CHAPTER I.

INTRODUCTORY.

§ 1. Alienation in general—Inter vivos and by will.—One entitled to rights in land may, by his voluntary act, alienate them, or transfer them to another, in one of two modes: his alienation may be inter vivos or it may be by will.

Of these modes the former is more often used in the practical affairs of life than the latter, and it is that mode to which the following pages are devoted.

Alienation inter vivos is now generally accomplished by a deed of conveyance, and it is proposed to consider the essential features of the deed.

A will of lands is regarded as a conveyance operating upon the death of the testator, but a will and a deed are made under different circumstances, and, moreover, the rules as to the interpretation of the two classes of instruments differ in many respects. It is intended, therefore, to refer but incidentally to the law of wills.

Owners of interests in lands have not always had the power of transferring their interests, either inter vivos or by will,[1] but at the present time, speaking generally, the owner of the fee has the absolute right of alienation.

In order, however, that the alienation may be effectual the persons from whom and to whom the particular interest is intended to be transferred must be capable in law of transferring it on the one hand and, on the other, of taking and keeping it; the object or purpose of the transfer must be valid in law; and the manner of alienation prescribed by law must be observed.

Restraints upon the right of alienation—arising either from the personal incapacity of the parties to the transfer or from the nature of the particular interest intended to be transferred, or from the purpose or object of the transfer—are exceptions to the general doctrine that permits alienation, and will therefore be considered after the deed has been discussed.

§ 2. **Conveyancing—What the term implies.**—The term conveyancing, used in a broad sense, includes, it is true, much more than an examination of the subject of deeds. Deeds of conveyance and devises are not the only written instruments affecting interest in lands, as an estate for years, for example, is generally created by a "lease," and a "mortgage" in some states conveys the legal title to the mortgagee.

Moreover, rights in land may be acquired without any written instrument to show what they are; for not only does an estate in fee simple, if undisposed of by its owner, descend at his death to his heirs, but valuable interests may be gained by prescription, and an estate in fee simple may be acquired by adverse possession.

One properly performing the functions of a convey-

[1] See Digby Hist. L. Real Prop., 5th ed., pp. 100, 133, 157, 376; Pollock and Maitland Hist. Eng. Law, 2d ed., I, pp. 329 et seq., II, p. 315.

ancer should, therefore, have "an acquaintance with the general principles of the law of real property and a large amount of practical knowledge, which can only be derived from experience",[2] for in his work is included not merely the drafting of many different documents intended to affect interests in real property, but an inquiry into the legal effect of acts and events which in the past have concerned the property.

However, almost innumerable decisions relating to title indicate ignorance and carelessness on the part of those actually acting as conveyancers, and irrespective of decisions, it is well known that the task of examining titles and the drafting and interpretation of instruments affecting them are too often left to those wholly unfitted by study and training for such work.

While the full duty of the conveyancer is not attempted to be set forth in this volume, it will probably be found to be true that a study of the principles involved in the preparation and interpretation of deeds will include a consideration of most of his important functions.

§ 3. Controlling effect of lex situs—Power of states as to real property.—One principle of practical importance may not inappropriately be referred to at this point. It is a well settled general rule of law that all questions relating to the transfer of title to real property are governed by the law of the place where the property is situated—lex loci rei sitæ or lex situs.

It is especially important for the American lawyer to keep this principle in mind because he must in practice frequently consider questions as to the title to real property in states other than his own, and each state is as to every other state sovereign in its power to regulate the acquisition and transfer of real property within its limits. While the law of one state upon these subjects may resemble in some particulars the laws of other states much

[2] Justice Sharswood in Watson v. Muirhead, 57 Pa. 167.

diversity in other respects exists, the general result being that the real property laws of no two states are identical.

§ 4. **Power of the United States—Effect of treaties on state laws.**—Moreover, as to most matters relating to such property the federal government has no power of regulation.

The courts of the United States will generally respect and follow the law of the state where the property is as that law exists in the statutes and decisions of the state.[3]

The federal and state courts sometimes disagree as to what the law of the state is,[4] but such instances do not affect the general principle that the federal courts will apply the state law, when it is clear what that law is.

There should, however, be noted in this connection the provision of the constitution of the United States that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."[5]

The protection which should be afforded to the citizens of foreign countries who may acquire property in this country is a proper subject for regulation by treaty,[6] and the statutes of any state as to the property rights of aliens, therefore, must be construed with reference to a treaty, should there be one touching the matter, between the United States and the government of the alien. The law of the place where the land is, still governs in such a case, because the treaty is the law and may abrogate or amend, as the case may be, the

[3] Gormley v. Clark, 134 U. S. 338, 348; Brine v. Insurance Co., 96 U. S. 627.

[4] As illustrating such disagreement compare the case of Hardin v. Jordan, 140 U. S. 371, 380, 384, with that of Fuller v. Shedd, 1896, 161 Ill. 462, 490; 44 N. E. 286; 52 Am. St. R. 380, which are discussed in § 114, post.

[5] Art. VI, § 2.

[6] Geofroy v. Riggs, 133 U. S. 258, 266.

statute of the state; allowing it, however, to remain in force as to other cases not affected by treaty.[7]

§ 5. Application of the doctrine that lex situs controls —Its reason.—This principle, that the law of the place of the real property controls, applies, generally speaking, to the different kinds of instruments conveying or affecting title, that is, deeds, mortgages, wills, etc.; it applies to matters of form; to matters relating to the capacity of the person from whom the title proceeds and to the capacity of the person taking title, as well as, generally, to questions relating to the construction or interpretation of the instrument.

The reason for the doctrine is to be found in the fact that from the very nature of the subject-matter, which is immovable and fixed permanently at a particular place, no other rules of law than those of that place can ultimately control the disposition of the property. For no court of one country or state could enforce its judgments, rendered in accordance with its own laws, relating to the title to real property in another independent country or state.[8]

§6. Illustrations—Formal matters.—(a) Formal matters.—If by the law of the place where the land lies "no estate of freehold can be conveyed, unless by a deed or conveyance under the hand and seal" of the party

[7] Hauenstein v. Lynham, 100 U. S. 483. The doctrine of the supremacy of treaties over state laws is stated broadly as it appears to be laid down by the supreme court of the United States. The government through the treaty-making power seems able to do indirectly what it could not do directly by an act of congress. The consideration of treaties as affecting title to land arises most frequently in cases of descent, and state courts admit the supremacy of the treaty over state laws: Scharpf v. Schmidt, 1898, 172 Ill. 255; 50 N. E. 182; Adams v. Akerlund, 1897, 168 Ill. 632; 48 N. E. 454; Doehrel v. Hillmer, 1897, 102 Iowa, 169; 71 N. W. 204; Succession of Sala, 1898, 50 La. Ann. 1009; 24 So. 674.

[8] See Minor, Conflict of Laws, pp. 28, 29.

conveying, and an instrument is executed in another jurisdiction, the residence of both grantor and grantee, without a seal, sufficient, where executed, to pass real estate there, it is not a good conveyance of the land in question;[9] or if the law of the place where the land is requires a deed for the conveyance of land to be executed in the presence of two witnesses, a deed executed in the presence of one only is void.[10] So, a will executed in one state and valid there, may be invalid as a will devising real estate in another, and its probate in the former state does not establish its validity in the latter state unless the laws of the latter permit it; and the same is, of course, true of a will executed in a foreign country.[11]

§ 7. **Illustrations—Capacity.**—(b) Capacity of those from whom and to whom title passes.—A will executed by a married woman in Kentucky, where a married woman was (at that time) incompetent to make a valid will devising real property, is, nevertheless, held valid in Tennessee as to such property there, the formalities required by the Tennessee statutes having been observed.[12] And though in most states a mortgage is not, strictly speaking, a conveyance, the capacity of a mortgagor of real property to make the mortgage in question will be determined, generally, by the law of the place where the mortgaged premises are situated, rather than by the law of the domicil of the mortgagor, should that differ from the former. Hence, though by the law of her domicil a married woman is incompetent to make a valid mortgage of land situated there, her mortgage of land in another

[9] United States v. Crosby, 7 Cranch 115.

[10] Clark v. Graham, 6 Wheat. 577.

[11] Robertson v. Pickrell, 109 U. S. 608; Vogel v. Lehritter, 1893, 139 N. Y. 223; 34 N. E. 914.

[12] Carpenter v. Bell, 96 Tenn. 294; 34 S. W. 209.

state where married women are competent, will be held valid, though executed at her domicil.[13]

And, in general, the capacity of one to take title as grantee, devisee or heir, is determined by the same principle. For example, one Fox died possessed of real and personal property situated in New York, having by his will devised and bequeathed all his property to the government of the United States. His heirs contested the will and the state courts held[14] that the United States could take the personal property, but could not take the real property, because the New York statute of wills provided that a devise of lands may be made "to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise".

The supreme court of the United States, in affirming the decrees of the New York courts, stated the principle that each state has power to regulate the tenure of real property within its limits, the modes of its acquisition and transfer, the rules of descent and the extent to which testamentary disposition of it may be made, and held that "person" in the New York statute signified a natural person, or an artificial person deriving its existence from legislation; that the United States is not such a "person",

[13] Thomson v. Kyle, 1897, 39 Fla. 582; 23 So. 12; 63 Am. St. R. 193; Cochran v. Benton, 1890, 126 Ind. 58; 25 N. E. 870; Sell v. Miller, 11 Ohio St. 331; Post v. First Nat. Bank, 138 Ill. 559; 28 N. E. 978. In none of these cases does it appear that the mortgage was given to secure an obligation void where entered into and where it was to be performed. They seem, therefore, distinguishable from such a case as Evans v. Beaver, 1893, 50 Ohio St. 190; 33 N. E. 643; 40 Am. St. R. 666, in which the question was as to the validity of a mortgage of Ohio land, executed in Indiana by a married woman living there, to secure an obligation as surety to be performed in Indiana where such a contract is void: and it was held that the mortgage, being merely the security for the performance of a void obligation, could not be enforced.

[14] In the matter of will of Fox, 52 N. Y. 530.

and that "corporation" applied only to such corporations as are created by the laws of the state.[15]

The government of the United States has capacity, however, to take real estate as devisee, when it lies in a state where no such restrictions as these exist;[16] and a New York corporation, having power to hold land and whose charter contains no prohibition against taking by will, may take Connecticut lands as devisee,[17] though it cannot take New York lands under the same will.[18]

So the law of the state where the land lies will determine who are the heirs of a deceased owner of the land, capable of inheriting it.

The laws of one state may provide, for example, that aliens, whether resident or non-resident, may take title by descent,[19] while those of another may prevent non-resident aliens from inheriting (such laws being subject to existing treaties).[20]

§8. **Illustrations—Construction and effect of instruments.**—(c) Validity and effect determined by lex situs. —Whether, for example, the effect of a conveyance to a trustee is to vest the legal title in him or in the beneficiary, will depend on the construction of its provisions under the lex situs.[21] So the question whether under a will there has been an "equitable conversion" into personalty of the testator's real estate situated in a state other than that of his domicil will be settled by the law of the state where the land is. This law may be very different from that of the testator's domicil, and the result of the

[15] United States v. Fox, 94 U. S. 315.

[16] Dickson v. United States, 125 Mass. 311.

[17] White v. Howard, 38 Conn. 342.

[18] White v. Howard, 46 N. Y. 144, 167.

[19] Blythe v. Hinckley, 1900, 127 Cal. 431; 59 Pac. 787; Lumb v. Jenkins, 100 Mass. 527.

[20] Wunderle v. Wunderle, 144 Ill. 40; 33 N. E. 195; 19 L. R. A. 84; Doehrel v. Hillmer, 102 Iowa 169; 71 N. W. 204.

[21] McGoon v. Scales, 9 Wall. 23.

application of the principle in such cases may be that the testator's real estate in one state will pass to persons other than those to whom his real estate in another will pass although all his property in different states is referred to in the same terms in his will.[22] And the decision of a court of the testator's domicil that his will worked an equitable conversion into personalty of all realty wherever situated, is not conclusive on the courts of another state where part of the realty is.[23]

§ 9. **Statutes adopting foreign law—Not exceptions to rule.**—There are statutes in many of the states that provide that instruments transferring or affecting real property within their limits, but executed beyond these limits, shall be valid for many purposes if they conform to, and are valid under, the law of the place where executed. Cases arising under such statutes are sometimes inaccurately considered as exceptions to the general rule that the law of the place where the land lies controls in such matters.

They are not, however, really exceptions to this rule, for the law of the place where the property is, by adopting the foreign law for the particular cases specified, makes that foreign law for the time being and under the particular circumstances its own law, and thus the principle still applies. The foreign law derives its efficacy in such cases not from the law-making power of the place of its creation, but from that of the place which adopts it for these special purposes.[24]

And if there be no such adopting law in the place where the real property is, the foreign law cannot have the effect there that it would have in the place of its origin.[25]

[22] Hobson v. Hale, 95 N. Y. 588.

[23] Clarke v. Clarke, 1899, 178 U. S. 186. The principle as applied to the construction of devises is well discussed in 41 Am. L. R. (N. S.), pp. 623, 718.

[24] Root v. Brotherson, 4 McLean 230; West v. Fitz, 109 Ill. 425, 443.

[25] Trowbridge v. Addoms, 1897, 23 Colo. 518, 522; 48 Pac. 535.

§ 10. Limitations to the application of the rule.— But while the principle is of very extensive application, it does not necessarily follow that the law of the place of the realty will determine the validity for all purposes of every instrument which, though relating to real property, may create simply a personal liability,[26] nor of every instrument through which title to real property may be ultimately obtained. Hence, the Massachusetts courts will enforce a covenant made in North Carolina by a husband with his wife to release and extinguish his rights in her land in Massachusetts, the contract being valid under the law of North Carolina where the parties lived, and being a personal covenant, though concerning Massachusetts land, and though it seems that the same contract if made in Massachusetts would have been invalid.[27] So, while a mortgage of real estate is generally governed by the law of the state where the realty is, an assignment of the mortgage is often regarded as a new contract passing a chattel interest, and its validity will not necessarily depend upon the law of the place where the property is,[28] though that law may control as to the remedy and procedure when the assignee seeks to foreclose the assigned mortgage.[29]

[26] See post, § 213.

[27] Polson v. Stewart, 1897, 167 Mass. 211; 45 N. E. 737; 36 L. R. A. 771; 57 Am. St. R. 452.

[28] Dundas v. Bowler, 3 McLean 397, 401; Hoyt v. Thompson, 19 N. Y. 207, 224.

[29] Dohm v. Haskin, 88 Mich. 144; 50 N. W. 108.