CHAPTER IV.

OF PRESUMPTIVE EVIDENCE.

§ 14. The general head of Presumptive Evidence is usually divided into two branches, namely, *presumptions of law*, and *presumptions of fact*. Presumptions of Law consist of those rules, which, in certain cases, either forbid or dispense with any ulterior inquiry. They are founded, either upon the first principles of justice; or the laws of nature; or the experienced course of human conduct and affairs, and the connexion usually found to exist between certain things. The general doctrines of presumptive evidence are not therefore peculiar to municipal law, but are shared by it in common with other departments of science. Thus, the presumption of a malicious intent to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal found with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle, of its application. The one fact being proved or ascertained, the other, its uniform concomitant, is universally and safely presumed. It is this uniformly experienced connexion, which leads to its recognition by the law without other proof; the presumption, however, having more or less force, in proportion to the universality of the experience. And this has led to the distribution of presumptions of law into two classes, namely, *conclusive* and *disputable*.

§ 15. *Conclusive*, or, as they are elsewhere termed, imperative, or absolute presumptions of law, are rules determining the quantity of evidence, requisite for the support of any particular averment, which is not permitted to be overcome by any proof, that the fact is otherwise. They consist chiefly of those cases, in which the long experienced connexion, before

alluded to, has been found so general and uniform as to render it expedient for the common good, that this connexion should be taken to be inseparable and universal. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community; and therefore it is, that all corroborating evidence is dispensed with, and all opposing evidence is forbidden.[1]

§ 16. Sometimes this common consent is expressly declared, through the medium of the legislature, in *statutes*. Thus, by the statutes of limitation, where a debt has been created by simple contract, and has not been distinctly recognised, within six years, as a subsisting obligation, no action can be maintained to recover it; that is, it is conclusively presumed to have been paid. A trespass, after the lapse of the same period, is in like manner, conclusively presumed to have been satisfied. So, the possession of land, for the length of time mentioned in the statutes of limitation, under a claim of absolute title and ownership, constitutes, against all persons but the sovereign, a conclusive presumption of a valid grant.[2]

---

[1] The presumption of the Roman law is defined to be, — "conjectura, ducta ab eo, quod ut plurimum fit. Ea conjectura vel a *lege* inducitur, vel a *judice*. Quæ ab ipsa lege inducitur, vel ita comparata, ut probationem contrarii haud admittat; vel ut eadem possit elidi. *Priorem* doctores *præsumptionem* JURIS ET DE JURE, *posteriorem præsumptionem* JURIS, adpellant. Quæ a *Judice* inducitur conjectura, *præsumptio* HOMINIS vocari solet; et semper admittit probationem contrarii, quamvis, si alicujus momenti sit, probandi onere relevet." Hein. ad Pand. Pars iv. § 124. Of the former, answering to our conclusive presumption, Mascardus observes, — "Super hac presumptione lex firmum sancit jus, et eam *pro veritate habet*." De Probationibus. Vol. I. Quæst. x. 48. An exception to the general conclusiveness of this class of presumptions is allowed in the case of admissions *in judicio*, which will be hereafter mentioned. See *post*, § 169, 186, 205, 206.

[2] This period has been limited differently, at different times; but for the last fifty years it has been shortened, at succeeding revisions of the law, both in England and the United States. By Stat. 3 & 4 W. 4, c. 27, all real actions are barred, after twenty years from the time, when the right of action accrued. And this period is adopted in most of the United States. See

§ 17. In other cases, the common consent, by which this class of legal presumptions is established, is declared through the medium of the judicial tribunals, it being the *Common Law* of the land; both being alike respected, as authoritative declarations of an imperative rule of law, against the operation of which no averment or evidence is received. Thus, the uninterrupted enjoyment of an incorporeal hereditament, for a period beyond the memory of man, is held to furnish a conclusive presumption of a prior grant of that, which has been so enjoyed. This is termed a title by prescription.[1] If this enjoyment has been not only uninterrupted, but exclusive and adverse in its character, for the period of twenty years, this also has been held, at Common Law, as a conclusive presumption of title.[2] There is no difference, in principle, whether

4 Kent, Comm. 188, note (a). The same period in regard to the title to real property, or, as some construe it, only to the profits of the land, is adopted in the Hindu Law. See Macnaghten's Elements of Hindu Law, Vol. I. p. 201.

[1] 3 Cruise, Dig. 467, 468. "Prescriptio est titulus, ex usu et tempore substantiam capiens, ab authoritate leges." Co. Litt. 113, a. What length of time constitutes this period of legal memory, has been much discussed among lawyers. In this country the Courts are inclined to adopt the periods mentioned in the statutes of limitation, in all cases analogous in principle. Coolidge *v.* Learned, 8 Pick. 504; Melvin *v.* Whiting, 10 Pick. 295; Ricard *v.* Williams, 7 Wheat. 110. In England it is settled by Stat. 2 & 3 W. 4, c. 71, by which the period of legal memory has been limited, as follows; — in cases of rights of common or other benefits arising out of lands, except tithes, rents, and services, *prima facie* to 30 years; and conclusively to 60 years, unless proved to have been held by consent, expressed by deed or other writing; in cases of aquatic rights, ways, and other easements, *prima facie* to 20 years; and conclusively to 40 years, unless proved in like manner, by written evidence, to have been enjoyed by consent of the owner; and in cases of lights, conclusively to 20 years, unless proved in like manner, to have been enjoyed by consent.

[2] Tyler *v.* Wilkinson, 4 Mason, 397, 402; Ingraham *v.* Hutchinson, 2 Conn. 584; Bealey *v.* Shaw, 6 East, 208, 215; Wright *v.* Howard, 1 Sim. & Stu. 190, 203; Strickler *v.* Todd, 10 Serg. & Raw. 63, 69; Balston *v.* Bensted, 1 Campb. 463, 465; Daniel *v.* North, 11 East, 371; Sherwood *v.* Burr, 4 Day, 244; Tinkham *v.* Arnold, 3 Greenl. 120; Hill *v.* Crosby, 2 Pick. 466. See Best on Presumptions, p. 103, note (*m*); Bolivar Man. Co. *v.* Neponset Man. Co. 16 Pick. 241.

the subject be a corporeal or an incorporeal hereditament; a grant of land may as well be presumed, as a grant of a fishery, or a common, or a way.[1] But, in regard to the effect of possession alone for a period of time, unaccompanied by other evidence, as affording a presumption of title, a difference is introduced, by reason of the statute of limitations, between corporeal subjects, such as lands and tenements, and things incorporeal; and it has been held, that a grant of lands, conferring an entire title, cannot be presumed from mere possession alone, for any length of time short of that prescribed by the statue of limitations. The reason is, that with respect to corporeal hereditaments, the statute has made all the provisions, which the law deems necessary for quieting possessions; and has thereby taken these cases out of the operation of the Common Law. The possession of lands, however, for a shorter period, when coupled with other circumstances, indicative of ownership, may justify a Jury in finding a grant; but such cases do not fall within this class of presumptions.[2]

§ 18. Thus, also, a sane man is conclusively presumed to contemplate the natural and probable *consequences* of his own acts; and therefore the intent to murder is conclusively inferred from the deliberate use of a deadly weapon.[3] So, the

[1] Ricard *v.* Williams, 7 Wheat. 109; Prop'rs of Brattle Street Church *v.* Bullard, 2 Metc. 363.

[2] Sumner *v.* Child, 2 Conn. 607, 628–632, per Gould, J.; Clark *v.* Faunce, 4 Pick. 245.

[3] 1 Russ. on Crimes, 658–660; Rex *v.* Dixon, 3 M. & S. 15; 1 Hale, P. C. 440, 441. But if death does not ensue, till a year and a day, (that is, a full year,) after the stroke, it is conclusively presumed, that the stroke was not the sole cause of the death, and it is not murder. 4 Bl. Comm. 197; Glassford on Evid. 592. The doctrine of presumptive evidence was familiar to the Mosaic Code; even to the letter of the principle stated in the text. Thus, it is laid down in regard to the manslayer, that, "if he smite him with an *instrument of iron*, so that he die," — or, "if he smite him with throwing a *stone wherewith* he may die, and he die," — "or, if he smite him with a *hand-weapon of wood wherewith* he may die, and he die; he is a murderer."

deliberate publication of calumny, which the publisher knows to be false, or has no reason to believe to be true, raises a conclusive presumption of malice.[1] So, the neglect of a party to appear and answer to process, legally commenced in a Court of competent jurisdiction, he having been duly served therewith and summoned, is taken conclusively against him, as a confession of the matter charged.[2]

§ 19. Conclusive presumptions are also made in favor of judicial proceedings. Thus the *records* of a Court of justice are presumed to have been correctly made;[3] a party to the record is presumed to have been interested in the suit;[4] and

---

See Numb. xxxv. 16, 17, 18. Here, every instrument of *iron* is conclusively taken to be a deadly weapon; and the use of any such weapon raises a conclusive presumption of malice. The same presumption arose from *lying in ambush*, and thence destroying another. Ib. v. 20. But, in other cases, the existence of malice was to be proved, as one of the facts in the case; and in the absence of malice, the offence was reduced to the degree of manslaughter, as at the Common Law. Ib. v. 22, 23. This very reasonable distinction seems to have been unknown to the Gentoo Code, which demands life for life, in all cases, except where the culprit is a Bramin. "If a man deprives another of life, the magistrate shall deprive that person of life." Halhed's Gentoo Laws, Book 16, sec. 1, p. 233. Formerly, if the mother of an illegitimate child, recently born and found dead, concealed the fact of its birth and death, it was conclusively presumed, that she murdered it. Stat. 21, Jac. 1, c. 27; probably copied from a similar edict of Hen. 2, of France, cited by Domat. But this unreasonable and barbarous rule is now rescinded both in England and America.

[1] Bodwell *v.* Osgood, 3 Pick. 379; Haire *v.* Wilson, 9 B. & C. 643; Rex *v.* Shipley, 4 Doug. 73, 177, Per Ashurst, J.

[2] 2 Erskine, Inst. 780. Cases of this sort are generally regulated by statutes, or by the rules of practice established by the Courts; but the principle evidently belongs to general jurisprudence. So is the Roman law. "Contumacia, eorum, qui, jus dicenti non obtemperant, litis damno coercetur." Dig. Lib. 42, tit. 1, l. 53. "Si citatus aliquis non compareat, habetur pro consentiente." Mascard. De Prob. Vol. 3, p. 253, concl. 1159, n. 26. See further on this subject, *post*, § 204–211.

[3] Reed *v.* Jackson, 1 East, 355. Res judicata pro veritate accipitur. Dig. Lib. 50, tit. 17, l. 207.

[4] Stein *v.* Bowman, 13 Pet. 209.

after verdict, it will be presumed that those facts, without proof of which the verdict could not have been found, were proved, though they are not expressly and distinctly alleged in the record; provided it contains terms sufficiently general to comprehend them in fair and reasonable intendment.[1] The presumption will also be made, after twenty years, in favor of every judicial tribunal acting within its jurisdiction, that all persons concerned had due notice of its proceedings.[2] A like presumption is also sometimes drawn from the solemnity of the act done, though not done in Court. Thus a bond, or other specialty, is presumed to have been made upon good *consideration*, as long as the instrument remains unimpeached.[3]

§ 20. To this class of legal presumptions may be referred one of the applications of the rule, *Ex diuturnitate temporis omnia præsumuntur ritè et solenniter esse acta;* namely, that which relates to transactions, which are not of record, the proper evidence of which, after the lapse of a little time, it is often impossible, or extremely difficult, to produce. The rule itself is nothing more than the principle of the statutes of limitation, expressed in a different form, and applied to other subjects. Thus, where an authority is given by law to executors, administrators, guardians, or other officers, to make sales of lands, upon being duly licensed by the Courts, and they are required to advertise the sales in a particular manner, and to observe other formalities in their proceedings; the lapse of sufficient time, (which in most cases is fixed at thirty

---

[1] Jackson *v.* Pesked, 1 M. & S. 234, 237, Per Ld. Ellenborough; Stephen on Pl. 166, 167; Spiers *v.* Parker, 1 T. R. 141.

[2] Brown *v.* Wood, 17 Mass. 68. A former judgment, still in force, by a Court of competent jurisdiction, in a suit between the same parties, is conclusive evidence, upon the matter directly in question in such suit, in any subsequent action or proceeding. Duchess of Kingston's case, 11 Howell, St. Tr. 261; Ferrer's case, 6 Co. 7. The effect of Judgments will be farther considered hereafter, under that title.

[3] Lowe *v.* Peers, 4 Burr. 2225.

years,)[1] raises a conclusive presumption that all the legal formalities of the sale were observed. The license to sell, as well as the official character of the party, being provable by record or judicial registration, must in general be so proved; and the deed is also to be proved, in the usual manner; it is only the intermediate proceedings, that are presumed. *Probatis extremis, præsumuntur media.*[2] The reason of this rule is found in the great probability, that the necessary intermediate proceedings were all regularly had, resulting from the lapse of so long a period of time, and the acquiescence of the parties adversely interested; and in the great uncertainty of titles, as well as the other public mischiefs, which would result, if strict proof were required of facts so transitory in their nature, and the evidence of which is so seldom preserved with care. Hence it does not extend to records and public documents, which are supposed always to remain in the custody of the officers charged with their preservation, and which, therefore, must be proved, or their loss accounted for, and supplied by secondary evidence.[3] Neither does the rule apply to cases of prescription.[4]

§ 21. The same principle applies to the proof of the execution of *ancient deeds and wills.* Where these instruments are more than thirty years old, and are unblemished by any

[1] See Pejepscot Prop's *v.* Ransom, 14 Mass. 145; Blossom *v.* Cannon, ib. 177; Colman *v.* Anderson, 10 Mass. 105. In some cases, twenty years has been held sufficient. As, in favor of the acts of sheriffs. Drouet *v.* Rice, 2 Rob. Louis. R. 374. So, after partition of lands by an incorporated land-company, and a several possession, accordingly, for twenty years, it was presumed, that its meetings were duly notified. Society, &c. *v.* Wheeler, 1 New Hamp. R. 310.

[2] 2 Erskine, Inst. 782; Earl *v.* Baxter, 2 W. Bl. 1228. Proof that one's ancestor sat in the House of Lords, and that no patent can be discovered, affords a presumption that he sat by summons. The Braye Peerage, 6 Cl. & Fin. 657. See also, as to presuming the authority of an executor, Piatt *v.* McCullough, 1 McLean, 73.

[3] Brunswick *v.* McKean, 4 Greenl. 508; Hathaway *v.* Clark, 5 Pick. 490.

[4] Eldridge *v.* Knott, Cowp. 215; Mayor of Kingston *v.* Horner, ib. 102.

alterations, they are said to prove themselves; the bare production thereof is sufficient; the subscribing witnesses being presumed to be dead. This presumption, so far as this rule of evidence is concerned, is not affected by proof, that the witnesses are living.[1] But it must appear that the instrument comes from such custody, as to afford a reasonable presumption in favor of its genuineness; and that it is otherwise free from just grounds of suspicion;[2] and in the case of a bond for the payment of money, there must be some indorsement of interest, or other mark of genuineness, within the thirty years, to entitle it to be read.[3] Whether, if the deed be a conveyance of real estate, the party is bound first to show some acts of possession under it, is a point not perfectly clear upon the authorities; but the weight of opinion seems in the negative, as will hereafter be more fully explained.[4] But after an undisturbed possession, for thirty years, of any property, real or personal, it is too late to question the authority of the agent, who has undertaken to convey it,[5] unless his authority was by matter of record.

[1] Rex *v.* Farringdon, 2 T. R. 471, Per Buller, J.; Doe *v.* Wolley, 8 B. & C. 22; Bull. N. P. 255; 12 Vin. Abr. 84; Gov. &c. of Chelsea Water Works *v.* Cowper, 1 Esp. 275; Rex *v.* Ryton, 5 T. R. 259; Rex *v.* Long Buckby, 7 East, 45; McKenire *v.* Fraser, 9 Ves. 5; Oldnall *v.* Deakin, 3 C. & P. 462; Jackson *v.* Blanshan, 3 Johns. 292; Winn *v.* Patterson, 9 Peters, 674, 675; Bank U. States *v.* Dandridge, 12 Wheat. 70, 71; Henthorne *v.* Doe, 1 Blackf. 157; Bennet *v.* Runyon, 4 Dana, R. 422, 424; Cook *v.* Totton, 6 Dana, 110; Thruston *v.* Masterson, 9 Dana, 233; Hinde *v.* Vattier, 1 McLean, 115; Walton *v.* Coulson, Ib. 124; Northrop *v.* Wright, 24 Wend. 221.

[2] Roe *v.* Rawlings, 7 East, 279, 291; 12 Vin. Abr. 84, Evid. A. b. 5; Post, § 142, 570; Swinnerton *v.* Marquis of Stafford, 3 Taunt. 91; Jackson *v.* Davis, 5 Cowen, 123; Jackson *v.* Luquere, ib. 221; Doe *v.* Benyon, 4 P. & D. 193; Doe *v.* Samples, 3 Nev. & P. 254.

[3] Forbes *v.* Wale, 1 W. Bl. 532; 1 Esp. 278, S. C.; Post, § 121, 122.

[4] Post, § 144, note (1.)

[5] Stockbridge *v.* West Stockbridge, 14 Mass. 257. Where there had been a possession of thirty-five years, under a legislative grant, it was held conclusive evidence of a good title, though the grant was unconstitutional. Trustees of the Episcopal Church in Newbern *v.* Trustees of Newbern Academy, 2 Hawks, 233.

§ 22. *Estoppels* may be ranked in this class of presumptions. A man is said to be estopped, when he has done some act, which the policy of the law will not permit him to gainsay or deny. "The law of estoppel is not so unjust or absurd, as it has been too much the custom to represent."[1] Its foundation is laid in the obligation, which every man is under, to speak and act according to the truth of the case, and in the policy of the law, to prevent the great mischiefs resulting from uncertainty, confusion, and want of confidence, in the intercourse of men, if they were permitted to deny that, which they have deliberately and solemnly asserted and received as true. If it be a recital of facts in a deed, there is implied a solemn engagement, that the facts are so, as they are recited. The doctrine of estoppels has, however, been guarded with great strictness: not because the party enforcing it necessarily wishes to exclude the truth; for it is rather to be supposed, that that is true, which the opposite party has already solemnly recited; but because the estoppel *may* exclude the truth. Hence, estoppels must be certain to every intent; for no one shall be denied setting up the truth, unless it is in plain and clear contradiction to his former allegations and acts.[2]

§ 23. In regard to *recitals in deeds*, the general rule is, that all parties to a deed are bound by the recitals therein,[3]

[1] Per Taunton, J., 2 Ad. & El. 291.

[2] Bowman *v.* Taylor, 2 Ad. & El. 278, 289, Per Ld. C. J. Denman; Ib. 291, Per Taunton, J.; Lainson *v.* Tremere, 1 Ad. & El. 792; Pelletreau *v.* Jackson, 11 Wend. 117; 4 Kent, Comm. 261, note; Carver *v.* Jackson, 4 Peters, 83.

[3] But it is not true, as a general proposition, that one, claiming land under a deed, to which he was not a party, adopts the recitals of facts in an anterior deed, which go to make up his title. Therefore, where, by a deed made in January, 1796, it was recited that S. became bankrupt in 1781; and that by virtue of the proceedings under the commission certain lands had been conveyed to W., and thereupon W. conveyed the same lands to B., for the purpose of enabling him to make a tenant to the præcipe; to which deed B. was not a party; and afterwards, in February, 1796, B., by a deed, not referring to the deed last mentioned, nor to the bankruptcy, conveyed the premises to a

which operate as an estoppel, working on the interest in the land, if it be a deed of conveyance, and binding both parties and privies; privies in blood, privies in estate, and privies in law. Between such parties and privies, the deed or other matter recited need not at any time be otherwise proved, the recital of it in the subsequent deed being conclusive. It is not offered as secondary, but as primary evidence, which cannot be averred against, and which forms a muniment of title. Thus, the recital of a lease, in a deed of release, is conclusive evidence of the existence of the lease against the parties, and all others, claiming under them in privity of estate.[1]

tenant to the præcipe, and declared the uses of the recovery to be to his mother for life, remainder to himself in fee; it was held that B., in a suit respecting other land, was not estopped from disputing S.'s bankruptcy. Doe *v.* Shelton, 3 Ad. & El. 265, 283. — If the deed recite that the consideration was paid by a husband and wife, parol evidence is admissible to show that the money consisted of a legacy given to the wife. Doe *v.* Statham, 7 D. & Ry. 141.

[1] Shelley *v.* Wright, Willes, 9; Crane *v.* Morris, 6 Peters, 611; Carver *v.* Jackson, 4 Peters, 1, 83; Cossens *v.* Cossens, Willes, 25. But such recital does not bind strangers, or those, who claim by title paramount to the deed. It does not bind persons claiming by an adverse title, or persons claiming from the parties by a title anterior to the date of the reciting deed. See Carver *v.* Jackson, ub. sup. In this case the doctrine of estoppel is very fully expounded by Mr. Justice Story, where, after stating the general principle, as in the text, with the qualification just mentioned, he proceeds (p. 83) as follows. — "Such is the general rule. But there are cases, in which such a recital may be used as evidence even against strangers. If, for instance, there be the recital of a lease in a deed of release, and in a suit against a stranger the title under the release comes in question, there the recital of the lease in such a release is not *per se* evidence of the existence of the lease. But, if the existence and loss of the lease be established by other evidence, there the recital is admissible, as secondary proof, in the absence of more perfect evidence, to establish the contents of the lease; and if the transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, there the recital will of itself, under such circumstances, materially fortify the presumption, from lapse of time and length of possession, of the original existence of the lease. Leases, like other deeds and grants, may be presumed from long possession, which cannot otherwise be explained; and under such circumstances, a recital of the fact of such a lease, in an old deed, is certainly far stronger presumptive proof in

§ 24. Thus also, a grantor is, in general, estopped by his deed, from denying, that he had any title in the thing granted. But this rule does not apply to a grantor, acting officially, as

favor of such possession under title, than the naked presumption arising from a mere unexplained possession. Such is the general result of the doctrine to be found in the best elementary writers on the subject of evidence. It may not, however, be unimportant to examine a few of the authorities in support of the doctrine, on which we rely. The cases of Marchioness of Anandale *v.* Harris, 2 P. Wms. 432, and Shelley *v.* Wright, Willes, 9, are sufficiently direct, as to the operation of recitals by way of estoppel between the parties. In Ford *v.* Gray, 1 Salk. 285, one of the points ruled was, 'that a recital of a lease in a deed of release is good evidence of such lease against the releasor, and those who claim under him; but as to others it is not, without proving, that there was such a deed, and it was lost or destroyed.' The same case is reported in 6 Mod. 44, where it is said that it was ruled, 'that the recital of a lease in a deed of release is good evidence against the releasor, and those that claim under him.' It is then stated, that 'a fine was produced, but no deed declaring the uses, but a deed was offered in evidence, which did recite a deed of limitation of the uses, and the question was, whether that (recital) was evidence; and the Court said, that the bare recital was not evidence; but that, if it could be proved, that such a deed had been, and lost, it would do, if it were recited in another.' This was doubtless the same point asserted in the latter clause of the report in Salkeld; and, thus explained, it is perfectly consistent with the statement in Salkeld, and must be referred to a case, where the recital was offered as evidence against a stranger. In any other point of view, it would be inconsistent with the preceding propositions, as well as with the cases in 2 P. Williams and Willes. In Trevivan *v.* Lawrence, 1 Salk. 276, the Court held, that the parties and all claiming under them were estopped from asserting that a judgment sued against the party as of Trinity term, was not of that term, but of another term; that very point having arisen and been decided against the party upon a scire facias on the judgment. But the Court there held, (what is very material to the present purpose,) that 'if a man makes a lease by indenture of D. in which he hath nothing, and afterwards purchases D. in fee, and afterwards bargains and sells it to A. and his heirs, A. shall be bound by this estoppel; and, that where an estoppel works on the interest of the lands, it runs with the land into whose hands soever the land comes; and an ejectment is maintainable upon the mere estoppel.' This decision is important in several respects. In the first place, it shows that an estoppel may arise by implication from a grant, that the party hath an estate in the land, which he may convey, and he shall be estopped to deny it. In the next place, it shows that such estoppel binds all persons claiming the same land, not only under

a public agent or trustee.[1] A covenant of warranty also estops the grantor from setting up an after acquired title against the grantee, for it is a perpetually operating cove-

the same deed, but under any subsequent conveyance from the same party; that is to say, it binds not merely privies in blood, but privies in estate, as subsequent grantees and alienees. In the next place, it shows that an estoppel, which (as the phrase is) works on the interest of the land, runs with it into whosoever hands the land comes. The same doctrine is recognised by Lord Chief Baron Comyn in his Digest, Estoppel B. & E. 10. In the latter place (E. 10) he puts the case more strongly; for he asserts, that the estoppel binds, even though all the facts are found in a special verdict. 'But,' says he, and he relies on his own authority, 'where an estoppel binds the estate, and converts it to an interest, the Court will adjudge accordingly. As if A. leases lands to B. for six years, in which he has nothing, and then purchases a lease of the same land for twenty-one years, and afterwards leases to C. for ten years, and all this is found by verdict; the Court will adjudge the lease to B. good, though it be so only by conclusion.' A doctrine similar in principle was asserted in this Court in Terrett *v.* Taylor, 9 Cranch, 52. The distinction, then, which was urged at the bar, that an estoppel of this sort binds those claiming under the same deed, but not those claiming by a subsequent deed under the same party, is not well founded. All privies in estate by a subsequent deed are bound in the same manner as privies in blood; and so indeed is the doctrine in Comyn's Digest, Estoppel B. and in Co. Litt. 352, *a*. We may now pass to a short review of some of the American cases on this subject. Denn *v.* Cornell, 3 Johns. Cas. 174, is strongly in point. There, Lieutenant Governor Colden, in 1775, made his will, and in it recited that he had conveyed to his son David his lands in the township of Flushing, and he then devised his other estate to his sons and daughters, &c. &c. Afterwards David's estate was confiscated under the act of attainder, and the defendant in ejectment claimed under that confiscation, and deduced his title from the state. No deed of the Flushing estate (the land in controversy) was proved from the father; and the heir at law sought to recover on that ground. But the Court held, that the recital in the will, that the testator had conveyed the estate to David, was an estoppel of the heir to deny that fact, and bound the estate. In this case the estoppel was set up by the tenant claiming under the state, as an estoppel running with the land. If the state or its grantee might set up the estoppel, in favor of their title, then, as estoppels are reciprocal, and bind both parties, it might have been set up against the state or its grantee. It has been said at the bar, that the state is not bound by estoppel by any

[1] Fairtitle *v.* Gilbert, 2 T. R. 171; Co. Lit. 363, b.

nant;[1] but he is not thus estopped by a covenant, that he is seised in fee and has good right to convey;[2] for any seisin in fact, though by wrong, is sufficient to satisfy this covenant, its import being merely this, that he has the seisin in fact, at the time of conveyance, and thereby is qualified to transfer the estate to the grantee.[3] Nor is a feme covert estopped, by her deed of conveyance, from claiming the land by a title subsequently acquired; for she cannot bind herself personally, by

recital in a deed. That may be so, where the recital is in its own grants or patents, for they are deemed to be made upon suggestion of the grantee. (But see Commonwealth *v.* Pejepscot Proprietors, 10 Mass. 155.) But where the state claims title under the deed, or other solemn acts of third persons, it takes it cum onere, and subject to all the estoppels running with the title and estate, in the same way as other privies in estate. In Penrose *v.* Griffith, 4 Binn. 231, it was held, that recitals in a patent of the Commonwealth were evidence against it, but not against persons claiming by title paramount from the Commonwealth. The Court there said, that the rule of law is, that a deed, containing a recital of another deed, is evidence of the recited deed against the grantor, and all persons claiming by title, derived from him subsequently. The reason of the rule is, that the recital amounts to the confession of the party; and that confession is evidence against himself, and those who stand in his place. But such confession can be no evidence against strangers. The same doctrine was acted upon and confirmed by the same Court, in Garwood *v.* Dennis, 4 Binn. 314. In that case the Court further held, that a recital in another deed was evidence against strangers, where the deed was ancient, and the possession was consistent with the deed. That case also had the peculiarity belonging to the present, that the possession was of a middle nature, that is, it might not have been held solely in consequence of the deed, for the party had another title; but there never was any possession against it. There was a double title, and the question was, to which the possession might be attributable. The Court thought, that a suitable foundation of the original existence and loss of the recited deed being laid in the evidence, the recital in the deed was good corroborative evidence, even against strangers. And other authorities certainly warrant this decision."

[1] Terrett *v.* Taylor, 9 Cranch, 43; Jackson *v.* Matsdorf, 11 Johns. 97; Jackson *v.* Wright, 14 John. 183; McWilliams *v.* Nisby, 2 Serg. & Rawl. 515; Somes *v.* Skinner, 3 Pick. 52.

[2] Allen *v.* Sayward, 5 Greenl. 227.

[3] Marston *v.* Hobbs, 2 Mass. 433; Bearce *v.* Jackson, 4 Mass. 408; Twombly *v.* Henley, Ib. 441; Chapell *v.* Bull, 17 Mass. 213.

any covenant.[1] Neither is one, who has purchased land in his own name, for the benefit of another, which he has afterwards conveyed by deed to his employer, estopped by such deed, from claiming the land by an elder and after acquired title.[2] Nor is the heir estopped from questioning the validity of his ancestor's deed, as a fraud against an express statute.[3] The grantee, or lessee, in a deed poll, is not, in general, estopped from gainsaying anything mentioned in the deed; for it is the deed of the grantor or lessor only; yet if such grantee or lessee claims title under the deed, he is thereby estopped to deny the title of the grantor.[4]

§ 25. It was an early rule of feudal policy, that the tenant should not be permitted to deny the title of the lord, from whom he had received investiture, and whose liege man he had become; but as long as that relation existed, the title of the lord was conclusively presumed, against the tenant, to be perfect and valid. And though the feudal reasons of the rule have long since ceased, yet other reasons of public policy have arisen in their place, thereby preserving the rule in its original vigor. A tenant, therefore, by indenture, is not permitted, at this day, to deny the title of his lessor, while the relation thus created subsists. It is of the essence of the contract, under which he claims, that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration. He could not controvert this title, without breaking the faith, which he had pledged.[5] But this doctrine does not apply with the same force, and to the same extent, between other parties, such as releasor and releasee, where the latter has not received possession from the former. In such cases, where the

[1] Jackson *v.* Vanderheyden, 17 Johns. 167.

[2] Jackson *v.* Mills, 13 Johns. 463; 4 Kent, Comm. 260, 261, note.

[3] Doe *v.* Lloyd, 8 Scott, 93.

[4] Co. Lit. 363, b.; Goddard's case, 4 Co. 4. But he is not always concluded by recitals in anterior title deeds. See Ante, § 23, note.

[5] Com. Dig. Estoppel A. 2; Craig. Jus Feud. lib. 3, tit. 5, § 1, 2; Blight's lessee *v.* Rochester, 7 Wheat. 535, 547.