings, habits, and feelings of
the people.” However, it is held in both states that although joint tenancies
are not favored, yet where the instrument expressly declares or necessarily
once recognized it, the doctrine of survivorship has since been subjected to legislative reform. Some statutes provide that a conveyance or devise to two or more persons shall create a tenancy in common, and not a joint tenancy, unless a contrary intent is plainly apparent or is expressly declared. Some explicitly purport to abolish the incident of survivorship, and others provide that joint tenancies shall not exist.

The statutes have been so long in effect in all of the jurisdictions that the constitutional questions arising out of retroactive application are now, in all probability, of only historical interest. However, completeness of treatment demands consideration of the matter.

The courts have not been able to agree whether these statutory changes could be made applicable to tenancies which by the law at the time of their coming into existence, were joint tenancies.

Since the concept of survivorship is purely a survival of medieval law and an anomaly, it is surprising that so many courts have found constitutional impediment to the retroactive application of statutes abolishing the incident of survivorship. While there is considerable divergence in the phraseology of the statutes, this factor does not seem in any way to have influenced the decisions. The courts have in no way indicated that they thought the wording of the statutes is significant. In fact, the decisions of one jurisdiction often conflict with the decisions of other jurisdictions which have an identical or closely similar statute. It is rather that some courts have conceived the possibility of acquiring the whole estate by survivorship as a property interest, which is pro-

implies an intention to create such estate, the court will give effect to that intent. Foraker v. Kocks, 41 Ohio App. 210, 180 N. E. 743 (1931); Peyton v. Wehrhane, 125 Conn. 420, 6 A. 2d 313 (1939).

protected from deprivation, while other courts have been able to see in the incident of survivorship nothing but a fortuitous circumstance.

The proceedings which provoked the determination of the constitutionality of the statutes have generally been actions for partition brought by heirs of deceased tenants against the heirs or successors in interest of the surviving tenant, or actions for partition or ejectment brought by the heirs of deceased tenants against the surviving tenant. The question is identical in most of the cases: Did the survivor take the whole estate, notwithstanding the statute, because he happened to outlive the other tenants?

In every case, the tenancy was created before the statute, and all of the tenants died after the statute was enacted without having effected a severance. If some of the joint tenants were dead before the statute was passed, their interests would not be revived. An estate already vested in the survivor could not be taken away.

None of the cases holding that the incident of survivorship can be retroactively extinguished does so on the ground that survivorship is akin to heirship and therefore within the extensive power of the legislature to restrict the devolution of property at death. This would be a facile solution to the problem, except that the survivor does not take as heir. The historical concept is that the survivor does not take a new title by survivorship. The joint tenants together

12 Eisenhardt v. Lowell, 105 Colo. 417, 98 P. 2d 1001 (1940); Annable v. Patch, 3 Pick. 360 (Mass. 1825); Miller v. Dennett, 6 N. H. 109 (1833).
own but one estate. Hence the claims of deceased tenants are merely extinguished by their deaths.\textsuperscript{13}

1. Statutes Which Abolish the Common-Law Rule of Construction

The Massachusetts statute is one of those which provide that a conveyance or devise of land to two or more persons shall create an estate in common and not in joint tenancy, unless it clearly appears from the instrument that a joint tenancy was intended.\textsuperscript{14} The effect of such a statute is to substitute for the common-law presumption in favor of joint tenancies a rule of construction, or a presumption in favor of tenancies in common. The Massachusetts courts have held that the presumption created by the statute could (and should) be applied in construing conveyances and devises which were made when the common-law presumption still obtained.

The Supreme Judicial Court, in answer to claims that the incident of survivorship is property which cannot be taken by the legislature, said that since joint tenants can always sever the tenancy and destroy the right of survivorship, the statute very reasonably presumed that such tenancies were

\textsuperscript{13} 2 Tiffany, \textit{Real Property}, sec. 419 (3d ed.) \textit{supra} note 1.

\textsuperscript{14} By the Acts and Laws of 1786, c. xxiii, sec. 4, it was enacted: “That all gifts, grants, . . . of any lands, tenements, and hereditaments, which have been, or shall be made to two or more persons, whether for years, for life, in tail or in fee, shall be taken, deemed and adjudged to be estates in common, and not in joint-tenancy, unless it has been or shall be therein said, that the grantees, . . . shall have or hold the same lands, . . . jointly, or as joint tenants, or in joint tenancy, or to them and the survivor or survivors of them, or unless other words be therein used, clearly and manifestly showing it to be the intention of the parties to such gifts, grants, . . . that such lands, . . . should vest and be held as joint estates, and not as estates in common.”

The contemporary statute, Mass. Gen. Laws 1932, c. 184, sec. 7, is a simplified restatement of the original statute. The only substantial difference is that the present statute, by virtue of an amendment made in 1885 (Mass. Acts 1885, c. 237), applies to conveyances and devises made to husband and wife.
not intended. In another case, the court declared that the act, instead of depriving the joint tenants of property, gave them a more beneficial interest than they had before, because it is better to have a certain interest in a moiety than an uncertain right of succession to the whole. The court admitted that the legislature cannot impair the title to estates without the consent of the owners (except for public purposes when adequate compensation is paid), but concluded that there can be no objection to the retrospective operation of any act which enlarges or otherwise makes a title more valuable; the consent to the holder to such statutes may always be presumed. In Burghardt v. Turner it was stated that there could be no objection to the application of the statute to existing joint tenancies, for the further reason that the operation of the statute was really prospective; it declared how a deed should be affected by events then future.

The Supreme Court of California, on the other hand, ruled that a statute similar in import to the Massachusetts statute above could not be given retroactive effect (even if that were the legislative intention) for the stated reasons that

17 Mass. Const. 1780, Art. x: “But no part of the property of any individual, can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people: . . . And whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.”
18 12 Pick. 534 (Mass. 1832).
19 Act of April 27, 1855, c. cxi, sec. 1. “Every interest in real estate, granted or devised to two or more persons, other than executors and trustees as such, shall be a tenancy in common, unless expressly declared in the grant or devise to be a joint tenancy.” The present statute reads: “A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy . . .” Cal. Civil Code, sec. 683 (Deering 1949).
the legislature does not have authority to deprive joint tenants of one of the essential elements of their tenure, i.e., the "right of survivorship," 20 nor the power to affect past contracts, or to alter or destroy the nature of estates. 21 We may surmise that the California court was much influenced by the name which it applied to the interest in survivorship. This is but another illustration of the danger in calling every interest a "right."

In Miller v. Dennett, an old New Hampshire case, it was argued that: if a deed were made to two persons and the survivor of them and the heirs of the survivor, the legislature could not declare that the land should not go to the survivor and his heirs but to the heirs of each. That being so,

"Does it, then, make any difference whether this condition is expressed by the parties to the contract or by the law in force at the time when the contract was executed? . . . The laws in force at the time the contract is made, constitute a part of the contract." 22

20 Greer v. Blanchar, 40 Cal. 194 (1870). The land was conveyed two years before the statute was enacted to a trustee "in trust for the use and benefit of Harriet M. Risley and S. Risley." Harriet died after the statute went into effect. Her heir sought to compel the trustee to convey the premises to him and to S. Risley and to make an accounting of rents and profits. It was held that the conveyance created a joint tenancy and that Harriet's interest was extinguished by her death.

21 Dewey v. Lambier, 7 Cal. 347 (1857). This was an action of ejectment. The plaintiff established title to the premises by a deed from one H. to himself and W. Held: The deed to plaintiff and W. created a joint tenancy which was not destroyed by the Act of 1855. Since W. and plaintiff were joint tenants, they should have joined in the action in ejectment. Failure to do so was fatal to a recovery.

22 6 N. H. 109, 112 (1833). The heirs of the surviving tenant sought to have the court apply the common-law rule of construction to a deed, whose words did not indicate whether the grantor intended to create a tenancy in common or a joint tenancy. The deed was executed and delivered prior to the Act of June 21, 1809, which was almost exactly identical with Mass. Stats. 1785, c. 62, sec. 4, supra note 14.
The court was not impressed with the contention; it said:

"The statute only changes a joint tenancy into a tenancy in common. The contract, which created the estate, is not altered or impaired. The deed conveyed an estate in joint tenancy, and that estate must now be considered as remaining until the statute of 1809 changed it into a tenancy in common. Such a change did not impair the obligations of any contract in the deed, but merely made the grantees tenants in common from the time the statute took effect." 23

However, it appears that the result might have been otherwise (i.e., a holding that there was an impairment of the obligation of contract) had the deed expressly granted the estate to several persons for life, remainder to the survivor and his heirs. In the instant case the survivor could base his claim only upon the common-law presumption.

The New Jersey Supreme Court, however, concluded that any law which changes the legal effect of a deed as between the original joint tenants, or as between their successors, impairs the obligation of a contract. 24 This court could see no merit in the argument that the power of joint tenants to destroy the incident of survivorship at any time during their lifetimes makes the interest in survivorship, on account of its tenuiousness and uncertainty, subject to divestment by

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23 6 N. H. 109, 115.
24 Den ex dem. Berdan v. Van Riper, 16 N. J. L. 7 (Sup. Ct. 1837). The court reflected that the possibility of survivorship might perhaps have been a motivating factor in the transaction involved in the case because of the condition of health or age of one of the grantees. However, it would seem that if these were the considerations which motivated the transaction, the instrument would have expressly created a joint tenancy.

The statute in question (Act of Feb. 4, 1812) provided: "No estate after the passage of the act, shall in this state be considered and adjudged to be an estate in joint tenancy, except it be expressly set forth in the grant or devise creating such estate, that it is the intention of the parties to create an estate in joint tenancy and not an estate of tenancy in common, any law, usage or decision heretofore made to the contrary notwithstanding." The contemporary statute is N. J. Rev. Stat. 1937, 46:3-17.
the legislature. 25 Also rejected was the proposition that this was one of those situations in which the rights of individuals come so injuriously in conflict with the interests of the public, that the legislature may interfere to prevent the evil, although private contracts may be affected thereby. "Whether men are joint-tenants or tenants in common," said the court, "is a matter of total indifference to the public." 26

Treating interests created by deed as contractual within the meaning of the contracts clause of the federal Constitution is probably a misapplication of the clause. 27 And, of course, the New Jersey case reflects an outmoded attitude not in keeping with the prevailing concept that obligations of contracts are subject to some modification in the interests of the public welfare. 28

Assuming that the contracts clause was properly invoked in the New Hampshire and New Jersey cases above, the result reached by New Hampshire is the sounder. How can it be said that the existing law becomes part of the contract (in the sense that this law cannot be changed without impairing the contract) unless the contracting parties are aware

25 In Goff v. Yauman, 237 Wis. 643, 298 N. W. 179 (1941), it was held that one of the two joint tenants in the case had voluntarily terminated the joint tenancy by applying for and accepting old-age assistance under a statute which explicitly stipulated that assistance paid should become a lien on the property of the beneficiary and that consequently there could be no question of the retroactive application of the statute although it went into effect after the creation of the tenancy.


Thirty-two years later a New Jersey court said this of the statute in question: "The object, no doubt, was to give to the words used the effect which most persons would suppose they had. When lands were conveyed to two persons and their heirs, few supposed that the heirs of the one who happened to die first would have none of it, and that they gave it to the survivor and his heirs." Boston Franklinite Co. v. Condit and Torrey, 19 N. J. Eq. 394, 397 (Ch. 1869).

27 See Chapter 2, p. 14 et seq.

28 Consider in particular, Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398 (1934) sustaining the Minnesota Mortgage Moratorium Law.
of the existing law and act in accordance therewith? This is especially true of presumptions or rules of construction which are but aids to legal reasoning, or devices by which the court arrives at the real or presumed intention of the parties. But the presumption that a grant to two or more persons creates a joint tenancy is highly artificial, and any need for such a presumption has long since disappeared. Even when the New Hampshire and New Jersey decisions were rendered (in the 1830's), probably nine-tenths of the grantors did not know of the existence of the rule, and if they had known, they would have used appropriate words to create a tenancy in common. It is quite clear that when courts applied the common-law rule of construction they were really adding something to the deed which the parties did not themselves intend. The legislature could certainly take away this addition without impairing any obligations.

In Miller v. Dennett it was also contended that the retroactive reversal of the common-law presumption would violate the Constitution of New Hampshire which prohibits retroactive legislation. The court relied upon the definition of retroactivity which does not conceive of legislation falling within the inhibition of the Constitution unless vested rights are impaired. There is no impairment of vested rights here, said the court, because the acquisition of the whole estate by survivorship would have been nothing more than a hope or expectation, like the expectation of a child to inherit the estate of a parent.

2. Statutes Which Purport to Abolish the Incident of Survivorship

The statutes of some states, instead of merely doing away with the common-law presumption, in terms purport to

29 N. H. Const. 1792, Bill of Rights, Art. xxiii: "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offences."

30 Supra Chapter 2, p. 13.
abolish the incident of survivorship. The Pennsylvania statute is illustrative:

“If partition be not made between joint tenants, whether they be such as might have been compelled to make partition or not, or of whatever kind the estates or thing holden or possessed be, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts, charges, curtesy or dower, or transmissible to executors or administrators, and be considered to every other intent and purpose in the same manner as if such deceased joint tenants had been tenants in common: Provided always, That nothing in this act shall be taken to affect any trust estate.”

If this legislation were to be taken at its face value, joint tenancies as they are known at common law could no longer exist. But the quoted statute, and identical and similar legislation in other jurisdictions, is construed not to prevent the creation of a joint tenancy (with the incident of survivorship) if the grantor or testator expressly stipulates that it is his intention to create a joint tenancy. That is to say, the creation of a tenancy in common will be presumed to have been intended in the absence of any indication to the contrary, but if the intent to create a joint tenancy or estate of survivorship is clearly expressed, the expression will be given effect. The judicial deduction is that only the inadvertent creation of joint tenancies by operation of law is sought to be avoided by the legislatures, hence the statutes are not to be construed literally. Thus, the statutes which

32 Withers v. Barnes, 95 Kan. 798, 149 Pac. 691 (1915) (“Act only abolished joint tenancies and doctrine of survivorship by operation of law. The law does not prevent the grantor’s purposely creating a joint tenancy”); Truesdell v. White, 13 Bush. 616 (Ky. 1878); Wilson v. Ervin, 227 N. C. 396, 42 S. E. 2d 468 (1947); In re Lowry's Estate, 314 Pa. 518, 171 Atl. 878 (1934); McLeroy v. McLeroy, 163 Tenn. 124, 40 S. W. 2d 1027
purport to abolish the element of survivorship have come to have about the same effect as those which purport only to abolish the common-law rule of construction.

The fact that the statute purports to abolish the incident of survivorship rather than the common-law presumption, or vice versa, seems not to have had any effect on these decisions. One finds that without regard to the form of the statute, the arguments in favor of permitting retroactive operation are all much on the same order, as are also the arguments against permitting retroactive operation.

In Bambaugh v. Bambaugh, the Pennsylvania Supreme Court assigned the following reasons for allowing the Pennsylvania statute to operate on a tenancy created by a deed executed and delivered some years before its enactment:

"The truth is, that the doctrine of survivorship was so little known to people in general, and so abhorrent to their feelings, when known, that it was thought best to get rid of it at once. The courts had been long struggling against it, but were unable, without a dangerous prostration of established principles, to go as far as they wished. The aid of the legislature was, therefore, necessary. There is no force in the argument, that the operation of the act on existing estates, was an invasion of vested rights. Who should be the survivor, was in contingency, and in the mean time, either joint tenant might have severed the estate, by legal means, without the consent of his companion. The act of assembly did for them, at once, and without expense, which ninety-nine in a hundred wished to be done. [sic] But if there were any joint tenants who desired the chance of survivorship, they might have it, by an agreement for that purpose. Now, should we undertake to put a limitation on the plain words of the law, we might do an irreparable injury to many, who reading the words as they are written, have supposed a partition unnecessary, and therefore, have died without effecting it. Something was said in the argument of this cause, against

the constitutional power of the legislature, to pass an act affecting estates *then in existence*. But on this point we have no doubt. The act deprived no man of his property. Where a title had already accrued by survivorship, it remained untouched. The only effect of the law was, to place the parties on an equal and sure footing leaving nothing to chance; without depriving them, however, of the right of making any agreement between themselves, which they might think proper.\(^{34}\)

The Kansas Supreme Court, however, thought the statute of that state (which has since been replaced by a statute of the Massachusetts type) could not change the nature of existing joint tenancies. In *Cress v. Hamnett*\(^ {35}\) it was held that the nature of the interest each joint tenant would take

\(^{34}\) II S. & R. 191, 192 (Pa. 1824).

\(^{35}\) 144 Kan. 128, 58 P. 2d 61 (1936).

A few days before the effective date of the statute, certain land was conveyed to one George S. Crary upon the express condition that if George died without issue then the remainder of the estate in fee simple should go to Martha Crary and Abigail Cress. Abigail died intestate in 1933, leaving heirs. George Crary died without issue in 1935. One of the heirs of Abigail brought an action against Martha, the survivor, for partition of the land. It was claimed by the plaintiff that the statute destroyed Martha’s claim to survivorship. The deed was construed to have created in Martha and Abigail a joint tenancy in an executory interest after an estate in fee-simple defeasible.

The statute in question, Laws 1891, c. 203, sec. 1 [Kan. Gen. Stat. 1935, sec. 22-132] read: “If partition be not made between joint tenants or joint owners of estates in entirety, whether they be such as might have been compelled to make partition or not, or whatever kind the estate or thing held or possessed be, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts or charges and be considered to every other intent and purpose as if such joint tenants or tenants of estate in entirety had been or were tenants in common; but nothing in this act shall be taken to affect any trust estate.”

In 1939 the statute was rewritten for clarification and so as to conform with the opinions of the Kansas Supreme Court construing the statute. The present reading is as follows: “Real or personal property granted or devised to two or more persons including a grant or devise to a husband and wife shall create in them a tenancy in common with respect to such property unless the language used in such grant or devise makes it clear that a joint tenancy was intended to be created: *Except*, That a grant or devise to executors or trustees, as such, shall create in them a joint tenancy unless the grant or devise expressly declares otherwise.” Kan. Laws 1939, c. 181, sec. 1; Kan. Gen. Stat. 1949, sec. 58-501.
was fixed by the deed creating the tenancy, and the legisla-
ture "was powerless by subsequent act to deprive either one
of any element of the interest created by the deed." Justice
Burch said this was not like the legislature's taking away
the privilege of inheritance: what the legislature gives, the
legislature can take away, but the legislature cannot, by sub-
sequent enactment, take away from the joint tenants what
has previously been given them by deed, an instrument
sounding in contract.

3. Statutes Which Appear to Abolish Joint Tenancies as
Such

There is one other type of statute affecting the incident
of survivorship to be found in a few states. This type of
statute seems to go further than merely abolishing the inci-
dent of survivorship, and, prima facie, would appear to make
the creation of a joint tenancy quite impossible even where
the instrument of creation contains express words. The
Georgia statute reads:

"Joint tenancy shall not exist in this state, and all such
estates, under the English law, shall be held to be tenancies
in common." 36

However, the words of this act are not taken literally by
the courts. Survivorship as an incident of joint tenancy has
been abolished; but where the deed or will, in express terms,
or by necessary implication, provides for survivorship, the
law allows the deed or will to be enforced. 37 The same result
has been reached in Oregon. 38 These statutes present no con-

37 Equitable Loan & Security Co. v. Waring, 117 Ga. 599, 44 S. E. 320
(1903).
38 Erickson v. Erickson, 167 Ore. 1, 115 P. 2d 172 (1941). The deed
contained the following recital: "The Grantees herein do not take the title
in common but with the right of survivorship; that is, that the fee shall vest
in the survivor of the grantees." The court held that the survivor took the fee.
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Institutional issues not already considered, but the courts of these states have never had to decide whether the statutes could be applied retroactively.

4. The Effect of an Instrument Which Expressly Creates a Joint Tenancy

In the cases discussed, the joint tenancy arose because of the operation of the common-law presumption and not because express words were used. The courts have never had to decide whether a statute can retroactively destroy the incident of survivorship when the instrument which created the tenancy expressly provides that the grantees or devisees shall take as joint tenants. The writer suspects a great many courts would erroneously assume that the express declaration in the instrument automatically guarantees some kind of constitutional protection to the element of survivorship to which that element would not be entitled if the joint tenancy were the product of the application of the rule of construction. But really it should make no difference how the tenancy arises. In any case, the element of survivorship is quite a fragile thing, since it is generally within the power of any of the tenants to destroy the tenancy, and along with it the incident of survivorship. 39

It intimated that the deed did not create a technical joint tenancy but did not state just which of the attributes of a common-law joint tenancy could be read into the conveyance. The court did not decide the exact nature of the rights of the tenants inter vivos. It even refused to decide definitely whether the survivor took the fee by virtue of his survivorship or whether the deed should be construed as granting a life estate to the grantees as tenants in common with a contingent remainder to the survivor.

The absence of an ascertainable ratione decidendi in the Erickson case is commented upon and criticized in O'Connell, "Are Joint Tenancies Abolished in Oregon?" 21 Ore. L. Rev. 159 (1942).

The Oregon statute reads: "... and joint tenancy is abolished, and all persons having an undivided interest in real property are to be deemed and considered tenants in common." Ore. Comp. Laws Ann. 1940, sec. 70-205. 39

39 2 Tiffany, Real Property, secs. 425, 468 et seq. (3d ed.).
Those courts which entertain the questionable doctrine that legislative impairment of interests created by a deed is *ipso facto* an impairment of the obligation of a contract would no doubt feel doubly obliged to protect the element of survivorship from impairment where a deed expressly created the joint tenancy.

A distinction, however, must be made between an express creation of a joint tenancy and the express creation of a right of survivorship. When the instrument states that the grantees or devisees shall take as joint tenants, they take an estate which has the incidents of a joint tenancy, one of which is the power of the tenants to effect a severance. But where the right of survivorship is expressly provided for, it may be in keeping with the intent of the parties for the court to construe the instrument to create an indestructible right of survivorship rather than a common-law joint tenancy with the incident of severability. An eminent writer suggests that a grant to two with right of survivorship might conceivably be construed to create a tenancy in common for life, with a contingent remainder in fee to the survivor.40 Probably neither an indestructible right of survivorship nor a contingent remainder can be extinguished by the legislature.41

Where also the tenants are precluded from exercising the power to compel partition, either by their own agreement, or by virtue of a valid prohibition against partition in the instrument,42 it is possible that the incident of survivorship would be deemed even by those courts which otherwise

40 2 Tiffany, *Real Property*, sec. 424 (3d ed.).

41 See *supra* Chapter 4 for a discussion of the extent to which the legislature may extinguish or impair contingent remainders.

42 The tenants may contract with each other not to compel partition; such agreements are enforceable. The creator of the tenancy may impose prohibitions against compulsory partition for a reasonable period of time. 2 Tiffany, *Real Property*, sec. 474 (3d ed.).
regard the incident as a mere expectancy, to be clothed with sufficient certainty to be a constitutionally protected interest.

5. The Effect of Repeal of a Statute

If any of the legislatures should repeal or amend the existing statutes so that the common-law presumption would again operate (an event which is unlikely to occur), the objections on constitutional grounds to the retroactive operation of the repeal or amendatory acts would be much more cogent than the objections to the retroactive operation of the statutes which abolished the presumption. A real and substantial burden would be imposed on the tenants if the common-law presumption were allowed to operate on their estate to make into a joint tenancy what had been a tenancy in common under the statute. The living tenants would have just grounds for complaint if they were compelled to take steps to prevent the operation of the incident of survivorship, and the heirs of deceased tenants, whose interests were destroyed by the survivorship, would have even more reason to complain of a deprivation of property without due process.

There appears to be but one case in which the question of the retroactive effect of a statute which restored the common-law presumption has been considered, and this only indi-

43 The statutes of several states provide that the making of a bank deposit in the form of a joint tenancy shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposit and the additions thereto in such survivor. Cal. Fin. Code, sec. 852 (Deering 1951); N. Y. Banking Law, sec. 239 (3). These statutes have been sustained when applied prospectively on the ground that they are in the nature of statutes of limitation, by which the remedy for a claim to establish the real fact with reference to the account must be pursued before either of the depositors is dead or it will be barred. Heiner v. Greenwich Savings Bank, 118 Misc. Rep. 326, 193 N. Y. S. 291 (1922); In re Conover's Estate, 163 Misc. Rep. 599, 297 N. Y. S. 577, aff'd 252 App. Div. 917, 300 N. Y. S. 1357 (4th Dept. 1937); Hill v. Badeljy, 107 Cal. App. 598, 290 Pac. 637 (1930).
rectly. In *Boston Franklimite Co. v. Condit and Torrey*, the direct question was whether a surviving trustee acquired the entire title by survivorship so that he could convey the title without the joinder of the heir of the predeceased trustee. The premises were conveyed in trust in 1817 after the enactment of a statute in 1812 which declared that no estate shall be considered in joint tenancy, unless expressly stated to be such in the grant creating it. An act passed April 1, 1868, provided that “all estates heretofore or hereafter granted or devised to trustees shall be construed to have vested and to vest an estate in joint tenancy in such trustees . . .” The court decided that the surviving trustee did not take the whole title because the Act of 1812 made the trustees tenants in common; consequently, so far as the Act of 1868 affected estates vested before its passage, it must be held to be unconstitutional and inoperative. No reasons were assigned.

The holding in *Boston Franklimite Co. v. Condit and Torrey* has nothing to recommend it. The decision of the court merely meant that a person who had no real interest had to be joined to make an effective transfer of title, or that the bare legal title had to be declared out of the heir of the decedent trustee by court action before the surviving trustee could continue to carry out the purposes of the trust. It has generally been held in other jurisdictions that, even where trust estates are not expressly exempted, the statutes do not prevent the application of the common-law presumption when a grant or devise is made to trustees, and the statutes frequently contain express exemptions of trust estates. The

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44 19 N. J. Eq. 394 (Ch. 1869).
45 *Supra* note 24.
47 4 Thompson, *Real Property*, sec. 1792 (Perm. ed.).
reason for holding that conveyances to trustees are not within the spirit, and consequently not within the scope of the statutes, is to be found in the logical and natural assumption that grantors and testators want the title to go to the surviving trustee and not to the deceased trustee’s heirs, who might well be persons unqualified to fulfill the duties of trusteeship.49

PARTITION OF LAND HELD IN JOINT TENANCY AND IN COMMON

At common law in England, joint tenants and tenants in common could not compel partition. The right to a writ of partition was extended to them by a statute enacted in the Reign of Henry VIII.50 In this country it has been quite frequently declared that partition is a matter of right.51 It would appear that the power to compel partition exists independent of statute as part of the common law of the United States.52 All of the states have statutes which authorize

49 4 Thompson, Real Property, sec. 1792 (Perm. ed.).

Also, in many states the statutes are held not to apply to conveyances in mortgage or in cases of property held in partnership, or to conveyances to husband and wife. 4 Thompson, op. cit., sec. 1787.

50 Stat. 31 Hen. VIII, c. 1 (1540). Freeman, Cotenancy and Partition, sec. 421.

51 2 Tiffany, Real Property, sec. 474 (3d ed.). Tiffany points out that this statement must be taken with some qualification. The power is subject to the power of the court under modern statutes to decree a sale instead of a partition in kind. The cotenant may preclude himself by agreement with his cotenants from asserting it. Where the devise or conveyance by which the cotenancy is created expressly prohibits partition during a period named or until a certain event, such prohibition is generally effective to prevent an involuntary partition in violation thereof.

52 Richardson v. Monson, 23 Conn. 94 (1854); Tiedeman, State and Federal Control of Persons and Property, p. 667: “The right of compulsory partition of all joint estates, as an invariable incident of these estates, except in cases of tenancies in entirety, has come down to us an inheritance from the mother country, and all joint estates in the United States have been created in actual or implied contemplation of the possibility of a compulsory partition. Consequently no question can arise as to the constitutionality of laws providing for compulsory partition.”
courts to partition lands upon petition of interested parties having a present right to possession.\textsuperscript{53}

The validity of these statutes, so far as they authorize partition in kind of lands held in joint tenancy or in common, seems very rarely to have been questioned, probably because it is assumed that the statutes merely restate the pre-existing law and do not impose any new burdens or destroy any rights under the common law.\textsuperscript{54} However, statutes authorizing partition have on occasion been attacked on procedural grounds.\textsuperscript{55}

In at least one instance, the power to compel partition in kind has been claimed to be a property interest of which the joint owners cannot be deprived without denying due process of law.\textsuperscript{56} The constitutionality of a statute was involved

\textsuperscript{53} Restatement, Property, c. II, Topic 1 (1948 Supp.).

\textsuperscript{54} In Baldwin v. Baldwin, 74 Hun 415, 26 N. Y. S. 579 (1893) it was held that a joint tenant may sue for partition of land acquired after the enactment of a statute authorizing joint tenants to maintain such actions, though the right of survivorship will thereby be defeated, as the parties took their deed with notice of the statute.

On the constitutionality of retroactive partition statutes affecting future interests see supra Chapter 4, p. 154 et seq.

\textsuperscript{55} In Richards v. Rote, 68 Pa. 248 (1871), it was held that the legislature could not validate proceedings in partition wherein a court, on the petition of one of the parties interested in the partition, appointed a "trustee" to represent one of the joint owners who was alleged to be a man of weak intellect. The latter was given no notice or opportunity to object. Affirmation of the validating act would, in the opinion of the court, have been a declaration that the legislature can take one person's property and confer it on another.

But in Biddle v. Starr, 9 Pa. 461 (1848), the court upheld a statute which retroactively authorized partition pending the contest of the will of a deceased joint owner, although prior to the statute a court could not have acted until the controversy concerning the will of the deceased tenant was settled. There was no injustice in the joinder of the adverse claimants and the executors, since the same notice, the same proof and proceedings, were otherwise adhered to. A court of equity, ordinarily, apart from statute, will not, in a proceeding for partition, undertake to settle questions as to legal title which may arise between the parties thereto. 2 Tiffany, Real Property, sec. 478 (3d. ed.). But this is a mere procedural matter which can surely be altered by legislation even as to pending proceedings.

\textsuperscript{56} Hatch v. Tipton, 131 Ohio St. 364, 2 N. E. 2d 875 (1936). The statute was challenged on the grounds that it is retroactive and in violation of Ohio Const., Art. II, sec. 28, which prohibits retroactive legislation (see supra
which provides that an executor or administrator of a deceased co-owner shall have (for purposes of administering the estate) the power to compel the sale of the entire tract in which the decedent’s interest is fractional and undivided (the other owners, of course, to receive their just share of the proceeds). However, the alleged absolute power of the co-owners to compel partition in kind was found to be conditional: partition in kind could not be had where property was incapable of physical partition or where any of the surviving co-owners elected to purchase the entire estate at an appraised value. The court declared that a right which is not absolute but is dependent for its existence upon the action or inaction of another is not basic or vested, and so not within the protection of the Constitution. Indeed, the court stated that the loss which the co-owners claimed to have sustained might be characterized as the loss of an undue advantage which they had over the interest of a deceased co-owner. But undue advantage can never ripen into a vested right, deprivation of which is constitutionally repugnant.

Partition by Sale

Some authority is given in all states to the courts to order a sale of the land where it cannot be divided equally or cannot be divided without prejudice to the interests of some

Chapter 2, p. 13); in violation of the due process clause of the Fourteenth Amendment; and in violation of Ohio Const., Art. I, sec. 19, which provides that “private property shall ever be held inviolate.”

Prior to the enactment of the statute, any living co-owner had the power of partition, while the administrator or executor of a deceased co-owner did not have such power. It is the general rule that an administrator or executor has no such seizin of the land of the deceased co-owner as to entitle him to be made a party to partition proceedings. Marshall v. Marshall, 86 Ala. 383, 5 So. 475 (1889); Throckmorton v. Pence, 121 Mo. 50, 25 S. W. 843 (1894); Garrison v. Cox, 99 N. C. 478, 6 S. E. 124 (1888).
of the parties. In a few cases, it has been questioned whether the legislature can constitutionally authorize a court to sell the land in case partition in kind is impracticable. In *Richardson v. Monson* a proceeding was instituted under a statute which gave authority to the court to order a sale of the land and to distribute the proceeds among all persons interested in the estate, in proportion to their interests, whenever a sale would, in the opinion of the court, promote the interests of all parties better than a partition would, and whenever the property could not conveniently be occupied in common. The tenancy in question had come into being prior to the enactment of the statute. Facts were stated in the bill to prove that partition was impracticable. The defendants argued that to give the statute a retroactive effect would impair the obligation of contracts and would authorize the taking of property from one person and the vesting of it in another. It was claimed that the statute in authorizing the court to compel a sale upon the application of one or more tenants in common, and representing in this case a small minority of interest, deprived some of the tenants of their property merely to accommodate others, and without reference to the public interests. The court replied that the power to compel a partition enters into the very nature of the title of estates held in common and the only question is how partition can best be made. The legislature had supplied the answer in this instance by providing for sale where partition could not be made to the best advantage of the parties.

59 Restatement, Property, sec. 178, Comm. a, Spec. Note (1948 Supp.). The statutes vary somewhat in wording but agree in substance. Sales are allowed *inter alia* when partition in kind will operate "to the great prejudice" of the owners, or "to the manifest prejudice" of the owners, or where the property "cannot be equitably divided in kind," or divided without "great inconvenience" to the parties interested.

60 23 Conn. 94 (1854).

This statute, decided the court, introduced no new principle; it only provided for an emergency when a division could not be well made in any other way.

In *Metcalf v. Hoopingardner* 62 it was held that the power of the legislature to provide that the share of all parties shall be sold where a division of the lands cannot be made, had been too long acquiesced in to be any longer called in question. 63

“When parties, by contract, assume the relation of tenants in common in real estate, the law fixes their respective rights, one of which is that the partnership may be dissolved, so to speak, and that if necessary the common property may be sold and the proceeds divided.” 64

It is the general rule that when the circumstances designated by the statute are found to exist a sale will be ordered, even if a majority in interest, or the majority in numbers holding an interest in the property, request a partition in kind. 65 However, partition in kind ought to be made whenever possible, although it is difficult, and a sale will not be ordered unless a partition in kind would materially impair the value of the land or substantially prejudice the interests of the owners. 66 The compulsory sale of one’s property

62 45 Iowa 510 (1877).
63 In Kluthe v. Hammerquist, 45 S. D. 476, 188 N. W. 749 (1922), it was contended that such procedure was in violation of sec. 2, art. 6, of the state Constitution in that it deprived the party of his legal title without due process of law, and deprived him of his right to freedom from forced or compulsory alienation of his property. Held: Statute is not violative of any constitutional right when properly construed and applied.
64 45 Iowa 510, 512.
66 “The generally accepted test of whether a partition in kind would result in great prejudice to the owners, is whether the value of the share of each in case of a partition, would be materially less than his share of the money equivalent that could probably be obtained for the whole.” 20 R. C. L., p. 774, quoted in Kluthe v. Hammerquist, 45 S. D. 476, 479, 188 N. W. 749, 750 (1922) *supra* note 63.
without his consent is warranted only in clear cases.\textsuperscript{67} If the judgment does not provide for distribution of the proceeds of sale to the tenants in proportion to their interests in the land, the sale is void.\textsuperscript{68}

**MISCELLANEOUS STATUTES RELATING TO TENANCIES IN COMMON AND JOINT TENANCIES**

Where the pre-existing law recognizes the privilege of one cotenant in a mine to enter without the consent of the other and take away ores, although the value of the land might be lessened thereby, this privilege has been held to be a substantial property interest which cannot be taken away by the legislature.\textsuperscript{69} The rights created by a statute which takes away this privilege have also been held to be valuable property interests which cannot constitutionally be divested by an act which purports to restore the privilege.\textsuperscript{70} Of course, the legislature has no power to convert ownership in severalty into joint ownership.\textsuperscript{71}

**II. TENANCIES BY ENTIRETIES**

Tenancy by entireties is the tenancy by which husband and wife at common law hold land conveyed or devised to them by a single instrument.\textsuperscript{72} This form of joint ownership, although differing from a joint tenancy in some respects, is essentially a form of joint tenancy. Survivorship


\textsuperscript{68} See Mead v. Mitchell, 17 N. Y. 210 (1858).

\textsuperscript{69} Butte and Boston Consol. Min. Co. v. Montana Ore Purchasing Co., 25 Mont. 41, 63 Pac. 825 (1901).

\textsuperscript{70} Ibid.

\textsuperscript{71} Shell v. Matteson, 81 Minn. 38, 83 N. W. 491 (1900) *supra* Chapter 3, note 104.

\textsuperscript{72} 2 Tiffany, *Real Property*, sec. 430 (3d ed.).
is also the predominant characteristic of tenancies by entireties. The survivor of the marriage, whether husband or wife, is entitled to the whole, and this right cannot be defeated by a conveyance of the other, nor by a sale under execution against the other, nor can the tenants partition the estate.\textsuperscript{73}

It appears that this form of joint ownership has not experienced such hostility on the part of the courts as has the institution of joint tenancy. Certainly, the courts have not seized at the opportunity to be rid of tenancies by entireties by broadly applying and construing the various statutes affecting the incident of survivorship in joint tenancies and the various "Married Women's Property Acts." These statutes have usually been held to allow tenancies by entireties to exist in one form or the other.\textsuperscript{74}

\textsuperscript{73} 2 Tiffany, \textit{op. cit.} However, the tenants can destroy the estate by a joint conveyance. Maxwell v. Sullivan, 123 Fla. 263, 166 So. 575 (1936); Beihl v. Martiny, 236 Pa. 519, 84 Atl. 953 (1912).

\textsuperscript{74} 2 Tiffany, \textit{Real Property}, sec. 433 (3d ed.).

The reasons usually assigned that statutes affecting the incident of survivorship in joint tenancies are not applicable to tenancies by entireties are: (1) these statutes encompass only joint tenancies or conveyances to two or more persons, but in contemplation of law, husband and wife are but one person and do not take as joint tenants; (2) the incident of survivorship is not an evil in the case of tenancies by entireties and it cannot be assumed that the legislatures intend to abolish the incident of survivorship except where it is productive of harmful results.

In Hiles v. Fischer, 144 N. Y. 306, 39 N. E. 337 (1895) it was held that the Married Women's Property Act simply takes away the husband's usufruct of the wife's separate property. The right of the husband to the rents and profits and use of the land held by entireties is not an incident of this estate but is a right enuring to him from the general principle of the common law which vests him \textit{jure uxoris} with the rents and profits of all his wife's lands, whether held by a sole or joint title, during their joint lives. The effect of the statutes is to take the husband's exclusive right to the usufruct of the lands held in entirety. By virtue of the statute, husband and wife are now tenants in common or joint tenants of the use, each being entitled to one-half of the rents and profits during their joint lives. Upon the death of one, the survivor takes the whole estate.

The courts which take the opposite view, \textit{i.e.,} that the Married Women's Acts have abolished tenancies by entireties, generally do so on the ground that the theoretical unity of the spouses with respect to rights of property being done away with, it would be inconsistent to retain any of the incidents of
The legislatures have also shown a greater reluctance to alter the incidents of the tenancy by entireties than they have to change the incidents of the joint tenancy. The common-law rule that a conveyance of land to husband and wife during coverture ordinarily creates an estate by the entirety, is still in effect in many jurisdictions.\(^\text{75}\)

This judicial and legislative acquiescence in, or approval of, the common-law rule is very likely a realization that as a matter of fact grantors and devisors to husband and wife may often really intend that the survivor shall take all. Certainly, many married persons desire to hold their land as tenants by the entirety for the purpose of saving costs of administration.

Legislation affecting the incident of survivorship has been enacted in a number of jurisdictions. Some statutes purport to abolish the incident;\(^\text{76}\) some provide that conveyances and devises to husband and wife shall be presumed to create estates in common;\(^\text{77}\) in some states the tenants are given

it. See: Wilson v. Wilson, 43 Minn. 398, 45 N. W. 710 (1890); Swan v. Walden, 156 Cal. 195, 103 Pac. 931 (1909).

A third view is expressed by a few courts that estates by entireties still exist as at common law, entirely unaffected by the Married Women's Act. Arrand v. Graham, 297 Mich. 559, 298 N. W. 281 (1941).


\(^\text{76}\) E.g., the Kentucky statute, infra note 79.

\(^\text{77}\) E.g., Mass. Gen. Laws 1932, c. 184, sec. 7: "A conveyance or devise of land to two or more persons or to husband and wife, except a mortgage or a devise or conveyance in Trust, shall create an estate in common and not in joint tenancy, unless it is expressed in such conveyance or devise that the grantees or devisees shall take jointly, or as joint tenants, or in joint tenancy, or to them and the survivor of them or unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy."
the power to partition. The courts have consistently held that such legislation cannot be applied to existing tenancies.

The basis of the courts’ refusal to allow the statutes to be given a retroactive effect has generally been the theory that when land is conveyed or devised to husband and wife, they do not take title as individuals but as one legal person, or, as the proposition is sometimes quaintly stated, they take per tout et non per my.

In Elliott v. Nichols it was said:

“... all the books agree, una voce, that husband and wife not only cannot compel each other to make partition, but even if they concur in the wish, they have not the power to sever the tenancy. It is a sole, and not a joint tenancy. They have no moieties. Each holds the entirety. They are one in law, and their estate one and indivisible. If the husband alien; if he suffer a recovery; if he be attainted, none of these will affect the right of the wife, if she survive him. Nor is this by the jus accrescendi. There is no such thing between them. That takes place where, by the death of one joint tenant, the survivor receives an accession—something which he had not before—the right of the deceased. But, as between husband and wife, the survivor takes nothing from the decedent; acquires no new title nor interest nor estate thereby; but takes by the original conveyance the whole, because invested thereby with the entire estate. The survivor gets the entire estate by virtue of the title being in him or her by the original conveyance, but rid of the possible contingency of

78 E.g., the New York statute, infra note 86.
79 67 Ky. 502 (1868). Land was conveyed to Mr. and Mrs. N. in 1837. Mr. N. mortgaged same in 1865. Mrs. N. died in 1861, leaving children and heirs who resisted the foreclosure of the mortgage on one-half of the land, claiming that a statute enacted in 1850 had abolished the incident of survivorship in estates by entireties, and that consequently their parents held as tenants in common.
2 Stanton’s Ky. Rev. Stat. 1852, c. 47, Art. iv, § 14, provided: “Where any real estate or slave is conveyed or devised to husband and wife, unless a right of survivorship is expressly provided for, there shall be no mutual right to the entirety by survivorship between them; but they shall take as
the other’s surviving and retaining the estate, because like­wise so invested in that party.”

“As the entire title and estate was vested in both husband and wife, the Legislature could not have diverted any portion of the title, and we must presume did not intend to do so, but that, as a rule of property and a declaration of the legal effect of such deed subsequently made, and the legal rights of the parties thereunder, said statute was enacted.”

Similar reasoning has been used by other courts in refusing to allow a retroactive effect to statutes of their respective jurisdictions.

An Arkansas statute, enacted in 1947, provides that courts of equity shall have the power to dissolve estates by the tenants in common, and the respective moieties be subject to curtesy or dower, with all other incidents to such a tenancy.” (Now, with the omission of “or slave” and immaterial modifications, Ky. Rev. Stat. 1948, sec. 381.050.)

The same might be said of the element of survivorship in joint tenancies. 2 Tiffany, Real Property, sec. 419 (3d ed.). Supra note 1.

Holmes v. Holmes, 70 Kan. 892, 79 Pac. 163 (1905). In 1876 a tract of land was conveyed to Mr. and Mrs. H. In 1896 after the statute abolishing survivorship had been passed (supra note 35), Mrs. H. died, leaving her husband surviving her, and the question arose whether the heirs of Mrs. H. inherited any interest in the land. Held: No.

An opposite view was adopted in an earlier case, Stewart v. Thomas, 64 Kan. 511, 68 Pac. 70 (1902), wherein it was held that the statute was intended to apply to existing tenancies by the entirety and that consequently the children of the deceased wife (husband surviving) were necessary parties to foreclosure proceedings on a mortgage executed by husband and wife. The concept of the estate by entireties was characterized as out-moded.

Pease v. Whitman, 182 Mass. 363, 65 N. E. 795 (1903). This was an action in tort for flowing plaintiff’s land, which had been conveyed to Mr. and Mrs. L. in 1883. Mr. L. conveyed the premises to defendant. Mrs. L. did not join in the deed. After Mr. L.’s death his widow conveyed the premises to the plaintiff. In 1885 the statute relating to construction of conveyances and devises to two or more persons (supra note 14) was amended by inserting after the word “persons” the words “or to husband and wife.” Mass. Acts 1885, c. 237 (for the statute as it now reads see supra note 77). Held: The statute of 1885 could not affect this case because the rights of the wife became vested in 1883 before the statute was enacted and therefore defendant took nothing under the deed from Mr. L.

CONCURRENT OWNERSHIP

entirety, upon the rendition of a final decree of divorcement, and in the division of the property, so held by the parties, shall treat the parties as tenants in common.\(^{83}\) It has been held that the statute cannot be constitutionally applied to an entirety estate, which was created prior to the passage of the statute.\(^{84}\) In Pennsylvania a like result was reached under a similar statute.\(^{85}\)

In Zorntlein v. Bram\(^{86}\) it was declared that the legislature cannot retroactively bestow authority upon either the husband or wife separately to convey to a third party.

To be sure, the *una persona* theory is not the only factor inducing the courts to hold that a statute cannot retroactively destroy the incident of survivorship in tenancies by the entireties. Whether or not it is accurate to ascribe the inability of either husband or wife to sever the tenancy to a doctrine of the common law which forbade the recognition of the separate existence of the spouses, the fact remains that the incident of survivorship cannot be defeated by a conveyance by one tenant, as in the case of a joint tenancy, nor by a sale under execution. Since the incident cannot be destroyed ordinarily except by the joint conveyance of the

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It is generally held that divorce terminates the tenancy. 2 Tiffany, *Real Property*, sec. 436 (3d ed.). Arkansas is one of the few states in which it is denied that the tenancy ceases upon divorce.
85 Clements v. Kandler, 9 Pa. Dist. & Co. 310 (1925); Ebersole v. Goodman, 7 Pa. Dist. & Co. 605 (1925); Cooper v. Niemeyer, 50 Pa. Dist. & Co. 634 (1944). Pennsylvania is another state in which it has been held, contrary to the prevailing view, that divorce does not sever the tenancy by the entirety.
Pa. Act of 1925, P. L. 649 provided that whenever a husband and wife, now or thereafter holding property as tenants by entireties, have been divorced, either of such tenants may bring suit to have the land sold and the proceeds divided between them. Pa. Act of 1949, P. L. 1394 provides that if title is acquired after Sept. 1, 1948, upon divorce, the property will automatically be owned as a tenancy in common. The Act of 1949 is now Purdon's Pa. Stat. Ann., Tit. 68, sec. 501 (1951 Supp.).
86 100 N. Y. 12, 2 N. E. 388 (1885). In 1878 the land was conveyed to Mr. and Mrs. B. On Sept. 23, 1881, Mrs. B. executed a deed purporting to
spouses, the interest of each spouse, while both are living, in the possibility of getting the whole estate, is something more than a mere expectancy. It may therefore seem questionable whether the legislatures can extinguish such an interest without the consent of both tenants. The constitutional immunity from legislative impairment which ought to be afforded the incident of survivorship in tenancies by entireties, it seems, should be very much the same as that immunity which is afforded to contingent remainders. 87

When a court thinks only of the una persona theory, however, it is likely to lose sight of the fact that there may be valid policy reasons for extending to tenants by entireties some of the privileges enjoyed by tenants in common and joint tenants. In Zornilein v. Bram 88 for example, the court seems to have thought there was something in the nature of tenancies by entireties which deprives the legislature of authority to allow either of the spouses to sever the estate, although the other spouse does not object. While the legislature probably ought not to be allowed to take away from a nonconsenting spouse the chance of getting the whole estate by survivorship, it is absurd to hold that even if the spouses concur in the wish, they cannot take advantage of a statute to sever the tenancy.

convey an undivided one-half of the premises to plaintiff. On Sept. 30, 1881, Mr. and Mrs. B. joined in a deed of the premises to defendant. N. Y. Laws 1880, c. 472 (now incorporated in N. Y. Dom. Rel. Law, sec. 56) provided: "Whenever husband and wife shall hold any lands or tenements as tenants in common, joint tenants, or as tenants by entireties, they may make partition or division of the same between themselves, and such partition or division, duly executed under their hands and seals, shall be valid and effectual. . . ."

Plaintiff brought this action for partition. Held: The deed executed by Mrs. B. to the plaintiff conveyed no title and he could not maintain an action for partition.

87 For the constitutional protection afforded contingent remainders see supra Chapter 4.

88 100 N. Y. 12, 2 N. E. 388 (1885), supra note 86.
The idea that the spouses do not have separate legal personalities is altogether outdated and is not likely to recommend itself to many present day courts. One could expect such a theory to be the deciding factor in cases arising prior to 1850. The modern view is that there is nothing in the relationship of husband and wife to prevent their acquiring property as joint tenants or as tenants in common.

While it is true that a conveyance or devise to a husband and wife still creates in many jurisdictions a tenancy by entireties, this result is reached upon the presumption that the alienor intended to create a tenancy by entireties unless the instrument clearly expresses the intention that the alienees shall take as tenants in common or as joint tenants.

The change in view from the proposition that the courts are dealing with a rule of law to the proposition that the issues turn on the application of a rule of construction ought to have some effect on the constitutionality of the retrospective operation of the type of statutes under discussion. But the change is not reflected in the cases previously cited, and they are therefore of doubtful authority for future decisions. The rule of law on which these cases are based has in the course of time become a rule of construction and may well disappear altogether from the law. Even without the influence of statutes, the courts in a number of jurisdictions have repudiated the institution of tenancy by the entireties as not

89 There are American cases decided in the first half of the nineteenth century which go so far as to hold that husband and wife suffer "a legal incapacity to take in severalty, arising from a legal identity; and a grantor cannot remove that incapacity without the intervention of a trustee." Dias v. Glover, 1 Hoff. Ch. 71 (N. Y. 1839); Stuckey v. Keefe's Ex'rs, 26 Pa. 397 (1856). Freeman, Cotenancy and Partition, sec. 72, states that it is doubtful whether any reported case prior to the publication of Mr. Preston's "Treatise on Estates" ever supported the doctrine that, as between themselves, husband and wife can take an estate other than by entireties.

90 2 Tiffany, Real Property, sec. 431 (3d ed.).

91 2 Tiffany, op. cit.
in harmony with the usages of the community, or as based on a concept of marriage relation which no longer obtains.\textsuperscript{92} The courts in the future are not likely to treat husband and wife as different from any other grantees.

\textsuperscript{92} 2 Tiffany, \textit{Real Property}, sec. 433 (3d ed.).

In Kerner v. McDonald, 60 Neb. 663, 84 N. W. 92 (1900) it was said: "Many principles of law have changed with the passing of time, through the gradual change of thought on the part of society and the flux and change of social organization. Many others have ceased because the reason which called them into existence has ceased, and it seems to us that to this last-named principle may be referred the law of estates by entirety." (60 Neb. 663, 670, 84 N. W. 92.)

In Van Ausdall v. Van Ausdall, 48 R. I. 106, 135 Atl. 850 (1927), the court remarked: "On the facts before us at early common law a presumption would exist in favor of construing this deed as creating a tenancy by entirety. This was only a presumption, \textit{i.e.}, an aid to legal reasoning. It arose because grantees were husband and wife and legal policy favored a holding \textit{per tout et non per my}'. It was employed in English law at a time when a married woman had few property rights. It was created for what was conceived to be the wife's protection. If she now has full property rights and needs no such protection, the reason for its employment has disappeared and a court properly may decline to be guided by it. One of the glories of the common law has been that it is not static. It grows as new conditions arise. When the basis for a presumption has gone, there is small reason for a court longer to act upon that presumption. If nothing has taken the place of such basis, perhaps the presumption may continue to be applied. Where for that basis has been substituted an entirely altered conception of the property relation of husband and wife, the imputation of intent, as if no alteration had been made, is not sound. There is no legal requirement that such a common law presumption must remain unaffected until expressly altered by statute. A presumption is not evidence. It is an aid to legal reasoning applied to particular subjects. It is grounded on 'experience, probability, policy and convenience'. When the grounds change so should the presumption." (48 R. I. 106, 109, 135 Atl. 850, 851.)
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