

## CHAPTER XXV.

### CAPACITY OF ALIENS TO PURCHASE AND CONVEY REAL PROPERTY.

- |  |  |
|--|--|
| § 408. At common law aliens could acquire title by purchase, not by descent. | § 410. Alien may convey before office found.     |
| 409. Nature of the title thus acquired—Office found.                         | 411. Common law as modified by statute.          |
|  | 412. Power of the states to remove disabilities. |

§ 408. At common law aliens could acquire title by purchase, not by descent.—At common law an alien could acquire a defeasible title to real property by purchase,<sup>1</sup> but could not inherit from either an alien ancestor or a citizen.<sup>2</sup>

Real property acquired by devise is generally considered as acquired by purchase within this rule, as “purchase” includes devise not only at common law,<sup>3</sup> but under statutes which relate to the acquisition of real property by aliens.<sup>4</sup>

§ 409. Nature of the title thus acquired—Office found.—The title to real property thus acquired by an alien was defeasible by the sovereign. The alien could hold the property until “office found”—a proceeding by a public

<sup>1</sup> *Manuel v. Wulff*, 1894, 152 U. S. 505.

<sup>2</sup> *Wunderle v. Wunderle*, 1893, 144 Ill. 40; 33 N. E. 195; 19 L. R. A. 84; *Crane v. Reeder*, 21 Mich. 24; 4 Am. R. 430; *Glynn v. Glynn*, 1901, 62 Neb. 872; 87 N. W. 1052.

<sup>3</sup> *Fairfax v. Hunter*, 7 Cranch. 603; *Jones v. Minogue*, 29 Ark. 637; *Guyer v. Smith*, 22 Md. 239; 85 Am. Dec. 650.

<sup>4</sup> *Doehrel v. Hillmer*, 1897, 102 Iowa 169; 71 N. W. 204; *Stamm v. Bostwick*, 1890, 122 N. Y. 48; 25 N. E. 233; 9 L. R. A. 597.

officer upon an inquest by which the fact of alienage was established and made a matter of record.<sup>5</sup>

A conveyance, therefore, to an alien is not void, but voidable merely, and until the state or sovereign power procures an escheat or forfeiture upon proceedings in the nature of office found the alien has complete dominion over the property,<sup>6</sup> and to divest his estate during his lifetime an office found, or some proceeding equivalent to it, on the part of the state is necessary.<sup>7</sup>

Nor may the alien's title be assailed because of alienage by any person except the state.<sup>8</sup>

§ 410. Alien may convey before office found.—Having, therefore, a title subject to be divested by the state alone, the alien may, before office found, convey real property, acquired by him by purchase, to any one capable of taking and holding title; and the title of his grantee, according to the weight of authority, will not thereafter be subject to be defeated on account of the grantor's alienage.<sup>9</sup>

It has, however, been sometimes said that the grantee of the alien takes a title liable to be defeated by the state;<sup>10</sup> but as the real reason for the disability of aliens is that it is against public policy to allow those owing no allegiance to the government to own lands within its jurisdiction and protection, it would seem unreasonable and unjust that the state, after refraining from enforcing a forfeiture

<sup>5</sup> Phillips v. Moore, 100 U. S. 208.

<sup>6</sup> McKinley Creek Mining Co. v. Alaska Mining Co., 1902, 183 U. S. 563.

<sup>7</sup> Jackson v. Adams, 7 Wend. 367; Elmondorff v. Carmichael, 3 Litt. 472; 14 Am. D. 86.

<sup>8</sup> Gouverneur's Heirs v. Robertson, 11 Wheat. 332; Justice Mining Co. v. Lee, 1895, 21 Colo. 260; 40 Pac. 444; 52 Am. St. R. 216.

<sup>9</sup> Halstead v. Board Comm'rs, 56 Ind. 363; Goodrich v. Russell, 42 N. Y. 177; Oregon Mortgage Co. v. Carstens, 1896, 16 Wash. 165; 47 Pac. 421; 35 L. R. A. 841; Strickley v. Hill, 1900, 22 Utah 257; 62 Pac. 893; 83 Am. St. R. 786.

<sup>10</sup> Harley v. State, 40 Ala. 689; Scanlan v. Wright, 13 Pick. 523; 25 Am. D. 344; Purczell v. Smidt, 21 Iowa 540.

32 BREWS CON.

while the land is held by an alien, should have the right to divest the title of one—especially if he be a citizen—simply because the land had been conveyed to him by an alien.

When, however, an alien that holds title to land by purchase, dies without having conveyed the land and without having had his title divested in proceedings taken by the state, the state at once becomes entitled thereto, although he may have left those who might have inherited his land had he been a citizen. Nor is any proceeding in the nature of office found necessary to vest title in the state in such a case.<sup>11</sup>

§ 411. **Common law as modified by statute.**—The common law principles as to the property rights of aliens are still generally recognized in the United States except in so far as they have been expressly modified by statute.

Both in England and in most of the United States, however, there have been extensive modifications of the common law in this respect, and in some of the states almost all distinctions between citizens and aliens regarding property rights have been removed,<sup>12</sup> while in about one-half the states special privileges are conferred only upon aliens resident in the state (or in some cases in the United States), non-resident aliens being prohibited in some cases from holding more than a certain amount of land, or from inheriting at all, or from inheriting unless

<sup>11</sup> *Slater v. Nason*, 15 Pick. 345; *Crane v. Reeder*, 21 Mich. 24; 4 Am. R. 430; *Colgan v. McKeon*, 24 N. J. L. 566; *Sands v. Lynham*, 27 Gratt. 291; 21 Am. R. 348. See, for the application of this principle, where a statute has enabled alien heirs to inherit under certain circumstances, *State v. Stevenson*, 1898, 6 Idaho 367; 55 Pac. 886.

<sup>12</sup> In the following states the disabilities of aliens are substantially removed, though in some (Maryland, Virginia, West Virginia) their removal is expressly restricted to "alien friends": Alabama, Arkansas, Colorado, Florida, Maine, Maryland, Massachusetts, Michigan, Nevada (except Chinese), New Jersey, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia.

within a certain time they claim the land, and either become citizens or sell it.<sup>13</sup>

In other states the policy has been to impose by constitution or statute somewhat greater restrictions on the right of aliens to take and hold real property than were imposed by common law.<sup>14</sup>

§ 412. **Power of the states to remove disabilities.**—The removal of all an alien's common law disabilities or the addition of other disabilities is a matter within the control of each state, subject to the treaty-making power of the United States, under which the disabilities of aliens may be removed irrespective of the policy of any state; <sup>15</sup> though, plainly, in the absence of any treaty the power of the state to legislate upon the subject is absolute.<sup>16</sup>

As constitutional provisions regarding land-holding by aliens exist in many states, the legislatures of such states have not complete control of the subject. Yet constitutional provisions in a particular state enlarging the rights of aliens do not of themselves prevent the legislature of that state from still further removing their disabilities. So, for example, where a state constitution gives certain special privileges to "resident aliens," while the legislature may not deprive this class of the privileges thus conferred, it may, nevertheless, extend to other aliens equal

<sup>13</sup> No brief abstract of the laws would be of value, and they cannot here be set out at length. Some conditions as to residence appear in those of the following states: California, Connecticut, Delaware, Idaho, Illinois, Iowa, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New York, Pennsylvania, Texas, Wisconsin, Wyoming.

<sup>14</sup> For example: By the constitution of Washington conveyances to an alien, except under certain circumstances, are void; and a lease for forty-nine years to a corporation, the majority of whose stock is held by aliens, is void. *State v. Hudson Land Co.*, 1898, 19 Wash. 85; 52 Pac. 574; 40 L. R. A. 430.

<sup>15</sup> See ante, § 4.

<sup>16</sup> *Blythe v. Hinckley*, 1901, 180 U. S. 333; *Blythe v. Hinckley*, 1900, 127 Cal. 431; 59 Pac. 787.

privileges, unless some other clause of the constitution prohibits such action.<sup>17</sup>

<sup>17</sup> *Nicrosi v. Phillipi*, 1890, 91 Ala. 299; 8 So. 561; *State v. Smith*, 70 Cal. 153; 12 Pac. 121; *Blythe v. Hinckley*, 1900, 127 Cal. 431; 59 Pac. 787; *Thompson v. Waters*, 25 Mich. 214, 227.