CHAPTER XVII.

ATTESTATION.

§ 250. Witnesses to conveyances at common law.—No attestation of a deed was necessary at common law.[1] There early arose a practice, however, of appending to the deed the names of many persons as witnesses, not always in early times the names of those only who were present,[2] though undoubtedly later the names of witnesses were mainly the names of those present who heard the deed read. They appear to have been often numerous, and were written, not by the witnesses themselves, but by the person who prepared the deed. About the time of Henry VIII it became the practice for the witnesses to sign their own names either at the bottom of the deed or indorsed on it.[3]

Yet this later form of attestation was not a part of the

[1] Co. Litt. 7a; Garrett v. Lister, 1 Lev. 25.

[2] "* * * people wrote down the names of absent friends and got their consent afterwards. * * * A witness to a deed, according to the popular conception, was not necessarily one who had seen it executed, but one who was willing to give it credit by his name. This may account for its turning out so often, when witnesses were questioned, that they knew nothing about the matter." Thayer Treatise on Evidence, pp. 97, 98; and the witnesses formed part of the jury to try the validity of the deed: Ib.; Fox v. Reil, 3 Johns. 477.

[3] Burdett v. Spilsbury, 6 M. & G. (46 Eng. C. L. R.); C. J. Tindal, at pp. 456, 457.

Generated at University of Michigan on 2020-05-19 17:30 GMT / https://hdl.handle.net/2027/hvd.32044031800931
Public Domain, Google-digitized / http://www.hathitrust.org/access_use#pd-google
Digitized by Google
Original from HARVARD UNIVERSITY

deed, necessary to its validity, but was merely a means of preserving the evidence of its due execution.

Where there were witnesses it was necessary, in order to prove the execution of the deed, to first call some of them, if possible, and other evidence could not be given of its execution until they were produced, or until it appeared that they could not be produced, or, if produced, that they denied its execution or were incompetent to testify.[4]

It is still the general rule (in the absence of a statute to the contrary) that at least one of the attesting witnesses to a written instrument must be called when the execution of the instrument is in dispute.

This common law rule has been changed, however, in some states, as in England, and statutes make it applicable to those written instruments only that are required by law to be attested, and unless the instrument is one of this character, it may be proved as if unattested, though it is actually attested.[5]

Moreover, it has been held, though it seems not in accord with the weight of authority, that, as one of the reasons for the rule requiring the attesting witness to be called was that at the time it arose the parties to an action were incompetent to testify (which is no longer so), the necessity for the rule no longer exists, and therefore, the execution of a deed may be proved by the grantor or the officer before whom it was acknowledged, as well as by the attesting witness.[6]

[4] Dundy v. Chambers, 23 Ill. 369; Brigham v. Palmer, 3 Allen 450.

[5] For example: Mich. C. L. 1897, § 10199 provides: "That whenever, upon the trial of any action * * * a written instrument is offered in evidence, to which there is a subscribing witness, it shall not be necessary to call such subscribing witness, but such instrument may be proved in the same manner as it might be proved if there were no subscribing witness thereto, except in the case of written instruments to the validity of which one or more subscribing witnesses are required by law." And see N. Y. Rev. Stat. 1901, p. 1283, § 107; R. I. Gen. L. 1896, ch. 244, § 43; No. Dak. Rev. Co. 1899, § 3888a; McManus v. Commow, 1901, 10 N. D. 340; 87 N. W. 8.

[6] Garrett v. Hanshue, 1895, 53 Ohio St. 482; 42 N. E. 256; 35 L. R. A.

Generated at University of Michigan on 2020-05-19 17:30 GMT / https://hdl.handle.net/2027/hvd.32044031800931
Public Domain, Google-digitized / http://www.hathitrust.org/access_use#pd-google
Digitized by Google
Original from HARVARD UNIVERSITY

Attesting witnesses can result in little inconvenience, even when not necessary, especially where the common law rule as to the necessity for calling them is not in force, and they may under some circumstances be of value where proof of execution becomes necessary; deeds are, therefore, often witnessed in those states where they need not be.

§ 251. **Witnesses under statutes in the United States.**— Not being necessary at common law, attesting or subscribing witnesses are required to a conveyance in the United States only when some statute so provides.

In about one-half the states they are not required for any purpose to deeds, but in most of such states they may make proof before some officer, who certifies to this proof in a certificate on the deed similar to the certificate of acknowledgment and for the same purposes.[7]

In about an equal number of states statutes require them for some purposes and under some circumstances, and in these states in which they are required they are not always required for the same purposes.

For example, in some states it is necessary to the validity of the deed as a legal conveyance that there be subscribing witnesses, two witnesses being essential in Ohio[8] and in Connecticut.[9]

But, generally speaking, in those states where statutes provide that conveyances shall be attested by witnesses the requirement is not essential to the validity of the deed as between the parties, but, like the requirement as to acknowledgment,[10] is a formality necessary under the statute to entitle the deed to be recorded, the title to the

321, with note as to necessity of calling subscribing witnesses. See Bowling v. Hax, 55 Mo. 446.

[7] See post, § 295.

[8] Langmede v. Weaver, 1901, 65 Ohio St. 17; 60 N. E. 992; Richardson v. Bates, 8 Ohio St. 257, 261.

[9] Winsted Bank v. Spencer, 26 Conn. 195.

[10] See post, § 261, n. 19.

Generated at University of Michigan on 2020-05-19 17:30 GMT / https://hdl.handle.net/2027/hvd.32044031800931
Public Domain, Google-digitized / http://www.hathitrust.org/access_use#pd-google
Digitized by Google
Original from HARVARD UNIVERSITY

land passing from the grantor to the grantee on the signing of the deed (and sealing it when necessary) and its delivery.

For example, although the statute of Michigan[11] provides that "deeds executed within this state * * * shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such * * *," a deed with but one witness, or with no witness, is valid as a conveyance of the legal title, though it may not be recorded,[12] and a statute in the same terms is construed in the same way in Wisconsin,[13] and similar statutes in the same way in several other states.[14]

§ 252. The method of attesting.—It will be noticed that statutes providing for witnesses to deeds generally require that they shall sign their names "as such" or "as witnesses," etc.

In order that it may appear on the instrument that they sign in this capacity, their signatures usually follow a brief attestation clause placed at the end of the instrument and to the left of the grantor's signature. This clause varies in form, the more usual forms being: "Signed, sealed and delivered in the presence of," "Sealed and delivered in the presence of," "In the presence of," or, in some states, simply one word, as "Attest," or "Witness" is used.[15]

While it is the better practice to have the witness sign directly under a clause in the form usual in the state

[11] C. L. 1897, § 8962.

[12] Carpenter v. Carpenter, 1901, 126 Mich. 217; 85 N. W. 576; 17 Detroit Leg. News 778; Fulton v. Priddy, 1900, 123 Mich. 298; 82 N. W. 65; 6 Detroit Leg. News 1053.

[13] Harrass v. Edwards, 1896, 94 Wis. 459; 69 N. W. 69.

[14] Howard v. Russell, 1898, 104 Ga. 230; 30 S. E. 802; Kingsley v. Holbrook, 45 N. H. 313; 86 Am. Dec. 173; Conlan v. Grace, 36 Minn. 276; 30 N. W. 880; Pearson v. Davis, 1894, 41 Neb. 608; 59 N. W. 885 (and see Strough v. Wilder, 1890, 119 N. Y. 530, 535; 23 N. E. 1057).

[15] Though the word "delivered" often is used as above, in most cases the deed is not actually delivered in the presence of the witness.

Generated at University of Michigan on 2020-05-19 17:30 GMT / https://hdl.handle.net/2027/hvd.32044031800931
Public Domain, Google-digitized / http://www.hathitrust.org/access_use#pd-google
Digitized by Google
Original from HARVARD UNIVERSITY

where the land lies, no particular place or form seems indispensable, provided it appears that the person signing signed as a witness.[16]

Where there are several grantors in the same deed their several executions may, of course, be attested by the same witnesses, but where the deed is executed by different grantors at different times and places, and before different witnesses (as is often the case in practice), there should be a statement near the name of the witness indicating which particular grantor's execution he attests.[17] And in such cases the attestation as to each grantor should be complete, for a defective attestation as to one of several grantors is not made good by a proper attestation as to the other grantors in the same deed.[18]

It is not necessary that the witness should see the grantor sign, and it is quite customary for him to be called in to subscribe his name after the grantor has signed his; in such cases the grantor should acknowledge his signature to the witness, who should sign in the grantor's presence and at his request,[19] and the witness should either see the grantor sign or hear him make such an admission of his signature.

§ 253. **Disqualification of witness by interest.**—One having a direct interest in the conveyance as grantee or mortgagee should not be an attesting witness to it,[20] nor

[16] Culbertson v. Witbeck Co., 127 U. S. 326; Link v. Connell, 1896, 48 Neb. 574; 67 N. W. 475; Arrington v. Arrington, 1898, 122 Ala. 510; 26 So. 152. (Though as to "subscribing," which is the term sometimes used in the statute concerning witnesses, see supra, § 235.)

[17] See Culbertson v. Witbeck Co., 127 U. S. 326.

[18] Harrass v. Edwards, 1896, 94 Wis. 459; 69 N. W. 69; Hall v. Redson, 10 Mich. 21.

[19] Jackson v. Phillips, 9 Cow. 94, 113; Tate v. Lawrence, 11 Heisk. 503.

[20] Amick v. Woodworth, 1898, 58 Ohio St. 86; 50 N. E. 437; Donovan v. St. Anthony &c. Co., 1899, 8 N. Dak. 585; 80 N. W. 772; 73 Am. St.

Generated at University of Michigan on 2020-05-19 17:30 GMT / https://hdl.handle.net/2027/hvd.32044031800931
Public Domain, Google-digitized / http://www.hathitrust.org/access_use#pd-google
Digitized by Google
Original from HARVARD UNIVERSITY

should one of several grantors witness the execution of the conveyance by another grantor; and it has been held that the wife of the grantor is not competent to witness her husband's deed.[21]

R. 779; Coleman v. State, 79 Ala. 49. See Child v. Baker, 24 Neb. 188, 201; 38 N. W. 725.

[21] Corbett v. Norcross, 35 N. H. 99; Bank v. O'Brien, 1894, 94 Tenn. 38; 28 S. W. 293.

Generated at University of Michigan on 2020-05-19 17:30 GMT / https://hdl.handle.net/2027/hvd.32044031800931
Public Domain, Google-digitized / http://www.hathitrust.org/access_use#pd-google
Digitized by Google
Original from HARVARD UNIVERSITY