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THE LAW OF RELIGIOUS SOCIETIES AND CHURCH CORPORATIONS.

CHAPTER III.

HOW CHURCH PROPERTY MAY BE ACQUIRED AND TITLES HELD.

THE *restraints* imposed upon the transfer of property for religious purposes by the Statutes of Mortmain and Wills and otherwise, and the question of corporate capacity to receive or hold titles, have already been briefly considered.

The inquiry now to be made relates to the several modes in which the right to property may be acquired for church purposes in the absence of restraining provisions, and where the purpose of acquisition is not prohibited by or in excess of the amount permitted by statutory law. By the common law in England and under the established church system, there were restraints on the acquisition of property for "superstitious uses." [77] But under our government,

[77] See note 52 *ante*. At the October Term 1871 of the Common Pleas of Gallia county, Ohio, an interesting case (*Rothgeb, Executor*, v. *Rothgeb's Devisees*) was decided by Judge W. W. JOHNSON, involving the validity of a trust to propagate Atheism. Rothgeb by his will directed a monument to be erected, *not to* mark his resting-place, but in a conspicuous place, with an inscription containing a brief argument to prove that "death is the eternal dissolution of the soul and body; * * the soul as the flame of a lamp blown out is no more." The executor filed a petition asking the court to determine his duty. JOHNSON, J., held that an individual had a right "to express the sentiments of the proposed inscription, or to

with its religious freedom, the same restraints do not exist. In considering the mode in which property may be acquired for church purposes, the first inquiry should always be as to the capacity to take and the restraints thereon, if any, imposed by local

found a school or publish books promulgating the same principles." But he held these rights of freedom of action, of speech and the press "are *personal* rights * * which die with him and are not capable of being aliened or delegated * * and that the courts will not lend their aid to affirmative acts subversive of religion, although they would not use their coercive power in support of it," and so decreed against executing this provision of the will. The court cited Ordinance 1787, art. 3-5; provisions of the Ohio Constitution, 2 Ohio St. 387; 4 Id. 586. See Webster's argument in the great *Girard Will Case*. This case is now in the Supreme Court of Ohio. The report of the case will necessarily set out the words the testator directed to be inscribed on a monument. This will more effectually propagate his doctrines than any monument the executor could erect—"*aere perennius*."

See *Board of Education* v. *Minor et al.*, 23 Ohio St. 211, and the elaborate arguments on and decision by Superior Court of Cincinnati in same case, entitled "The Bible in the Public Schools," Cincinnati, Ohio, 1871. As to Franklin's motion for prayers in the Constitutional Convention of 1787, see 5 Elliott's Debates 254. Franklin himself wrote concerning the matter: "The convention, with three or four exceptions, thought prayers unnecessary."—Sparks's Life and Writings of Franklin, vol. v., p. 153. And Mr. Madison's letter to Mr. Sparks, April 8th 1831, refers to the "account so erroneously given, with every semblance of authenticity," concerning the proposition for a religious service in the convention, and which account appeared in the National Intelligencer a few years before, purporting to have been derived from "the youngest member of the convention." B. F. Morris, in his "Christian Life and Character of the Civil Institutions of the United States," is mistaken in saying prayers were had. He refers to a work published in 1825, "Religious Opinions and Character of Washington."

As to date of Constitution, see 1 Elliott's Debates 317; 5 Id. 555.

See note 5 *ante*.

As to religious freedom: Potter's Dwarris on Statutes 554-565.

For lands granted by Congress for religious purposes, see Am. St. Papers, Pub. Lands, vol. 6, pp. 448, 477, 663, and vol. 5, p. 391; Act of Congress, July 23d 1787; Act April 2d 1792; note 6 *ante*.

Where the object of a trust is illegal it will not be executed by the courts: Tiffany & Bullard on Trusts 247-249; *Terrett* v. *Taylor*, 9 Cranch 43; *Andrew* v. *N. Y. B. & P. B. Soct.*, 4 Sanf. S. C. R. 184; Willard Eq. 578; *West* v. *Shuttleworth*, 2 M. & K. 684, 698; *De Themines* v. *De Bonneval*, 5 Russ. 288. But if in such case a trust shows a design to promote charity *generally*, there will be a *cy pres* application; *Att.-Gen.* v. *Green*, 2 Bro. C. C. 492; *Da Costa* v. *Da Paz*, Ambl. 228; *Att.-Gen.* v. *Baxter*, 1 Vern. 848; *Att.-Gen.* v. *Greise*, 2 Id. 266; *Martin* v. *Margham*, 14 Simons 230.

As to what is a general charitable intent, see cases collected in Hill on Trustees 452; Tiffany & Bullard on Trustees 247.

In England the application is made by the crown; in this country it may be done by the legislature: Willard's Eq. 580; *Ayers* v. *M. E. Ch.*. 3 Sandf. S. C. R. 351; *Andrews* v. *N. Y. B. & P. B. Soct.*, 4 Id. 178; Tiffany & Bullard 249.

regulations or general provisions or principles. Many of the principles applicable to the acquisition of realty are equally so as applied to personalty. But first of all it is deemed proper to inquire as to realty.

Sir EDWARD COKE defined a title—*Titulus est justa causa possidendi id quod nostrum est*—or as BLACKSTONE says, "the means whereby the owner of lands hath the just possession of his property." The books on the law of real estate say that there are *two* methods of acquiring an estate in things real, to wit:—

1. DESCENT, in which title is vested by operation of law, and
2. PURCHASE, in which title is vested in a party by his own act or agreement.

The word "purchase" has a technical legal import, more comprehensive than in popular use, including every mode of acquiring title other than by *descent.*

TITLE BY DESCENT.

A corporation is endowed with succession, and in religious corporations this is generally declared by the organic act perpetual.

The individual members of a corporation may, from time to time, change until none may survive of those living when a title to realty has been acquired, but the ideal or corporate person continues and holds for the benefit of living members or on trusts defined. This continuous title is not descent, it is corporate succession or perpetuity.

There are but few cases where titles may be transmitted by descent for religious purposes, and yet there are some.

Where property is held in common for combined religious and temporal purposes, under a religious system which devotes it to the use of a community, it *descends* to the adhering members for their common objects, to the exclusion of all who withdraw, as in the case of the "Separatists," the so-called "Shakers" and other communists.[78]

If a gift for charity be made for an illegal object, with no purpose for general charity, the charity will fail, and a resulting trust for the heir or next of kin will arise: *West* v. *Shuttleworth,* 2 M. & K. 684, 658; *De Themines* v. *De Bonneval,* 5 Russ. 288; Tiffany & Bullard Trusts 249. So there may be a resulting trust in that class of cases where in England the sign manual of the king was necessary to administer a trust unless the legislature give it effect: Willard's Eq. 596; 4 Kent Com. 508; Tiffany & Bullard Trusts 248.

[78] See note 47, and cases there cited, and *Beatty* v. *Kurtz,* 2 Peters 566; *Ki-*

So property devised or conveyed to certain persons and their heirs in trust for specified religious purposes without designating a trustee as successor, will upon the death of the original devisee or grantee descend to their heirs, charged with the trust, and the title will remain in the heirs until the proper court shall appoint a trustee, and decree a conveyance, or until he shall voluntarily convey to a trustee. This is so upon general equity principles.[79] In some of the states, and, as has been shown, in the District of Columbia, there are statutes which specifically provide a mode of supplying a succession of trustees by appointment of churches, in which case the title at once vests in the trustees so appointed.[80]

TITLE BY PURCHASE.

In England there are perhaps some modes of acquiring titles to realty unknown in practice in this country. There and here are also modes of acquiring titles that can have no application in practice to those to or for religious societies. The modes in use here in the ascending order of their importance are by:

1. PRESUMPTION of a grant;
2. PRESCRIPTION;
3. LICENSE;
4. DEDICATION; and by
5. ALIENATION, including deed of conveyance, devise and possibly other modes of conveyance by act of the parties.

These are all modes of acquiring the *legal* title to realty, or of whatever title could pass from the original owner, and of course there are modes of acquiring only *equitable* titles, by contract, &c., familiar to jurists and lawyers.

The acquisition of title by *estoppel* is not enumerated as a dis-

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sor's Appeal, 62 Penna. St. 428; *Schnorr's Appeal*, 67 Id. 138. The so-called Shakers, near Lebanon, Ohio, have a written bond of union controlling their property, a copy of which the writer has, but which has never been published.

79 See note 48 *ante*.

80 See note 49 *ante*. It has already been stated that the Moravian Church took title to a person who was required to make a will to transmit title for church purposes. So a practice has prevailed in the Roman Catholic Church of having title vested in the archbishop, who transmits it to his successor by will. In Tayler's Precedents of Wills 243, a form is given as follows: "This is the last will and testament of me, I. R., of, &c. I devise all my real estates vested in me as * * trustee, unto L. L. and M. M., of, &c., and their heirs, upon such trusts and subject to such equities as shall at my decease be subsisting concerning the same respectively."

tinctive mode of effecting a conveyance at law or in equity, because it operates rather on the *evidence* than on the real *title*, which is left to pass in theory and effect in one of the modes already indicated.[81]

These *five* several modes of acquiring title are separate and distinct, though as to some of them, "thin partitions do their bounds divide." The elementary treatises and court reports contain elaborate definitions and discussions of these subjects, of the distinctions between them, the cases in which these modes of acquiring title are operative, the principles which govern them, and the rules of evidence which guide in applying them. Much of this learning has no application to titles held for church purposes, and of that which has, only a brief summary can now be presented. The value of this is by no means limited to operate as a guide in acquiring titles, but it reaches back to principles on which existing titles rest, and for the protection of which the sources of information must be explored.

I. Presumption of a Grant.

It may be stated in general terms that courts of law and of equity in support of an adverse, continuous, actual occupancy of realty under claim of title *bonâ fide* in law and fact for a period of time equal to the local statute of limitations, PRESUME A GRANT to the occupant from all adverse claimants, in all those cases *not* covered by such statute.[82] There are cases where an occupancy

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[81] In 3 Washburn's Law of Real Property 70 [459], it is said, "It is not, however, that an estoppel *gives an estate*, or *divests another* of an estate or interest in lands. It merely binds the interest by a conclusion which precludes the parties between whom it is made to operate, from asserting or denying the state of the title." 1 Prest. Abst. 420; 2 Id. 205; Crabbe Real Prop. 1046; 2 Smith's Lead. Cas., 5th Am. ed. 642. Washburn cites cases of estoppel: *Ham* v. *Ham*, 14 Me. 351; *Hicks* v. *Cram*, 17 Verm. 449; *Barker* v. *Bell*, 37 Alab. 359; *McPherson* v. *Walters*, 16 Id. 714; *Att.-Gen.* v. *Merrimack Co.*, 14 Gray 586-604; *Cin.* v. *White*, 6 Pet. 438; *Hobbs* v. *Lowell*, 19 Pick. 405-409; *Hunter* v. *Trustees*, 6 Hill 41; *State* v. *Trask*, 6 Verm. 355; 19 Ohio St. 514; Perry on Trusts, § 870; *Buckingham* v. *Smith*, 10 Ohio 292.

[82] *As to Easements.* Washburn's Easements and Servitudes 24 [19], 25 [20], 101 [66], 103 [68], 105 [70], 107 [71]. This doctrine originally only applied to easements: *Ferris* v. *Brown*, 3 Barb. 105; 2 Washb. Real Prop. 293 [39]; 3 Id. 51 [448]. But now it extends to lands: *Ricard* v. *Williams*, 7 Wheat. 59, and Cruise has devoted a chapter to titles to land acquired by prescription.

For prescription or *usucapion* (*usu* rem capere) by the civil law, see Maine Anc. L. 284; Wood Civ. L. 123; Phillips Jurisprudence, § 147; Washb. Easements 62.

As to Lands. Starkie Evidence, part iv., p. 1222, tit. "Prescription;" *Be-*

will be protected in much less time than the period fixed by the Statute of Limitations, but these are *sui generis*. They are cases where the evidence shows it *probable* that a grant has in fact been made, or where from some equity it *ought* to have been made.[83] This is indeed a branch of the same law. This benign doctrine has been carried so far as to presume a grant from the government, even in opposition to the maxim, *Nullum tempus occurrit Regi*, and against the truth.[84] The presumption rests on the principle

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dle v. *Beard*, 12 Co. 5; *Eldridge* v. *Knott*, Cowp. 215; Id. 109, 110; 1 Greenl. Ev., § 45 n.; 2 Id., § 541 n.; *Jarboe* v. *McAtee*, 7 B. Monroe 279; *Jackson* v. *McCall*, 10 Johns. 377; *Ricard* v. *Williams*, 7 Wheat. 59 [244]; *Courcier* v. *Graham*, 1 Ohio 349; *Roads* v. *Symmes*, Id. 316; 5 Id. 456; *Berthelemy* v. *Johnson*, 3 B. Monroe 92; *Schauber* v. *Jackson*, 2 Wend. 13; *Jackson* v. *Schoonmaker*, 7 Johns. 12; *Vandyck* v. *Van Beuren*, 1 Caines R. 84; *Farrar* v. *Merrill*, 1 Greenl. 17; *Grote* v. *Grote*, 10 Johns. 492; *Burgen* v. *Bennett*, 1 Caines C. 1; *Archer* v. *Tanner*, 2 Hen. & Mun. 370.

As to Churches. See notes 55 *ante*, 90 *post*. Hoffman's Ecc. L. 123-126: *Harpending* v. *Dutch Church*, 16 Pet. 455; *Humbert* v. *Trinity Church*, 22 Wend 485; *Dutch Church* v. *Mott*, 7 Paige 77; *People* v. *Trinity Church*, N. Y. Court of Appeals, Sept. 1860; *Mather* v. *Trinity Church*, 3 S. & R. 509; *Att.-Gen. ex rel. Marsellus*, v. *Minister, &c.*, N. Y. Court of Appeals 1867; *Williams* v. *Presbyterian Church*, 1 Ohio St. 478.

See *Baker* v. *Fales*, 16 Mass. 488; *Doe* v. *Trustees*, 2 Hawks 233; *Penny* v. *Philadelphia*, 4 Harr. 79.

The possession must be "*bonâ fide* in law." As an example: a possession by a purchaser cannot be in law adverse to his vendor by contract before payment unless continued long beyond the period of statutory limitation: Washb. Easements 105 [70]; Perry on Trusts, § 866. So the possession of a trustee generally is not in law adverse to his *cestui que trust*, whatever the fact may be. So in case of mutual mistake: *Campbell* v. *Wilson*, 3 East 294. In *Ricard* v. *Williams*, 7 Wheat. 244, Story, J., says, "It is the policy of courts of law to limit the presumption of grants to periods analogous to those of the Statute of Limitations *in cases where the statute does not apply*. But where the statute applies it constitutes ordinarily a sufficient title or defence, independently of any presumption of a grant, and therefore it is not generally resorted to. But if the circumstances of the case justify it, a presumption of a grant may as well be made in the one case as in the other."

[83] *Foley* v. *Wilson*, 11 East 56; Phillips Ev., ch. vii., s. 2, p. 126; *Ricard* v. *Williams*, 7 Wheat. 244; Perry on Trusts, § 866, and cases cited; *Bealy* v. *Shaw*, 6 East 215; *Courcier* v. *Graham*, 1 Ohio 440; *Duke* v. *Thompson*, 16 Id. 53; *Minns* v. *Morse*, 15 Id. 571; Perry on Trusts, § 869, and cases cited.

[84] *Bedle* v. *Beard*, 12 Co. 5, cited Stark. Ev., part iv., p. 1222, commented on Cowp. 109, 110; *Eldridge* v. *Knott*, Id. 215; *Jarboe* v. *McAtee*, 7 B. Monroe 279; *Jackson* v. *McCall*, 10 Johns. 377; *Croker* v. *Pendleton*, 10 Shepley 339; *Mayor of Hull* v. *Horner*, Cowp. 102; *Powell* v. *Millbank*, 12 G. 3, B. R. 1 T. R. 399; *Goodtitle* v. *Baldwin*, 11 East 488; *Rex* v. *Brown*, cited Cowp. 110; *Mather* v. *Trinity Church*, 3 S. & R. 509; *Roe* v. *Ireland*, 11 East 280; *Read* v.

(1) "which will not presume any man's act to be illegal;" (2) upon the doctrine that "those who are silent when they should speak shall be silent when they would speak," (3) "on a consideration of the hardship which would accrue to parties if after long possession

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Brookenan, 3 Term R. 159; *Rex* v. *Carpenter*, 2 Show. 48; *Biddulph* v. *Ather*, 2 Wils. 23; *Bullard* v. *Barksdale*, 11 Ired. 461.

These cases show that the courts have presumed, contrary to the real fact, a grant from the king in favor of an occupancy, so as to defeat a *later actual grant* from the king, though in such cases, as said in *Jarboe* v. *McAtee*, "a longer continued peaceable enjoyment has generally been deemed necessary * * than is deemed sufficient to authorize the like presumption in the case of deeds from private persons." These principles as applied to government grants are of the utmost importance, and are absolutely essential to the repose of society. The Statute of Limitations does not run against the government, nor in favor of the occupant of land, until the patent issues: *Roads* v. *Symms*, 1 Ohio 316; *Duke* v. *Thompson*, 16 Id. 34. A person who had complied with the pre-emption laws of Congress, and so entitled to a patent, might neglect to procure its issue, his estate travel down through generations, and when the evidence of his claim is lost a third person might enter the land, procure patent and oust him but for this salutary doctrine. So a person might enter land, receive his certificate of entry, and having paid in full, but neglected to procure patent, might need the same principle for his protection. So in the Virginia Military District in Ohio, in the Kentucky Military District, and in others, entries on warrants never carried into patent might be lost without remedy but for this principle. Imperfect entries need the application of the rule. This should certainly be so where a party came into possession under "color of title," as in *Bedle* v. *Beard*, 12 Co. 5. In the Virginia Military District the prior entry appropriates the land even as against a junior entry carried into patent. But in *Ridley* v. *Hettman*, 10 Ohio 524, a court of equity refused to decree the legal title in favor of the prior entry where the junior entry carried into patent had been held for a period equal to the Statute of Limitations, though the statute did not bind the chancery court. This was evidently on the doctrine of "stale equity," or it should be more properly on a *presumed grant* from the party holding the original entry. Since the case of *Ridley* v. *Hettman*, the Act of Congress of March 2d 1807 declares void all patents issued on lands on which there was a prior survey. The holder of a prior survey could therefore procure a patent and would no longer seek his remedy in equity, but would do so at law. But if he delayed to procure his patent until the period had run out for presuming a grant from him in favor of the holder of a junior survey carried into patent with twenty-one years' possession under it, he would be without remedy. His equity under his survey would pass by presumption to the occupant under the junior survey: *Duke* v. *Thompson*, 16 Ohio 48; *Blake* v. *Davis*, 20 Id. 242; *Ricard* v. *Williams*, 7 Wheat. 244. This must be so or a large class of cases will be without remedy. See note 89 *ante*, as to notice and tax sales.

The only effect of the Act of 1807 was to change the remedy from equity to ejectment at law. What was before illegal in equity became illegal at law. Yet if equity would not, prior to the statute, aid a party after twenty-one years to recover on his prior survey against an occupant under a junior survey, it must since

and when time had robbed them of the means of proof, their titles were to be subjected to rigorous examination;" and (4) "upon a principle of public policy and convenience which operates to the preservation of the public peace and the quieting of men's possessions;" and (5) "because it can work no prejudice except to those who are guilty of negligence in their affairs."[85]

The presumption will be made often in well known opposition to the fact.[86] And unless the salutary principle on which it rests is to be nullified or ignored, the presumption must be held as one of *law*, not merely of *fact*, and so it cannot be repelled or rebutted but is *conclusive*.[87] The history of the doctrine proves this. It

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the statute enjoin an ejectment, or rights will be sacrificed to mere modes of seeking redress.

In Angell on Limitations, § 38, it is said, "What might be the operation of the statute on private persons in cases where the legal estate remains in the state, with an equitable interest in those persons, was considered by the late Ch. Justice TILGHMAN of Pennsylvania a point involving important consequences, and would require great consideration when it shall call for a decision:" *Johnson* v. *Irwin*, 3 S. & R. 291; *Thomas* v. *Hatch*, 3 Sumn. 170; *Williams* v. *Presb. Soc.*, 1 Ohio St. 492. Washburn on Easements 102 [66], referring to titles between individuals, says the presumption may arise "though the jury should not find as a fact that any deed had ever been made; and although the user began in fact *as an act of trespass*."

[85] Stark. Ev., part iv., p. 1202; *Eldridge* v. *Knott*, Cowp. 215; 1 Mod. 117; 1 Lev. 25; Palm. 427; *Knight* v. *Halsey*, 2 B. & P. 206; *Ex diuturnitate temporis omnia præsumuntur solemniter esse acta*, Co. Litt. 6. Lord COKE says, "that an Act of Parliament may be presumed, even in the case of the crown, which is not bound by the statutes of limitation:" Broom's Legal Max. 852; Id. 800; Angell on Lim., *passim*; *Pendleton* v. *Galloway*, 9 Ohio 180; *Ridley* v. *Hettman*, 10 Id. 524; *Ricard* v. *Williams*, 7 Wheat. 244; *Buckingham* v. *Smith*, 10 Ohio 298; 5 Ohio St. 318; 11 Id. 47; Perry on Trusts, § 869, and cases cited.

[86] See cases note 84 *ante*. STORY, J., in *Ricard* v. *Williams*, 7 Wheat. 59 [244], said the presumptions "can never fairly arise where all the circumstances are perfectly consistent with the non-existence of a grant. *A fortiori*, they cannot arise where the claim is of such a nature as is at variance with the supposition of a grant." But this is contrary to the *reason* and *object* of the presumption, and is flatly in opposition to the prevailing rule now.

Washburn, in his Easements 103 [68], says, "The fiction of presuming a grant from twenty years' possession or use was invented by the English courts in the 18th century, to avoid the absurdities of their rule of legal memory, and was derived by analogy from the limitation prescribed by the stat. 21 Jac. 1, c. 21, for actions of ejectment, *not upon a belief* that a *grant in any particular case has been made*, but on general presumptions." Id. 101 [66]. *Edson* v. *Munsell*, 10 Allen 568; *Valentine* v. *Piper*, 22 Pick. 93; *Melvin* v. *Lock*, 17 Id. 255; *Emaus* v. *Turnbull*, 2 Johns. 313; Tudor Lead. Cas. 114; *Coolidge* v. *Learned*, 8 Pick. 504.

[87] This necessarily follows from the authorities in the preceding notes. The

is said that "the Court of Chancery was the first to adopt this doctrine of presuming the existence and loss of a deed in 1707; but that it was not till 1761 that the courts of common law adopted it."[88] It was introduced to protect the possession of easements and servitudes—incorporeal hereditaments—as a matter of necessity, because the Statute of Limitations did not apply to these, but only to corporeal hereditaments. But now the presumption applies in law and in equity courts, and protects equally legal and equitable titles or even title acquired by trespass.

As the doctrine commenced with a design of supplying a defect in the Statute of Limitations, it must apply to all cases where in any party an equitable title exists, either by an inchoate title from the government or other equity, which may be lost or transferred by presumption, or it will only accomplish a part of its purpose.

It is not necessary that the possession which is protected shall have been with the knowledge of the person whose title is transferred by the presumption, for any such qualification would practically defeat the whole purpose, reason and scope of the doctrine itself. The reason of the law is the life of the law, so much so that when the reason of a rule ceases the rule itself ceases. And

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question has been much controverted but should now be regarded as at rest: *Strickler* v. *Todd*, 10 S. & R. 63–69; *Rust* v. *Low*, 6 Mass. 90; *Mayor* v. *Horner*, Cowp. 102; 2 Greenl. Ev., § 539; Washburn's Easements 105 [70]; *Olney* v. *Fenner*. 2 R. I. 211; *Pillsbury* v. *Moore*, 44 Me. 154; *Belknap* v. *Trimble*, 3 Paige 577; *Townshend* v. *McDonald*, 2 Kern. 381; *Hazard* v. *Robinson*, 3 Mason 272; *Wilson* v. *Wilson*, 4 Dev. 154; *Ingraham* v. *Hough*, 1 Jones N. C. 39; *Gayelty* v. *Bethune*, 14 Mass. 51, 53; *Parker* v. *Foote*, 19 Wend. 309, 315; *Corning*. v. *Gould*, 16 Id. 531; *Hall* v. *McLeod*, 2 Metc. (Ky.) 98; *Wallace* v. *Fletcher*, 10 Foster 434; *Winnipiseogee Co.* v. *Young*, 40 N. H. 420; *Tracy* v. *Atherton*, 36 Verm. 512, reviews *Townsend* v. *Downer*, 32 Id. 183; *Knight* v. *Halsey*, 3 Bos. & P. 172, 206; *Curtis* v. *Keesler*, 14 Barb. 511; 1 Greenl. Ev., § 17–45, and cases cited; 3 Cruise Dig. 467–8; *Tyler* v. *Wilkinson*, 4 Mason 402; *Ingraham* v. *Hutchinson*, 2 Conn. 584; *Bealey* v. *Shaw*, 6 East 215; *Wright* v. *Howard*, 1 Sim. & Stu. 203; *Strickler* v. *Todd*, 10 S. & R. 69; *Balston* v. *Benstead*, 1 Campb. 465; *Daniel* v. *North*, 11 East 371; *Sherwood* v. *Burr*, 4 Day 244; *Tinkburn* v. *Arnold*, 3 Greenl. 120; *Hill* v. *Crosby*, 2 Pick. 466; Best on Presumptions 103, note *m*; *Bolivar Man. Co.* v. *Neponset M. Co.*, 16 Pick. 241.

[88] Washburn's Easements 109 [72]; *Wallace* v. *Fletcher*, 10 Foster 446. Like all new and valuable doctrines, it has been strongly resisted; 3 Dane Abr. 55; 2 Washb. Real Prop. 294 [40], and cases cited. But Washburn's Easements 109 [72], says, it "must now be considered as established law." In *Parker* v. *Foote*, 19 Wend. 309, the court say, "the modern doctrine of presuming a right by grant * * exerts a much wider influence in quieting possession than the old doctrine of title by prescription."

any qualification of a rule which annihilates the rule itself cannot be sound.[89]

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[89] In *Wilson* v. *Wilson*, 4 Dev. 154, the court say, "If the presumption was not repelled they (the jury) ought to find for the defendants" claiming the presumption: citing 2 Stark. Ex. 669, part iv., pp. 1202–1222; *Ingraham* v. *Hough*, 1 Jones N. C. 39. Even this, as has been shown in previous notes, is not carrying the doctrine so far as law and reason extend it: 1 Greenl. Ev., §§ 17–45; 3 Cruise Dig. 467; Co. Lit. 113 *a*. There are some authorities applicable to easements only that the presumption cannot arise in favor of a possession unless it is with the knowledge of the person seised of the inheritance: Washb. Easements 103 [67], 105 [70]; *Cooper* v. *Smith*, 9 S. & R. 26; 2 Greenl. Ev., § 539, n. 1. There may be some reason for this as applied to them since the person seised of the inheritance cannot always know that an easement is being enjoyed. No such qualification as to the land itself is found in the cases cited in previous notes, nor in Washburn 106 [70], when stating the rule, nor 2 Stark. Ev., part iv., p. 1201 note *b*, nor in *Ridley* v. *Hettman*, 10 Ohio 524, nor in Tudor's Lead. Cas. 114, nor by any authority which can comprehend the reason and spirit and object of the principle. This possibly may do as to easements in a case where the possession which claims protection is only constructive, or is not evidenced by such notorious acts as would lead the person seised of the inheritance to assert his rights. But a notorious possession must be deemed evidence of such knowledge, as that the person seised of the inheritance could not assert he was not put upon inquiry. Possession has always been deemed *notice* of the claim of the party in possession, from which it is conclusively presumed the person seised of the inheritance had knowledge, and any attempt to engraft exceptions on this is monstrous, as to the ownership of land: *House* v. *Beatty*, 7 Ohio R., part 2, p. 84–90; *Kelly* v. *Stanberry*, 13 Ohio 408–426; 3 Washb. Real Prop. 284 [591]; *Lea* v. *Polk*, 21 How. 493; *Watkins* v. *Edwards*, 23 Texas 443; *Partridge* v. *McKinney*, 10 Cal. 181; *Stafford* v. *Lick*, 7 Id. 479; *Hunter* v. *Watson*, 12 Id. 363; *Morrison* v. *Kelly*, 22 Ills. 610; *Helms* v. *May*, 29 Ga. 121; *Wyatt* v. *Elam*, 23 Id. 201; *Berg* v. *Shepley*, 1 Grant Cas. 429; *Coleman* v. *Barklew*, 3 Dutch. 357; *McKinzie* v. *Perrell*, 15 Ohio St. 168; *Williams* v. *Presb. Soc.*, 1 Id. 492; *Buckingham* v. *Smith*, 10 Ohio 282.

A party who neglects his land and refuses to pay taxes is in no good position to say he had no knowledge that others were occupying it. He is bound to know that the states enforce tax collections by land sales, and as against a tax title he could make no such claim. And where a party is in possession under color of title and with a chain of title on record, the Registry Acts generally make such recorded deeds notice. But possession without this will raise the presumption of a grant for land. It has been well observed "that ancient possession would injure instead of strengthening a title if after a succession of ages and the decease of the parties objections should prevail which might have been answered in the lifetime of the parties, and which if well founded would have been sooner made:" *Bedle* v. *Beard*, 12 Co. 5; Cowp. 109–215; Perry on Trusts, § 869. This applies as well where the person seised of the inheritance does not know of the possession as where he does.

There is another conclusive reason against requiring proof that the person seised of the inheritance knew of the adverse possession. The books agree that the

This doctrine will exert a wide and salutary influence in giving repose to church titles.

But it goes beyond the mere question of title, and has an application affecting *the purposes for which property may be held.*

It sometimes becomes desirable to sell church property, which by a conveyance in trust has been devoted to the purposes of a particular religious denomination. The power conferred on courts by general equity principles, or by statute, is often in such cases overlooked or disregarded, and a sale made by those holding the legal title without any formal ratification by the *cestui que trusts*, and perhaps in some instances against the wishes of some or all of them. Where property has been so *donated* upon a use as the consideration, it may nevertheless be sold to trustees for another religious denomination or generally, with the assent of the donor and *cestui que trusts*, or without the consent of the donor, when the title has been derived upon a pecuniary consideration. But these precautions are often not taken. When a sale and conveyance has been made without these, the title of the purchasers will often be quieted even in a less period than is fixed by the Statute of Limitations on proof of the acquiescence of the parties having a right originally to prevent a transfer.[90]

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principle of presumption of a grant was adopted by way of *analogy to the Statute of Limitations.*

The Statute of Limitations requires no such knowledge. The analogy therefore fails if any such qualification is made in the rule. The equity courts are not bound by the statute, and yet they act on it by way of analogy without any such qualification: *Pendleton* v. *Galloway*, 9 Ohio 180.

[90] In addition to the cases cited in notes in this chapter, see notes 47, 53, 55, 74; Hoffman's Ecc. L. 217; Id. chap. xxiii.; *Robinson* v. *Bullions*, 9 Barb. 64; *People* v. *Steele*, 2 Id. 397; High on Injunctions, chap. v.; Perry on Trusts, §§ 861, 864; *Baker* v. *Fales*, 16 Mass. 488; *Doe* v. *Trustees*, 2 Hawks 233; *Penny* v. *Philadelphia*, 4 Harr. 79; Perry on Trusts, § 870; *Williams* v. *First Presb. Soc.*, 1 Ohio St. 478.

The principle of estoppel would often apply where the *cestui que trusts* stood by and saw a purchase made, or knew of it and made no objection, under circumstances which required their protest, or saw improvements made on the faith of the purchase.

Lands were granted by Congress to Ohio, in trust for common schools: 1 Chase Stat. 71–74; Swans. Land L., *passim*. On 26th February 1824, the legislature memorialized Congress for its consent that the state might sell the lands: IV. Am. St. Papers, Pub. Lands 47. So Missouri: Dec. 11th 1828, vol. 5, p. 603. Congress by Act of Feb. 15th 1843 (1 Lester Land Laws 82), Act of May 19th 1852 (Id. 181), Act February 19th 1851 (Id. 173), authorized some of the states to sell

The courts would doubtless, for the sake of repose, extend the same principles to parties in possession, in case of a divided congregation, especially on sufficient evidence of acquiescence.

And the perversion of a trust would in proper cases receive the same consideration, especially in cases which might invoke the power of a court to make a *cy pres* application of trust principles.

These principles will apply to each of the seven forms or agencies asserting title through which a religious society may seek its organized purposes, to wit: (1) an unincorporated association, (2) by unincorporated trustees claiming for such society, (3) by corporation or trustees *quasi corporate* for such associations, by (4) an incorporated society, (5) common law trustees for such corporation, (6) by corporation or trustees *quasi corporate* for such corporation or by (7) two corporations (see *ante*, Vol. 12 N. S. 347 to 353).

II. Prescription.[90a]

The terms "prescription," and "limitation," and the expresssions "presumption of a grant," "stale equity," and some others indicating title or exemption from action, are not always employed with precision. The term "prescription," from the word *prescribo*, is derived from the Roman or civil law, and is more comprehensive than limitation. Prescription has often been employed as applicable to easements alone, but it is not necessarily or by general usage so limited. It is so comprehensive as to be often used to include limitation as prescribed by the Statute of Limitations, the prescription of a grant, the doctrine of stale equity as applied by chancery courts, and every means by which a title is quieted, or an action barred by lapse of time. It has been said that prescription in its proper sense is of two kinds. "That is, it is either an instrument of the *acquisition* of property, or an instrument of an *exemption* only from the servitude of judicial process."

The statutes of limitation have generally been so drawn as not to apply to easements, but courts of law and equity on general principles apply to them the principles of the Statute of Limita-

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the school lands. The Ohio legislature authorized a sale without authority of Congress: 3 Chase Stat. 1552, &c.

[90a] Angell on Limitations, § 2. The Statute of Limitations affects the remedy merely, while prescription affects the right: *Billings* v. *Hall*, 7 Cal. 1.

For a discussion of prescription, see Cruise Dig. tit. xxxi., ch. 1, § 11; Angell on Highways, § 131; Washburn's Real Property.

tions by presuming a grant. So in many cases which do not fall within the statute, and in some that do, courts of law, as we have seen, apply the doctrine of the presumption of a grant.

The statutes of limitation have generally been so drawn as only to apply to actions at law, and yet when parties seek remedies in equity the courts, though not bound by any statute, generally act by way of analogy to it, and apply its principles. They do this upon the doctrine that they will not aid a *stale equity.*

Statutes of limitation are generally so drawn as to affect only the *remedy* without touching the *right.* The presumption of a grant, and prescription when it applies independently of the statute, denies the right and so withholds a remedy. The doctrine of stale equity proceeds upon the idea that all equitable right is gone, and so denies the right and withholds the remedy.

To preserve the symmetry and distinctive features of the law the several subjects of "presumption of a grant," "prescription," "limitations," "stale equities," and legal and equitable "estoppels," might well be treated separately, and regarded as distinct doctrines, though cognate in their character and relations.

Prescription, when applied to realty as distinct from the doctrine of the presumption of a grant, is generally employed only at law and in the second sense mentioned, which might better be defined *a means of denying or defeating a remedy by pleading the Statute of Limitations.*

III. License.[91]

This is a generic term, and will only be considered as to rights in land for religious purposes. A license is a right given by competent authority to do an act or enjoy a privilege which without it would be illegal.

The permission to occupy a piece of ground for religious exercise or to erect a church thereon is a license.

A license is either (1) implied or (2) express.

It is either (1) by parol or (2) in writing.

It is either (1) a bare authority without interest or (2) it is coupled with an interest.

It is either (1) executory or (2) executed.

It is either (1) revocable or (2) irrevocable.

[91] License distinguished from easement: Washb. Easements and Servitudes 6, 23; *Ex parte Coburn,* 1 Cow. 568; *Wolfe* v. *Frost,* 4 Sandf. Ch. 72; *Foster* v. *Browder,* 4 R. I. 47; *Rowbotham* v. *Wilson,* 8 Ellis & B. 23.

An implied license is one presumed from the conduct of the party having a right to give it.

An express license is one which in direct terms gives the permission to do an act or enjoy a privilege.

When this permission is given by word merely, it is a parol license.

A written license may pursue all the statutory formalities required for the conveyance of real estate, or it may be without such formality and yet valid.[92]

Whatever may be its form or character, it may be a bare authority without being coupled with an interest. When it is of this character, it is, until some act is done under it, merely executory, and being without consideration is revocable.

It can only be executed by the party to whom it is given in person, and cannot be transferred to another.

But when executed by being carried partly or altogether into effect, it can only be rescinded when it is of such character that this is practicable, and then only by a party placing the other in the same condition he would have occupied before he entered on its execution.

An executed license where the parties cannot be placed in *statu quo* is irrevocable.[93]

When the license is coupled with an interest it is not a mere permission, but is in effect equivalent to an irrevocable grant which is alienable.[94]

A license may arise upon the principle of legal or equitable estoppel.[95]

The legal and equitable principles as to license prevailing in ordinary cases, apply as a general rule equally as to rights in realty for religious purposes, subject to the restraints, if any, imposed by law.

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92 *Sullivant* v. *Commissioners*, 3 Ohio 89. But see 6 East 602; 8 Id. 310 *n.*: Say R. 3; 14 S. & R. 267; 4 Id. 241; 2 Eq. Cas. Abr. 522; 11 Ad. & El. 39; s. c. 39 E. C. L. R. 19.

93 *Wilson* v. *Chalfant*, 15 Ohio 248; *Buckingham* v. *Smith*, 10 Id. 296; *Williams* v. *Presb. Ch.*, 1 Ohio St. 478; 8 East 308; Palm. 71; s. c. Poph. 151; s. c. 2 Roll. R. 152.

94 Crabb Real Prop., §§ 521–525; 2 Mod. 317; 8 East 309; 7 Bing. 693; 5 B. & C. 221; 7 D. & R. 783.

95 See note 81 *ante; Att.-Gen.* v. *Merrimac Co.*, 14 Gray 604; *Buckingham* v. *Smith*, 10 Ohio 293.

Possession taken under an executed license is a good defence in an action of ejectment,[96] and will enable the occupant to maintain trespass for an injury, and gives the right to rebuild and repair churches erected in pursuance of the license.

IV. Dedication.

There is a clear distinction between a license and a dedication.[97]

It is not designed to attempt a discussion of the law of dedication generally, for this in its details would require a treatise rather than a chapter. But a brief outline of some principles will be stated.

For all practicable purposes a dedication of land is a gift for a public use.

A dedication may be (1) express or (2) implied. An express dedication may be by (1) parol or (2) in writing. Dedications may be as at (1) common law or (2) statutory. A parol dedication, or one in writing without the statutory formalities required in deeds of conveyance, will be sustained.[98]

By the Civil Law realty could be devoted to religious purposes by dedication.[99]

And the common law equally allows it for charitable uses, as church lots, cemetery grounds and like purposes.[100]

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96 *Sullivant* v. *Commissioners*, 3 Ohio 89; *Wilson* v. *Chalfant*, 15 Id. 248.

97 *Gowen* v. *Phila. Exchange Co.*, 5 W. & S. 143. For discussion of, see Angell on Highways, §§ 132–168; Dillon on Municipal Corp. 475; *Cincinnati* v. *White*, 6 Pet. 431; *Noyes* v. *Ward*, 19 Conn. 250; *Manley* v. *Gibson*, 13 Ills. 312.

98 *Fulton* v. *Wehrenfeld*, 8 Ohio St. 440; *Wisby* v. *Bonte*, 19 Id. 238; Angell on Highways, §§ 142–162; *Hobb* v. *Lowell*, 19 Pick. 405; *Wright* v. *Tukey*, 3 Cush. 290; *Morris* v. *Bowers*, Wright (Ohio) 750; *Williams* v. *Presb. Church*, 1 Ohio St. 478.

99 *Xiques* v. *Bujac*, 7 La. Ann. 449; *Renthrop* v. *Bourg*, 4 Martin (La.) 97; Inst. 1, 2, 7, 9; Bract. fol. 8; *Abbott* v. *Mills*, 3 Verm. 521; *Doe* v. *Jones*, 11 Ala. 83; *Pawlett* v. *Clark*, 9 Cranch 293, 321: Washburn's Easements and Servitudes 185 [137]. In Angell on Highways, § 133, it is said "the doctrine of dedication is of purely common-law origin. * * * In that [Civil] law there was no principle strictly analogous to that of dedication." Poth. Pand. de Inst., lib. 43, tit. 8, art. 1.

100 *Antones* v. *Eslava*, 9 Port. (Alab.) 527; *Hannibal* v. *Draper*, 15 Mo. 634; *Xiques* v. *Bujac*, 7 La. Ann. 449; *Christian Ch.* v. *Scholte*, 2 Iowa 27; *Chapman* v. *Gordon*, 29 Ga. 250; *Shapleigh* v. *Pillsbury*, 1 Greenl. (Me.) 280; Dillon on Munic. Corp., § 510; High on Injunctions, § 241; Washb. Easements 186 [138]; *Beatty* v. *Kurtz*, 2 Peters C. C. R. 566, 583; *Board Ed.* v. *Edson*, 18 Ohio St. 221; *Rice* v. *Osgood*, 9 Mass 38; 3 Peters 99; *Pearsall* v. *Post*, 20 Wend. 118;

But this is of course subject to the qualification that where the local law imposes restraints on grants, these cannot be evaded by a dedication.

And a dedication may arise upon the principle of estoppel.[101]

A dedication may be found as a question of fact by user even less than the statutory period of limitation, especially if there be evidence of acquiescence.[102]

Courts of equity will not permit funds devoted to a particular charity to be devoted to other objects, even if those for whose use it was given should concur in a diversion.[103]

Potter v. *Chapin*, 6 Paige 639; 3 Washburn on Real Property 70; *Att.-Gen.* v. *Merrimac Co.*, 14 Gray 586, 604; *Williams* v. *Presb. Soc.*, 1 Ohio St. 478; *Todd* v. *P. Railroad Co.* 19 Id. 514; *Wisby* v. *Bonte*, Id. 245; 1 Law Record, Cin., Ohio 166; 2 Myl. & K. 576 n., and cases cited; Taylor Prec. Wills 67; *Brown* v. *Manning*, 6 Ohio 298. The doctrine commenced with the case of *Lade* v. *Shepard*, 2 Strange 1004, A. D. 1735.

As to cemetery: *Hunter* v. *Sandy Hill*, 6 Hill (N. Y.) 407, commented on 2 Smith's Lead. Cas., 4th ed. 193; 22 Wend. 454. Other purposes: *Reynolds* v. *Commrs.*, 5 Ohio 204; *Smith* v. *Hueston*, 6 Id. 101; Id. 298, 305; *Klinkener* v. *School Dist.*, 11 Penna. St. 444.

[101] 3 Washb. Real Prop. 70; Dillon Munic. Corp., § 495; *Cinn.* v. *White*, 6 Peters 431; *Brown* v. *Manning*, 6 Ohio 298; 7 Ohio, part 1, p. 96, 220; Id. part 2, p. 135; *Fulton* v. *Mehrenfeld*, 8 Ohio St. 440; *Noyes* v. *Ward*, 19 Conn. 250; *Mayor* v. *Franklin*, 12 Ga. 239; *Cole* v. *Sprowl*, 35 Me. 161; 2 Greenl. Ev., § 662. In Angell on Highways, § 156, it is said this doctrine "is not sanctioned by a single English decision."

[102] *Pinquite* v. *Lawrence*, 11 Ohio St. 274. See cases collected in Angell on Highways, § 142. In *Woodyear* v. *Hadden*, 5 Taunt. 125, it is said, "it is not like a grant presumed from length of time." See Angell, *passim*. But in *Rugby Charity* v. *Merryweather*, 11 East 375, an uninterrupted user of eight years was deemed sufficient proof of dedication, without reference to the intention of the owner. A dedication must be for a *public* use: 19 Ohio St. 514; Dillon Munic. Corp., § 510 n.

[103] This is a general principle, without reference to the mode of acquiring property: Tiffany & Bullard on Trusts 250; *Miller* v. *Gable*, 2 Denio 492, 541; S. C. 10 Paige 627; *Kinskern* v. *Luth. Ch.*, 1 Sandf. Ch. 439; *Field* v. *Field*, 9 Wend. 394; *Robertson* v. *Bullions*, 9 Barb. 132; *Mann* v. *Ballett*, 1 Verm. 43; *Att.-Gen.* v. *Gleg*, 1 Atk. 356; *App* v. *Luth. Cong.* 6 Barr 201. As to dedications in trust, see Dillon Munic. Corp., § 512.

Property conveyed to promote the teaching of particular religious doctrines will be protected from a diversion: *Mann* v. *Ballet*, 1 Verm. 43; *Att.-Gen.* v. *Gleg*, 1 Atk. 356; *App* v. *Lutheran Cong*, 6 Barr 201; *Miller* v. *Gable*, 2 Denio 492; *Gable* v. *Miller*, 10 Paige 201; *Att.-Gen.* v. *Shore*, 7 Sim. 290; *Shore* v. *Wilson*, 9 Cl. & Fin. 355; *Att.-Gen.* v. *Pearson*, 11 Sim. 592; *Brown* v. *Luth Ch.*, 23 Penna. St. 493; *Field* v. *Field*, 9 Wend. 394; *Trustees* v. *Sturgeon*, 9 Barr 322; Hill on Trustees, 3d ed. 467, note 1, and cases cited. *Feizel* v. *Trustees*, 9 Kansas 592. The bishop of the Methodist Episcopal Church assigned a minister to a

Where a dedication is made for a specified use, the courts will prevent its diversion.[104] Even the legislature cannot authorize a diversion where private rights are involved.[105]

Nor can evidence of the declarations of a dedicator be given to vary the purposes expressed in a written dedication.[106]

A dedication will be sustained, even though there be no grantee *in esse* when it was made capable of taking a fee.[107]

V. ALIENATION.

The subject of alienation *by* churches is not now to be considered. This will be reserved for a subsequent chapter. The acquisition of property by church organizations by alienation from

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church held by trustees by deed in usual form of discipline. The trustees refused to permit the use of the church. The court issued a *mandamus* to compel them. The case was ably argued by *Hon. S. A. Cobb* and *H. L. Alden*, who cited 4 H. & McH. (Md.) 449; 2 Barb. 397; 12 Johns. 444. The court as a question of pleading refused to allow damages, but said "the legal pastor can recover salary due him in an ordinary action at law."

If a gift be made to a Unitarian society for the propagation of Unitarian doctrines, and the society ceases to teach Unitarianism, it will not be entitled to control the trust: *Gilman* v. *Hamilton*, 16 Ills. 225. See cases of *Andrew* v. *N. Y. Bible & P. B. Soc.*, 4 Sandf. S. C. R. 178, commented on in Tiffany & Bullard on Trusts 248; Willard's Eq. 577, 596; *Miller* v. *Gable*, 2 Denio 524; *Williams* v. *Williams*, 4 Selden (N. Y.) 525.

"The doctrine of charities in the United States is substantially the same as in England in all that class of cases where they can be administered by the court without the aid of the crown; and in that class of cases where the sign manual of the king is necessary, the gift would fail, and a trust would result to the heir at law or next of kin, unless the legislature interfere to give it effect:" Willard's Eq. 579; *Vidal* v. *Girard Ex.*, 2 How. 127; *Ingles* v. *Trustees Sailors' Snug Harbor*, 3 Pet. 99; *Exrs. of Burr* v. *Smith*, 7 Verm. 241; *Graig* v. *Emery*, 16 Pick. 107; *McCarty* v. *Orphans' Asylum*, 9 Cow. 437; Tiffany & Bullard on Trusts 249; Willard's Eq. 596; 4 Kent Com. 508.

[104] See cases in note to sect. 512, Dillon Munic. Corp.; *M. E. Church* v. *Hoboken*, 33 N. J. Law 13.

[105] *Le Clercq* v. *Gallipolis*, 7 Ohio, part 1, p. 217; 18 Id. 24; *Warren* v. *Lyons City*, 22 Iowa 351; *John and Cherry St.*, 19 Wend. 659; *Woodruff* v. *Neal*, 28 Conn. 168; Dillon Munic. Corp., § 514; *Commrs.* v. *Lathrop*, S. Ct. Kansas 1872.

But where the donor or grantor retains no beneficial interest the legislature may authorize a sale: *Van Ness* v. *Washington*, 4 Pet. 232; *Com.* v. *Rush*, 14 Penna. St. 186; *Com.* v. *Alburger*, 1 Whart. 469; *Board* v. *Edson*, 18 Ohio St. 221.

[106] *Brown* v. *Manning*, 6 Ohio 298; *Lebanon* v. *Commrs.*, 9 Id. 80.

[107] *Pawlett* v. *Clark*, 9 Cranch 292; *New Orleans* v. *U. S.*, 10 Pet. 713; *Williams* v. *Presb. Soc.*, 1 Ohio St. 478; *McConnell* v. *Lexington*, 12 Wheat. 582; *Doe* v. *Jones*, 11 Ala. 63; *Vick* v. *Vicksburg*, 1 How. (Miss.) 379; *Antones* v. *Eslava*, 9 Port. (Ala.) 527; *Winona* v. *Huff*, 11 Minn. 119; *Savannah* v. *Steamboat Co.*, Charlt. (Ga.) R. 342; *Klinkener* v. *School District*, 1 Jones (Penna.)