NOTES

THE EXAMINATION OF TITLES IN KENTUCKY*

This paper is a discussion of something of purely practical value, the Examination of Real Estate Titles. It is a type of work largely committed to the younger man who goes into the larger offices, where the result of his work will probably have the final once-over of the older and more experienced members of the firm; and he naturally will desire that his work will be good. If there were some concrete written law upon the subject, this discussion would not be worthwhile; but unhappily there is no such well from which one may draw the pure fluid of perfection. The statutes are multiform. The decisions of the courts are not the less numerous. Only from years of experience can one hope to know, in an intuitive sort of way, the main stream of a perfect title, and the feeder streams that go to make up the main current.

Real estate titles may evolute from certain primary sources which may be here mentioned, and which in turn will be considered as upon their main features. They are: By deed; by inheritance, or to be more exact, by the Kentucky Statutes of Descent and Distribution which may, in a generic sort of way, be said to direct the course of inheritance; by will; by adverse possession.

Then I purpose to discuss the indirect impinging of sundry side channels upon all four titular methods.

1. TITLE BY CONVEYANCE INTER VIVOS

Upon this nature of titular acquisition we may rest with a good deal of primary, but not final, confidence upon the Statutes—provided, and the proviso is large, that we may be sure that our search of the index has brought us to know and consider all the statutory law, the latent as well as the patent. So we may very well go into the form of the deed itself, and the manner of its formal execution and recordation:

* This article was not prepared by Judge Winn for publication, but was the basis of an oral discussion.
(a) Section 501 of the Statutes provides for the acknowledgment in Kentucky before notaries public, or the Clerk of a County Court, or (and this anomalous method is not recommended) by the proof of two subscribing witnesses, somewhat after the manner of the execution and attestation of wills. No seal is required of the Kentucky officer.

(b) If the document be executed outside of the state, and within the confines of any of the states or territories, the execution may be before the Clerk of a Court, a notary public, mayor of a city, or Commissioner of Deeds, all under seal.¹

(c) Section 503 of the Statutes provides for the execution of deeds in extraterritorial lands. It is not necessary to go into it here.

After the deed has thus been rightfully acknowledged by the grantor and delivered to the grantee, it is perfectly good as between them; but its sufficiency as against others is another story. The grantee, to protect himself, must forthwith place it on record in the County Clerk’s office, in the county where the land lies. When once so recorded, it is constructive knowledge to all the world of everything in it. That is the intent of section 494 of the Statutes. But, and note this carefully, it is not good to protect the grantee if he had prior actual knowledge of any adverse transaction affecting the grantor’s title—a provision written into the very wording of the named statute.

Certain other essential matters may be the subject of brief allusion:

(a) A married man in Kentucky, without joint execution by his wife, may make a valid conveyance of his real estate. His grant is good and perfect—but if the grantor’s wife has not joined in the deed, she, upon his death, will be entitled to her dower of one-third in the land for the term of her natural life.

(b) Per contra, a married woman cannot, in Kentucky, make any conveyance of, or create any lien upon, her lands unless her husband join with her as a co-grantor or co-lienor, followed by due execution and acknowledgment. That distinction between the freedom of the husband and wife to convey found in sections 2127 and following of the Statutes is about

¹ Ky. Stat. (Carroll’s, 1936), § 503.
all that is left in Kentucky differentiating the equal rights in property and ownership as between married men and married women.

(e) Under section 490 of the Statutes an “owner may convey any interest in lands not in the adverse possession of another.” Now that sounds plain enough, but there is a falsehood in the very simplicity of its statement; for there are certain interests in lands which the owner cannot convey. We have a sort of an inherent sense that one who takes a grant of land, or who becomes the beneficiary of a gift of it under a will, may do with it as he pleases, may, as within the words of the statute, “convey any interest in lands”; but let us see about that: there has grown up in Kentucky, as in other states, the doctrine of a limited restraint against alienation by the owner of lands. It is a quixotic rule; and yet it is firmly implanted in the judicial statutes (a misnomer, of course) of the Commonwealth. Perhaps my meaning may best be expressed by reference to certain particular cases. To illustrate,

_Harkinss v. Lisle:_2 Here the Court wrote that it is “committed to the doctrine that a restraint on alienation for a reasonable time is valid.” So if the grantor or the testator should pass land to a vendee or devisee, and in the instrument thus passing the title should prohibit the taker from selling the land for a reasonable length of time (note the word “reasonable”), the taker could not, notwithstanding the direct intent of the statute quoted above, pass a good title to another. To those interested in a further investigation of the subject, mention may be made of _Stewart v. Brady_3 and _Stewart v. Barrow_4 as they have been discussed and enlarged upon in subsequent Kentucky cases citing them. It is enough to say of them here and now that they commit the law of Kentucky to the doctrine that one who takes title by what would otherwise be a fee simple may not pass that title on as against a restriction that he may not convey it away within a reasonable time. Just what is a reasonable time? The kind gods alone, and the judges of the Court of Appeals, may know. A restriction for the lifetime of the taker has been held invalid in _Cropper v. Bowles_5. A re-

---

2132 Ky. 767, 117 S. W. 352 (1909).
866 Ky. (3 Bush) 623 (1868).
70 Ky. (7 Bush) 368 (1870).
150 Ky. 393, 150 S. W. 380 (1912).
constraint against alienation by the grantee during the lifetime of the grantor has been upheld in Turner v. Lewis—and this notwithstanding that the lifetime of the grantor may, in the course of things, chance far to outrun the lifetime of the grantee, whose lifetime may not be the subject of a reasonable restraint. So, as in Harkness v. Lisle it was held that a provision against alienation to a certain specified person was valid. So, also, in Price v. Virginia Iron, Coal and Coke Co. it was held that a provision that the grantee should not for a period of twenty years convey the land to any person other than the grantee’s bodily heirs was reasonable and valid. There are many other cases which could be examined to advantage, and which should be examined, whenever the title searcher meets, in a source of title, any effort at restraint upon free and full alienation. Out of the welter of cases, unless they fell upon the one extreme or the other, an exact determination is in the lap of the gods, if the searcher takes the chance; and upon that subject of taking the chance, it may parenthetically be remarked that there is always the open sesame of a friendly judicial determination of whether the restraint be valid or invalid.

(d) Contrary to the common understanding, an infant’s deed is not void. It is voidable, it is true, upon the infant grantor’s part, but not upon that of the adult grantee under an infant’s deed. But if the infant, apparently mature, represents to the grantee that he is of full age, his representation estops him from attacking his deed upon the ground of his minority.

(e) Insane persons may convey; but their deeds are voidable if there be inadequacy of price, or other injustice in the obtaining of the deed. And their deeds are not ipso facto voidable, where the transactions are fair.

(f) A deed of pure quitclaim, purporting to do no more than is evidenced in the term itself, is good to pass title.

---

* 189 Ky. 837, 226 S. W. 367 (1920).
7 Supra, note 2.
* 171 Ky. 523, 188 S. W. 658 (1916).
* See the West Ky. Digest, Title "Infants", Section 23.
9 See Adkins v. Adkins, 183 Ky. 662, 210 S. W. 462 (1919).
* Clay v. Clay’s Committee, 179 Ky. 494, 200 S. W. 934 (1918); Lexington & Eastern Ry. Co. v. Napier’s Heirs, 160 Ky. 579, 169 S. W. 1017 (1914)
To be effectual as a grant, the grantor must be named in the text itself; if he merely sign and acknowledge a deed in which he is not named as a grantor, his act is wholly ineffectual.\textsuperscript{13}

In 1904 the General Assembly enacted a statute requiring every grant of land to recite in its text the source of the grantor's title, and to give where it was of record, the date of the instrument affording his title, and the book and page of its record. That provision will be found of most excellent value to the title searcher. But it is to be borne in mind that, though the statute is peremptory in its such demand, the failure of the grantor to insert his source does not make the deed ineffective to pass his title.\textsuperscript{14}

In what has been said about the formalities of deeds, the writer indulges the hope that the surface has been rather more than scratched; but be very, very sure not to rely upon it as a plowing of the large and wide field. It is my belief that if these narrowly stated fundamentals are kept in mind, and if the statutes and cases cited are gone into, the searcher will be stimulated from the very investigation thus required to follow up to their sources other minor channels not made the subject of specific allusion.

2. Title by Inheritance

Expanding a reflection heretofore adverted to, it is stated that there is, in Kentucky, no such thing as the taking of real property by inheritance, as that term is commonly understood. The use of the word "heir" in Kentucky is a misnomer; but we cannot abandon its use, because we have no concrete and succinct term to describe the passage of lands where there is no will. The term, "descent and distribution" is too long and unwieldy, so I follow the common parlance, and speak of one who takes under these statutes as an heir.

The devolution of the real property of an intestate is set up in Kentucky in sections 1393 and following of the Kentucky Statutes. I make brief condensation of them; but it is always to be borne in mind that statutory provisions are ephemeral, and that the course of descent and distribution of today may be altered by legislative enactment tomorrow.

\textsuperscript{13}Parsons v. Justice, 163 Ky. 737, 174 S. W. 725 (1915).
\textsuperscript{14}Perkins v. J. M. Robinson Norton & Co., 124 S. W. 310.
EXAMINATION OF TITLES IN KENTUCKY

The titular searcher then, in his effort to determine whether the grantors have passed, or the proposed grantor is enabled to pass, a good title, must take fair and full concern of these statutes. If it be an executed conveyance to which the searcher's attention is addressed, he will find that since 1928 there has existed in Kentucky a statute demanding that the grant of one who takes by inheritance shall have filed with it an affidavit of descent setting forth that state of facts which makes of him a good grantor. Back of that time, the searcher's only reliance was upon known family history; and the title abstractors of whom precision was demanded had to go about among the older inhabitants, and get from them affidavits that A and B and C, to illustrate, were the only surviving descendants of the intestate D; or that E married F, and was without issue; or that G, who may have conveyed forty or fifty years ago, was unmarried at the time, and was of full age. These are considerations which the title examiner, going back the essential period of years, must yet take into consideration. In the rural communities, there will not be much of difficulty, but in the cities, where neighbor knows less of neighbor, and where there is a constant flux and flow of population, it may be difficult to ascertain the facts—but until these family facts are known, and are duly ascertained by the searcher, he is without right to say that the title is good.

A few of the provisions of the statutes of descent and distribution may have cursory allusion:

(a) If either consort die, leaving the other surviving, with children of their union, we all rather inherently understand that the surviving consort takes one-third of the realty for life, and that the descendants of the union, per stirpes, take the fee, subject to this life right of one-third. But not all of us may understand that if there be no heirs, and there be a surviving consort, such survivor takes the entirety. The devolution beyond that will be found set out in 1393 of the Kentucky Statutes.

(b) If the property goes to collateral kindred by virtue of the absence of descendants, and a surviving consort, the collaterals of the half blood, half brothers, half nieces, and the like, take only half as much as those of whole blood.15

15 Ky. Stat. (Carroll's, 1936), § 4095a-1.
16 Ky. Stat., § 1395.
(c) A bastard may inherit from his mother, but not from his father; and he may transmit through his intestate death property to his mother, or her kindred, and not to his father.\textsuperscript{17}

(d) An illegitimate child becomes legitimate for purposes of inheritance if his parents, after his birth, marry and recognize him.\textsuperscript{18}

(e) Then here are two peculiar and particular exceptions to the statutes:

If a parent shall have made a gift of real estate to his son, and if that son die intestate, and without issue, the identical property will revert to the grantor parent, if living.\textsuperscript{19}

(f) If an infant die without issue, having theretofore derived real estate title from either of his parents, the parent, if living, and, if not, his or her kindred, inherit the entirety of such estate.

A retention in mind of these elementary statements will, it is believed, suffice to set the searcher of the records so far into the right channels as that he is not apt to go ashore.

3. Title by Wills

The subject of Will Construction, and of the sundry rules by which are fixed the nature of estates created by them, are too ramified to be set forth in this brief discussion. When, in the course of titular search, there appear in the chain of title gifts to testator’s “heirs”, or “children”, there must be studious examination of the case law to ascertain the identity of the takers. To illustrate: is the word “heirs” synonymous with “children”? Does the word “children” mean John, and James, and Mary, who actually are children, or does it extend to include descendants of children who may be dead? To what date or time are to be related the words “dying without issue”—do they mean the time of the death of the testator, or that of a prior life-tenant, or the childless death of the devisee at any time whatsoever? No succinct answer can be given here; and this because the provisions in the sundry wills employing these terms are about as uncertain as the poor vehicle of phraseology may

\begin{footnotes}
\item[18] Ky. Stat., § 1398
\end{footnotes}
make them. Safety may be found only in a studious search of the allied cases upon the subject. There are, however, certain fundamentals which can be stated with reasonable certitude:

(a) The orders of probate should be looked to, naturally, to see whether the will has been duly established and recorded as a valid will. Its probate is declared by Section 4852 of the Statutes to be conclusive, if probated in the proper county, until it may be "superseded, reversed, or annulled."

(b) After probate, and after the elapsing of twelve months, a purchaser may buy of a devisee, without liability to the creditors of the estate. But, if an appeal be taken within 12 months after probate, the Circuit Court may make an order restraining any distribution pending the appeal. But pending a contested original probate proceeding, a personal representative, though duly empowered otherwise, can not sell the land of the deceased.

(c) Every person of sound mind, and over the age of 21 may make a will. This particular statute, coming down from ancient days, as well excludes married women; but by an act of 1894, a married woman may now make a will.

(d) But this must be looked to, and borne in mind: if a man or woman make a will, and thereafter marry, the document becomes null. The statute seems rather nonsensical, since either surviving spouse would have the right to renounce the will and take his or her distributable and dower portions.

(e) Suppose a testator dispose by will of a particular piece of realty, and then, before his death, shall have sold the realty, what is the rule? The sale, of course, stands; and under Sec. 4835 of the Statutes, it does not affect the other provisions of the will. But there is another statute, Sec. 2068, which bears directly upon the subject here. That statute provides that if the land be devised to an "heir" of the testator, the value of

**Ky. Stat., § 2087**
**Ky. Stat., § 4851**
**Ky. Stat., § 3848**
**Ky. Stat., § 4825**
**Ky. Stat., § 2147.**
**Ky. Stat., § 4832**
**Ky. Stat., § 1304.**

K. L. J.—6
the devise, which otherwise would have been frustrated by the sale, shall go to the heir. Quære: Would not land bought with such proceeds pass under the will—though not owned at the time of the will’s making?

(f) If a devisee is dead when the will-maker dies, the issue of the devisee will take the land.27

(g) But if there be no such issue, or if for any other reason whatsoever any devise in a will should fail or be void, the property included in such devise does not pass under the residuary clause of the will, but passes as intestate property.28

(h) If a testator has a child whom he does not mention in his will, such child shall take his fractional portion of the estate.29 And just here it is well to recall this interesting rule: a testator can not exclude his child by a plain provision that this child shall take no part of the estate; for he must go further, and give all his estate to others—or the child, notwithstanding the prohibition, will take his share of any undevised estate.30

(i) The will of a non-resident may be probated in Kentucky, and will suffice to pass title to Kentucky land, when, and only when, it shall have been executed according to Kentucky’s rules of execution.31

(j) I do not go into them, but make reference to, the important statutes on will construction embraced within Sections 2338, and following. The sections deal with those elusive subjects of “death without issue”, contingent remainders, and the like. Nothing less than everlasting zeal in searching out these statutes and the case law can put one upon sound footing. But there is this one point that should be mentioned. If a land owner acquires his title under a document, either granting or testamentary in character, with an integral provision for a defeasance, as in case (to illustrate) he should die without issue, and he should so die, his widow takes her dower in the land, notwithstanding that the interest or estate of her husband terminated with his death.32 The rule is well settled, though

---

27 Ky. Stat., § 4841.
28 Ky. Stat., § 4843.
29 Ky. Stat., § 4848.
31 Ky. Stat., § 4854.
32 See Rice v. Rice, 133 Ky. 406, 118 S. W. 270 (1909); Landers v. Landers, 151 Ky. 206, 151 S. W. 386 (1912); Murphy v. Murphy, 182 Ky. 731, 207 S. W. 491 (1919).
its artificiality is apparent; for it is patently inconsistent that the widow of one who takes a life estate should not have dower, and yet that the widow of one who has a defeasible estate, which is reduced to a life tenure by his death without issue, should have dower.

Finally, upon this subject: the writer has not endeavored to cover the somewhat multiform other questions that are sure to arise. But what has been said should so far suffice to arouse a comprehension of the dangers inherent in will titles, and to arouse a sense of the necessity of full investigation of the statutory and case law, that it will at least be of service.

4. TITLE BY ADVERSE POSSESSION

1st. Title by adverse possession means fundamentally such possession consistently and continuously for fifteen years. There then intervenes Section 2505 of the Statutes, which forbids the bringing of an action to recover real estate within fifteen years from the time when the cause of action first accrued. So the right of action accrues at any time during the currency of the fifteen years; but when the fifteen years are ended, without action by the adverse claimant, he is barred by the statute.

Inasmuch as claims of ownership through adverse possession are rare in the lowlands and cities of the Commonwealth, but are much more generally common in the hill country of the state, I do not go into them with much of detail.

2nd. What is adverse possession? Answer: in the first place, it means possession in the essential intent of such a title. A claimant by adverse possession need not be on the land himself; for he can occupy it by a tenant or a lessee. He may possess it upon an enclosure and the use of it for the requisite time, without any actual residence upon it. The requisites of an adverse possession are best set out, so far as I have ever been able to find, in the Kentucky case law, in *Owsley v. Owlsley* in these words:

"It must be an actual physical entry upon or control of the premises, and be continuous."

"It must be open, that is, it must of itself be such as to afford notice to the rightful owner of its hostile nature."

²² 117 Ky. 47, 77 S. W. 397 (1903).
"It must be adverse, that is, it must be against and in defiance of the claim of the real title holder, and be such as to exclude his authority."

"It must be accompanied by the claim by the occupant that it is his property, either by speech or by such acts of authority as indicate it."

It would be hard to improve upon these fundamentals. There are naturally other impinging propositions, such as the area or the extent of the possession, answered by the two rules that if one enter without a paper title, but just as a squatter, and takes possession, his possession is limited to that indicated by well-defined and marked boundaries, and the other of them that if he enters under a written claim of title, his possession will be coextensive with the lines of his paper title. Then, of course, there is always the question of what is continuity, upon which the thought may be remarked that occasional acts, such as cutting timber or plowing a field for certain seasons, will not suffice—for the demand is for continuity. And continuity is not broken during the moving out of one tenant under the adverse claimant and the present moving in of another; but bad luck to him if he lets it lie there any perceptible time unoccupied, or not used. From the nature of the word it must be adverse, i.e., if one go in as the tenant of another, his entry is friendly and not adverse; and in order to set up adverse title claim in himself, he must bring home notice to the one under whom he enters that he renounces allegiance to him, and asserts possession in himself. And he cannot act silently or secretly; for, as within the definition above given, he must proclaim his claim on the highways and by-ways, or by his equally effective acts of occupancy and use.

There is this one important addition to this subject:

There are, of course, no record titles of adverse possession. There is no central office to which the searcher may go to ascertain whether the claimant has perfected his title. As a general proposition, the purchase of adverse titles means the purchase of conflicting and generally litigated claims of ownership. There, of course, may be instances when the buyer and his lawyer feel so far convinced of the efficacy of the possession as to persuade them to take such title; but in the main such a course is of more than doubtful wisdom. Knowledge about these claimed titles will largely come not as incident to titular investigation.
as preliminary to bargain and sale, but as incident to the prosecution or defense of law suits in which the subject of adverse possession is the test of success or failure in the claim.

5. TITLE BY SUNDAY HIDDEN OR INDIRECT LIENS

There are created by statute, state and Federal, certain liens upon realty which may be described generally as involuntary, as distinguished from those which the title holder may himself have created by mortgage or purchase money lien. There are a good many of them, such as liens upon railroad properties, and the like, which are unnecessary, perhaps, to discuss here. There are, however, certain ones, the possibility of the existence of which should be borne in mind always, and which should be searched out in the effort to ascertain a clear title. These may be named:

(a) By section 1560 of Title 26 of the U.S. Code Annotated, there is created a lien in favor of the United States for all Federal taxes unpaid after demand "upon all property whether real or personal, belonging to such person". The Federal Government must, under the demands of section 1562 of the same book, give notice of this lien, which it may do in either of two ways:

1st. It may file notice of the lien in the office of the Clerk of the United States District Court in the district where the property lies—which necessitates an examination of the records in that office where there may be any sort of occasion to suspect the possibility of unpaid Federal taxes.

2nd. The same statute provides that the notice may be given as well by filing notice of the lien in the office of the Clerk of the County in which the property lies, a provision which is made possible by section 2358a-2 of the Kentucky Statutes.

(b) Under the state law, one who furnishes material or labor in the improvement of real estate has a lien upon the property alike for the material or the wages, or both. The one who becomes the beneficiary of such right to a lien must, under the provisions of section 2463 of the Statutes, file his notice before the beginning of the work, or the furnishing of any material, or, under the provisions of section 2468, he may file his lien within six months after the material is furnished, or the
work is done. Thus, for six months, there may exist a lien wholly in the air, of which there is, and for which there need be, no sort of record manifestation or assertion; and if the sale be of newly improved property, the utmost caution should be observed to see that the bills against it for labor and materials are paid.

(e) Under the several statutes appertaining to the several statutory classes of towns in Kentucky, streets may be improved as an expense charged against the property abutting upon the streets. These statutes generally provide for liens against the abutting properties; so if the property being dealt with abuts upon any such street improvement, the existence of such a lien must be made the subject of inquiry.

(d) If a suit be brought either in the state or Federal District Court which affects the title to or a lien upon any real estate, the plaintiff in this action may, under the provisions of section 2358a-1, file in the County Clerk's office a notice of the existence of the action; and after the filing of such notice a buyer of the property takes it subject to any rights which the plaintiff in the suit may gain in or against the property. There is kept in each County Clerk's office a book of these involuntary liens and judicial liens, and a squint must be had at it.

(e) When a sheriff gives a bond for the faithful performance of his duties, the statutory law of the Commonwealth, section 4130, fastens a lien upon his real estate as additional surety; and if the property under investigation belong to, or has in any comparatively recent past year belonged to, a sheriff, it must be seen whether he has received his quietus.

(f) I recur again to the provisions of section 2087 of the Statutes, which in effect gives a lien upon the property of a decedent for a period of twelve months after his death—gives it in the indirect way of a provision that an alienation by the heir or devisee within this time shall not be effective against creditors of the decedent who, within this time, may bring their actions.

ROBERT H. WINN,
Attorney at Law,
Mt. Sterling, Ky.