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 alieenee 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*, \(\text{\textsuperscript{118}}\).

\(^4\) 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.
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of transaction particularly open to such abuses. The sale of residential lots having an area less than a prescribed minimum may be prohibited. 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": Ariz., La., N. M., Idaho, Mont., Ore., Kan., and Utah. McGovney, The Anti-Japanese Land Laws of California and Ten Other States, 35 Calif. L. Rev. 7 (1947). An excellent review of such legislation is given in a Comment, The Alien Land Laws: A Reappraisal, 56 Yale L. Rev. 1017 (1947). Generally on the subject of restrictions on the capacity of aliens to acquire land interests, see 1 Powell, Real Property, 1101 et seq.

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.\textsuperscript{9} 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.\textsuperscript{10} 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.\textsuperscript{11}

\textsuperscript{9} Shapler 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).

\textsuperscript{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, \S 122.

\textsuperscript{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, \S 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 consummated 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
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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).\(^\text{17}\)

\(^{17}\) 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 disseisin 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. Thus husband and wife may be deprived of the privilege of disinherit 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.

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. Of course such statute must be in effect before the death of the owning spouse, since the inter-

Reynolds v. Reynolds, 24 Wend. 193 (N. Y. 1840). This was an action of ejectment for dower. Plaintiff was married to Reynolds in 1800. They lived together until 1802, when plaintiff left her husband because of his misconduct. Shortly after plaintiff left Reynolds, he took the defendant into his house and lived with her as his wife. In 1805 plaintiff supposing herself absolved from the marriage contract married another and continued to live with him as his wife until his death. She and Reynolds were never divorced. Defendant maintained that plaintiff, having lived in adultery, was not entitled to dower. Laws 1787, c. IV, sec. VII provided in effect that if a wife willingly leave her husband and go away and continue to live with her adulterer, she shall be barred of an action to demand dower; except that if her husband willingly become reconciled with her and allow her to live with him, in which case she shall be restored to her action. This statute was repealed seven years before Reynolds' death. Defendant contended that plaintiff's right to dower was forfeited prior to the repeal. Held: Plaintiff was entitled to dower. While her husband lived the plaintiff had no interest in the land, no right of action which could be forfeited. Her misconduct vested no new interest or title in any third persons and consequently none was taken away by the repeal statute.

A statute enlarging the marital estate cannot be so applied as to impair substantially the remedy of existing creditors of the owning spouse. Hoskins v. Hutchings, 37 Ind. 324 (1871) (mortgagee); Parkham v. Vandeventer, 82 Ind. 544 (1882) (mortgagee); Davidson v. Richardson, 50 Ore. 323, 91 Pac. 1080 (1907) (judgment creditor); Patton v. City of Asheville, 109 N. C. 685, 14 S. E. 92 (1891) (unsecured creditor). See also the cases cited *infra* note 31.

18 See *infra* this Chapter, p. 90, *et seq.*
est of an heir vests at the moment of the death of the ancestor. 21

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. 22 In *Gladney v. Sydnor* 23 the Supreme Court of Missouri ruled, on the ground that the Missouri Constitution prohibits retroactive legislation which impairs vested rights, 24 that a statute restricting the power of the husband to sell or encumber the homestead without his wife's joinder 25 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." 26


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. I, 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. 27

“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 coplaintiff 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. 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’rs, 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
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).)

32 Brettun 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.

33 Brettun 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.

34 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
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.

35 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)).


36 357 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.
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.

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
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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 personalty 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, 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.\textsuperscript{40}

The problem considered in \textit{Willcox v. Penn Mutual Life Insurance Co.} is not likely to recur. The rash of community property statutes subsided after the \textit{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.\textsuperscript{41} The states which adopted community property statutes repealed them.\textsuperscript{42} The problems which arose as a result of the repeal of community property statutes will be discussed in Chapter 6.

\textbf{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.\textsuperscript{43} It

\textsuperscript{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.

\textsuperscript{41} 62 Stat. 114, c. 168, sec. 301; Int. Rev. Code, sec. 12 (d).


\textsuperscript{43} \textit{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, \textit{Real Property}, sec. 1133 (5d 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. 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. 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. 48

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. Hetz 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. 1935); 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).

47 Walsh, 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, Title by Adverse Possession, 32 Harv. L. Rev. 135, 139 (1918). See also note 54 infra.

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
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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.\(^49\) 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.\(^50\) 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.\(^51\) 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, *The Disseisin of Chattels*, 3 Harv. L. Rev. 313, 318 (1890).

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

\(^{50}\) "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, *Constitutional Limitations*, p. 447 (6th ed.).

\(^{51}\) 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, *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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{54} There is an old case holding that a


\textsuperscript{54}States with statutes so providing are listed by Walsh, \textit{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 pendency 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 expedients, 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

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

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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.

Procedural aspects of limitations are discussed in 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. 4 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.

Statutes introducing changes in the common law have been sustained when applied prospectively. In Kennebec Purchase, etc. v. Laboree, 2 Greenl. 275 (Me. 1823), prior to the statute there was no such thing as constructive possession without a claim of title. The statute provided that the adverse claimant does not need to surround the premises by fences or render them inaccessible by other obstructions, but it is sufficient if the possession is open, notorious, and exclusive, comporting with the ordinary management of similar estates in the possession of their owners. In Montoya v. Gonzales, 232 U. S. 375 (1914), the statute provided that possession for ten years, under a deed purporting to convey a fee simple, of any lands which have been granted by Spain, Mexico, or the United States, gives a title in fee to the quantity of land specified in the deed, if during the ten years no claim by suit in law or equity effectually prosecuted shall have been set up. As applied to the peculiar facts, the statute enacted that possession for ten years of the front and cultivable portion of a strip under a deed carrying the whole of it back sixteen miles to the mountains gave title to the whole.

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).

70 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.\(^71\) 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,\(^72\) 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

\(^71\) 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 Quixoite-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.)

\(^72\) 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 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. Claufton, 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. Claufton 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.\textsuperscript{74}

\textsuperscript{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) \textit{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

be conclusive evidence that there was no irregularity in the assessment of the taxes, was a statute of limitations, and did not deprive the former owner of such lands or property without due process in violation of the Fourteenth Amendment.

75 Page 80 et seq.

76 Whitney v. Wegler, 54 Minn. 235, 55 N. W. 927 (1893); Merchants' Nat. Bank of Bismark 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 possessor 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.

78 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.
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.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 *bona fide* belief that he owned the land.⁸⁰ Under the common law, the landowner may recover possession without any obligation to pay the *bona fide* occupant for improvements made in good faith.⁸¹ The

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.

⁸⁰ 2 Tiffany, *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.\textsuperscript{82} 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.\textsuperscript{83} 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.\textsuperscript{84}

Many of the states now have occupying claimant statutes.\textsuperscript{85} The general effect of these statutes (there is considerable variation) is to compel the owner of the land to pay to the

\textsuperscript{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).

\textsuperscript{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.”

\textsuperscript{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).

\textsuperscript{85} 2 Tiffany, Real Property, sec. 625 (3d ed.).
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... 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

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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. Dansy, 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-

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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 (1811).

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. 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, 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).

91 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).

92 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. 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. 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. 99 Acquisition of land by either process is commonly called accretion. 100

98 Patton, Titles, sec. 83.
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.

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.  

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. A Minnesota statute was held to applied to both processes, and it is so applied by the writer for the sake of convenience.

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101 Tiffany, Real Property, sec. 1219 (3d ed.).
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.

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.\(^{106}\) On the other hand, a more recent decision,\(^{107}\) 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. 236, 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.
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vary 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} 4 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.\(^{113}\) 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.\(^{114}\) 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
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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." (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
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.\textsuperscript{116} 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.

\textsuperscript{116} Patton, \textit{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 legis-

117 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
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.\textsuperscript{120} Legislatures have frequently sought to enhance the power of control over waters of particular streams by adopting a definition of navigability which included those streams.\textsuperscript{121} The privileges appertaining to riparian ownership are presumed by the courts to be vested property interests which the legislature cannot impair by declaring a stream or body of water navigable which is

\begin{itemize}
\item \textsuperscript{120} 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).
\item 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).
\item 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).
\end{itemize}
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. 63 (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. 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.

Since the decision in 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 alinee is postponed to a later alinee 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-
ers of such instruments to comply with the provisions of the statute. 130

A very few early judges thought that a recording statute must be given prospective operation. 131 But most courts have not been greatly impressed with the thought that vesting the alienor with the power to realienate is something like


Moore v. Chalmers-Galloway Live Stock Co., 90 Colo. 548, 10 P. 2d 950 (1939). 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; 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; 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; the statute merely changes a rule of evidence in which no one has a vested interest; the statute must apply to all alienations, for a contrary holding would produce a state of uncertainty and confusion; 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; the statute does not really retroact if it does not require deeds

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

\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 recorder" for record. Laws 1927, c. 150, p. 590, sec. 8. The Colorado Constitution contains a provision forbidding retroactive legislation. See supra note 130.

ACQUISITION OF INTERESTS IN LAND

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 vendee 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. 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. 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

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.\textsuperscript{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.\textsuperscript{149} While the details vary somewhat,

\textsuperscript{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.


Excellent discussions of these statutes are to be found in Basye, *Streamlining Conveyancing Procedure*, 47 Mich. L. Rev. 1097, 1100 (1949) and Aigler, *Constitutionality of Marketable Title Acts*, 50 Mich. L. Rev. 185 (1951).

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.\textsuperscript{150} 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 \textit{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."

\textsuperscript{150} 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 pur­
sued. 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 proc­
ess. 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 market­
able 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 pre­
serving them and given a reasonable period within which to
take the necessary steps.151

Most of the statutes enacted to date provide for the preser­
vation 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 constitu­
tionality of imposing this duty would seem to have been

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

\textsuperscript{152} Supra p. 73.
\textsuperscript{154} Supra p. 42.
\textsuperscript{155} P. 227 et seq. The comments in note 69 supra this Chapter in respect to extinction of marital interests by retroactive statutes of limitations are also apropos to marketable title statutes.
\textsuperscript{156} Supra p. 47.
\textsuperscript{157} The Michigan statute quoted above supra note 149 does not require an affirmative showing of possession. It requires only the negative showing of no one in hostile possession.
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 held to be in violation of the Fourteenth Amendment a statute 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." 160

"... [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." 161

**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. 162 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 163 or of delegating judicial

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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.\textsuperscript{164} 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.

\textsuperscript{170} Mass. 328, 49 N. E. 652 (1898); McFadin v. Simms, 309 Mo. 312, 273 S. W. 1050 (1925). 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.

\textsuperscript{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.
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to the land in question and no more.\textsuperscript{165} It is, therefore, pointless 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 been 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. 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.

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

166 White v. Ainsworth, 62 Colo. 513, 163 Pac. 959 (1917).
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.
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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 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 1926, 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. 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 *bona fide* purchaser through the fraud of an agent to whom the certificate of title had been entrusted.

**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. 

"... [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 'right' in that respect, therefore,

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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.

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.
clarsed, 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 household.

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.).

*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.

*Wisz. 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." 181

A middle view, which would not leave the power of the legislature untrammelled 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* 182 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.  

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. The

\[183\] 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. 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.”

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. 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.”

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* 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.”

“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

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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

191 18 Ill. 176, 184.
192 189 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 legislature may deprive the testator of 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.
ACQUISITION OF INTERESTS IN LAND

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. 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. 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.

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

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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 (Pa. 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, Wills, sec. 29 (Lifetime ed.).

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).

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.

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

Key v. Key, 154 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. 202 In a Kansas case, 203 a bequest in a will executed in 1929 was rendered invalid by a statute enacted in 1939. 204 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.” 205

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

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. 203 Estate of Weeks, 154 Kan. 103, 114 P. 2d 857 (1941). 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. 205 154 Kan. 103, 105, 114 P. 2d 857, 859.
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, 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.

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-

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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).
mains unexpended or in the possession of any guardian or custodian of the estate of said lunatic or non compos mentis, shall go to the next of kin of the person from whom it was so derived . . .”

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 chaml-

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 rank 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."


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

221 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 legislatures have not acted unreasonably and arbitrarily. 222

222 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 bastard 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
ACQUISITION OF INTERESTS IN LAND

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.223

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); Wynne’s Lessee v. Wynne, 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. 555, 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.\textsuperscript{224} 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.

\textsuperscript{224} 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. In re Giordano's Estate, 85 Cal. App. 2d 588, 193 P. 2d 771 (1948); In re Thramm's Estate, 80 Cal. App. 2d 756, 183 P. 2d 97 (1947); Parlato v. McCarthy, 136 Conn. 126, 69 A. 2d 648 (1949); Remington v. Bank, 76 Md. 546, 25 Atl. 666 (1893); In re Nossen's Estate, 111 Mont. 40, 162 P. 2d 216 (1945); Ferrie v. Public Administrator, 3 Bradf. Sur. 249 (N. Y. 1855).

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. \ldots 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.\(^{225}\) 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.\(^{226}\) This is analogous to a retroactive shortening of the period of limitations.\(^{227}\)

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

\(^{225}\) 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 (1865) (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. 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. A will is not


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 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.

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.\(^{230}\) 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.\(^{231}\)

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.\(^{232}\) 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.\(^{233}\) 2\(^{3}\) Page, *Wills*, sec. 561 (Lifetime ed.).

\(^{230}\) \(^{2}\) Wills v. Lochmune, 72 Ky. (9 Bush) 547 (1873).

\(^{231}\) \(^{2}\) 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.

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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Acquisition of interests in land 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); Hartsen 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); Lubrs 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. 570, 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. 245, 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.

240 Bull v. Nichols, 15 Vt. 329 (1843) (change of tribunal for making partition between claimants); Wills v. Lochane, 72 Ky. (9 Bush) 547 (1873) (appellate 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.

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.
ACQUISITION OF INTERESTS IN LAND

decedent's land have also been sustained when applied in the case of decedents whose deaths were prior to the statutes. 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. 65, 121 S. E. 7 (1923); Langdon v. Strong, 2 Vt. 234 (1829). Contra, Jones' Heirs v. Perry, 10 Yerg. 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 (1855); 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.245

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 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
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.\textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{248}

decedent prior to the adoption of the statute did not impair any vested right or interest of decedent’s widow as sole heir.\textsuperscript{246}

\textsuperscript{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.

\textsuperscript{247} Chapter 4, note 93.

\textsuperscript{248} Custer and Lantz v. Commonwealth, 25 Pa. 375 (1855).
Retroactive Land Legislation

Rights of Executors and Administrators

Although an executor or administrator may be in possession of the lands of the deceased, he has no estate therein.\textsuperscript{249} 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.\textsuperscript{250} Naturally, a statute defining the duties of an executor or administrator may be so arbitrary and unreasonable as not to be sustainable,\textsuperscript{251} 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,\textsuperscript{252} but not by virtue of his office. It has been held that executors named in a non-

\textsuperscript{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).

\textsuperscript{250} See cases cited note 249.

\textsuperscript{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.

\textsuperscript{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.  

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.